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LETTER FROM THE EDITOR

Dear Readers:

The Richmond Journal of Law and the Public Interest is proud to present the spring issue of Volume XVI. The issue examines issues affecting children’s rights and education. The articles reveal our legal system’s struggle to balance choice, constitutional freedoms, and the mental and physical health of our children.

In Is Circumcision Legal?, Peter W. Adler discusses the history and medical implications of the practice of circumcision. He notes the dangers associated with this elective surgery and highlights a recent court decision in Germany in which circumcision is deemed criminal assault. Additionally, the piece compares the lack of circumcision regulation to federal laws prohibiting female genital mutilation. Adler urges American courts and legislatures to treat non-therapeutic circumcision as an impermissible violation of a child’s genital integrity.

Reclaiming Hazelwood: Public School Classrooms and a Return to the Supreme Court’s Vision for Viewpoint-Specific Speech Regulation Policy, by Brad Dickens, provides an updated perspective on the Supreme Court’s ruling in Hazelwood v. Kuhlmeier. The Hazelwood case requires that student speech and expression be viewpoint neutral; Dickens argues that the Supreme Court’s holding was intended to be a narrow exception which the federal circuits have since over-applied. If Hazelwood is applied appropriately, Dickens believes schools are better able to carry out their educational missions and students may exercise their First Amendment rights more appropriately.

The spring issue also contains two student comments. The first, Whose Choice Are We Talking About? The Exclusion of Students With Disabilities From For-Profit Online Charter Schools by Matthew D. Bernstein, discusses the impact of for-profit and online education on special education students. The comment analyzes both
the rise of “educational management organizations” and the trend of special education students being pushed out of for-profit schools due to the expense of providing special education services. Dickens urges states to create laws regulating online charter schools, to require educational management organizations to make their finances transparent, and to connect charter schools to a special education infrastructure.

The second comment author, Stephanie Fitzgerald, discusses some of the successes and failures of the “No Child Left Behind” federal education legislation in No Child Left Behind in Special Education: The Need for Change in Legislation That Is Still Leaving Some Students Behind. The comment specifically analyzes the relationship between No Child Left Behind and special education students. Fitzgerald highlights scholars’ arguments that the current legislation is unreasonable, unfair, and unrealistic for students with learning disabilities. She discusses the need for research-based instructional methods, heightened accountability, increased parental input, and flexibility in the use of funding.

Thus, Volume XVI’s spring issue examines a few of the ways in which our society is struggling to protect the rights of our children. The debate includes issues of physical well-being, educational opportunity, and constitutional rights. The editors and staff of the Richmond Journal of Law and the Public Interest hope these pieces enrich the dialogue regarding children’s rights, and we look forward to bringing you forthcoming publications.

Sincerely,

Rachel W. Logan

Editor-in-Chief
IS CIRCUMCISION LEGAL?

Peter W. Adler

INTRODUCTION

An important, divisive, and unanswered question of American law—and indeed of international law—is whether it is legal to circumcise healthy boys.

American medical associations and experts assert that circumcision is a common, safe, and relatively painless procedure with many medical benefits that exceed the risks. They argue that insurance should pay for it. Some religious organizations argue that circumcision is a sacred religious ritual. In any event, proponents claim that parents have a general

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3. Id. at e757.
5. Male Circumcision, supra note 2, at e757 (“Analgesia is safe and effective in reducing the procedural pain associated with newborn circumcision.”); Male Circumcision, supra note 2, at e770–71 (describing subcutaneous ring block injections and dorsal penile nerve block injections as effective techniques in mitigating pain and its consequences during circumcision of newborns).
6. Id. at e756 (“Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some sexually transmitted infections, and penile cancer.”).
7. Id. at e772 (citing two large U.S. hospital-based studies estimating ‘the risk of significant acute circumcisions in the United States to be between 0.19% and 0.22%’).
8. Id. at e757 (“The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure.”).
9. E.g., In re Marriage of Boldt, 176 P.3d 388, 393–94 (Or. 2008) (accepting the arguments of the American Jewish Congress and the Union of Orthodox Jewish Congregations of America that a father
and religious right to make the circumcision decision. They can point to the fact that no physician has ever been held liable by an American court for a properly performed circumcision.

Legal scholars, foreign medical associations, and increasing numbers of men claim the opposite, namely that circumcision is painful, risky, harmful, irreversible surgery that benefits few men, if any. These opponents of circumcision argue that, in any event, boys have a right to be left genitally intact, like girls under federal law, and to make the circumcision decision for

has the right under the freedom of religion clause to make the circumcision decision).

10. *Male Circumcision*, supra note 2, at e778 (“Parents should weight the health benefits and risks in light of their own religious, cultural, and personal preferences, as the medical benefits alone may not outweigh these other considerations for individual families.”).


16. INTACT AMERICA, supra note 14.

17. *ibid.*

18. *ibid.*

19. *Royal Dutch Med. Ass’n, supra note 13* (“There is no convincing evidence that circumcision is useful or necessary in terms of prevention or hygiene . . . . KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications.”).


themselves as adults. These opponents of circumcision can point to a June 2012 decision by a court in Cologne, Germany, which held that non-therapeutic circumcision for religious reasons is criminal assault. The German court reasoned that circumcision causes grievous bodily harm, and that boys have a fundamental right to genital integrity that supersedes their parents’ religious rights.

Thus, a battle is unfolding in courts and legislatures as to the legality of circumcision. Amidst all of the divisiveness and hyperbole, we need to ask, what are the relevant facts, legal issues, and what is the applicable law?

I. THE FACTS

A. Origins

Almost all mammals have foreskins. The male and female genitalia, which are identical in early gestation, have evolved to function together during sexual intercourse over sixty-five to one hundred million years. Male and female circumcisions have been practiced for thousands of years, usually for religious, cultural, and personal reasons.

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22. See generally Povenmire, supra note 20, at 88.
25. BBC, supra note 23.
30. W.D. Dunsmuir & E.M. Gordon, The History of Circumcision, 83 BRIT. J. UROLOGY 1, 1 (Supp. 1 1999) (stating that circumcision was customary in Egypt several thousand years before 2300 BCE).
circumcision has been performed as a religious ritual, a painful obligatory rite of passage, to mark or brand slaves and members of religious or tribal groups, and to suppress sexuality. American physicians introduced the practice in the late 1800s in an unsuccessful effort to prevent masturbation. For the following century, American physicians claimed that circumcision prevented or cured a long list of diseases such as epilepsy, paralysis, hip-joint disease, bad digestion, inflammation of the bladder, and tuberculosis; in fact, an uncircumcised penis was “seen as the cause of most human diseases and socially unacceptable behaviours.”

B. Medical Opinion

A large number of medical associations decline to recommend circumcision. In 1971, the American Academy of Pediatrics (“AAP”) stated there was no valid medical rationale for routine neonatal circumcision. In its 1999 policy report, reaffirmed in 2005, the AAP stated: “Existing scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data not sufficient to recommend routine neonatal circumcision.” Even in its comparatively pro-circumcision statement in 2012, the Academy did not recommend circumcision. Some foreign medical associations also actively discourage the practice.

32. Dunsmuir & Gordon, supra note 30, at 1-2.
33. Id. at 1.
34. Id.
36. Id.
37. See MALE AND FEMALE CIRCUMCISION 39–42, 259 (George C. Denniston et al. eds. 1999); Position Paper on Neonatal Circumcision and Genital Integrity, INT’L COALITION FOR GENITAL INTEGRITY 1, 1 (Sept. 28, 2007), http://www.icgi.org/Downloads/ICGoverview.pdf; see also Fox & Thomson, supra note 35.
42. Id.
C. Parental Consent

Although the national American medical associations have never recommended non-therapeutic circumcision, since 1971 they have continuously asserted that parents have the right to make the circumcision decision for religious, cultural, or personal reasons (which is to say for any reason). Some American physicians may solicit consent to the circumcision operation from vulnerable and usually uninformed parents. They sometimes badger and pressure parents to give their consent. Some American physicians recommend circumcision even though their medical associations do not. In soliciting circumcision, doctors may mention cancer, sexually transmitted diseases, and HIV to parents, may claim that circumcision has medical benefits, or tell parents that it is legitimate for...
them to make the circumcision decision for religious, cultural, and personal reasons. Physicians may not mention any risks, and if they do, they may take the same position as the AAP: that the risks are very low. After obtaining parental consent, American physicians circumcise more than one million American boys each year, usually within one to two days of their birth. The best predictor of whether a given boy will be circumcised is the circumcision status of his father.

D. The Surgery

American medical associations have stated that neonatal circumcision is elective, non-therapeutic surgery. It is irreversible surgery that removes approximately one-half of the covering of the penis. Newborn boys must first be immobilized on a board. The surgery is invasive. Then a clamp may be used or a device attached to stop blood flow to the foreskin until it dies. These clamps have been blamed for serious injuries. Throughout the first half of the twentieth century, the prevailing medical opinion was that infants do not feel pain, or not to the same degree as adults, and operations on children without anesthesia were

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52. Circumcision Policy Statement, supra note 41.
53. Circumcision, the Ultimate Parenting Dilemma, BBC, http://www.bbc.co.uk/news/magazine-19072761 (last visited Nov. 15, 2012) (“Three-quarters of American adult men are circumcised. There are over one million procedures each year, or around one every 30 seconds.”).
59. Id.
60. Id.
in 1999, however, some American medical associations stated that neonatal circumcision is painful and that anesthesia should be used. At that time, however, only forty-five percent of physicians were using anesthesia; additionally, anesthesia may be ineffective. Boys scream, try to escape, their heart rates, blood pressure, and cortisol levels (stress indicators) rise markedly, and they may perceive the experience to be terrifying.

E. Risks

Circumcision surgery carries a risk of many minor and major complications. The only debate concerns the extent of the risk. The AAP calls the risk of serious complications very low, but it cites studies showing a complication rate of 3.1% in Atlanta and of 1.2% to 3.8% in European centers, and another study of 214 boys showing a 25.6% rate of adhesions, 20.1% risk of redundant prepuce, 15.5% risk of balanitis, 4.1% risk of skin bridge, and 0.5% risk of meatal stenosis. The AAP later states,


65. Neonatal Circumcision, supra note 55.

66. Janice Lander et al., Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision, 278 J. AM. MED. ASS’N, no. 24, 1997 at 2157, 2157 (finding that some forms of anesthesia provided relief of pain for only part of the circumcision procedure); Cold & Taylor, supra note 29, at 37–38.


68. Paul M. Fleiss & Frederick M. Hodges, What Your Doctor May Not Tell You About Circumcision (“We know that circumcision is a terrifying, painful, and traumatic event.”).

69. N. Williams & L. Kapila, Complications of Circumcision, 80 BRIT. J. SURGERY 1231 (1993), available at http://cirp.org/library/complications/williams-kapila; Neonatal Circumcision, supra note 55. The American Medical Association lists the following complications and “untoward events” as potential side effects of circumcision:

Bleeding and infection, occasionally leading to sepsis, taking too much skin from the penile shaft causing denudation or rarely, concealed penis, or from not removing sufficient foreskin, producing an unsatisfactory cosmetic result or recurrent phimosis, formation of skin bridges between the penile shaft and glans, meatitis and meatal stenosis, chordee, inclusion cysts in the circumcision line, lymphedema, hypospadias and epispadias, and urinary retention. [Also] other rare but severe events including scalded skin syndrome, necrotizing fascitis, sepsis and meningitis, urethrocutaneous fistulas, necrosis (secondary to cauterization), and partial amputation of the glans penis.

70. Male Circumcision, supra note 2.
inconsistently, that the risks are unknown: “[I]t is difficult, if not impossible, to adequately assess the total impact of complications, because the data are scant and inconsistent regarding the severity of complications.” If American medical associations do not know the risks that circumcisions pose to boys after so many years, they should.

In any event, risks include serious injuries, such as the loss of part or all of the penis. A significant percentage of visits to pediatric urology clinics are to repair or attempt to repair injuries caused by circumcision. Research also suggests that more than one hundred American boys per year die from complications related to circumcision such as bleeding and infections.

F. Harm

Circumcision harms all boys and the men they will become. It cuts into and removes functional, living tissue, including thousands of nerve endings, creates a wound, causes operative and post-operative pain, and interferes with feeding and maternal bonding. Circumcised boys show increased sensitivity to pain at six months of age, suggesting that the procedure has long-term effects on brain function. The surgery leaves a scar, irreversibly removes parts of the penis which normally function

71. Id. at e775.
73. Aaron J. Krill et al., Complications of Circumcision, 11 SCI. WORLD. J. 2458, 2458 (2011); Rafael V. Pieretti et al., Late Complications of Newborn Circumcision: A Common and Avoidable Problem, PEDIATRIC SURGERY (Berlin), May 2010, http://www.springerlink.com/content/9w834626551u8087/ (last visited Nov. 1, 2012) (explaining that at Massachusetts General Hospital between 2003 to 2007, 4.7% of operations on children and 7.4% of cases at a pediatric urology outpatient clinic resulted from complications from a previous neonatal circumcision; see also Michael Miller, Couple Sues Doctor Over Botched Circumcision That Left Son’s Penis “Unsightly,” MIAMI NEW TIMES, May 23, 2012, available at http://blogs.miaminewtimes.com/riptide/2012/05/couple_sues_miami_doctor_over.php (stating that corrective surgery could not correct the mistake). Complications from circumcision include penile adhesions, skin bridges, meatal stenosis, redundant foreskin, buried penis and penile rotation. I.O.W. Leitch, Circumcision - A Continuing Enigma, 6 AUST. PEDIATRIC. J. 59 (stating that 8.5% of circumcisions are recircumcisions); The Case Against Neonatal Circumcision, 6172 BRIT. MED. J. 1163, 1163 (1979) (stating that as many as 10% of babies require a second circumcision).
75. See Cold & Taylor, supra note 29, at 41.
78. Anna Taddio et al., Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination, 349 LANCET 599, 602 (1997).
79. Cold & Taylor, supra note 29, at 41.
together, causes the penis to hang at a greater angle, and causes the glans to become calloused over time. Some scholars claim that circumcision can also cause post-traumatic stress syndrome.

Circumcision also changes and impairs men’s sex lives. As the AAP acknowledged in 1999, it changes sexual behavior. The removal of the foreskin also indisputably prevents normal sexual function. In the intact male, the highly elastic foreskin, a moist and sensitive mucous membrane like lips and eyelids, moves freely back and forth in a virtually frictionless gliding action. The foreskin, consisting of several parts, such as the dartos muscle, ridged band, and frenulum, which function together, is replete with blood vessels and specialized nerve endings including stretch receptors. Research shows that the foreskin is the most sensitive part of the penis. Some men also report that the surgery leaves insufficient skin...
and mucosa for a comfortable erection. Thus, circumcision may reduce sexual pleasure for men, and also for their for female partners, which in turn may impair relationships. The complete extent of the harm that circumcision causes remains unknown. Increasing numbers of boys and men are angry at both physicians and their parents for having circumcised them without their consent, and have foreskin envy. Even though circumcision is common in America, intact men here rarely choose it for themselves.

G. Benefits

In 1999, the American Medical Association stated that circumcision has potential medical benefits, specifically a reduction in the risk of infant urinary tract infections, penile cancer in adult males, and possibly certain sexually transmissible diseases (“STDs”), including the human immunodeficiency virus (“HIV”). Despite these possible benefits, the AMA concluded that the “data are not sufficient to recommend routine neonatal circumcision.” It reasoned that urinary tract infections in uncircumcised males and penile cancer are rare. As to STDs, the AMA stated, “behavioral factors are far more important risk factors for acquisition of HIV and other sexually transmissible diseases than circumcision status, and circumcision cannot be responsibly viewed as ‘protecting’ against such infections.” In its 2012 circumcision report,

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92. Hammond, supra note 57, at 87.
93. Frisch et al., supra note 85.
94. W.D. Dunsmuir & E.M. Gordon, The History of Circumcision, 83 Brit. J. Urology Int’l, Supp. 1, at 1 (1999) (“[D]espite the billions of foreskins that have been severed over thousands of years, it is only recently that efforts have been made to understand the prepuce.”); see also David Gisselquist & Joseph Sonnabend, Have We Ignored a Very Simple Procedure That Could Significantly Reduce the Risk of Heterosexual Transmission of HIV to Men?, AIDS Perspective (May 8, 2012), http://aidsperspective.net/blog/?p=860 (describing a study that, surprisingly, shows that uncircumcised men who washed their genitals within ten minutes of sexual intercourse are more likely to contract HIV.).
95. Taddio et al., supra note 98, at 602 (“[I]nphants circumcised without anaesthesia may represent an infant analogue of a post-traumatic stress disorder triggered by a traumatic and painful event.”).
96. See Richard Hyfler, Circumcision: You Can’t Have It Both Ways, FORBES, http://www.forbes.com/sites/richardhyfler/2011/05/26/circumcision-you-cant-have-it-both-ways/ (last viewed November 1, 2012) (referring to foreskin envy and stating that an estimated one-quarter million men worldwide are attempting to restore their foreskins to the extent possible, though some parts are irrevocably lost); Personal communication from Ronald Low (August 6, 2012).
97. EDWARD WALLERSTEIN, CIRCUMCISION: AN AMERICAN HEALTH FALLACY 128 (1980) (estimated that three men per 1,000 in the United States undergo circumcision after infancy).
98. AM. MED. ASS’N, supra note 31.
99. Id.
100. Id.
101. Id. (emphasis added).
however, the American Academy of Pediatrics ("AAP") asserts that the "health benefits of newborn male circumcision [no longer ‘potential benefits’] outweigh the risks."102 In its Circumcision Speaking Points for members, however, the AAP states that the health benefits of circumcision include a lower risk of various diseases.103 Thus, in its 2012 circumcision report, the AAP is now claiming as actual benefits what it concedes are still only potential benefits or slightly reduced risks.

The truth is that infants and boys rarely if ever benefit from circumcision. They will not be at risk of STDs for many years. It is contested whether circumcision reduces the risk of urinary tract infections or penile cancer.104 Even if it does, it would be necessary to circumcise between 100 and 200 boys to prevent one case of urinary tract infection,105 which could be treated easily and safely with oral antibiotics.106 Also, physicians do not perform preemptive genital surgery on girls to reduce the risk of urinary tract infections. Finally, circumcision may cause more infections than it prevents.107

Men also rarely benefit from circumcision. For example, even if circumcision reduces the risk of penile cancer, which is debated,108 penile cancer is a rare disease in America that generally occurs in old age and is often a byproduct of poor hygiene,109 in contrast to breast cancer in women, which is many times more common and occurs at a younger age.110 In addition, penile cancer may be prevented by washing and not smoking.111

104. AM. MED. ASS’N, supra note 31.
105. Id.
107. Herman A. Cohen et al., Postcircumcision Urinary Tract Infection, 31 CLINICAL PEDIATRICS, no. 6, 1992 at 322, 324; Task Force on Circumcision, American Academy of Pediatrics, supra note 49, at 687 ("[c]ircumcised infant boys had a significantly higher risk of penile problems (such as meatitis) than did uncircumcised boys."); Dario Prais et al., Is Ritual Circumcision a Risk Factor for Neonatal Urinary Tract Infections?, 94 ARCHIVES OF DISEASE IN CHILDHOOD 191, 194 (2009); Jacob Amir et al., Circumcision and Urinary Tract Infection in Infants, 140 AM. J. DISEASES IN CHILDREN 1092, 1092 (1986).
108. Am. Acad. of Pediatrics, supra note 41, at 690.
110. Compare Am. Acad. of Pediatrics, supra note 41, at 690, with Breast Cancer Risk in American
A few studies suggest that circumcision reduces the risk of STDs, but they have been criticized as flawed.\textsuperscript{112} Other studies have found no effect,\textsuperscript{113} and several studies have found circumcised men may be at greater risk for sexually transmitted urethritis and chlamydial infection.\textsuperscript{114} Circumcision also does not prevent HIV and AIDS, which are more common in the United States, where a high percentage of men have been circumcised, than in Europe, where circumcision is relatively rare.\textsuperscript{115} Three African studies suggest that circumcision may reduce the risk of African men contracting HIV during unprotected sex with infected female partners by up to 60%, but this is only a 1.3% absolute reduction, and only during the period of a short study.\textsuperscript{116} Moreover, the validity of these findings has been challenged.\textsuperscript{117} The operation may actually increase HIV infections,\textsuperscript{118} and it also may increase the absolute risk of HIV transmission from infected, circumcised men to their female partners by 61%.\textsuperscript{119} In America, sexually active men must still practice safe sex to avoid STDs,\textsuperscript{120} and so long as they do, circumcision does not confer any additional benefit.\textsuperscript{121}


\textsuperscript{112} See, e.g., Edward O. Laumann et al., \textit{Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice}, 277 J. OF THE AM. MED. ASSOC., no. 13, 1997 at 1052, 1052 (“We find no significant differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases.”).


\textsuperscript{115} See also AM. ASS’N, supra note 31 (“behavioral factors appear to be far more important risk factors in the acquisition of HIV infection than circumcision status, and circumcision cannot be responsibly viewed as ‘protecting’ against such infections”).
H. Profits

Circumcision is uncommon in many parts of the world. Outside the United States, it is usually performed for religious reasons, and rarely on infants, who are more vulnerable than young men, except in America, Israel, and South Korea. As stated, many foreign medical associations have stated that circumcision has little medical value and should be deterred. Outside the United States, some governments have stopped paying for it. In America, by contrast, circumcision is a highly profitable, vertically integrated business, in which physicians and hospitals charge for the procedure, and the government has funded it through the Medicaid program since 1965. In addition, foreskins are sometimes sold to pharmaceutical and cosmetics companies.

II. LEGAL ISSUES

The fact that circumcision is commonplace, asserted by proponents of circumcision in legal briefs, is not in and of itself a valid legal argument. Slavery was once commonplace, as was drilling holes in the brain to cure

124. See Helen Weiss et al., supra note 122, at 1.
125. Id.
126. See id.
127. Kim et al., supra note 144, at 28; see also Weiss, supra note 122, at 8–9.
132. See e.g., LORI ANDREWS & DOROTHY NELKIN, BODY BAZAAR: THE MARKET FOR HUMANissue in the BIOTECHNOLOGY AGE 2 (2001) (noting that pieces of people are used in a variety of ways, including the use of infant foreskin removed in circumcisions.). A book review of Body Bazaar, written by Elizabeth Whelan, states, “Andrews and Nelkin make it clear that body parts from the living and the dead are gold mines for pharmaceutical development.” Elizabeth Whelan, Biomedical Prostitution?, 17 INSIGHT ON THE NEWS, issue 20, 2001, at p. 27; see also The Skinny on Miracle Wrinkle Cream, INFINITE UNKNOWN (2009), http://www.infiniteunknown.net/2008/02/20/the-skinny-on-miracle-wrinkle-cream/.
epilepsy and mental disorders, the use of leeches to remove blood, and the use of unsterile instruments in surgery. In addition, even if circumcision has potential or actual medical benefits (which is debated), it does not necessarily follow that it is a legal practice. Removing any body part, if removed to prevent it from becoming diseased, would be medically beneficial, yet this would not justify amputating a leg, for example, to prevent an infection that could be treated with antibiotics. Physicians do not routinely remove healthy body parts from children other than the male foreskin. The fact that there is legislation against cutting girls’ genitals but not boys’ genitals also does not resolve whether or not male circumcision is legal. As legal scholars have noted, he who avers must prove; thus, physicians who circumcise have the burden of proving that the surgery is legal.

Circumcision raises one principal issue for its opponents: do boys, like girls, have a right to genital integrity, and, if so, where is the right found? The surgery raises many troublesome legal issues for proponents. Is invasive surgery on boys’ genitals legal when cutting girls’ genitals is a federal crime? How can it be legal to remove boys’ foreskins to reduce the risk of penile cancer, but not girls’ breasts, which are many times more likely to become cancerous? Can physicians lawfully endanger and harm boys without benefiting most of them? Do physicians have the right

140. In banning female genital mutilation, Congress made findings that such mutilation violates federal and state statutory and constitutional law. *Id.*
143. 18 U.S.C § 116.
to operate on healthy boys, against their own recommendation,\textsuperscript{146} at the request of parents for reasons having nothing to do with medicine,\textsuperscript{147} usually without fully informing parents of the risks?\textsuperscript{148} Is it lawful to circumcise healthy boys when intact men rarely choose it for themselves?\textsuperscript{149} Do parents have the right to make the circumcision decision for religious reasons or any reason? To summarize these issues and the analysis to follow:

1. Do boys have a legal right to genital integrity? If not,
2. Do physicians have the legal right to circumcise healthy boys? If so,
3. Do parents have the legal authority to make the circumcision decision? If so,
4. Is it lawful to use Medicaid to pay for circumcision, for companies to buy and sell foreskins, and for trade associations to be held liable for circumcision?

III. THE LAW

A. Do Boys Have a Right to Genital Integrity?

The question should be stated more broadly: does every American citizen – whether young or old, male or female – have a right to personal security or bodily integrity and hence to genital integrity? If boys do not, adults and girls do not, either. Congress stated in banning non-therapeutic female genital cutting that it “infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional.”\textsuperscript{150} That is to say, cutting girls’ genitals already violated many federal and state statutes and constitutions. What are those laws?

1. The Common Law

In 1791, the United States passed a constitutional amendment that adopted British common law.\textsuperscript{151} The first chapter of Blackstone’s
Commentsaries, “Of the Absolute Rights of Persons,” states that the rights of the people are to be preserved inviolate.¹⁵²

a. The Right to Personal Security

The principal purpose of the law, Blackstone wrote, is to protect the right of all people to personal security:

1. The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health... 2. [Man’s rights] include a prohibition not only of killing, and maiming, but also of torturing... and... no man shall be forejudged of life or limb contrary to... the law of the land... 3. [A man’s] person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member. 4. The preservation of a man’s health from such practices as may prejudice or annoy it.¹⁵³

The U.S. Supreme Court acknowledged this concept in 1997, citing the Magna Carta: “Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security.”¹⁵⁴ Circumcision interrupts a boy’s and a man’s enjoyment of his limbs, body, and health, maims and wounds him,¹⁵⁵ and violates his common law right to personal security.

b. The Right to Liberty

After discussing personal security, Blackstone wrote that the law of England preserved the personal liberty of individuals:

The absolute rights of man... [include the] power of choosing those measures which appear to him to be most desirable... This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control.”¹⁵⁶

¹⁵². U.S. CONST. amend. IX (“[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); 1 WILLIAM BLACKSTONE, COMMENTARIES *129. See generally Jackson, supra note 151.
¹⁵³. 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *133–34.
¹⁵⁶. 1 WILLIAM BLACKSTONE, COMMENTARIES *121, *125.
In 1891, the Supreme Court in *Union Pacific Railway Company v. Botsford* affirmed the paramount importance of freedom and personal security as derived from the common law:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.... “The right to one’s person may be said to be a right of complete immunity; to be let alone.”157

Circumcision violates a boy’s right to be let alone, free from interference, and to control his own person in the future. These fundamental common law rights to personal security and liberty became enshrined in the Declaration of Independence158 and, as discussed below, in the United States Constitution159 and state constitutions160 and numerous other provisions of law.

2. Constitutional Law

The Bill of Rights to the United States Constitution was adopted to protect individuals.161 As the Supreme Court has stated, “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”162 Constitutional rights are “fundamental” and “may not be submitted to vote.”163 Accordingly, legislation that violates constitutional rights is legally invalid.164 Since Congress found non-therapeutic female genital cutting to violate girls’ federal and state constitutional rights,165 what are the rights to which the Supreme Court was referring? It should be asked first, though,

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159. *U.S. Const. pmb.*
160. See, e.g., *Mass. Const* art. 1, (West, Westlaw through Nov. 2012 amendments) provides: “All men are born free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying and defending their lives and liberties . . . [and] that of seeking and obtaining their safety and happiness.”
165. 18 U.S.C. § 16.
whether boys have a right to the same protection against genital cutting as girls?

a. The Right to Equal Protection

Shea Lita Bond addressed this issue in her 1999 article, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment.*166 Congress and sixteen states have banned female genital cutting except when medically necessary.167 The American Academy of Pediatrics briefly recommended that its physicians perform a ritual pinprick of a girl’s genitals if that might prevent more harmful genital cutting, even though this would have violated federal law.168 This ignited a storm of protest, and the policy was quickly retired.169 Thus, even a pinprick of girls’ genitals is a federal crime. Physicians likewise cannot cut adults’ genitals without their consent (an adult subjected to this could use force in self-defense, call the police, or successfully bring suit).170

The Fourteenth Amendment to the United States Constitution prohibits states from enforcing laws that “deny to any person... equal protection of the laws”.171 State constitutions also contain equal protection clauses.172 Bond concluded in her article that state statutes protecting females but not males from genital cutting violate the constitutional guarantee that similarly situated males and females should be treated equally before the law.173 She reasoned that when state laws discriminate on the basis of gender, as here, the governments must show an “exceedingly persuasive justification” for


170. See, e.g., BLACK’S LAW DICTIONARY (9th ed. 2009). Black’s Law Dictionary defines tortious “battery” as “[a]n intentional and offensive touching of another without lawful justification.” BLACK’S LAW DICTIONARY 173 (9th ed. 2009). “Self-defense” is defined generally as a “justification for the use of a reasonable amount of force in self-defense if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger.” BLACK’S LAW DICTIONARY 1481 (9th ed. 2009). Circumcision without the permission of the person circumcised would almost certainly qualify as an “offensive” and tortious bodily contact that would warrant the use of self-defense.


doing so,”174 which they cannot do. As stated, the male and female genitalia are identical in early gestation, are erogenous, and have evolved to function together.175 Male and female circumcision are usually medically unnecessary,176 are usually performed for religious and cultural reasons,177 inflict serious pain,178 risk medical complications and death,179 and harm their victims.180 Bond concluded that states must strike down statutes protecting girls from circumcision as unconstitutional or extend equal protection to boys.181 As discussed below, however, both male and female circumcision is unconstitutional. Thus, boys have a right to the same protection from genital cutting as girls.

b. The Right to Privacy

In 2010, the Royal Dutch Medical Association issued a policy statement that non-therapeutic circumcision violates children’s rights to physical integrity and autonomy under the Dutch Constitution.182 Article 10 thereof states, “Everyone shall have the right to respect for his privacy,”183 while Article 11 provides, “Everyone shall have the right to inviolability of his person.”184 As discussed below, non-therapeutic male circumcision similarly violates the privacy clauses of the United States Constitution and state constitutions.


176. Bond, supra note 165, at 366.

177. Bond, supra note 165, at 360.

178. Bond, supra note 165, at 362.

179. Bond, supra note 165, at 369.


181. Bond, supra note 165, at 380; see also Ross Povenmire, Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?, 7 AM. U. J. GENDER, SOC’Y & THE L. 87, 120 (1998-1999) (“Overbroad distinctions between ‘genital mutilation’ and ‘circumcision’ cannot obscure the unconstitutional and discriminatory effect of the Anti-FGM Act.”)


The United States Supreme Court held that the protections given by the Bill of Rights imply a constitutional personal right to privacy.\textsuperscript{185} In \textit{Roe v. Wade}, for example, the Supreme Court held that a woman has a constitutional right of privacy to make her own decisions about her body and pregnancy, independent of her parents’ beliefs and desires.\textsuperscript{186} A few state constitutions also expressly guarantee their citizens the right to privacy.\textsuperscript{187} State privacy rights are broader than their federal counterpart, and are not limited to “state action,” but also apply to private individuals.\textsuperscript{188} As the California Court of Appeals held in \textit{American Academy of Pediatrics v. Lungren}, citing United States Supreme Court decisions,\textsuperscript{189} individuals have an inalienable constitutional right of privacy or liberty to make their own decisions in matters related to sex, life, and health.\textsuperscript{190} In \textit{Eisenstadt v. Baird}, the United States Supreme Court stated, “[i]f the right of privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion” into matters fundamentally affecting a person.\textsuperscript{191} The California court stated that bodily intrusions violate the privacy right, which includes “interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (‘autonomy privacy’).”\textsuperscript{192} The California court called the right of a minor female to make important choices about her own body “clearly among the most intimate and fundamental of all constitutional rights.”\textsuperscript{193}

Interpreting the privacy clause in the Montana constitution, the Supreme Court of Montana similarly stated that “few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one’s bodily integrity and health.”\textsuperscript{194} The court stated that bodily autonomy is violated by a surgical operation (“invasion”) imposed against a person’s will.\textsuperscript{195} The court cited Professor Joel Feinberg: “For to say that I

am sovereign over my bodily territory is to say that I, and I alone, decide.”

Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease... who must undergo or forego the treatment... [and] who, if he or she survives, must live with the results of that decision. One’s health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one’s economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.

Most men consider their genitals to be highly personal and private. Indeed, genitalia are often called “private parts,” and indecent exposure of them is a crime. Circumcision is manifestly an important and irreversible decision central to the safety, health, personal dignity, and autonomy of men. Since boys and men rarely choose circumcision for themselves, and it impairs men’s sex lives (the only question is to what extent), the decision to remove a foreskin is of profound importance. Under the privacy clauses of federal and state constitutions, boys have a constitutional or absolute right to make a choice about circumcision without government interference.

c. The Right to Life, Liberty, Property, and the Pursuit of Happiness

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” State constitutions sometimes contain similar language, and sometimes add that there is a right to the pursuit of happiness. Circumcision violates the right of every boy to life (it can be

196. Id.
199. The British Medical Association has noted that courts have described circumcision as an “important and irreversible decision.” The Law and Ethics of Male Circumcision: Guidance for Doctors, 30 J. MED. ETHICS 259, 261 (2004).
200. Id. at 261.
202. See, e.g., U.S. CONST. amend. XIV, § 1; CAL. CONST. ART. I, § 1.
204. See, e.g., ILL. CONST. art. 1, § 1 (West 2006) (“Inherent and Inalienable Rights: All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness.”).
fatal),\textsuperscript{205} to personal security (it is invasive, risky, and harmful),\textsuperscript{206} to liberty (the autonomy to make the circumcision decision for himself as an adult), to property (one’s body parts are surely one’s property), and to pursue happiness however he chooses. Thus, boys have absolute constitutional rights under various provisions of the Fourteenth Amendment to be free from government interference in their decision to be left intact.

\textit{d. The Right to Freedom of Religion}

The First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”\textsuperscript{207} Every individual, including every boy, has a right to freedom of religion.\textsuperscript{208} Once a boy reaches the age of reason, he has the constitutional right to choose his parents’ religion, a different religion, or no religion.\textsuperscript{209} Although parents can permanently disfigure their own bodies or faces for religious reasons, it violates a boy’s right to freedom of religion to brand him permanently as belonging to a religion that he may choose to renounce.\textsuperscript{210} In fact, many adults do not follow the religion in which they were raised.\textsuperscript{211} For example, 15\% of those raised in the Jewish faith no longer follow it,\textsuperscript{212} and some Jews are opposed to circumcision.\textsuperscript{213} Boys have a constitutional right under the Freedom of Religion clause to make the choice to be left genitally intact without government interference.


\textsuperscript{206} See, e.g., id.

\textsuperscript{207} U.S. CONST. amend. I.

\textsuperscript{208} See, e.g., ILL. CONST. art. 1, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion.”); see also COLO. CONST. art. 2, § 4.


\textsuperscript{210} Id. at 68 (“Parents choosing circumcision for religious reasons may in fact be violating the child’s own religious freedom, including the freedom to change religious beliefs.”).


\textsuperscript{212} Id. at 22.

3. Criminal Law

   a. The Child Abuse Statutes

In a 1985 law review article, Circumcision as Child Abuse: The Legal and Constitutional Issues, William Brigman called routine neonatal circumcision the most widespread form of child abuse in society today. Every state has statutes and policies designed to prevent and punish child neglect and abuse. In California, for example, cutting a girl’s genitals is expressly listed as child abuse and is classified as a felony. Male circumcision appears to meet California’s general definitions of and therefore constitutes criminal child abuse, as well as assault, battery, and sexual abuse and sexual assault (“an intrusion by one person into the genitals... of another person... [except] for a valid medical purpose”). The California Penal Code also prohibits willfully harming, injuring, or endangering a child, inflicting any cruel or inhuman injury upon a child resulting in a traumatic condition, inflicting physical injury or death other than by accidental means upon a child and mayhem (“unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless”). Similarly, under the Massachusetts child abuse statute, it is criminal assault and battery to intentionally touch a child in a way that causes bodily injury or substantial bodily injury without justification or excuse, as circumcision does. Thus,

214. William E. Brigman, Circumcision as Child Abuse: The Legal and Constitutional Issues, 23 U. LOUISVILLE J. FAM. L. 337, 338 (1985). Brigman wrote that it might not be viewed as such because it is so common, but called it “as barbarous as female circumcision, the removal of earlobes, fingers or toes, the binding of infant female feet or other disfiguring practices around the world.” Id.


217. Id. at § 273.

218. Id. at § 240.

219. Id. at § 242.

220. Id. at § 11165.1.

221. Id. at §§ 11165.2-5.3.

222. CAL. PENAL CODE ANN. § 273(d).

223. Id. at § 11165.6.

224. Id. at §203. This assumes that unnecessary surgery meets the statutory definition of “malicious.” Id. at § 220(a) (“Any person who assaults another with intent to commit mayhem... shall be punished by imprisonment... for two, four, or six years.”).

225. MASS. GEN. LAWS ch. 265 § 133(a)-(b) (2012) (stating that “[p]hysical injury includes ‘swelling, bruising, impairment of any organ, and any other such nontrivial injury’ and ‘[s]ubstantial bodily injury’ is defined as a bodily injury which creates a permanent disfigurement, protracted loss or
physicians and Jewish mohels who circumcise, along with the parents who authorize it, commit criminal child abuse and are subject to the applicable fines and imprisonment.226

A 2010 Texas appellate case, Williamson v. State, confirms that any unnecessary surgery on children constitutes statutory child abuse.227 The Williamson court held a mother criminally liable for unnecessary surgery that caused serious bodily injury to her son,228 defined in Texas as “an injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”229 A physician testified that unnecessary surgery does not constitute reasonable medical care.230 The court also found a scalpel to meet the definition of a “deadly weapon” as it can cause death or serious bodily injury.231 Circumcision, whether male or female, is thus criminal child abuse.

b. Criminal Assault

As stated in the Introduction, in June 2012, a court in Cologne, Germany, held that non-therapeutic circumcision causes grievous bodily harm without legal justification.232 In a 1999 law review article, Male Non-Therapeutic Circumcision: The Legal and Ethical Issues, Christopher Price wrote that lawyers in four common-law jurisdictions (the United States, England, Canada, and Australia) agree that non-therapeutic circumcision constitutes criminal assault, even though it has not been prosecuted.233 Boyle234 and Somerville235 reached the same conclusion the following year. Under the common law, battery and false imprisonment coupled with force and

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226. See 110 MASS. CODE REGS. § 2.00 (2008) (stating “[a]buse” in Massachusetts includes an intentional act by a caretaker “upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury”), available at http://www.mass.gov/lt/laws/110cmr.html.
228. Id. (affirming the judgment of the trial court).
231. TEX. PENAL CODE ANN., at § 1.07(a)(17); see also Williamson, 356 S.W.3d at 20.
232. BBC NEWS EUROPE, supra note 23.
233. Christopher P. Price, Male Non-Therapeutic Circumcision: The Legal and Ethical Issues, in Male and Female Circumcision: Medical, Legal, and Ethical Considerations in Pediatric Practice 425, 437 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).
234. Boyle et al., supra note 204.
violence are criminal as well as civil injuries. Any application of force is prima facie an assault. Consent is a defense only to assaults that do not inflict actual bodily harm. Medical treatment is an exception to assaults causing bodily harm, but non-therapeutic circumcision is not medical treatment. American courts also have noted that children, and particularly very young children, are especially vulnerable, require protection under criminal law, and that crimes against them are morally outrageous.

A 2006 Washington appeals court decision, State v. Baxter, held that circumcision by a parent constitutes criminal assault. The court upheld the conviction of a father for assault for attempting to circumcise his eight year-old child. The court reasoned that “the harm Baxter inflicted on his son triggered the State’s right to impose criminal liability.” Insofar as circumcision harms all boys and men, even when performed by physicians, the same reasoning that applies to parents should apply to physicians. In summary, circumcision constitutes statutory assault and battery, child abuse, sexual assault, child endangerment, and mayhem, and even manslaughter when it results in accidental death. These rights derive from and exist today under the criminal common law.

4. Tort Law

Blackstone noted that, insofar as every man’s person is sacred, the least touching of it willfully without legal authority to do so is an unlawful battery. A person is liable to another for civil battery for intentionally
causing any harmful or offensive contact.\textsuperscript{247} Even a surgeon is liable for a battery absent the patient’s consent or the valid consent of a third person.\textsuperscript{248} As argued below, however, parental consent to circumcision is invalid.\textsuperscript{249} Margaret Somerville concluded in 2000, “[p]hysicians who undertake infant male circumcision could be legally liable for medical malpractice (civil liability in battery or negligence), which can result in an award of damages simply for carrying out the circumcision even if it was competently performed.”\textsuperscript{250} Circumcision also constitutes the dignitary tort of false imprisonment.\textsuperscript{251} Damages for torts include pain and suffering, and thus would include surgical and post-surgical pain, loss of sexual function and pleasure, and psychological harm, to the extent demonstrable by a preponderance of the evidence.\textsuperscript{252}

5. Human Rights Law

Several United Nations documents together form the “International Bill of Rights.”\textsuperscript{253} The U.N. Charter requires member states to promote human rights and fundamental freedoms without distinction as to race, sex, or religion.\textsuperscript{254} The Charter specifies that children have the same human rights as adults,\textsuperscript{255} and special rights arising from their need for protection during minority.\textsuperscript{256} The 1948 Universal Declaration of Human Rights recognizes every person’s right to life, liberty, and security of the person, and to freedom from cruel or degrading treatment.\textsuperscript{257} The 1996 International Covenant on Civil and Political Rights gives minors the right to protection from family, society, and the state.\textsuperscript{258} The 1989 Convention on the Rights
totally prohibits the first and lowest stage of it: every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.”).
\textsuperscript{247} See Restatement (Second) of Torts § 13(a) (1965).
\textsuperscript{248} Id. at § 13 comment (c). But see Miller ex rel. Miller v. HCA, Inc., 118 S.W.3d 758, 768 (Tex. 2003) (noting that a physician who provides emergency, life-saving medical treatment to a child without parental consent is not liable for battery); Montgomery v. Bazaz-Sehgal, 742 A.2d 1125, 1131 (Pa. Super. Ct. 1999).
\textsuperscript{249} See Somerville, supra note 234.
\textsuperscript{250} Id.
\textsuperscript{251} Restatement (Second) of Torts § 35 (1965).
\textsuperscript{252} Restatement (Second) of Torts § 903 (1979).
\textsuperscript{254} See U.N. Charter pmbl., available at http://www2.ohchr.org/english/docs/UNcharter.pdf.; see also Id. art. 55.
\textsuperscript{256} See id.
\textsuperscript{258} See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art 5.¶ 1, U.N.
of the Child, although ratified by every nation except the United States and Somalia,\textsuperscript{259} establishes international law applicable to children worldwide.\textsuperscript{260} Article 3 requires member states’ legal institutions to make their primary consideration the best interests of the child, and to ensure the child such protection and care as is necessary for his or her well-being.\textsuperscript{261} Article 6 recognizes that every child has the inherent right to life.\textsuperscript{262} Article 19 recognizes children’s rights to special protection from mental or physical violence or abuse, by parents or anyone caring for the child.\textsuperscript{263} Article 24.3 requires abolishing traditional practices prejudicial to the health of children.\textsuperscript{264} Article 34 protects children from sexual abuse.\textsuperscript{265} Article 36 protects children from exploitation prejudicial to the child’s welfare.\textsuperscript{266}

The Royal Dutch Medical Association,\textsuperscript{267} the South African Medical Association,\textsuperscript{268} the Tasmania Law Reform Institute,\textsuperscript{269} the Slovenian human rights ombudsman,\textsuperscript{270} and the Norwegian ombudsman\textsuperscript{271} all have concluded that male circumcision constitutes a human rights violation. In an article published by the Netherlands Institute of Human Rights,\textsuperscript{272} Jacqueline Smith wrote,

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260. Id.


262. Id. at 168.

263. Id. at 169.

264. Id. at 169–70.

265. Id. at 171.

266. Id.

267. See ROYAL DUTCH MEDICAL ASSOCIATION (KNMG), Circumcision Policy, (May 27, 2010), KNMG-viewpoint-Non-therapeutic-circumcision-of-male-minors-27-05-2010-v2.pdf (adopting a policy of strong deterrence due in part to the increasing emphasis on children’s rights).


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The focus must be placed on the children who are forced to suffer without consent. Male circumcision is, like female genital mutilation, a “harmful traditional practice” and as such is in violation with the rights of the child. It is necessary to advocate full respect for these human rights for all children, boys and girls alike.273

The British Medical Association has also stated that if circumcision is prejudicial to a child’s health and wellbeing, which it is, it is likely that a legal challenge on human rights grounds will be successful.274 Thus, circumcision is a human rights violation.

6. Public Policy

In State v. Baxter,275 the Washington appeals court stated, “[c]utting a child’s genitalia is also disfavored in public policy,” 276 citing the federal and state laws prohibiting female circumcision.277 Thus, male circumcision is also unlawful as contrary to public policy.

In summary, under numerous provisions of American law and international law, boys, like girls, have the right to genital integrity and to be free from harm. Children also have a special right to freedom from harmful practices like ritual or routine circumcision by reason of their vulnerability.

B. Do Physicians Have the Legal Right to Circumcise Healthy Boys?

As shown in Part A, above, boys have the absolute right under the common law and federal and state constitutional law, and under the criminal law, tort law, and human rights law, to be left genitally intact. The rules of medical ethics also require physicians to respect human dignity and rights.278 Therefore, one does not even reach the question of whether physicians can lawfully perform non-therapeutic circumcisions. If one did reach the question, however, there are various additional legal reasons why they cannot.

273. Id. at 10.
276. Id. at 93.
277. Id.
1. Physicians Cannot Discriminate Against Boys

The American Academy of Pediatrics calls non-therapeutic female genital cutting potentially fatal and child abuse and acknowledges that even a pinprick of a girl’s genitals is a federal crime. As discussed above, under the Equal Protection Clause of the federal and state constitutions, and under international law, physicians must treat boys the same way that they treat girls. The rules of medical ethics similarly prohibit physicians from discriminating on the basis of sex. American Medical Association Policy H-65.992 is “to oppose any discrimination based on an individual’s sex,” and the association’s long-standing Policy H-65.990 is that no human being shall be denied equal rights due to an individual’s sex, gender, religion, or origin. A 2001 American Academy of Pediatrics committee report reaffirms that pediatricians cannot discriminate against children in pediatric health care. Circumcision also discriminates against boys on the basis of age, since physicians do not circumcise men or women against their will.

2. Physicians Cannot Lawfully Operate on Healthy Boys

In 2010, the Royal Dutch Medicine Association stated that the rule for physicians is “do not operate on healthy children.” As discussed below, that is the ethical and legal rule for American physicians, as well.

a. Healthy Boys Are Not Patients

Insofar as the physician-patient relationship is contractual and consensual, physicians must have a patient before they can provide medical services. “Patient” includes a person suffering or needing medical

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281. Press Release, supra note 278 (“The AAP does not endorse the practice of offering a ‘clitoral nick’.”).
285. Id. at H-65.990.
288. See generally 70 C.J.S. Physicians § 76.
or surgical treatment, and those needing medical advice or preventive medicine. Initially, newborn boys are patients: their health status is evaluated, and they are given interventions such as eye drops and vaccinations to protect them from disease. Thereafter, however, physicians do not have the right to perform unnecessary cosmetic medical procedures on them.

In New Hampshire, for example, before a physician can perform a procedure, patients (or their proxies) must “be fully informed in writing by a health care provider of his or her medical condition, health care needs, and diagnostic test results,” and be given the opportunity to participate in his or her care and medical treatment and to exercise the right to refuse treatment. A circumcision consent form, by contrast, describes the initial diagnosis or condition as “uncircumcised newborn male.” A healthcare cost review organization states that the most common diagnosis and condition in hospitals is “newborn infant,” for whom the most common treatment is “circumcision.” “Healthy newborn” and “uncircumcised newborn male” are not diagnoses, circumcision is not treatment, and children pronounced to be healthy are not legitimate candidates for unnecessary surgery. AMA Ethical Rule 8.03 also states:

Under no circumstances may physicians place their own financial interests above the welfare of their patients. ... For a physician to unnecessarily hospitalize a patient... for the physician’s financial benefit is unethical. If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.298

Once newborn boys are pronounced healthy and immunized, physicians have no more right to operate on them than they would on boys outside the hospital.

289. Id. § 1 n. 25 (citing Glatzmayer v. U.S. 84 F.2d 192 (5th Cir. 1936).
290. Id. § 1.
291. Id. § 76.
292. Id. § 79.
293. N.H. REV. STAT. ANN. § 332-I:2(e).
294. Id.
297. Id.
b. Circumcision Is Not Within the Scope of Medicine

Physicians are licensed to practice medicine only within the scope of their state medical licenses. A physician is a person responsible for the treatment and care of patients. Medicine is “to treat diseases and restore or preserve health.” In regards to surgery, a Mississippi appeals court stated,

[s]urgery deals with the diagnosis and treatment of injury, deformity, and disease through an operation or procedure. A patient sees a surgeon because there is the need for an invasive procedure.... [T]he surgeon determines whether a surgical procedure is medically necessary.

Some state regulations, such as those in Massachusetts, prohibit physicians from practicing medicine “beyond its authorized scope” at the risk of the loss of their licenses. Likewise, California medical licenses authorize the holder to “sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions.” Physicians also have an ethical duty to combat assaults on the health and wellbeing of humankind, and to ameliorate suffering and contribute to human wellbeing.

Circumcision is non-therapeutic and usually performed for non-medical reasons. The diagnostic code for non-therapeutic circumcision is ritual or routine elective surgery in the absence of medical need. Circumcision is not preventive medicine like immunizations either: it does not benefit the
vast majority of boys or men. Simply stated, circumcision is not medical care, health care, or medicine. It is unlawful as beyond the scope of medicine.

c. Unnecessary Surgery on Children Is Unlawful

It is unethical and a conflict of interest for physicians to unnecessary hospitalize or operate upon a patient purely for the physician’s benefit. “If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.” The AMA Rules of Medical Ethics also prohibit American physicians from providing or charging for unnecessary services. Urologists likewise pledge, “I will condemn unnecessary surgery as an extremely serious ethical violation.”

In many jurisdictions, this is a legal as well as an ethical rule. In *Williamson v. Texas*, a physician testified that unnecessary surgeries on children do not constitute reasonable medical care. In fact, they do not constitute medical care at all. Florida medical guidelines, for example, prohibit “a procedure that is medically unnecessary or otherwise unrelated to the patient’s diagnosis or medical condition.” Massachusetts regulations similarly require reporting of physicians “who have engaged in a pattern of abuse such as... [u]nnecessary surgery.” Illinois law provides a form to make claims against physicians for unnecessary surgery. Thus, the rules of medical ethics and the laws of many states prohibit physicians from performing unnecessary surgery on healthy children.

3. Physicians Cannot Endanger or Harm Boys Unnecessarily

As discussed above, child abuse statutes in every state prohibit physicians from endangering or harming a child except in the presence of a valid medical purpose. As courts have noted, unnecessary surgery is

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311. Id.
312. Id. at 2.19.
313. AM. UROLOGICAL ASS’N CODE OF ETHICS, Rule 8.
315. FLA. ADMIN. CODE ANN. r. 64B8-8.001 (2012).
inherently harmful.\textsuperscript{319} For example, in 2006, in \textit{Tortorella v. Castro}, a doctor misread an MRI scan and removed healthy tissue.\textsuperscript{320} In holding him liable, the California appeals court stated, “it seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm...”\textsuperscript{321} The court stated further, “the patient needlessly has gone under the knife and has been subject to pain and suffering.”\textsuperscript{322} In addition, the most fundamental ethical rule for physicians is, “first, do no harm.”\textsuperscript{323} The American Academy of Pediatrics Committee on Bioethics also acknowledges that children deserve effective medical treatment that is likely to prevent substantial harm or suffering or death.\textsuperscript{324} Circumcision, by contrast, is not medical treatment, benefits few men, if any, and causes substantial harm, suffering, and occasionally death.\textsuperscript{325}

4. A Physician’s Legal Duty Is to the Patient

The American Academy of Pediatrics Ethics Committee wrote in 1995, “[P]roxy consent” poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses.... [T]he pediatrician’s responsibilities to his or her patient exist independent of parental desires or proxy consent.\textsuperscript{326}

Similarly, the AAP advocates legal intervention whenever children are endangered or might be harmed due to a parent’s religious beliefs, and acknowledges that the law prohibits physicians and parents from harming children for religious reasons.\textsuperscript{327} Thus, it is unethical and unlawful for

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\item \textsuperscript{319} \textit{See} \textit{Tortorella v. Castro}, 43 Cal. Rptr. 3d 853, 860 (Cal. Dist. Ct. App. 2006).
\item \textsuperscript{320} \textit{Id} at 855–56.
\item \textsuperscript{321} \textit{Id} at 860.
\item \textsuperscript{322} \textit{Id.} at 862. \textit{See also} \textit{Dilieto v. Cnty. Obstetrics & Gynecology Grp.}, 297 Conn. 105 (2010) (physician liable for unnecessary removal of patient’s reproductive organs); \textit{Murphy v. Blau}, 2010 WL 745056 (Conn. 2010) (doctor negligent in performing unnecessary surgery and failing to communicate the risks to the patient).
\item \textsuperscript{323} \textsc{Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics} 120 (3d ed. 1989).
\item \textsuperscript{324} \textit{Am. Acad. of Pediatrics, Religious Objections to Medical Care}, 99 \textit{Pediatrics} 279, 279–81 (1997).
\item \textsuperscript{325} \textit{Circumcision Policy Statement, supra note 41; Bond, supra note 177.}
\item \textsuperscript{326} \textit{Am. Acad. of Pediatrics, Informed Consent, Parental Permission, and Assent in Pediatric Practice}, 95 \textit{Pediatrics} 314, 315 (1995) (emphasis added).
\item \textsuperscript{327} \textit{Am. Acad. of Pediatrics, Religious Exemptions from Child Abuse Statutes}, 81 \textit{Pediatrics} 169, 170–71 (1988) (“[T]he constitutional guarantees of freedom of religion do not sanction harming another person in the practice of one’s religion, and they do not allow religion to be a legal defense when one
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physicians to perform unnecessary surgery on children that they do not recommend, and to take orders from parents for personal, religious, or cultural reasons having nothing to do with health.

5. Circumcision Violates the Rule of Proportionality

As surgical consent forms show, physicians have a legal duty to offer patients alternative medically reasonable courses of treatment, including no treatment, and to consider and disclose the related risks of each to patients or their proxies.\textsuperscript{328} The ethical rule of proportionality likewise requires that physicians weigh the risks and rewards of alternative treatments and of no treatment.\textsuperscript{329} Given that American medical associations call circumcision unnecessary,\textsuperscript{330} it is risky and harmful, few men benefit from it, and diseases can be prevented more effectively without it, circumcision violates the rule of proportionality. As the British Medical Association concluded, “[t]o circumcise for therapeutic reasons where medical research has shown other techniques to be at least as effective and less invasive would be unethical and inappropriate.”\textsuperscript{331}

6. Circumcision Violates the Best Interests Rule

Pediatric physicians have an ethical\textsuperscript{332} and legal\textsuperscript{333} duty to act in the best interests of each child patient who needs medical care. Circumcision violates the “best interests of the child” rule. First, it precludes physicians from operating on many boys to benefit only a few.\textsuperscript{334} For example, one study suggests that it would be necessary to circumcise 322,000 boys to prevent one case of penile cancer,\textsuperscript{335} which would results in 644 harms another.”).

\textsuperscript{329} See Tetsuro Shimizu, Non-Consequentialist Theory of Proportionality: With Reference to the Ethical Controversy Over Sedation in Terminal Care, 2 JOURNAL OF PHILOSOPHY AND ETHICS IN HEALTH CARE AND MED., 4, 12 (Jul. 2007).
\textsuperscript{332} See id.
\textsuperscript{333} See In re Richardson, 284 So.2d 185, 187 (La. Ct. App. 1973) (The law protects a minor’s right to be free in his person from bodily intrusion to the extent of loss of an organ, unless this loss be in the best interest of the minor).
\textsuperscript{335} Id.
Physicians cannot lawfully sacrifice the many to benefit the few. Second, the best interests rule requires physicians to choose whatever medical treatment a child would choose for himself, when that can be determined. The circumcision choice of newborn boys can be inferred based on the overwhelming preferences of adult men, as intact men rarely volunteer to be circumcised and adults only rarely request the amputation of functional body parts. Third, American medical associations do not recommend circumcision; in 1999, the AMA called it medically unjustified, and in 2012, the AAP acknowledged that at best, circumcision slightly reduces the risk of diseases. Thus, the professional opinion of the AMA seems to be that circumcision is not in the best interest of boys. Due to the many disadvantages to circumcision, and the fact that intact men rarely choose if for themselves, physicians would be unable to prove by a preponderance of the evidence that it is in the best interest of boys.

7. Is Circumcision a Fraud and an Unfair and Deceptive Act and Practice?

Some physicians no doubt mistakenly believe that circumcision will benefit every boy and man. Some physicians who circumcise, however, do not disclose the truth about it. In the late 1800s and early 1900s, physicians claimed falsely that circumcision prevents a succession of diseases. American physicians who circumcise often solicit parental consent to circumcision even though their national medical associations do not recommend it. In doing so, physicians may appear to endorse circumcision. They sometimes approach uninformed parents at their most vulnerable time instead of in advance, contrary to American medical policy. Physicians may mention penile cancer, STDs, and HIV to the

338. Circumcision Policy Statement, supra note 102, at 585.
341. See supra note 37; see also supra Part II.
342. PEDIATRICS, supra note 325, at 314.
343. Circumcision Policy Statement, supra note 102, at 585.
parents of newborns, which may frighten them and falsely imply that circumcision will prevent those diseases. Physicians may not mention that circumcision is a painful surgery that requires forcing the foreskin apart from the glans, or that it risks the loss of part or all of the penis, and death.

The AAP has publicized its claim in 2012 that the benefits of circumcision outweigh the risks, which is false. The AAP concedes that it does not know the risks and that circumcision rarely benefits any boy or man. The AAP also fails to disclose the disadvantage that circumcision harms all boys and men. Physicians introduced circumcision to America to cure masturbation by reducing pleasure, but the AAP now contends the opposite, that it does not reduce pleasure. The AAP does not mention studies showing that circumcision reduces sexual pleasure, nor does it disclose that the foreskin has a sexual function.

Physicians have an ethical duty to reveal when they have made arrangements to sell a body part being removed. But one would assume that they do not explain the details to parents or that the hospital may sell the foreskins to pharmaceutical and cosmetics companies. Importantly, since 1971, medical associations and physicians who circumcise also appear to have told parents that the circumcision decision is theirs to make for religious, cultural, or personal reasons.

345. Circumcision Policy Statement, supra note 102, at 585.
346. Id.
347. See Male Circumcision, supra note 2, at e756, e774; Circumcision Policy Statement, supra note 41, at 688; Council on Scientific Affairs, supra note 31.
348. See Male Circumcision, supra note 2, at e756, e761. But see Male Circumcision, supra note 2, at e759, e775.
349. See id. at e772, e775.
350. See id. at e775.
351. See id. at e760.
353. See Male Circumcision, supra note 2, at e769.
354. Id.; see supra, notes 85-93.
356. The consent form for the surgery is likely to disclose that the tissue removed may be used or sold, but parents are unlikely to read the form carefully. See, e.g., Univ. of Va. Health Sys., supra note 294.
357. Id.
358. See Male Circumcision, supra note 2, at e757, e759, e763.
Committee correctly states the opposite: that a physician’s ethical and legal duty is to the child patient, regardless of his parents’ beliefs. If parents can prove that their consent to circumcision was obtained by fraud, even many years earlier, they may still have viable claims against physicians and hospitals since the statute of limitations for fraud begins upon the discovery of it.

Parents who pay for circumcision also may have a cause of action for unfair and deceptive acts and practices under state Consumer Protection statutes that allow claims for the sale of services. In 2008, for example, in Reed v. ANM Health Care a Washington State appeals court noted that a doctor’s entrepreneurial activities fall outside the ambit of health care. In Reed, the court found that the physician’s decision “was motivated by reasons other than her medical judgment.” The court held, “if a doctor is motivated to promote an unnecessary surgery for financial gain, an injured plaintiff can pursue a claim under the Consumer Protection Act.” Physicians may be motivated to perform this unnecessary, elective surgery, which medical associations generally do not recommend, for monetary gain. Parents who can prove they have been subjected to unfair and deceptive practices may, in some states, have claims under their state’s Consumer Protection Act. Such claims might avoid the procedural obstacles and requirements of a medical malpractice claim, and could result in the award of multiple damages and attorneys’ fees.

C. Do Parents Have the Right to Make the Circumcision Decision?

Since healthy boys have the right to be left bodily and genitaly intact, and physicians do not have the right to circumcise them, one does not reach the question of parents’ rights in the matter. But since American medical

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359. See Informed Consent, Parental Permission, and Assent in Pediatric Practice, supra note 325.
360. Id.
361. See, e.g., 54 C.J.S. Limitations of Actions § 277 (“[T]he statute of limitations generally begins to run when the fraud is discovered or with reasonable diligence should have been discovered”). Moreover, the failure of a defrauded person to discover “fraud may be excused where there exists a fiduciary or confidential relationship between the parties.”; id.
364. Id., at 1014.
365. Id. at 1016.
366. Id. at 1014.
367. See Giannetti, supra note 129, at 1565; Circumcision Policy Statement, supra note 41, at 691.
368. See, e.g., Reed, 225 P.3d at 1014.
369. See Giannetti, supra note 129, at 1545–46, 1566 (arguing that American trade associations may be liable for circumcision as well).
associations and some religious associations assert that parents have a religious right to cause their sons to be circumcised under the First Amendment free exercise of religion clause, and a general right to do so, it should be asked whether parental consent to non-therapeutic circumcision is legally valid.

1. Boys’ Rights to Genital Integrity Supersede Their Parents’ Rights

A court in Cologne, Germany addressed this question in its June 2012 decision holding that circumcision is “grievous bodily harm.” The court concluded that boys’ rights to genital integrity supersede or trump their parents’ religious and other rights. American law compels the same conclusion. Constitutional rights in America adhere to individuals; here, they adhere to boys and men. Moreover, Congress made the express finding that female genital mutilation “can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law.” Thus, the rights of boys and girls to remain genitally intact do not unconstitutionally abridge their parents’ legal rights.

2. Parents Have a Legal Duty to Protect Their Children From Harm

Blackstone wrote that parental power over children enables them to carry out their duties, including the duty to protect their children. The British House of Lords affirmed this in 1985:

Nor has our law ever treated the child as other than a person with capacities and rights recognized by law. The principle of the law... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.

In America, as well, “the duty of parents to provide for the safety and welfare of their children... has long been recognized by the common law

370. U.S. CONST, amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”); see also In re Marriage of Boldt, 176 P.3d 388, 393 (Or. 2008) (holding that the minor son’s opinion about whether to be circumcised was valid evidence in the determination of a materials change in circumstances for the consideration of custody).
371. See Kulish, supra note 24; BBC, supra note 25.
372. See Kulish, supra note 24.
373. See, e.g., Adamson v. California, 332 U.S. 46, 51 (1947) (“T]he Bill of Rights, when adopted, was for the protection of the individual”); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).
375. See 1 WILLIAM BLACKSTONE, COMMENTARIES *160.
Parents “have the duty to take every step reasonably possible... to prevent harm to their children.” For example, parents cannot consent to their child’s participation in non-therapeutic research in which there is any risk of injury or damage to health. Both the common law and child abuse statutes prevent parents from endangering or injuring their children other than for a valid medical purpose. Thus, parents are required by law to protect their sons from the risks of, and the harm caused by, circumcision.

3. Parents Have No Religious or Other Right to Order Circumcision

Parents have a complete right to freedom of religious belief, and the right to bring up their children in their own religion. Nonetheless, laws do not violate the free exercise of religion clause so long as they are valid, neutral, and generally applicable. For example, Native American Indians cannot smoke the illegal drug peyote in religious ceremonies. The Supreme Court prohibited polygamy in Reynolds v. United States, explaining that to rule otherwise would be to “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” Parents do not own their children or have the unfettered right to control their lives and bodies; this would constitute slavery, which was abolished by the 13th Amendment to the United States Constitution.

As Ross Povenmire wrote, parents cannot risk harming their children or harm them for religious reasons. The Supreme Court stated in Wisconsin

378 Id.
380 See, e.g., Connecticut v. Maurice M., 975 A.2d 90, 101 (Conn. App. Ct. 2009) (“parents have a common-law duty to protect their children”); In re S.D., 204 P.3d 1182, 1188 (Kan. Ct. App. 2009) (“parents have a natural, as well as common-law, duty to protect their children from abuse”); see also supra, Part III.A.3.a (discussing the child abuse statutes).
382 See Huffman v. Alaska, 204 P.3d 339, 344 (Alaska 2009) (holding the state can require parents to allow tuberculosis test on child over religious objection).
385 U.S. CONST. amend XIII, § 1.
386 Ross Povenmire, Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States,
v. Yoder that parental discretion may be challenged “if it appears that the parental decision will jeopardize the health and safety of the child”.387 In Prince v. Massachusetts in 1944,388 the controlling case, parents asked their children to distribute religious pamphlets on highways which was in violation of a state statute. Finding the statute constitutional despite the freedom of religion clause, the Supreme Court famously stated:

The right to practice religion freely does not include liberty to expose the... child to ill health or death.... The catalogue [of possible harms] need not be lengthened.... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, [including] matters of conscience and religious conviction.... Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.... Parents may be free to become martyrs themselves. But [they may not] make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.389

The Prince decision suggests that parents do not have the legal right to order the circumcision of their children for religious reasons. The surgery not only risks ill health and death but is certain to cause physical injury,390 and possibly psychological injury as well.391 Prince also makes clear that parents cannot force their children to undertake potentially harmful activities before their children become old enough to make an informed choice for themselves.392 In State v. Baxter, a Washington case decided in 2006, the court concurred with the holding in Prince:

Both corporal punishment and religious practice are grounded in the parents’ beliefs as to the best interests of the child, and as parental control over the child’s upbringing does not justify cutting the child as punishment, it does not justify cutting the child as a religious exercise.393

387. Wisconsin, 406 U.S. at 234.
390. See supra Part I.E.
391. See Andrews, 498 F. Supp. at 1047 ("[M]edical treatment] decision[s] can either produce or eliminate physical, psychological, and emotional ruin.").
Thus, parents do not have the right to circumcise their sons for religious reasons.

4. Parents Can Only Consent to Medical Care

Just as physicians cannot perform unnecessary surgery on children, parents cannot consent to it. In 1979, a Texas appeals court considered whether parents could consent to remove and transplant a kidney from a daughter to a son to save his life, and held that they could not. The court noted that the power of parents to consent is limited to medical and surgical treatment. The court defined treatment as “the steps taken to effect a cure of an injury or disease... including examination and diagnosis as well as application of remedies.” Similarly, in Williamson v. State, a court found a mother guilty of felonious assault for requesting unnecessary surgery that injured her child. The American Academy of Pediatrics Committee on Bioethics agrees that parents can only give informed consent for the diagnosis and treatment of children, adding that it should be the with assent of the child whenever appropriate. This is inconsistent with the 2012 AAP Task Force on Circumcision’s claim that parents have the right to make the circumcision decision. No doubt parents can consent to safe, effective preventive medicine, such as eye drops for newborns, but they cannot consent to unnecessary surgery that is ineffective in preventing disease.

5. Parents Must Act in Their Sons’ Best Interests

Even if circumcision had a valid medical basis, and parents had the right, as proxies, to make the circumcision decision, they would still be required by law, like physicians, to act in the best interests of their sons. As Steven Svoboda writes, “[s]urrogates are expected to make decisions based on what the incompetent patient would want for himself[;]” “[i]t must be shown to a reasonable degree of certainty that the child would, upon attainment of the age of reason, have desired the surgery for himself.” As discussed above, men rarely choose circumcision for themselves, and

394. AMA Code of Medical Ethics, Rule 2.19.
396. Id. at 495.
397. Id.
399. Informed Consent, Parental Permission, and Assent in Pediatric Practice, supra note 325, at 314.
400. Circumcision Policy Statement, supra note 41, at 585.
402. Id. at 65, 70 (emphasis added).
circumcision violates the best interests rule. The best interests rule also prohibits parents from making the circumcision decision for reasons such as religious belief or aesthetic preference which have nothing to do with their son’s health.403

6. Parents Rarely Give Fully Informed Consent

Since parents do not have the right to make the circumcision decision, one does not reach the question of whether their consent is fully informed, as the law requires.404 Before 1971, physicians reportedly often circumcised newborn boys without parental consent.405 All such operations constituted an unlawful battery.406 Physicians may fail to obtain fully informed consent to circumcision today, as well. For example, it is unlikely that physicians inform parents that the operation can be fatal407 or prevents normal sexual function.408 If physicians told parents the truth about the surgery, it is unlikely that roughly half of parents would agree to it, as they do today, except perhaps on religious grounds.409

D. Ancillary Legal Issues

The analysis above allows these ancillary issues to be resolved quickly.

1. Is It Lawful to Use Medicaid to Pay For Circumcision?

Since 1965, tens of millions of boys have been circumcised under the jointly federal and state funded Medicaid program.410 The fundamental principle of Medicaid law, however, repeated throughout the federal and state Medicaid statutes and regulations,411 and affirmed by the United States Supreme Court,412 is that Medicaid only covers necessary medical services.413 Moreover, medical services must be reasonable and effective,

403. Id. at 68.
407. Bollinger, supra note 74.
408. See Frisch, supra note 85.
409. See generally Svoboda, supra note 239, at 61.
411. Adler, supra note 410, at 336.
412. Id. at 343 n. 89.
413. Id. at 336.
and the least costly alternatives must be used whenever available.\textsuperscript{414} Surgery is covered only after a physician or surgeon has diagnosed an illness or disease, and has determined that the surgery will be effective and is the only available treatment.\textsuperscript{415} Unnecessary, elective, cosmetic surgery is not covered.\textsuperscript{416} It has been unlawful since 1965 for physicians and hospitals to claim Medicaid reimbursement from the federal and state governments for circumcisions.\textsuperscript{417} Every such claim is a false claim against the federal and state governments, and is subject to severe penalties.\textsuperscript{418} In urging Medicaid coverage of circumcision,\textsuperscript{419} the AAP is advocating breaking the law.

2. Is It Lawful For Companies to Buy and Sell Boys’ Foreskins?

Given that boys have a right to genital integrity, that physicians cannot lawfully operate on healthy children,\textsuperscript{420} and that parental consent to circumcision is legally invalid, hospitals do not own the foreskins that they amputate. They are the property of the boys from whom they are unlawfully taken. Accordingly, hospitals cannot lawfully sell foreskins to pharmaceutical, cosmetics, or other companies, and the boys and men whose foreskins have been converted have claims against those companies.

3. Can Physicians’ Trade Associations Be Held Liable For Circumcision?

In 2000, Matthew Giannetti considered whether the American Academy of Pediatrics could be subject to trade association liability for its 1989 report on circumcision.\textsuperscript{421} He argued that trade association liability may be predicated on section 324A of the Restatement (Second) of Torts, which allows for the imposition of liability upon a trade association for gratuitous services, such as professional standard setting, if the association renders

\textsuperscript{414} Id. at 344.
\textsuperscript{415} Id.
\textsuperscript{416} Id.
\textsuperscript{417} Id. at 343.
\textsuperscript{418} Id. at 344.
\textsuperscript{419} Male Circumcision, supra note 2, at 585; Am. Acad. of Pediatrics Task Force on Circumcision, Technical Report: Male Circumcision, 130 PEDIATRICS c566, c777 (2012) (“Hospitals in states where Medicaid covers routine newborn male circumcision have circumcision rates that are 24% higher than hospitals in states without such coverage . . . . Financial barriers that prevent parents from having the choice to circumcise their male newborns should be reduced or eliminated . . . . The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure”).
\textsuperscript{420} See supra, Part III.B.2.
\textsuperscript{421} See generally Giannetti, supra note 129.
those services negligently. Giannetti cited the 1996 New Jersey Supreme Court case of Snyder v. American Association of Blood Banks, which held a blood bank trade association liable to the recipient of blood platelet transfusions who contracted AIDS. The court found that “[b]y words and conduct, the AABB [American Association of Blood Banks] invited blood banks, hospitals, and patients to rely on the AABB’s recommended procedures.” Thus the court held that the American Association of Blood Banks (“AABB”) owed a duty of care to individuals like Snyder, because it was foreseeable that blood banks would follow the AABB’s recommended procedures. In addition, the court also found that at the time of Snyder’s transfusions, ample evidence existed that blood products could transmit AIDS, and, therefore, the AABB was negligent.

The American Academy of Pediatrics intends that hospitals, physicians, and parents (as well as the media, legislators and Medicaid officials) will rely upon its 2012 circumcision policy report. Many of the AAP’s assertions in the report appear to be false or misleading. These include especially the assertion that the benefits of circumcision exceed the risks, that parents have the right to make the circumcision decision, and that Medicaid should pay for it, and also the claims that the circumcision is relatively painless, that the risks are low, and that circumcision does not affect sexual function. Accordingly, hospitals, physicians, parents, and men may have claims against the AAP (and the American Congress of Obstetricians and Gynecologists, which endorsed the 2012 AAP report) for trade association liability.
III. REMEDIES

A. Rights

As shown, circumcision violates the rules of medical ethics and numerous provisions of law. Boys and men are entitled to full redress. First, as the American Medical Association has stated, regulatory agencies are required to take allegations of unethical conduct very seriously. Unnecessary surgery on children is a serious ethical violation. Physicians who circumcise should lose their licenses to practice medicine. Second, the federal and state child abuse statutes protecting children from harm and the criminal assault laws must be enforced. The penalty for violating these laws is imprisonment. Third, the federal and state statutes protecting girls from non-therapeutic circumcision must be extended to boys. The proposed federal law that would allow circumcision and laws blocking remedies, such as statutes of repose, would violate boys’ rights and be invalid as unconstitutional. Fourth, federal and state Medicaid officials, legislators, and attorneys general all have the legal duty to end Medicaid funding of circumcision. Fifth, since physicians and hospitals do not have the legal authority to take boys’ foreskins, they do not have the right to sell them, nor do the buyers, including pharmaceutical and cosmetics companies, have the right to use them.

B. Reality

The reality is that regulatory, criminal, administrative, and legislative remedies have not been forthcoming for properly performed circumcision. Newborn boys cannot speak or vote, while physicians’ associations and religious organizations can (and do) lobby legislators, contribute to campaigns, and put pressure on Medicaid officials. For example, in 2010, a Jewish senator in Massachusetts wrote to her constituents that she had blocked a bill from leaving her committee, which would have allowed only therapeutic circumcision. In 2011, the president of the American Medical Association stated that the AMA would block all efforts to limit non-therapeutic circumcision, a statement at odds with the official AMA

435. See Part IIL.3, supra.
436. See AM. UROLOGICAL ASS’N CODE OF ETHICS, supra note 312.
437. See H.R. 2400, supra note 26.
policy that the “data are not sufficient to recommend routine [neonatal circumcision].” Physicians’ trade associations may also have influenced states to continue Medicaid coverage (when asked why they are continuing coverage, Medicaid officials uniformly respond by using medical terms). Representatives of the American Academy of Pediatrics, having argued recently that Medicaid should cover circumcision, may be trying to persuade the states that have ended Medicaid coverage to reinstate it, contrary to law.

C. Remedies

Circumcision, one of the most common surgeries in American hospitals, will continue until public opinion has turned completely against it, or until courts rule, as in Germany, that circumcision is unlawful. The constitutional right of access to the courts guarantees every American speedy, adequate, effective, and meaningful judicial remedies. Judges are sworn to uphold the Constitution and to grant those remedies. The 2012 German decision, this article, and those it cites, provide a blueprint for courts to hold physicians, hospitals, and parents liable to men for properly performed circumcisions.

CONCLUSION

This article has addressed whether circumcision is legal, and has shown that it is not. To summarize the law, boys, like girls and adults, have absolute rights under the common law to personal security and bodily integrity, and to freedom or the autonomy to make important and irreversible decisions about their bodies that can be delayed, like circumcision, for themselves. It is unconstitutional to protect girls from unnecessary genital cutting without extending equal protection of the law to boys. In addition, boys and girls are protected from circumcision by the criminal child abuse statutes, tort law, and human rights law.

440. See generally Adler, supra note 153.
441. See supra Part III.
442. See supra Part III.A.1.
443. See supra Part III.A.2.a.
444. See supra Part III.A.3.
One therefore does not reach the argument that physicians have the right to circumcise boys for religious, cultural, or personal reason, but if one did, it does not pass the blush test. A physician’s legal duty is to provide competent medical care to pediatric patients independent of their parents’ desires. Thus, physicians cannot take orders from parents to operate on children for reasons having nothing to do with medicine. Parents’ religious rights in turn are subordinate to their sons’ absolute rights to genital integrity and autonomy, and parents cannot risk harming their children, let alone actually harm them for religious reasons. Furthermore, physicians and parents have a legal duty to protect boys from circumcision.

This leaves the argument that circumcision is legally justified because it is preventive medicine. As the ethicist Margaret Somerville has written, it is a common error to believe that this justifies circumcision. Amputating any body part would have medical benefits but would violate the rights of the child. Circumcision also does not benefit the vast majority of boys or men at all (e.g., at best it reduces the risk of HIV during unsafe sex), and any benefits can be achieved easily and more effectively without it. The ethical and legal rule is that physicians cannot operate on healthy children. Amputations are legally justified only when medically

449. See supra Part III.A.5.
450. See supra Part III.B.4.
452. See supra notes 385-92.
453. Id.
454. MARGARET SOMERVILLE, THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT 202-19 (2000). A common error made by those who want to justify infant male circumcision on the basis of medical benefits is that they believe that as long as some such benefits are present, circumcision can be justified as therapeutic, in the sense of preventive health care. This is not correct. A medical-benefits or "therapeutic" justification requires that overall the medical benefits sought outweigh the risks and harms of the procedure required to obtain them, that this procedure is the only reasonable way to obtain these benefits, and that these benefits are necessary to the well-being of the child. None of these conditions is fulfilled for routine infant male circumcision. If we view a child's foreskin as having a valid function, we are no more justified in amputating it than any other part of the child's body unless the operation is medically required treatment and the least harmful way to provide that treatment.
455. See supra Part III.A.
456. See supra Part III.G. UTIs can be treated with antibiotics. Infants are not at risk of penile cancer, which can be prevented by proper hygiene, or of STDs, which can be prevented easily and effectively by abstinence, monogamy, or safe sex.
457. See supra Part III.B.
necessary to treat serious medical conditions,\textsuperscript{458} after a diagnosis and recommendation that the surgery is likely to be effective, cannot be delayed, that its benefits will outweigh the risks and harm, and that all other efforts to treat the disease have failed.\textsuperscript{459} Moreover, physicians and parents would need to prove that the surgery is in the best interests of the child, which includes proving that the child, if able, would have chosen the surgery for himself.\textsuperscript{460} Circumcision fails all of these tests. In short, under any analysis, circumcision is illegal.

\textsuperscript{458} Id.
\textsuperscript{459} See supra Part III.B.
\textsuperscript{460} See supra Part III.B.6.
WHOSE CHOICE ARE WE TALKING ABOUT? THE EXCLUSION OF STUDENTS WITH DISABILITIES FROM FOR-PROFIT ONLINE CHARTER SCHOOLS

Matthew D. Bernstein***

*I am a strong believer in testing. I believe the public is spending a lot of money on education, and they’ve got a right to know what the schools are doing and what the schools are not doing. They are not getting that today with the tests that are out there.*

—Albert Shanker, founder of the charter school movement, 1988

*The development of common standards and shared assessments radically alters the market for innovation in curriculum development, professional development, and formative assessments. Previously, these markets operated on a state-by-state basis, and often on a district-by-district basis. But the adoption of common standards and shared assessments means that education entrepreneurs will enjoy national markets where the best products can be taken to scale.*

—Joanne Weiss, Chief of Staff, Secretary of Education Arne Duncan, 2011

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I. INTRODUCTION: THE LIMITATIONS OF SCHOOL CHOICE

It is hardly controversial to say that the public education system in the United States is badly in need of change. Parents, teachers, politicians, and students share a view that our schools are inadequate, under-funded, and performing poorly, even while they may disagree about solutions. Test scores are declining, schools are facing funding shortages, and age-old problems like truancy, poverty, and declining facilities seem to be getting worse, not better. The United States, once a worldwide leader in educational achievement, has seen its reading scores for fifteen-year-olds sink to seventeenth internationally, behind Estonia and Poland—and that is the nation’s best result in the three-subject test. In science and math, the United States has fallen out of the top twenty, and in the case of math, the country is now a below-average nation. Nobody who is serious about our educational system would be willing to accept these results.

The need to reform education increasingly inhabits the public conscience through movies, editorials, and the news cycle. More and more, these sources point to charter schools as the locus from which the next generation of schools will emerge. As No Child Left Behind (“NCLB”) is replaced by market-inspired government initiatives like Race to the Top and innovations from the private sector, there is a great divide emerging in public education. On one side stand the established holders of the torch, the traditional public schools that, since the nineteenth century, have comprised the core of public education. On the other are charter school reformers, the creative innovators allergic to the status quo who want to shake up the

463 This paper limits its focus to grades K-12, or primary and secondary education. Higher education is simply outside the focus here.
467 See id.
system from the inside and build a new one in its place. As the debate over the best form of public education increasingly fuels the ongoing struggles between public unions and the private sector, between free-market ideals and the social safety net, and between federal, state, and local control, education in the United States is being pulled apart. Left in the gap are the young people for whom the system is supposedly designed, those who stand to benefit most from a high quality public education.

In the last fifteen years, information technologies have fostered the emergence of a new kind of school: the fully online “cyber” or “virtual” charter. These schools, operated almost exclusively by for-profit, private companies that are traded publicly on the stock market, are growing rapidly.\(^{471}\) The number of virtual schools nationwide has increased from seventeen in the 2003-2004 school year to seventy-nine in 2010-2011.\(^{472}\) The majority of states now allow students to obtain some of their education online.\(^{473}\) The companies that run these schools do not hide the fact that profits are their top priority.\(^{474}\) Indeed, it is not hard to see why the corporate business world envisions a huge opportunity in public education: today, spending on education totals more than one trillion dollars,\(^{475}\) and K12, Inc., the leader in privatized online education, estimates that the market for its schools is valued at $15 billion.\(^{476}\) The second biggest purveyor of online schools was recently bought for $400 million\(^{477}\) by Pearson Education, Inc., whose market capitalization is valued at approximately $14.39 billion.\(^{478}\) The purveyors of online schools tout their

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472 Gary Miron et al., Profiles of For-Profit and Nonprofit Education Management Organizations: Thirteenth Annual Report, 2010-2011, NATIONAL EDUCATION POLICY CENTER (Jan. 2012), http://nepc.colorado.edu/publication/EMO-profiles-10-11 [hereinafter Miron et al.]. 2003-2004 is the first year for which cyber charter data is available, while 2010-2011 is the most recent data available. Id.


474 See generally K12’s CEO Discusses F1Q 2013 Results - Earnings Call Transcript, SEEKING ALPHA (Nov. 9, 2012, 8:00 AM), http://seekingalpha.com/article/994861-k12-s-ceo-discusses-f1q-2013-results-earnings-call-transcript?source=email_rt_mc_focus&ifp=0.


477 Id.

innovative approach to public education as an asset and they enjoy considerable support from the education establishment. Citing many states’ recent voluntary adoption of the Common Core Standards—an attempt to standardize educational goals across all fifty states—Joanne Weiss, Chief of Staff for Secretary of Education Arne Duncan, championed the notion that “education entrepreneurs will enjoy national markets where the best products can be taken to scale.”

But the recent increase in the number of fully online schools exemplifies the costs as well as the benefits of privatized education. As in the consumer finance industry, where the development of derivatives moved faster than the ability of regulators to ensure their safety, the virtual education world is largely unregulated. Very few states have passed legislation directed specifically at online charter schools, and this absence of oversight has caught the attention of legislators. In the 2010-2011 school year, only 27.7% of for-profit virtual schools met Adequately Yearly Progress (“AYP”), the main measure of student achievement under NCLB. This shocking figure was almost half the percentage of privately-run, brick-and-mortar schools, where 52% met AYP. Schools managed by for-profit companies also fared worse than those managed by not-for-profits. Only one-third of students at K12, Inc., the biggest purveyor of private education, achieved AYP.

Average achievement based on test scores, especially under the nearly obsolete standards of NCLB, is only one concern regarding online public schools. Another is special education. While all charter schools are by definition exempt from many district and state requirements, they are not excused from obeying federal law regulating special education. There is a growing rift between the complex responsibilities all public schools owe to

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480 Weiss, supra note 2.
483 Miron & Urschel, supra note 11, at v.
485 Miron et al., supra note 12, at v.
486 Id. at 21–22; Saul, supra note 16, at A1.
students with disabilities and the identity of charter schools as independent, efficient, and results-driven. These problems are further exacerbated in for-profit, online schools. Over the past decade, clear and convincing evidence has emerged that for-profit charter schools are not adequately maintaining their fiscal and educational responsibilities to students with disabilities. While the lack of transparency maintained by most for-profit education companies has made gathering data difficult, it is apparent that online schools are both knowingly and unknowingly discriminating against students with severe disabilities. According to a variety of sources, the profit motive at online schools incentivizes them to do whatever they can to avoid serving the students who cost the most to educate. Chief among these are students with severe disabilities. As one special education scholar put it, “[t]he fewer disabled students a charter school enrolls, the greater its autonomy, the lower its costs, the higher its performance on statewide assessments, and the less bureaucratic red-tape it must deal with.” In principle, this kind of discrimination is akin to racial bigotry and is broadly illegal. It threatens not just cyber charter schools, but also the development of the American public school system as a whole.

By examining the history of special education law against the emergence of the for-profit and online education movements, this paper explores the charter school movement from a consumer law perspective. It aims to explain why much of the current debate over test scores, “accountability,” and teacher evaluation obscures other systemic fault lines that implicate the very reasons we have a public education system in the first place. In turn, the goal is to suggest solutions to some fundamental questions: in the twenty-first century, do we still need a public education system? What are our collective responsibilities to students? What does a quality education mean, and how do we maintain access to it?

489 Lin, supra note 13, at 184, 187; see Miron & Urschel, supra note 11, at 27; Nancy J. Zollers & Arun K. Ramanathan, For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling, 80 Phil DELTA KAPPAN 297, 301 (1998).
II. PUBLIC EDUCATION AND SCHOOL CHOICE AS CONSUMER LAW

It is surprising that public education is rarely thought of as a branch of consumer law, given the long-running tendency of education scholars, advocates, and the private education industry to apply the language and concepts of business to the field. Perhaps this is because, while the term “consumer” is used in a wide variety of social contexts, there is not a single authoritative definition. In 2012, it may be harder to say who is not a consumer than who is. The Consumer Financial Protection Bureau describes a consumer simply as an “individual.”[^492] Another common definition can be found in the Illinois Consumer Fraud and Deceptive Practices Act, which defines a consumer as “any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.”[^493] The provision of educational services fits comfortably within these definitions.

Consumer law is generally defined as protections to purchasers of goods and services.[^494] Most often, consumer protections occur in the form of government mandated disclosures (on, say, credit card statements), but they also take the form of legislation restricting certain business practices viewed as systemically harmful to consumers.[^495] The recent creation of the Bureau of Consumer Financial Protection, designed to prevent future abusive lending practices of the kind that led to the financial crash of 2008, is one example.[^496] One legal services website defines consumer law as “regulating many of the following business transactions and practices: advertising, sales and business practices; product branding; mail fraud; sound banking and truth in lending; quality produce and meats; housing material and other product standards.”[^497] Public education, increasingly viewed as a “product,” fits among these definitions. Scholars increasingly use terms such as “supply-side” economics, “market-based ideas of

[^493]: Illinois Consumer Fraud and Deceptive Practices Act, ILL. COMP. STAT. 815 § 505/1 (2007) (Merchandise includes “intangibles” and “services.”).
[^494]: See BLACK’S LAW DICTIONARY 359 (9th ed. 2009).
[^495]: See Bar-Gill & Warren, supra note 21, at 83–84, 90.
competition,” and “shopping for schools” to describe public education today.498

Economist Milton Friedman first broached the idea that the private sector should involve itself in education. His 1955 article, The Role of Government in Education, called the federal presence in education “an indiscriminate extension of governmental responsibility.”499 Friedman argued that there was an appropriate place for government in financing public education, as it promoted “a stable and democratic society,” but he thought that it was inappropriate for the government to administer schools themselves.500 The federal government should give money to parents in the form of vouchers, Friedman posited, and parents should then decide where to spend it.501 Friedman’s theory applied a classical free-market conception to public education; no one had previously proposed such a dramatic role for the private sector in schools. Under Friedman’s ideas, schools would (and should) compete among each other for students.502 Those who offered inferior products (curriculum, support, activities) would not draw students/customers, and would therefore fold.503 This was exactly the point: if a company was offering a low quality product, it should not be in business at all, let alone receive government money for its efforts.

Friedman’s notions of how the public school system should work, conceived over fifty years ago, essentially describe the way public education increasingly appears in the United States today. He envisioned a system in which government would provide money to each child’s parents, who would then be free to spend it “at a school of their own choice.”504 Nonprofits, private businesses, and even “governmental units” would run schools.505 Meanwhile, students and parents would hold the power of selection.506 The primary difference between the United States of 2012 and Friedman’s 1955 vision of the future lies in the mechanism by which the

500 Id.
501 Id. at 2.
502 Id. at 3.
503 Id.
504 Id. at 6.
505 Id. at 3.
506 Id.
government distributes funds. Rather than providing money directly to each child’s parents, today, funds flow from the federal government to schools on a per-student basis.\textsuperscript{507} In terms of the entities controlling the schools themselves, however, Friedman was basically correct. We now live in a world in which “private initiative and enterprise [has quickened] the pace of progress” and government in some instances serves “its proper function of improving the operation of the invisible hand without substituting the dead hand of bureaucracy.”\textsuperscript{508}

Friedman’s 1955 paper did not have an immediate effect on the public education landscape. In fact, the country would soon move in the opposite direction. Ten years later, President Lyndon Johnson, leaning on the legacy of his predecessor, John Kennedy, pushed a bill through Congress that instilled almost the opposite system Friedman desired.\textsuperscript{509} In 1965, Congress ratified the Elementary and Secondary Education Act (“ESEA”), with “little debate and no amendments.”\textsuperscript{510} The ESEA was by far the most expansive foray of the federal government into public education in United States history, a realm that to that point had been left largely to the states.\textsuperscript{511} As part of Johnson’s initiatives like the Great Society and the War on Poverty, the ESEA sent huge block grants under its Title I to schools with high numbers of poor and disadvantaged students.\textsuperscript{512} The basic premises of the original ESEA flew in the face of Friedman’s warnings about an expansive presence for the federal government in funding schools and set the status quo that persists today.

The ESEA was reauthorized in 2001 as NCLB,\textsuperscript{513} even while questions lingered over whether federal money had been properly spent over the previous thirty-six years.\textsuperscript{514} Many advocates claimed that even with the large amount of dollars leaving federal coffers, achievement gaps had not narrowed.\textsuperscript{515} NCLB installed an intense testing regime that punished schools for failure, but did not back up these new requirements with adequate

\begin{footnotesize}
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  \item \textsuperscript{507} Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).
  \item \textsuperscript{508} Friedman, supra note 39, at 6.
  \item \textsuperscript{509} Compare id., with Elementary and Secondary Education Act.
  \item \textsuperscript{511} Id. at 232.
  \item \textsuperscript{512} See id.; Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).
  \item \textsuperscript{515} Id. at i.
\end{itemize}
\end{footnotesize}
federal dollars. By 2007, six years after passage of the law, NCLB was $55 billion behind the level of funding Congress had authorized. Calls in the last five years for reauthorization of the ESEA and a fundamental overhaul of the discredited NCLB have been largely ignored, and the only significant change in federal education funding policy has been the Obama Administration’s choice to shift control from the legislative process to the executive through waivers to NCLB and the creation of the Race to the Top program. The funding mandates of the ESEA/NCLB remain the standard, and schools continue to rely heavily on the generosity of these programs, however limited they have become. Today, national education policy is characterized by a Congress unwilling to revamp its philosophical commitment to NCLB—an unrealistic system of accountability premised on the notion that all students in the United States will read at grade level by 2014—nor to exercise its political will to re-envision the federal education system.

While federal education policy has been marked by indecisiveness and a lack of leadership, corporate education entities have been working to build coalitions and establish themselves in the national public education landscape for the last twenty years. If success is measured by market share, few business sectors have been more successful at establishing a competitive basis to acquire federal funds. As the percentage of students in traditional public schools has declined, it has risen almost as fast in schools run by corporations. To understand how this has happened, it is necessary to examine the rise of charter schools in general.

III. The History of Charter Schools: Latent Privatization

Charter schools are open to all students free of charge. They are non-sectarian and are not permitted to discriminate against students on any

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516 Forum On Educational Accountability, supra note 53.
517 Id.
518 United States Dep’t of Educ., supra note 10, at 2.
519 See generally Miron & Urschel, supra note 11.
522 See generally Forman, supra note 61.
basis, including by gender, ethnicity, disability, class, or academic potential. Charter schools differ from traditional public schools in that they are often smaller and non-union and receive exemptions from certain state requirements about how to run themselves internally. Charter schools can decide how to spend their money: they pick who they hire, how to set up their administrations, what books to buy, and how much to rely on technology. They exist as part of a deal: they receive increased freedom from certain restrictions and regulations in exchange for a chance to experiment with new educational techniques and a promise to increase results. If they fail, local authorizers can revoke their charters. The idea is that students and parents can “shop” for charter schools in their area, and can choose to enroll in the schools they like best (or put their names in a lottery if there is more demand for a given school than there are spaces) in lieu of their local, traditional public schools.

The charter school world has undergone extreme changes in ideology since its inception. What is today a movement fascinated with teacher quality, unsympathetic to unions, big on test results, and often at odds with traditional public schools was founded by a teacher and a union member expressly in opposition to those attributes. It was not clear twenty years ago that the visions of Milton Friedman would merge with those of the founders of the charter school movement, and, abetted by burgeoning innovations in technology, coincide in the emergence of online for-profit schools. But in retrospect, the root ideologies of each fit together harmoniously.

The charter movement grew out of the separate but compatible ideas of two education pioneers: Ray Budde, a professor of educational management at the University of Massachusetts, and Albert Shanker, the former

524 Garda, supra note 30, at 662–63.
526 Id.
528 Weber, supra note 31, at 218.
529 Garda, supra note 30, at 666–67.
531 See, e.g., Albert Shanker, supra note 1.
President of the American Federation of Teachers. Budde’s 1988 book, *Education by Charter: Restructuring School Districts*, gave the movement its name, linking the notion of a charter to the goals, objectives, and shared responsibilities of the Magna Carta and the voyage of Henry Hudson. Budde’s idea was that a group of teachers could propose a charter dedicated to a specific educational purpose, such as a multi-level curriculum, a coordinated humanities program, or a whole-language approach. The school would be free from certain district requirements and would be given a multi-year chance to experiment with new ideas. Eventually, groups of charter schools would form a “crisscrossing system” that would “free the educational system from the bonds of ‘single-year operation syndrome’.” Each sector of the education world would benefit: charters would create “a strong sense of collegiality” among teachers, administrators would shed “the diffuse and heavy burden of being responsible for instruction,” and principals could “continue doing what good principals are already doing: supporting their teachers and creating a safe, positive climate in which students can learn and grow.” Accountability would come every five years in the form of a district review. If charters were not meeting the standards they set forth, the district could revoke the charter or demand a significant overhaul of the curriculum.

Shanker’s vision was similar. In a 1988 speech to the National Press Club, he outlined his ideas for a new kind of school that would promote authentic, teacher-driven innovation. Shanker’s beliefs emerged from the aftermath of the 1980s education reform movement, which was sparked by the publication of *A Nation at Risk*, the 1983 report from Ronald Reagan’s Commission on Educational Excellence. That report blasted the nation’s “steady decline” in educational performance and called for vast improvements in content, expectations, time, and teaching. High school

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533 Id. at 519.
534 Id. “Single-year operation syndrome” was the idea that schools spend so much time trying to stay afloat during the present school year that they rarely considering long-term holistic innovation. Id.
535 Id. at 520.
536 Id.
537 Id.
540 Id. at 11–12.
students’ average achievement on standardized tests, the report lamented, was lower than it had been twenty-six years previously.541 But more than that, “many 17-year-olds do not possess the ‘higher order’ intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps.”542 This was an issue, according to the Commission, because technology and computers were set to radically transform entire industries, including health care, construction, education, industrial science, and the military.543 “If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today,” the report concluded, “we might well have viewed it as an act of war.”544 Shanker’s design addressed this crisis in creativity by handing the reigns to teachers to rescue the curriculum from the educational ruts in which the nation found itself.545

Shanker’s main complaint was that schools educated all students using a one-size-fits-all approach.546 Even after the shock of A Nation at Risk, Shanker found it upsetting that the country was “reforming” its schools through regulations about seat time, an increase in mandated classes, an overemphasis on homework, and a litany of “regurgitating” on standardized tests.547 These were remedies for the sake of remedies, designed by a government that was out of original ideas. Shanker directly invoked business language to explain why the government’s reforms were obsolete.548 He wrote that in the business world, when an industry fails to regulate itself, it is not surprising to see the government step in and take control.549 That tendency is only natural, but equally understandable is the response from the business community, who, after a jolt, would want to control its own destiny.550

The whole point, Shanker said, was for the education community to re-take control of the reform movement, to come up “with better answers than would be imposed on them from some distance by those not actually

541 Id. at 11.
542 Id. at 12.
543 Id.
544 Id. at 9.
545 Shanker, supra note 1, at 15.
546 Id. at 14.
547 Id. at 14-15.
548 Id. at 5.
549 Id.
550 Id. at 5.
involved in the field.” Shanker envisioned the movement beginning through the formation of teacher-led autonomous “school[s] within . . . school[s].” These new schools would institute higher expectations and standards, promote innovation in the school day, team-teach, and self-govern. Unsurprisingly given his position as the head of the major teachers’ union, Shanker also emphasized the importance of vigorous collective bargaining, asserting, “[y]ou don’t see creative things happening where teachers don’t have any voice or power or influence.”

Proceeding from the visions of both Shanker and Budde, the system-within-a-system was born. Both men emphasized that these new schools would be schools of choice: no teacher would be forced into this arrangement and no parent would be obligated to send his children to them. In fact, Shanker found it essential that parents and teachers would collaborate with each other to build “a new structure.” Like Budde, Shanker wanted a guarantee that these new schools would be left to their own devices for five to ten years. Essentially, both men were calling on school policymakers to give free market innovation a chance to improve schools.

In 1991, the ideals of Budde and Shanker became reality when Minnesota became the first state to pass legislation authorizing the creation of charter schools. In 1992, the first charter school opened in St. Paul. The school, City Academy High School, largely honored Shanker’s dream. It served students as old as twenty-one and offered job skills training, counseling, and other social services. A local board, not a for-profit corporation, operated the school. The following year, California became the second state to authorize charters, and from there the movement skyrocketed.

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551 Id.
552 Id. at 12.
553 Id. at 13.
554 Id. at 9.
555 Id. at 17.
556 Id.
558 Charter Schools, supra note 97.
559 Id.
560 Id.
561 Understanding the Landscape, CAL. CHARTER SCH. ASS’N, http://www.calcharters.org/-starting/landscape (last visited Mar. 31, 2013); Charter School History and Policy, EdSOURCE,
From the very beginning of charter schools, all sides of the political spectrum found something to embrace. Charter schools represented both a Friedmanite method for transferring control of schools from the government to private citizens and a way in which liberal educators could institute local curriculum centered on marginalized communities. In 1993, the conservative Heritage Foundation sponsored the Center for Education Reform to back decentralized control of schools.\textsuperscript{562} The liberal Brookings Institution created its own policy arm shortly thereafter.\textsuperscript{563} The centrist Democratic Leadership Council also endorsed the movement, and in 1994, Bill Clinton pushed legislation through Congress that set aside federal money to spur the development of charter schools.\textsuperscript{564} Voucher advocates of the Reagan era and liberal ethnic studies proponents both found elements they could stand behind. As Diane Ravitch wrote, it is ironic that George W. Bush, a conservative Republican, presided over the “largest expansion of federal control in the history of American education. It was likewise ironic that Democrats embraced market reforms . . . that traditionally had been favored by Republicans.”\textsuperscript{565} All in all, with few political opponents, support for charter schools has grown exponentially over the last twenty years. Today, forty-one states and the District of Columbia permit charter schools, and there are over 5,000 charters in existence.\textsuperscript{566}

IV. THE EMERGENCE OF FOR-PROFIT EDUCATION COMPANIES

Due to both deliberate and unintentional policy decisions, Milton Friedman’s vision of an educational system funded by government but run by private companies has remained foundational to the charter school movement. From their creation, discussion about charter schools and school choice were grounded in microeconomic theory. As two education scholars wrote in 1990 in justification of privatized education, “the private market can determine the appropriate quantity and quality of a good by reaching an equilibrium between consumers and producers that optimizes the utility of

\textsuperscript{562} Dorothy Shipps, \textit{The Politics of Educational Reform, in SHAPING EDUCATION POLICY: POWER AND PROCESS} 259, 278 (Douglas E. Mitchell et al. eds., 2011).


\textsuperscript{564} DIANE RAVITCH, \textit{THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM} 125 (2010).

\textsuperscript{565} Id. at 21.

consumers and the profit of producers . . . the bureaucracy of governments leads to ineffective and inefficient institutions.\textsuperscript{567}

While the charter founders themselves never envisioned a role for private companies in running charter schools, charters fit naturally into public-private partnerships.\textsuperscript{568} As Ray Budde originally envisaged, the core of a charter school is the charter itself, and innate in that founding document is a market conception. After all, a charter is essentially a performance contract.\textsuperscript{569} There are two sides to the agreement and a quid pro quo: authorizers agree to a set of stipulations and charter schools agree to produce results. If the relationship falters in the middle, the authorizer may cancel the deal, but if the school performs well, the authorizer can extend the contract.\textsuperscript{570} The nature of the agreement also lends itself easily to a public-private affiliation, as it is premised on the notion that whoever manages the charter school—whether it be a public or a private entity—it is not the school district.

Like Budde, Albert Shanker’s original plan for charter schools also included private business, even while, echoing Freidman, he anticipated the need for public financing. Charter schools “will have to operate on the same money that all other schools do,” he said, and added “[t]here is a role in all this for the federal government, state government, the local government, the business community, and foundations.”\textsuperscript{571} Shanker could not have anticipated the extent to which he would be correct.

Wall Street analysts coined the term “educational management organization” (“EMO”) in the 1990s as an analogue to health management organizations (“HMOs”) in the health sector.\textsuperscript{572} The term EMO refers most often to a for-profit business that draws upon a range of funding inputs, including venture capital and public funds, and that seeks to return profits to investors.\textsuperscript{573} EMOs manage schools, but they do not technically run

\textsuperscript{567} Lacireno-Paquet, supra note 38, at 3.
\textsuperscript{568} Id.
\textsuperscript{569} See Hill et al., supra note 67, at 4.
\textsuperscript{570} See id.; see also Guilbert C. Hentschke et al., Education Management Organizations: Growing a For-Profit Education Industry with Choice, Competition and Innovation, REASON PUB. POL’Y INST. 1, 7 (May 1, 2002), http://reason.org/files/86f373eefe12bf11ff64e1305f3362.pdf.
\textsuperscript{571} Shanker, supra note 1, at 18.
\textsuperscript{572} Miron et al., supra note 12, at 1.
\textsuperscript{573} Id. at 2; see Hentschke et al., supra note 110, at 4 (discussing the role of venture capital and public funds in for-profit EMOs). There are also non-profit EMOs, but they are outside the scope of the examination here.
They are distinct from authorizers, school districts, and even charter founders. They provide curriculum, management, and resources. A vendor provides more targeted and specific services, such as accounting, transportation, benefits and payroll, professional development, and even special education in some places. EMOs, by contrast, supply the core academic and curricular needs of schools. While privatization advocates often point out that since long before the advent of charter schools, traditional public schools found it useful to contract with private companies for a range of services—including textbooks, food services, and transportation contracts—the move to full administration of public schools by private companies marked a fundamental shift in education policy in the United States. The central difference is the degree to which a company running a school has the power to violate students’ fundamental rights as enshrined in law. In other words, there is a big difference between a company having a say in the construction of a textbook and a company controlling the entire substance of a school.

The first EMO began in the same time and place as charters more generally—1990s Minnesota. Growth of EMOs in the 1990s and 2000s was explosive. The number of for-profit EMOs nationwide grew from 5 in the 1995-1996 school year to 99 in 2010-2011, and the number of schools those EMOs operated increased from 6 to 758 over the same time span. During those years, enrollment increased from around 1000 students in 1995-1996 to about 394,000 in 2010-2011. For-profit companies now operate in thirty-three states.

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574 Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ., 464 F.3d 1003 (9th Cir. 2006). The court makes this distinction clear. While private companies are not eligible for federal special education money, charter schools are free to contract out the management of their schools at 100%, making this distinction one of paperwork. Id. at 1009–10.
575 See, e.g., Miron et al., supra note 12, at 3.
576 See generally, Hentschke, supra note 110.
577 Miron et al., supra note 12, at 2.
578 Id.
579 See Hentschke, supra note 110, at 6.
580 Forman, supra note 61, at 850.
581 Zollers & Ramanathan, supra note 29, at 303.
582 See The History of For-Profit Education Management Organizations, at 3, http://a100educational-policy.pbworks.com/f/EMO_History.pdf (last accessed Mar. 31, 2013). Its original name was Educational Alternatives, but in a symbol of the future of many EMOs, the company soon foundered on educational instability and merged with another EMO out of Arizona.
583 See Miron et al., supra note 12, at ii.
584 Id.
585 Id. at iii.
the U.S. are operated by private companies, accounting for about 42% of all
students enrolled in charter schools nationwide.586 Almost all of the schools
managed by EMOs nationwide (94%) are charter schools.587

There are many advertised benefits to the administration of schools by
private companies. Corporations are theoretically better at monitoring
student progress, mastering the substantial reporting and business aspects of
running a school, and managing finances.588 They also have a financial
incentive to increase enrollment and to perform well because their contracts
can be terminated, whereas traditional public schools often receive funding
regardless of performance.589 A national company like K12, Inc., which
operates hundreds of schools across the United States, can also take
advantage of economies of scale; it can develop one set of curricula,
pedagogical principles, and administration policies, and apply those
innovations to its entire cadre of schools. In theory, privately run public
schools face more accountability, because, under the central tenet of school
choice, students can leave if they are dissatisfied.590 EMOs can also help
with startup funds and curriculum development, which theoretically frees
founders to concentrate on their local mission.591

Critics of allowing strong private involvement in public education cite
the fiduciary duty publicly traded companies owe to their shareholders.592
This mission often conflicts with the concurrent duty to students and federal
standards, given the companies’ acceptance of federal funds.593 Detractors
also cite a lack of control and decision-making for charter boards that have
contracted with private companies.594 Once a school hands over curricular
control to a private company and invests time and energy into that
company, it may be difficult to cancel a contract for lack of performance.595
The authority that a private company may exercise over a charter school
also violates one of the central ideas of the choice movement:

586 Id. at i. (figures are the most recent available, from the 2010-2011 school year).
587 Id. at iii.
588 Anne E. Trotter, Suzanne E. Eckes & Jonathan A. Plucker, Education Management Organizations
589 Id. at 936, 940.
590 See id.; see also Sandra Vergari, Charter Schools: A Significant Precedent in Public Education, 59
591 See Trotter et al., supra note 128, at 940.
592 Id.
593 Id. at 941.
594 Id.
595 Id.; Vergari, supra note 130, at 508.
independence.\textsuperscript{596} Moreover, economies of scale also have drawbacks: they can lock a standardized curriculum in a place where a customized, local focus would better serve students. Finally, privatized charter schools lack transparency and tend to favor efficiency and their bottom line over their duty to serve all students.\textsuperscript{597}

But the crux of the debate over the effectiveness of privatized education revolves around funding mechanisms. Charter schools funded by districts in general receive less money per pupil than traditional public schools.\textsuperscript{598} In amending ESEA in 1997, Congress found that only one state—the original charter platform, Minnesota—provided charter schools with both capital and operating per-pupil expenses.\textsuperscript{599} The remainder of states granted only operating funds to charters, leaving them to fend for funds for buildings and facilities on their own.\textsuperscript{600} Today, many states fund only 70% to 90% of schools’ necessary operating expenses.\textsuperscript{601} Additionally, charter school boards lack authority to issue school construction bonds that can be used to finance capital improvements and the building of new schools.\textsuperscript{602} Traditional public schools, by contrast, receive money for both capital and operating expenses, and frequently take advantage of bond initiatives to maintain financial viability.\textsuperscript{603} While conventional public schools receive free access to buildings, most charters must rent space using money that could otherwise go towards instruction.\textsuperscript{604} This kind of hard choice is one primary reason that charter schools often seek donations and private support or hand their entire operation over a private company.\textsuperscript{605} Charters authorized by school districts must combat the vested interest of those districts in funding the traditional public schools over the charter schools.\textsuperscript{606}

\textsuperscript{596} Trotter et al., supra note 128, at 941.
\textsuperscript{597} \textit{Id.}
\textsuperscript{600} \textit{Id.}
\textsuperscript{601} \textit{Id.}
\textsuperscript{602} \textit{Id.}
\textsuperscript{603} \textit{Id.}
\textsuperscript{604} \textit{Id.}
\textsuperscript{605} \textit{Hill et al., supra note 67, at 5.}
many districts charge a flat fee simply for having charter schools under their purview. 607

According to a 2010 report from Ball State University entitled Charter School Funding: Inequity Persists, charter schools remain underfunded, in some cases severely so, when compared with traditional public schools. 608

The report warns that under-funding threatens the welfare of children attending charter schools, and especially students in urban areas. 609 These students, who “derive the greatest benefit from new and innovative ways of thinking about learning, experienced the greatest disparity in funding. Thus, true school choice may be denied de facto, or at least severely impaired, for those students who already have few positive educational opportunities.” 610

Founding and running a charter school has become increasingly difficult in the face of these myriad financial impediments.

Difficulties in obtaining full public funding have led to a slowdown in growth in for-profit EMOs over the past few years. 611 Many EMOs, failing to adequately predict the costs involved with educating many types of children and navigating the complex fiscal landscape, have simply folded. 612

Some EMOs are now looking to diversify into collateral fields like educational publishing, but two companies expanded into the school management arena this year. 613 EMO mergers appear to be increasing. 614

Concerns about the motives of private companies are also complicating their efforts to expand. In Washington state, a legislator expressed concern that the legislature there was handing millions of dollars in state funds to private companies without being able to exert much control over the schools it was funding. 615

Struggling EMOs looking to increase profits in the face of a complicated financial climate are increasingly turning to cyber charters as an alternate method of augmenting their portfolios. Cyber charters account for over ten

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607 See Knight, supra note 22, at 410.
608 W. Holmes Finch, Introduction to Batdorff et al., supra note 146, at i.
609 Id.
610 Id. at i–ii.
611 Miron et al., supra note 12, at i.
612 The History of For-Profit Education Management Organizations, supra note 122, at 4.
613 These are Pearson Education and Cambridge Education, LLC. See Miron et al., supra note 12, at ii.
614 The History of For-Profit Education Management Organizations, supra note 122, at 3.
percent of EMO-run schools, but because they enroll many more students on average than brick-and-mortar schools, they total more than 27% of all students in EMO-run schools. Both of those proportions continue to rise. In contrast to the rest of the private education sector, where there is much more diversity in company size, nearly all of the virtual schools are run by five large EMOs.

The kind of virtual school these EMOs favor is fully online, not a hybrid of classroom- and internet-based instruction (nearly all schools today are hybrid in some way, in that they require students to complete some percentage of their work online). These schools may or may not have actual brick-and-mortar buildings. A student attending a fully virtual school may live hundreds of miles from the school’s location and thus receive no instruction at the school site. Lessons at these schools are dubbed “asynchronous,” meaning that students and teachers work at different times, through tools like threaded discussion boards, testing programs, and help systems. Coursework at virtual schools is primarily conducted on computers, through video lectures, PowerPoints, and virtual lessons—but students may also have paper textbooks or be required to perform science experiments in their homes using available materials. Students enrolled in virtual schools obtain help and support with their work through online communication with the school’s teachers, and from their parents or other people in their home.

V. THE EXCLUSION OF THE EXPENSIVE

Questions about for-profit charter schools and students with disabilities surfaced almost from the date EMOs came into existence. A landmark 1998 article by Nancy Zollers and Arun Ramanathan, subtitled The Sordid Side

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616 Miron et al., supra note 12, at 10.
617 Id. at 9–10.
618 These five EMOs are: Connections Education, K12, Inc., Leona Group, Mosaica Education, and White Hat Management. Connections, recently acquired by the education giant Pearson, and K12 are the two “dominant players.” Id. at 10.
620 The laws of some states, such as New Mexico, require all schools to have an actual building. N.M. STAT. ANN. § 2-8B-4.2 (2011).
621 NACSA, supra note 159, at 2.
622 Id. at 15.
623 Id. at 8.
624 Id. at 13.
of the Business of Schooling, chronicled major legal improprieties at Massachusetts EMOs. While these schools did a “decent” job of including students with mild disabilities, they “engaged in a pattern of disregard and often blatant hostility toward students with more complicated behavioral and cognitive disabilities.” These companies not only enrolled a far lower number of students with severe disabilities than did traditional public schools, but treated students with severe disabilities as “financial liabilities.” The offending schools were enabled, according to Zollers and Ramanathan, by “a state government that coddles charter schools while singling them out as examples of free-market accountability and innovation.”

Zollers and Ramanathan interviewed dozens of parents and discovered a variety of ways that Massachusetts EMOs pushed away students with severe disabilities. One of the most common practices was “counseling out” students. Because EMOs often engage in recruiting campaigns to ensure they fill their schools, their representatives have more contact with the general public than do administrators of traditional public schools. As EMOs engaged in self-promotion, they were simultaneously telling parents of expensive students that they would be “better served” in traditional public schools. For students who enrolled nonetheless, the schools were often using inappropriate disciplinary procedures: segregating students in violation of the least restrictive environment requirement, suspending students improperly, and eventually trying to counsel them out. These practices are broadly illegal, but parents who were unaware of their full rights under special education law were especially susceptible to this soft discrimination. While there was nothing harmless about the actual practices the schools used, on paper nothing untoward appeared. A parental signature on the transfer application indicated that the transfer was a “voluntary” parental decision. In the case of families of students with

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625 Zollers & Ramanathan, supra note 29, at 298.
626 Id.
627 Id. at 297.
628 Id. at 298.
629 Id. at 299.
630 Id. at 299.
631 Id.
632 Id.
633 Id. at 300.
635 Zollers and Ramanathan, supra note 29, at 300.
severe disabilities who were counseled not to attend charters from the outset, there would be no paper trail at all.

Compounding these practices was the manner in which Massachusetts funded special education. Each charter school there received per-student funding based on its local district’s special education and bilingual expenses, excluding the cost of private special placements.636 Because the EMOs enrolled fewer students with severe disabilities and because they often claimed special funds for “substantially separate” classes of students with only moderate disabilities, they received a major advantage in funding over traditional public schools.637 On top of that, Massachusetts also forced local districts—not charters—to pay for the busing of students to charter schools.638 The state allowed for-profit companies to create “for-profit nonprofit[s]” that could apply for federal special education money—the cost of which was, again, based on the costs of educating students in the local district.639 To add to the inequity, when students with severe disabilities left charter schools, regardless of whether they did so voluntarily, they most often returned to traditional public schools, thereby further raising the districts’ costs.640 These practices meant that for-profit companies were taking advantage of financial incentives but not upholding their end of the financial bargain to students.641 The companies treated education as another market to be maximized.642

In the fifteen years since Zollers and Ramanathan conducted their research, these problematic behaviors have not abated. A recent report from the Government Accountability Office (“GAO”), the investigative arm of Congress, found that nationwide, charter schools enroll a lower percentage of students in thirteen disability categories compared to traditional public schools.643 The audit noted that “[a]necdotal accounts also suggest that some charter schools may be discouraging students with disabilities from enrolling and denying admission to students with more severe disabilities

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636 Id. at 301. Zollers and Ramanathan also discuss how these for-profit schools enroll a lower percentage of bilingual students. Id.
637 Id.
638 Id.
639 Id. But see Arizona State Bd., 464 F.3d 1003, 1010 (9th Cir. 2006) (holding that for-profit charter schools were ineligible for federal funding under the IDEA and ESEA).
640 Zollers and Ramanathan, supra note 29, at 301.
641 Id.
642 Id.
643 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 9 (2012) [hereinafter GAO].
because services are too costly. In other words, charter schools are still engaged in widespread behavior that violates federal law.

The GAO report found that charter schools nationwide contain approximately 8.2% special education students, as compared to 11.2% for traditional public schools. While the GAO reported that “little is known about the factors contributing to differences in enrollment patterns,” the report discusses a number of practices Zollers and Ramanathan identified more than a decade before. The GAO found evidence of counseling out and of schools denying admission to students with severe disabilities. It also uncovered the practice of giving “placement exams,” which may discourage students from attending because they target general education students and do not offer appropriate accommodations to students with disabilities. In response to this procedure, the GAO found that many states are beginning to require that charter schools remove any questions about disability from their application forms, as these questions are a potential source of discouraging parents or promoting discrimination on the part of the school. The GAO report exposed that some charter schools to approach special education “informally,” implementing modifications without including them on students’ official special education plans. Charter school representatives and researchers noted that schools also engaged in reassessments of special education students that determined the students no longer required special education services.

In response to these critiques, charter proponents argue that their schools have lower numbers of special education students because their small size and low student-to-teacher ratios allow them to better serve all students. They argue that special education students who come to charter schools may discover, through intensive instruction, that improved differentiation across the entire classroom helps them realize that they no longer require

644 Id. at 12.
645 Id. at 6–7.
646 Id. at 11. Compare Zollers & Ramanathan, supra note 29, at 299–301, with GAO, supra note 183, at 12–13.
647 GAO, supra note 183, at 12–13; see Zollers & Ramanathan, supra note 29, at 299.
648 GAO, supra note 183, at 13.
649 Id. at 15.
650 Id. at 12–13. This practice creates huge problems when a student moves schools, and it violates the central protectionary promise of special education law.
651 Id. at 14. This process may work with misdiagnosed students with ADHD, for example, but it has no relevance to students with severe impairments whose special education status is hardly in controversy.
652 See Estes, supra note 174, at 217.
special education services at all.\footnote{Stephanie Banchero & Caroline Porter, Charter Schools Fall Short on Disabled, WALL ST. J., June 19, 2012, available at http://online.wsj.com/article/SB10001424052702303379204577477038-93836734.html#.} Students who, in traditional public schools, might be misdiagnosed with learning disabilities, can thrive in charter schools after this intensive instruction.\footnote{Id.} And, as Angela Ciolfi and James Ryan argue, parents in struggling traditional schools often seek the procedural protections of special education as a way of safeguarding their childrens’ civil rights, even if their children have no disabilities.\footnote{Id.} Once these students enter charters that already have those rights foremost in mind, charter proponents argue, the need for special education falls away.\footnote{Id.} Charter school officials also claim that, according to one scholar, “their enrollment numbers are lower partly because many parents of special-needs children choose to enroll in traditional schools that often are more experienced providing such services, or in private schools that can give those students individualized attention.”\footnote{Id.} Yet even these positive aspects of charter schools point to the limited availability of school choice. While true parental choice is the primary ideal of the current reform movement, the de facto practices of many charter schools expose the lack of symmetry between charter and traditional schools \vis-à-vis\ students with disabilities. The policies of exclusion of many charters make it clear that parents often feel as if they have no choice at all.\footnote{Id.}

Several recent lawsuits and administrative complaints have exposed additional illegal practices at charter schools. In a 2011 complaint filed with the Justice Department, the Bazelon Center, a nonprofit advocacy group, alleged that Washington D.C. charter schools systematically discriminate against students with disabilities.\footnote{Bill Turque, Advocates Accuse D.C. Charter Schools of Excluding the Disabled, WASH. POST, May 13, 2011, available at http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options.} About 18% of students in traditional public schools in Washington, D.C., receive special education services, compared with 11% in charter schools.\footnote{Id.} The Washington, D.C., schools system contains an unusually high percentage of charter schools, which serve about 29,000 students.\footnote{Id.} The District’s identity as a vanguard in the
charter movement brings high stakes to these charges for both charter advocates and critics.\(^662\) The complaint alleges similar kinds of discrimination as Zollers and Ramanathan and the GAO found: counseling out, disability questions on applications, and claims of lack of capacity.\(^663\)

One family’s case was illustrative. A student named Jared McNeil was recently expelled from a charter school for misbehavior, his mother said in an interview with the Washington Post.\(^664\) He did not enter the school with special education status, but was later diagnosed with “oppositional defiant disorder,” which required him to “spend five hours a week outside the classroom receiving special services.”\(^665\) His mother said school counselors told her that “you might want to start looking for other schools,” in violation of special education law.\(^666\) School officials claimed that the expulsion was not related to his disability, but his mother maintains that he was forced out expressly because he was disabled.\(^667\) Special education law requires schools to carry out certain procedural protections before a student can be expelled if the behavior in question results from the student’s disability.\(^668\) As McNeil’s mother asserted, the school cannot simply expel a student with a disability without due process.\(^669\)

In the 2010, the Southern Poverty Law Center filed an administrative complaint with the Louisiana Department of Education (“LDE”) on behalf of students with disabilities in New Orleans.\(^670\) The complaint alleged widespread discrimination against students in the Recovery School District (“RSD”), a post-Katrina special school district that took over low-performing schools previously run by the Orleans Parish School Board.\(^671\) Over 70% of students in New Orleans attend charter schools, the highest

\(^{662}\) See *Waiting for Superman*, supra note 8 (highlighting the controversy surrounding former Washington, D.C., Superintendent Michelle Rhee).

\(^{663}\) Turque, supra note 199.

\(^{664}\) Id.

\(^{665}\) Id.


\(^{667}\) Turque, supra note 199.


\(^{669}\) See 20 U.S.C. § 1415(k) (procedures for removal of a special education student to an alternative placement). The school refutes the charge, calling it “absolutely false.” Turque, supra note 199.


rate in the nation.\textsuperscript{672} When the LDE and the plaintiffs could not come to an agreement, the Lawyers’ Committee for Civil Rights Under Law filed a class action lawsuit on behalf of an estimated 4,500 students with disabilities in New Orleans.\textsuperscript{673} The complaint alleges many of the same practices identified in other locales: under-representation of special education students in charter schools (12.6\% vs. 7.8\%), counseling out, and state refusal to fix the problems.\textsuperscript{674} At one school, an administrator allegedly told a plaintiff that he was “no longer welcome” at the school due to his disability.\textsuperscript{675} The student could not find a school that would accept him and he remained out of school “for over 15 days without education services or a behavior support plan.”\textsuperscript{676} Another plaintiff reported being rejected by five different New Orleans schools due to his disability.\textsuperscript{677} School officials also told students that their schools could not accommodate severe disabilities.\textsuperscript{678} In an affront to the federal disability law, one school even lacked wheelchair accessibility.\textsuperscript{679} All of these practices violate federal law.\textsuperscript{680}

The issues in New Orleans did not occur sporadically or in isolation, according to the complaint, but represented a pattern of systematic discrimination.\textsuperscript{681} Schools failed to identify students who required special education.\textsuperscript{682} When the schools identified students who required additional services, officials made cynical efforts to confine the necessary remedies to sections of the law that require less procedural protection rather than recommend full special education.\textsuperscript{683} Critical diagnostic tests were excessively delayed,\textsuperscript{684} students routinely fell behind despite requesting services, and the graduation rate among students with disabilities in the RSD fell to 6.8\%, compared to 19.4\% statewide.\textsuperscript{685} Almost half the students

\begin{flushleft}
672 Id.
673 Berry, supra note 210, at 4.
674 Id. at 3–4.
675 See id. at 33–34.
676 See id. at 34.
677 See id. at 19
678 See id. at 19
679 See Berry, supra note 210, at 19.
680 See, e.g., 42 U.S.C. § 12132 (1990) (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). See generally 20 U.S.C. § 1412 (2005); 34 C.F.R. § 300 (2006).
681 Berry, supra note 210, at 10.
682 Id. at 19-20, 22.
683 Id. at 20.
684 Id. at 23.
685 Id. at 25.
\end{flushleft}
with disabilities in the RSD failed to complete school. All in all, the class’s complaint relates sixty pages of infractions in the RSD. While many of these problems are undoubtedly unique to post-Katrina New Orleans, the difference between New Orleans and the troubles in other locales is a matter of number, not kind. The situation in New Orleans demonstrates that students with disabilities are at the front lines of education policy and take the worst abuse when systems break down.

Another argument from supporters of privatization in education is that the line between public and private schools has already become blurry. Because many private schools offer free tuition and public schools in some states are allowed to require admission tests for entry, supporters argue that the discrepancy between private and public is ambiguous. “Our current language of schooling does not capture the complexity of education today,” writes one such advocate. This argument entirely ignores a central difference between public and private schools: students attending private schools using private money do not receive protection under federal law, while students who attend any school using public money do.

Another recent legal fight exemplifies this point. In June of 2011, a consortium of parents and civil rights groups filed a complaint with the Justice Department’s civil rights division alleging that the Milwaukee Parental Choice Program discriminates against children with disabilities by “segregating” them in public schools. The program, which began in 1990, allows students, under specific circumstances, to attend private schools using state money. The complaint alleges that Wisconsin’s voucher system promotes discrimination, citing evidence that only 1.6% of students attending private schools using state vouchers are enrolled in special education, in contrast to almost 20% of special education students in the traditional public school system. Despite these concerns, the state plans an expansion of the school choice program, promoted by Governor Scott

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686 Id.
687 See generally Berry, supra note 210.
688 Forman, supra note 61, at 845.
689 Id.
690 Id.
691 Id.
692 34 C.F.R. § 300.137 (2012).
695 Held, supra note 232.
Walker, that would raise income limits of participating students and expand the number of private schools that accept the vouchers.  

As online charters run by EMOs continue to gain in popularity, the problems with discrimination seen above in Massachusetts, Washington, New Orleans, and Milwaukee become even more acute. Despite a lack of lawsuits, there are increasing reports that suggest there are major obstacles to the free and appropriate education of students with disabilities in online charter schools. A recent exposé in the New York Times highlighted major improprieties at a number of online schools nationwide. At Agora Cyber Charter School, run by K12, Inc., for example, achievement is abysmal. At least half of the students are behind in math and/or reading, and a third do not graduate on time. Hundreds of students withdraw shortly after enrolling, leaving fees for re-takes and equipment behind. These fees, and other income that includes federal and state taxpayer money, have made the company immensely profitable. Agora’s projected profits for the next fiscal year are $72 million, accounting for ten percent of K12’s total revenues. Yet some teachers at Agora manage as many as 250 students, and the company often collects as much public money as traditional public schools, despite the fact that its facilities costs are much lower. K12, Inc. also profits by establishing schools in poorer districts in states that provide larger subsidies to areas where a high number of students live in poverty. Yet in one such school, in Tennessee, even though K12, Inc. received the subsidy, only a few of the students enrolled at its school were actually from that county. This incongruence is a central example of how the outdated legal landscape fails to properly incentivize companies to serve students.

K12, Inc. also spends a great deal less per pupil on special education than traditional public schools. Even though the company enrolls students with disabilities at rates not significantly lower than conventional public schools, it serves students with less severe disabilities, and even so, spends substantially less than traditional schools on services for students with disabilities. In fact, K12 “saves” at least $500 per pupil when compared

696 Saul, supra note 16.
697 Id.
698 Id.
699 Id.
700 Id.
701 Id.
702 Id.
703 Id.
704 Miron & Urschel, supra note 11, at 16.
to traditional public schools. The company also uses a significant portion of the public money it collects from the government for advertising—approximately $26.5 million in 2010. While utilizing incoming money to generate more business is a common strategy in the business world, the practice prompts questions when it draws upon taxpayer funds intended to fund education directly.

Only a few states have ratified laws specifically aimed at regulating online charter schools. A widespread lack of oversight characterizes the current educational landscape in the rest of the United States. For example, a 2008 article, “Virtual” Schools: Real Discrimination, by Edward Lin, exposes discriminatory practices at online schools in Washington State. Lin found discriminatory recruiting, admission policies, and programming in these online schools. He also found that online schools required significant parental participation in guiding students through lessons, “which necessarily excludes certain types of students.” Many of the schools also failed to provide students with the technology, such as computers, necessary for them to succeed, thus limiting access and reinforcing the “digital divide.” In their recruiting practices, the schools discriminated by promoting themselves only in certain sections of the state and in certain newspapers, which had the effect of disregarding bilingual and minority students. And while Washington state law prevents the schools from charging tuition, most schools imposed fees for supplemental materials.

The worst practices of these schools, however, appear to be in special education. For example, while 12.7% of students in Washington public schools receive special education services, the percentage of special education students at three online schools on which Lin focused were 1.0%, 3.1%, and 0.0%. It is also clear that many of these schools simply did not understand their legal duty when it comes to special education. An audit of an online school in Washington called Internet Academy, for example,
found that the school did not provide individualized learning plans or track student hours. \(^{715}\) Even more egregiously, as Lin reported, “in a survey of two well-established online schools and two state education agencies, one interviewee stated that parents need to be prepared to spend ‘a good five-and-a-half hours per day really providing support for their [disabled] child’.” \(^{716}\) Relying on parents to provide special education services is illegal. \(^{717}\) These kinds of practices likely continue, however, because of a combined lack of knowledge on the part of school administrators and parents, and because of the mistaken perceptions, perpetuated by the school choice movement, that certain schools are simply not equipped for certain students. \(^{718}\) As Lin writes, “school administrators . . . should bear the burden of justifying the disparate impact on certain types of students, including those requiring special education . . . . If online schools cannot justify their practices and policies, then they should not qualify for public school funding.” \(^{719}\)

VI. SPECIAL EDUCATION AND SCHOOL CHOICE: DIVERGENT PHILOSOPHIES

To understand the reasons this discrimination is occurring, it is necessary to recognize the divergent philosophies of the school choice and special education movements. Modern special education developed almost simultaneously to the charter school era. In 1975, the United States Congress, based on findings that more than 4 million children with

\(^{715}\) Id. at 182.
\(^{716}\) Id. at 187, n. 82.
\(^{718}\) See, e.g., jane100000, Comment to Advocates Accuse D.C. Charter Schools of Excluding the Disabled, WASH. POST (May 13, 2011) http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options (“It makes no sense to vilify charters for limiting [their] role to what they were intended to do.”). This understanding of our charter schools treats them as though they were private institutions and again reflects the marketization ideals many in the business community have popularized. This attitude is further exemplified in the assumptions about who will use online schools. An education scholar identified the skills that lead to student success in online educational courses:

1. Be able to be open minded about sharing life, work, and educational experiences as part of the learning process; 2. Be able to communicate through writing; 3. Be self-motivated and self-disciplined; 4. Be willing to “speak up” if problems arise; 5. Be willing and able to commit to four to fifteen hours per week per course; 6. Be able to meet the minimum requirements for the program; 7. Be accepting of critical thinking and decision making as part of the learning process; 8. Be able to access to a computer and modem; 9. Be able to think through ideas before responding; 10. Be of the opinion that high quality learning can take place without going to a traditional classroom.

Brady et al., supra note 155, at 204–05. It is hard to see how most of the skills identified are meant to apply to students with severe disabilities.

\(^{719}\) Lin, supra note 13, at 188.
disabilities were being denied equal educational opportunity, ratified the Education for All Handicapped Children Act ("EAHCA"). Congress found that more than one million children with disabilities had been fully denied access to public education, and in many instances parents of these children were forced to seek help outside the public education system, often at great expense. EAHCA was the first comprehensive law mandating affirmative obligations on the part of states and public schools with regard to people with disabilities. Passage of the EAHCA reflected the conclusion that there was an important role for the federal government in regulating, through cooperation with the states, the provision of services to students with disabilities. The EAHCA has gone through two major revisions—in 1990, as the Individuals with Disabilities Education Act ("IDEA"), and in 2004, as the Individuals with Disabilities Education Improvement Act ("IDEIA"). But its central tenets have remained intact.

The IDEA defines a disability to include intellectual impairments, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. It ensures that eligible children receive a free, appropriate public education ("FAPE") consistent with their educational needs. A FAPE encompasses the regular and special education needs of students, including evaluation, placement, and procedural safeguards. Schools are additionally obligated to identify and serve students not previously classified as eligible for

722 Garda, supra note 30, at 669.
723 NEW AMERICA FOUNDATION, supra note 260.
725 Id. at 2.
726 Id. at 1–2.
729 Id. IDEA is one of three major statutes designed to protect people with disabilities. The other two are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1998), and the Americans with Disabilities Act, 42 U.S.C.A. § 12101 et seq. (2009).
special education services. If a school cannot provide a FAPE to a special education student, it must pay for that student to attend another school—whether public or private—that can.

The IDEIA requires states to establish substantive and procedural due process rights for students with disabilities and create goals that specify the personnel, facilities, and funding allocations necessary to achieve a FAPE. States and local districts must maintain clear and available documentation of these plans. Special education is administered through the creation of an Individualized Education Program ("IEP") for each student with an identified disability. An IEP is a highly detailed road map for teachers and school personnel to follow in instructing special education students. It may contain statements about the child’s present levels of academic achievement and functional performance, including how her disability affects her involvement and progress in the general education curriculum; measurable annual goals; narratives regarding progress towards meeting the annual goals; a list of related services and supplementary aids and services provided to her; an explanation of the extent to which she will or will not participate with non-disabled children in regular school activities; an inventory of curriculum modifications necessary to measure her performance on state and district-wide assessments; the projected dates and frequencies for the duration of the services and modifications; and a list of her postsecondary goals.

Properly administering IEPs takes an enormous amount of work on the part of teachers, administrators, and parents. For many education professionals, the requirements of special education seem to absorb an unfairly disproportionate amount of time.

Yet despite the challenges to effectively practicing special education, the fundamental premises of the IDEIA comport with traditional American ideals of democracy and the eradication of discrimination. The IDEIA mandates that,
[t]o the maximum extent appropriate, children with disabilities… are educated with children who are not disabled, and… removal of children with disabilities from the regular educational environment occurs only 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. 739

All schools must use a “continuum of services” to ensure the schools meet the needs of each student, as outlined in the IEP. 740 These services can include mainstreaming all students with disabilities by placing them in regular education classrooms, as well as a range of additional services like home instruction, special classes, or supplementary instruction. 741 Most charter schools employ the full inclusion model, but many struggle to provide the additional services necessary to constitute a FAPE. 742 As scholar Mark Weber writes, “[s]pecial education is not a place to put children; it is a bundle of services to assist them to hold their own educationally.” 743 Many charters have limited capacity to offer more than basic inclusion. 744

One reason charter schools struggle with the provision of special education services is that many are one-school Local Educational Agencies (“LEAs”). 745 Special education law dictates that each LEA must serve each special education student under its purview. 746 Traditionally, an LEA is a school district. Thus, under the IDEIA, if a student with an IEP enrolls in a school that does not possess adequate resources to fulfill that IEP, the district (LEA) may transfer the student to another school within the district that can carry it out. 747 Legally, the schools are interchangeable. 748 Districts often take advantage of their size and distributed resources to share the collective costs of special education. 749 As LEAs, districts can pool specialized resources, such as specially trained teachers and equipment, at a

740 Garda, supra note 30, at 690.
741 Id. at 699.
742 Id. at 690–91.
743 See Weber, supra note 31, at 222.
744 Id. at 222.
745 Id. at 237. In most states, it is state-chartered, rather than district-chartered schools, who are their own LEAs.
746 Id.
747 See Garda, supra note 30, at 711.
748 Id. at 678.
749 Id. at 678–79.
few schools in the LEA and compel attendance of students with certain severe disabilities there.\footnote{750}

Because some charter schools are not part of a larger LEA/district, under the law these schools must cater to every student who enrolls, no matter the financial burden.\footnote{751} As such, these charter schools are not able transfer students to any other school.\footnote{752} Students with severe disabilities cost more to educate than other students, and their presence may mean that a charter will have to make large-scale purchases of therapy equipment or enter expensive contracts with private providers of special education.\footnote{753} The financial pressure of enrolling students with severe disabilities threatens some schools’ very existence. According to a 2002 report from the President’s Commission on Excellence in Special Education, “the greatest concerns about costs for local districts are derived from high-need children with significant disabilities who require expensive placements within and outside of the district. Critical shortages of qualified staff in special education exacerbate these concerns.”\footnote{754}

Although the IDEIA prioritizes funding for students with the most severe disabilities, LEAs with high numbers of students with severe disabilities may have less money available for other special education and non-special education students.\footnote{755} The IDEIA also does not provide supplementary funds to offset the fiscal shock on LEAs of providing a FAPE to children with especially high needs.\footnote{756} Indeed, federal funds have never covered the full costs of special education.\footnote{757} The maximum funding permitted under IDEIA is 40% of the average cost of educating a child without disabilities, but Congress has never provided full support even at that level, leaving the remaining portions to state and local funding sources.\footnote{758} To make up for the gaps in dollars, some states have established shared funds that local districts can tap into when necessary to offset the high costs of properly educating

\footnote{750} Id. This model of efficiency has significant parallels with the economies of scale utilized by companies like K12, Inc. The irony is that private companies running schools distributed across the United States share in many efficiency advantages, but pooling special education services is not one of them. There is simply no way to administer the most expensive special education services over the web.\footnote{751} Weber, supra note 31, at 237.
\footnote{752} Id. at 222.
\footnote{753} Id. at 241.
\footnote{754} PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., U.S. DEPT. OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 32 (2002) [hereinafter PRESIDENT’S COMMISSION].
\footnote{755} See id.
\footnote{756} Id.
\footnote{757} Weber, supra note 31, at 241.
students with severe disabilities, but many states have not.\textsuperscript{759} EMOs committed to properly adhering to special education law must maintain their own funding sources in case they see high incidences of students with severe disabilities enrolling at their schools. Because charter schools are public, private companies may not cherry pick their students or deny students enrollment based on their cost to educate or their identity as disabled.\textsuperscript{760} The financial burden faced by privately run public schools with high numbers of students with severe disabilities is compounded by the imbalance of funding for all charter schools described above in Section IV.

Legal scholar Robert Garda, Jr., calls the philosophical divide between school choice and special education a “culture clash.”\textsuperscript{761} The strong civil rights backbone to special education law is directly at odds with the school choice movement’s preference for efficiency, accountability, and outcomes.\textsuperscript{762} Congress ratified the IDEIA in an era where the goal was to provide equal access to the educational system, not to ensure certain results.\textsuperscript{763} Special education laws “simply do not allow the federal government to assess states’ compliance with outcome measures, such as disabled students’ graduation rates or performance on standardized tests.”\textsuperscript{764} This more nebulous form of measuring success contrasts sharply with the current political preference to measure every school and every teacher by tests scores. Further, special education law is compliance-based rather than outcome-based – it favors inputs over outputs.\textsuperscript{765} The goal of special education is to ensure that schools are properly following procedures that cannot be measured on tests; a number of courts have held that non-compliance with IDEIA procedures is the equivalent of the denial of a FAPE.\textsuperscript{766}

\textsuperscript{759} See supra note 294.
\textsuperscript{760} Id. at 669–70. The language of special education often overlaps with that of the civil rights movement: both speak of discrimination, access, and segregation.
\textsuperscript{761} See supra note 18.
\textsuperscript{762} Id. at 676–77. See Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982) ("[T]he ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."); see also supra note 30, at 675 n. 84 (citing Babb v. Knox Cnty. Sch. Sys., 965 F.2d 104, 108 (6th Cir. 1992); W.G. v. Bd. of Tr. of Target Range Sch. Dist., 960 F.2d 1479, 1485 (9th Cir. 1992); Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Sch., 853 F.2d 256, 259 (4th Cir. 1988); Bd. of Educ. of Cnty. of Cabell v. Dienelt, 843 F.2d 813, 814–15 (4th Cir. 1988); Jackson v. Franklin Cnty. Sch. Bd., 806 F.2d 623, 629 (5th Cir. 1986); Hall v. Vance Cnty. Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985)).
Despite the shift with the passage of NCLB to a federal educational system heavily premised on outcomes and results, special education law remains focused on an older model. It compels a school to adjust to the child rather than the child to the school.767 It also presages collective responsibility over school autonomy.768 Congress ratified the original EAHCA in an era when centralized authority was more highly valued than independence, and these principles still undergird special education law today.769 As a result, compliance with special education remains onerous, a “complex maze of procedures and paperwork that is difficult to navigate and implement.”770 The amount of red tape required to properly adhere to special education law undoubtedly drives some EMOs away from special education. In fact, special education law represents the precise type of governing most anathema to private industry: it is a centrally administered federal imposition heavy on bureaucracy, and it exists to protect a tiny percentage of marginalized people who drive up costs, sue often, and demand outsized attention. It appears that rather than taking the necessary time and resources to fully understand special education law, however, many cyber charters simply choose to ignore it.

VII. MOVING FORWARD: RECOMMENDATIONS AND CONCLUSIONS

The improprieties at the intersection of special education and privatized education represent more than aberrations or the missteps of a few bad actors. Rather, they expose deep rifts in the public education landscape that need to be addressed head-on. Unfortunately, reformers with ambitious ideas about how to overhaul the system easily ignore students with severe disabilities. While it may be true that many “schools have been quite good about ensuring that online programs are available to students with disabilities,” the data available show that widespread and systematic discrimination persists.771

A basic set of changes will improve the educational landscape. First, every state should begin the process of creating law, whether administrative or legislative, that specifically spells out the boundaries and limits, rights and obligations of online charter schools. Central to this policy should be

767 Garda, supra note 30, at 679.
768 Id. at 680.
769 Id. at 669–70.
770 Id. at 677.
guidance on how to successfully implement special education, and steep requirements for new charters looking for authorization. In addition, any cyber charter law should contain strict provisions for reporting and publicizing the special education approach each school employs. If we start to understand education as part of consumer law, it may be easier to recognize how disclosure requirements in education might parallel successful regulation in the financial services industry.

The current tendency of all private companies to guard their internal information obscures the full extent of these problems, and serves neither students with disabilities nor the companies themselves. EMOs appear to want fewer restrictions imposed on them from government, yet their business models are almost entirely predicated on the continual flow of federal money to their bank accounts. To parse a phrase, they want to eat their cake, but they don’t want to pay for it. If EMOs are accepting public financing, they owe the public a duty to demonstrate that they are spending it in ways that serve all Americans, as the law mandates. Maintaining the level of secrecy to which most companies cling lends credence to the assumptions of outsiders that private companies are assuring themselves huge profit margins, ignoring improprieties, or misusing public money. Until EMOs can demonstrate that they are ready to uphold their end of the bargain under special education law, we should hesitate before authorizing more cyber charters, especially those that are for-profit and operating as their own LEAs.

When we continue to promote for-profit online schools in the face of widespread evidence of systematic discrimination, we send a message that it is okay to marginalize special education students. By ignoring this

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772 See Robert Nott, State Panel Turns Down Virtual Charter Sch. Bid, SANTA FE NEW MEXICAN, Sept. 20, 2012, available at http://www.sfnewmexican.com/Local%20News/092112charterschool#.UWTgZOG2ws (discussing a group’s application to open a cyber charter school that was recently denied in New Mexico due to concerns about special education implementation, among other issues).

773 There is little available data on students with severe disabilities in online charter schools. I could find no scholarly articles examining special education in online public schools, and most of the literature is provided by the EMOs or their advocacy organizations. Nearly all of these reports and descriptions mention that the provision of special education services is a significant issue for online schools, then either tout the advantages to students with minor to moderate disabilities (ADD, learning disabilities, social anxiety), or make vague pronouncements that great care must be taken to assure access to all. If EMOs want to be seen as real educators and not just businesses, this must change.

774 Trotter et al., supra note 128, at 949; see also Mary Bailey Estes, Choice for All? Charter Schools and Students with Special Needs, 37 J. SPECIAL EDUC. 257, 261 (2004) (discussing widespread underreporting of IEP information in the Texas charter schools; where Estes did find data, it showed an under-enrollment of special education students in Texas charter schools. A lack of transparency may be another reason, unfortunately, that these schools avoid lawsuits.).
ongoing crisis, we implicitly support the notion that profits are king. As Mary Bailey Estes writes, “if an appropriate education within a choice context is available to some, it must be available to all. Students with disabilities and their parents have a right not only to equal access but also to quality, comprehensive, effective programming.”

This is true no matter whether these students attend charter schools or traditional public schools, and regardless of who pockets special education funds.

Even with massive problems at privatized online schools, the collective goal of effectively practicing special education does not come down to who runs schools per se, but to our priorities as a nation. No actor, whether federal, state, local, or private, is entirely immune from cutting corners or engaging in objectionable practices. Our priorities in making policy should be to students, not to ideologies. In an interesting recent development, charter schools, recognizing the financial burdens they take on by insisting on self-control, started to form “special education cooperatives” to pool resources (such as speech pathologists, school psychologists, and assessment specialists) in order to share the cost of special education services.

In setting up collectives, charters with large numbers of students who are expensive to educate are implicitly acknowledging the benefits of the traditional public school system. Special education scholars and charter school advocates now recommend that

for purposes of implementing IDEA, charter schools need to be connected in some way with a special education infrastructure. . . . Access to the necessary expertise, provided in a way that does not compromise the autonomy of the charter school and its mission, is essential to ensure appropriate services for students with disabilities and protect the charter schools from the serious consequences of avoidable non-compliance.

While taking advantage of economies of scale is a core philosophy of corporate education, the efficient pooling of resources and the collective sharing of burdens are also some of the central strengths of the traditional public education system. The fact that “charter schools have begun to operate in a manner increasingly similar to traditional public schools with regard to students with special needs” calls into question the need for two separate public school systems. Why have two separate systems with

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775 Estes, supra note 174, at 265.
776 Id. at 217.
similar needs and funding streams that compete for resources? The continued creation of for-profit online charters funded with public money that only cater to certain students presents ethical, moral, and practical challenges to our national identity. If the current model persists, traditional public schools will be left with the students most expensive to educate, and the system will be in danger of collapse under its own weight.\textsuperscript{779}

Charter schools continue to enjoy huge support from the Obama administration and from advocates on the left and the right.\textsuperscript{780} Many charter schools do excellent work, including with students with disabilities. But gaps in funding threaten their existence, and the recent increase in lawsuits over special education place additional strains on revenue streams. This puts the country’s public education system in an uncomfortable paradox. As we set up what is in effect a parallel system, we vest it with only some of the tools it needs to succeed. Charter school advocates couch the resistance to full funding and support of charter schools as a reflexive refusal to accept innovation and creative new approaches.\textsuperscript{781} Union advocates and education policy scholars see the increasing presence of charter schools as a strain on resources and a way to hollow out the community core of traditional public schools.\textsuperscript{782} They question the wisdom of this new system. But both groups agree that the emerging structure is not efficient. In a fiscal landscape facing increasing cuts to public education funding at all levels, burdens from state pension systems, and widening income stratification, maintaining two public education systems makes little sense.\textsuperscript{783} As Robert Garda, Jr., puts it, “[c]harter schools’ violations of disabled students’ civil rights undermine not only their viability and validity, but also that of the entire public education system.”\textsuperscript{784}

Moreover, whether one supports the education innovations of the corporate reform movement or not, it is important to think about whether we are asking the right questions about education in this country. Teaching is enormously difficult in any educational environment and to overlay a school structure that is concerned primarily about its bottom line makes our results worse. What was once a focus on curriculum and schools as community centers has devolved into an obsession with measurement and

\textsuperscript{779} Garda, \textit{supra} note 30, at 717.
\textsuperscript{780} \textit{Id.} at 658.
\textsuperscript{781} \textit{Id.} at 702.
\textsuperscript{782} \textit{Id.} at 707.
\textsuperscript{783} \textit{Id.} at 708–09.
\textsuperscript{784} \textit{Id.} at 717.
immediate results. The rise in virtual charter schools would likely not have been possible without the rigorous testing regime brought forth by education reformers in the second half of the twentieth century, codified in NCLB, and now embedded in the core of American education. What has been forgotten is, as Diane Ravitch elucidates, the ability to see every student as “a person of endless potential. Not rated by his or her test scores. Not defined by his or her family demographics. But as a person who is growing, developing, in need of adult guidance, in need of challenging and liberating education, an education of possibilities and passion.”

We have little excuse to be so far behind this mission in 2012.

Even by 1988, when Albert Shanker made his groundbreaking speech, the tendency of the American school to rely on standardized tests to measure student learning was already at a breaking point. Shanker railed against the “repeating and regurgitating things back on standard examinations” that was rampant at the time. He lamented the loss of creativity and claimed that “the kids who do the best on these tests are not necessarily people who later on in life make the greatest contributions to society,” citing the examples of Edison, Churchill, and Einstein. Even A Nation at Risk pointed to a lack of creativity and an absence of “higher order” intellectual skills. Sadly, since A Nation at Risk, the nation has only increased its focus on test scores, but has nonetheless been unable to raise them significantly.

In 1955, Milton Friedman had a vision of the American school as a center of “[a] stable and democratic society,” where education contributes to “widespread acceptance of some common set of values and…a minimum degree of literacy and knowledge on the part of most citizens.” Friedman, perhaps history’s most influential libertarian thinker, saw a world in which “the education of my child contributes to your welfare.” Ronald Reagan’s Commission on Educational Excellence echoed these concerns in 1983, writing:

All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the
utmost. This promise means that all children by virtue of their own efforts, 
competently guided, can hope to attain the mature and informed judgment 
needed to secure gainful employment, and to manage their own lives, thereby 
serving not only their own interests but also the progress of society itself.\textsuperscript{792}

Today, the notion that schools are places to develop young people has 
been co-opted by the ambitions of business. This is not a standard battle 
between liberals and libertarians over the role of government in education. 
The clash here is more about the ways in which we protect our citizens and 
about the definition of a free education for all. The solution to the culture 
clash between the mission and identity of charter schools and the goals and 
ideals of special education may not be simply a tweak—it may require a 
system overhaul. The original idea of charter schools, after all, was to bring 
together teachers, administrators, and school authorizers in the name of 
productive education, to “creat[e] a safe, positive climate in which students 
can learn and grow.”\textsuperscript{793} It is time to return to this grand concept.

\textsuperscript{792} Nation at Risk, supra note 81, at 9.
\textsuperscript{793} Budde, supra note 72, at 520.
COMMENTS

RECLAIMING HAZELWOOD: PUBLIC SCHOOL CLASSROOMS AND A RETURN TO THE SUPREME COURT’S VISION FOR VIEWPOINT-SPECIFIC SPEECH REGULATION POLICY

Brad Dickens***

Federal and circuit courts continue to fiercely debate whether the Supreme Court’s 1988 ruling in *Hazelwood v. Kuhlmeier* requires school policies regulating student speech and expression to be viewpoint neutral. However, this note suggests that the language of *Hazelwood* itself shows that the Circuit debate may be misguided. The Supreme Court intended *Hazelwood* to stand as a narrow exception to its earlier holding in *Tinker*, and *Hazelwood* only applies in instances where the government’s own voice is implicated, largely in a public context. When the school, and in effect the government, is speaking with its own voice, the school must be able to control the content and nature of such speech as a matter of practicality. Any requirement of viewpoint neutrality in this context is simply unnecessary and conflicts with the Court’s own precedent relating to government speech. When schools are allowed to operate the way *Hazelwood* intended, they are able to effectively execute their educational mission, and students are able to appropriately exercise their First Amendment rights via *Tinker* without the overly cumbersome burden of viewpoint neutral speech policies.

I. INTRODUCTION

The public school classroom is on the front lines in the battle of defining the First Amendment. Almost daily, new cases and incidents arise that probe the outer bounds of the First Amendment and the authority of schools to regulate student speech. In Tampa, Florida, in 2012, an elementary school principal prohibited a fourth grade student from distributing invitations to his classmates for an Easter egg hunt.794 In Oklahoma City, a

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five-year-old student was forced to take off his shirt on the playground and turn it inside out because it was a University of Michigan shirt and violated the school’s policy of only allowing University of Oklahoma or Oklahoma State University shirts. In Prague, Oklahoma, a high school valedictorian had her diploma withheld indefinitely for saying “hell” in her graduation speech. In Kountze, Texas, a high school found itself in federal district court over a district policy prohibiting the cheerleading squad from displaying a banner that read, “If God Is For Us, Who Can Be Against Us.”

Administrators, teachers, parents, and students in districts and communities across the nation struggle to understand and apply school speech policies that comply with the parameters of the First Amendment.

In 1969, the Supreme Court in Tinker v. Des Moines made an effort to define the scope and character of the First Amendment in a classroom context. Tinker produced the oft-quoted dictum that “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate.” Tinker remains a foundational case for school-related speech, and yet its language leaves ambiguities in the analytical framework that cannot be ignored. Just how far does the “schoolhouse gate” go? What precisely is a school’s educational mission?

In Hazelwood v. Kuhlmeier, the Court supplemented the foundational rule from Tinker to answer another difficult question left open by Tinker: how far can schools go in restricting speech on campus when the speech appears to carry the school’s approval (as in a school newspaper), rather than being a clearly private communication (as in a student wearing an armband in protest)? The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

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800 Id. at 273.
The language of the Court’s opinion leaves unanswered the question of whether school policies may restrict speech on the basis of a specific viewpoint or must instead remain viewpoint neutral. This issue is fiercely debated among the circuits and carries with it significant implications for the boundaries of speech rights of students in American classrooms.

This note surveys the body of circuit case law on school viewpoint neutrality, and ultimately to makes a case in favor of reading Hazelwood to authorize viewpoint-specific speech restrictions.

First, Hazelwood, by its own language, applies only to speech that could be interpreted as government-endorsed; it acts as a narrow exception to the general rule from Tinker, rather than a new separate standard for public school policy. Given Hazelwood’s position as a narrow exception triggered only when the government’s own imprimatur is implicated circumstantially, a viewpoint neutrality standard is incompatible with the justification for Hazelwood’s exception. The government may, and inevitably does, convey and endorse viewpoints, and it has an interest in maintaining integrity and singularity in its voice. Thus, a public school may regulate certain student speech precisely because of the viewpoint of that speech when it is reasonably perceived as carrying the school’s endorsement. Hazelwood recognizes that schools have an interest in maintaining their own messaging as they carry out their educational function.

Second, this note argues that the actual operation of a viewpoint neutrality requirement perversely incentivizes either a neglect of legitimate speech regulation or unnecessarily broad and inefficient prohibitions on speech, which would yield greater burdens on individual discourse than would result from viewpoint-focused regulation. When schools control

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802 Good News Club, 533 U.S. at 113; Daugherty, supra note 8, at 1062; Waldman, supra note 8, at 90.

803 Hazelwood, 484 U.S. at 272–73 (“[W]e conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

804 Alexis Zouhary, The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting, 83 NOTRE DAME L. REV. 2227, 2235–36 (2008) (“[T]he only area in which the government may unequivocally make viewpoint-based distinctions is when it is the speaker.”).
speech over concerns of school endorsement of certain messages, viewpoint-neutral regulation is too blunt an instrument, unnecessarily censoring benign speech outside the scope of the concerns that gave rise to regulation. By contrast, viewpoint regulation within the bounds of Hazelwood allows schools to identify speech that is especially problematic, restricting only what is necessary to allow the school to maintain the integrity of its pedagogical voice.

II. Hazelwood’s Foundation

In 1983, the principal of Hazelwood East High School removed several pages from the final draft of Spectrum, the high school student newspaper. Of concern to the principal were two articles on teen pregnancy and divorce, both of which contained interviews with students from the high school. The principal decided that there was not enough time to edit the objectionable portions of the stories before the paper went to print, so he chose to remove the two articles entirely in an effort to maintain the deadline. Students in the journalism class responsible for the articles brought an action against the school alleging that it had violated their First Amendment rights. The district court found that the principal had a “legitimate and reasonable concern” that readers would be able to easily discern the identities of the anonymous students mentioned in the article. The district court affirmed this by holding the school had the right to censor the speech based on its belief that the articles could be interpreted as the school’s endorsement of certain sexual norms.

The Eight Circuit reversed the decision. Applying Tinker, the circuit court held that the school had established a public forum through the newspaper, and as such, the school could only restrict speech that substantially interfered with school operations.

The Supreme Court reversed. The Court began its opinion with a tip of the hat to its holding from Tinker, acknowledging that the First Amendment

805 Hazelwood, 484 U.S. at 263–264.
806 Id. at 263.
807 Id. at 263–64.
808 Id. at 264.
809 Id. at 264–65.
810 Id.
811 Hazelwood, 484 U.S. at 265.
812 Id.; see also Tinker, 393 U.S. at 508.
813 Hazelwood, 484 U.S. at 266.
extends into schools, but noting that the school environment is a unique one for civil liberties.814

Early in the opinion, the Court critically established that a school newspaper is not a public forum, but did not go so far as to label the paper a non-public forum.815 The Hazelwood School District did not open the school newspaper up to “indiscriminate use” by the student body, choosing instead to maintain the intellectual space of the paper as an outlet for student learning within the context of a graded journalism class.816 Though the Court applied the “policy or practice” standard from Perry Education Association v. Perry Local Educators’ Association to defeat any argument that the paper is a classic public forum, it stopped short of giving it non-public forum status with that classification’s accompanying requirement of viewpoint neutrality.817 This odd designation gave rise to the circuit conflict explored herein.

The Court further clarified the departure from Tinker later in the opinion, holding that Tinker does not require that its standards apply to speech that could be seen as being officially endorsed by the school.818 In other words, there is a difference between the effects of students expressing their views as individuals and students speaking in a manner that appears to represent the school (i.e., the government).

Writing for the majority, Justice White explained that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.”819 However, the “pedagogical concern” standard only represents half of the complete Hazelwood authorization. This form of editorial control of speech is only authorized when there is a reasonable perception that the speech to be regulated bears the school’s imprimatur.820 These elements together form the Hazelwood rule.

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814 Id.
816 Hazelwood, 484 U.S. at 270.
817 Id. at 269.
818 Id. at 269 n.2.
819 Id. at 273.
820 Hazelwood, 484 U.S. at 270.
III. Hazelwood’s Legacy

The American legal community has viewed the Court’s decision in Hazelwood as both controversial and polarizing.821 Beneath the pedagogical concern standard lies an important but ultimately unanswered question: must school policies restricting speech, while still connected to a pedagogical concern, also be viewpoint neutral? Earlier opinions from the Supreme Court in Perry822 and Cornelius823 established a viewpoint neutrality requirement for policies controlling speech in a nonpublic forum. This precedent would normally be controlling without much controversy, but the Court had already spent a great deal of time and text noting that a public school classroom is a different environment and context than “the real world” of the rough and tumble public square.824 Do Perry and Cornelius apply to classroom policies, or is Hazelwood’s silence on viewpoint neutrality indicative of a new rule uniquely tailored to the school context?

IV. The Circuit Split

Circuit Courts remain divided on whether Hazelwood requires viewpoint neutrality for school district policies on student speech like those in the case. Some circuits have interpreted the Court’s holding in Hazelwood as a kind of special exception to viewpoint neutrality, allowing schools to zero in on specific messages in an effort to, for instance, avoid a violation of the Establishment Clause.825 Other circuits, however, see the spirit of Cornelius and Perry as inherently interwoven into Hazelwood’s standard, so much so that viewpoint neutrality is understood and does not require a mention.

824 Hazelwood, 484 U.S. at 266–67.
A. Viewpoint Neutral Circuits

The Second, Sixth, Ninth, and Eleventh Circuits have held that school policies limiting student speech and expression must be viewpoint neutral.\textsuperscript{826}

In \textit{Peck ex rel. Peck v. Baldwinsville Central School District}, a kindergarten student created a poster as part of an assignment to demonstrate what he had learned over the year about ways to help the environment.\textsuperscript{827} Antonio, the student, included pictures of Jesus and several other religious symbols because of his belief that Jesus was the only way to save the planet.\textsuperscript{828} The school folded over the poster to conceal the religious content.\textsuperscript{829} On remand from the Second Circuit, the district court held that the school’s censorship of the poster was based on legitimate pedagogical concerns, namely that Antonio could not articulate to the class the connection between images of Jesus and saving the environment.\textsuperscript{830} However before the fact question of viewpoint neutrality could even be decided by the district court on remand, the Second Circuit sought to extract from precedent the applicability of viewpoint neutrality to school policy.\textsuperscript{831} The court aptly began its analysis by acknowledging the circuit dispute into which it was about to involve itself.\textsuperscript{832} The court recognized the plausibility of arguments on either side, but ultimately folded the \textit{Perry} and \textit{Cornelius} nonpublic forum standards into its interpretation of the \textit{Hazelwood} doctrine.\textsuperscript{833} \textit{Hazelwood}, the court noted, never distinguished its facts with \textit{Perry} or \textit{Cornelius}, suggesting that the court did not intend to establish any kind of exception or new rule in its opinion.\textsuperscript{834} The court ultimately concluded its viewpoint analysis with, “we decline the District’s

\textsuperscript{826} See, e.g., Kincaid v. Gibson, 236 F.3d 342, 356 (6th Cir. 2001), reh’g granted and opinion vacated, 197 F.3d 828 (6th Cir. 1999), on reh’g en banc, 236 F.3d 342 (6th Cir. 2001) (holding that state university’s withholding of yearbooks on title grounds unauthorized because not viewpoint-neutral); Planned Parenthood of Southern Nevada, Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991); Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989).
\textsuperscript{827} Peck, 426 F.3d at 621–22.
\textsuperscript{828} Id. at 621–22.
\textsuperscript{829} Id. at 622.
\textsuperscript{831} Peck, 426 F.3d at 632–33.
\textsuperscript{832} Id. at 631–32.
\textsuperscript{833} Id. at 632–33.
\textsuperscript{834} Id. at 633.
invitation to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection.”

In Planned Parenthood of Southern Nevada v. Clark County School District, a high school prevented Planned Parenthood from placing advertisements in a school-sponsored publication. Representatives for the school asserted that to allow the advertisements would present the impression that the high school had taken a stance on one side of the divisive issue of abortion. First, the court identified the publication as a nonpublic forum. With this analysis in hand, the court then matter-of-factly concluded that any school policy within the nonpublic forum context must be viewpoint neutral in light of Cornelius. Two paragraphs later, the court made its case for the legitimacy of the school’s policy by citing to Hazelwood while also including “see also Cornelius” in the in-line citation. In this paragraph, the justices attempted to connect the general viewpoint neutrality requirement from Cornelius to the specific school context of Hazelwood. By citing the cases together, the court implied that Hazelwood was merely an application of a larger principle from Cornelius, and there could be no real interpretation of the rule that might deviate (or at least provide an exception to) from the viewpoint neutrality requirement.

In Kincaid, the Sixth Circuit considered a case in which Kentucky State University confiscated and refused to distribute a version of the school’s yearbook. The editor of the yearbook wanted to “bring Kentucky State into the nineties,” and included pictures of current world events, abstract phrases like “Destination Unknown,” and pictures without captions. The administration objected to the yearbook’s design and content as inappropriate and did not allow the yearbooks to be distributed on campus. The Court appropriately recognized the case’s obvious parallels to the facts of Hazelwood, but ultimately distinguished the case based on the level of involvement by the KSU administration in the yearbook’s

835 Id.
836 Planned Parenthood, 941 F.2d at 821.
837 Id. at 819.
838 Id. at 826–827.
839 Id. at 829.
840 Id.
841 Id.
842 The Ninth Circuit later appears to marginalize its own holding from Planned Parenthood in Downs. Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000). The Downs court points out that Planned Parenthood provides no real basis for a viewpoint neutrality requirement in Hazelwood, Id. at 1010.
843 Kincaid, 191 F.3d at 722.
844 Id. at 723.
production. The court spent a considerable amount of time in its opinion analyzing the type of forum created by the yearbook. The interesting aspect of the court’s forum analysis is that the court created its own unnecessary burden; early in the opinion, Hazelwood was described as requiring viewpoint neutrality in a nonpublic forum. Presumably because the actual language of Hazelwood gives no such requirement, the court also cited International Society for Krishna Consciousness as the basis for this assertion. However, Krishna occurred in an airport, entirely outside the scope or applicability of Hazelwood’s bounds.

In Searcey v. Harris, the Atlanta School Board restricted the Atlanta Peace Alliance (“APA”) from any involvement in Atlanta public high schools, including involvement in “career days.” The school board had adopted a policy stating in part, “participants shall not be allowed to criticize or denigrate the career opportunities provided by other participants.” The policy further stated that any group in violation of this policy would be “totally prohibited from participating in Career Day.” In its analysis, the Eleventh Circuit applied logic similar to that of the Second Circuit in Peck. Having established the school, and in particular Career Day, as a nonpublic forum, the court placed the facts within the Hazelwood framework—which it conceived as adopting that classification. The Eleventh Circuit was not willing to interpret Hazelwood’s silence on viewpoint neutrality as indicating an absence of that standard. Instead, the court concluded, “there is no indication that the [Supreme] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views.”

B. Circuits Authorizing Viewpoint Regulation

Not all courts, however, see viewpoint neutrality as an inherent implication of the Hazelwood standard. The First, Third, and Tenth Circuits

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845 Id. at 727.
846 Id. at 727–28.
847 Kincaid, 191 F.3d at 728–29.
848 Id. at 727.
849 Id.
851 Searcey v. Harris, 888 F.2d 1314, 1315 (11th Cir. 1989).
852 Id. at 1317.
853 Id. at 1317–18.
854 Id. at 1319–20.
855 Id. at 1319.
856 Id. at 1319 n.7.
have held that while school policies must still be grounded in reasonability, student speech can be restricted on the basis of viewpoint.\textsuperscript{857} Avoiding a violation of the Establishment Clause, for instance, constitutes a compelling state interest that justifies a restriction of specific student speech.\textsuperscript{858}

In \textit{Ward v. Hickey}, a high school biology teacher facilitated a class discussion concerning abortion of fetuses with Down’s Syndrome, specifically as it pertained to a Massachusetts referendum on the issue.\textsuperscript{859} Allegedly due to the content of the discussion, the school committee denied the teacher tenure.\textsuperscript{860} The First Circuit addressed several questions on appeal; of particular concern for purposes of this note was the issue of whether Ward’s particular discussion of abortion was protected by the First Amendment or instead subject to regulation under the authority of \textit{Hazelwood}.\textsuperscript{861} The court focused its viewpoint analysis around \textit{Perry} and acknowledged the Supreme Court’s holding that government policies must not seek to suppress expression due to the viewpoint expressed.\textsuperscript{862} However, the court interestingly concluded that, in light of the \textit{Hazelwood} standard, \textit{Perry} is distinguishable from the facts of \textit{Ward}, and its holding did not apply.\textsuperscript{863} The court believed that the greatest difference between these two cases was the presence in \textit{Ward} of a captive audience of impressionable young students (unlike the faculty mail system in \textit{Perry}).\textsuperscript{864}

The First Circuit’s distinction of \textit{Ward} and \textit{Perry} as they relate to \textit{Hazelwood} is significant, particularly when the court concluded that \textit{Hazelwood} did not require viewpoint neutrality in school policies.\textsuperscript{865} In doing so, the court suggested that the stakes are higher when young impressionable minds are in question. The court interpreted \textit{Hazelwood} as

\begin{footnotesize}
\footnote{857}{See \textit{Ward v. Hickey}, 996 F.2d 448, 454 (1st Cir. 1993); \textit{C.H. ex rel. Z.H. v. Oliva}, 195 F.3d 167, 172–73 (3d Cir. 1999) \textit{reh’g en banc granted, opinion vacated sub nom C.H. v. Oliva}, 197 F.3d 63 (3d Cir. 1999), and on \textit{reh’g en banc}, 226 F.3d 198 (3d Cir. 2000); \textit{Fleming v. Jefferson Cnty. School Dist.}, 298 F.3d 918, 926 (10th Cir. 2002).}
\footnote{858}{See \textit{Widmar v. Vincent}, 454 U.S. 263, 269–70 (1981) (“In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the university must therefore satisfy the standard of review appropriate to content-based exclusions. \textit{It must show that its regulation is necessary to serve a compelling state interest.”); accord \textit{Carey v. Brown}, 447 U.S. 455, 465 (1980).}
\footnote{859}{\textit{Ward}, 996 F.2d at 450.}
\footnote{860}{Id.}
\footnote{861}{Id. at 452–54.}
\footnote{862}{Id. at 454.}
\footnote{863}{Id.}
\footnote{864}{Id.}
\footnote{865}{\textit{Ward}, 996 F.2d at 454.}
\footnote{866}{Id. (citing \textit{Hazelwood}, 484 U.S. at 270).}
\end{footnotesize}
authorizing viewpoint regulation in the interest of preserving the student learning experience, a “legitimate pedagogical concern.”

In *Morgan v. Swanson*, a public elementary school prohibited a student from distributing laminated bookmarks containing a story titled “The Legend of the Candy Cane,” citing the Plano Independent School District’s policy prohibiting the distribution of “any written material, tapes, or other media over which the school does not exercise control and that is intended for distribution to students” without approval from the school.

One of the more significant arguments raised on appeal by the plaintiff was that the school’s policy was facially unconstitutional because of an absolute rule against viewpoint discrimination. The Fifth Circuit said, succinctly, “this is not so.” The court noted that the case at issue arose within a public school, an environment the court labeled “a special First Amendment Context.” The court acknowledged the plaintiff’s citation of a variety of cases suggesting a mandate of viewpoint neutrality, but it then summarily rejected the applicability of the cases, as not one of them involved student speech within a public school. Though Judge Benavides identified the contested issue of viewpoint neutrality within the context of an attempt to decide a qualified immunity claim, it is still worth noting that the Fifth Circuit did not consider viewpoint neutrality an absolute standard in the school context. In this way, *Morgan* suggests a willingness by the Fifth Circuit to isolate the public school classroom from the general mandates in *Perry* and *Cornelius*, implying that the school environment is unique, and it would be inappropriate to apply to it a viewpoint neutrality requirement.

In *C.H. ex rel. Z.H. v. Oliva*, the Third Circuit considered a case in which a kindergarten student created a poster for a Thanksgiving-themed project expressing thankfulness for Jesus, and the school censored the poster. The same student was also prohibited a year later (as a first grader) from

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867 *Id.* at 452 (quoting *Hazelwood*, 484 U.S. at 273).
869 *Id.* at 366–67.
870 *Id.* at 379.
871 *Id.*
872 *Id.*
873 *Morgan*, 659 F.3d at 379.
874 *Id.* at 383.
875 *C.H. ex rel. Z.H.*, 195 F.3d at 168–69.
bringing a biblical-themed book to share with the class. In determining the validity of the school’s actions against the student, the court appropriately identified *Hazelwood* as the controlling case. The court ultimately held that instances can and do arise in which a school must be able to take non-viewpoint-neutral action against certain speech, recognizing *Hazelwood*’s requirements of both legitimate pedagogical concern and the appearance of the school’s imprimatur in that context.

The court acknowledged that while viewpoint neutrality remains crucial to the analysis of speech restrictions in the context of cases like *Rosenberger* and *Lamb’s Chapel*, which related to extracurricular speech restrictions, it “is simply not applicable to restrictions on the State’s own speech . . . In [teacher-supervised, school-sponsored activity], viewpoint neutrality is neither necessary nor appropriate.” The government must have the ability to control the messages that are reasonably assigned to it, and consequently should not be artificially shackled by an arbitrary requirement of viewpoint neutrality.

**V. THE CASE AGAINST VIEWPOINT NEUTRALITY**

*Hazelwood* provides an exception to the general requirement of viewpoint neutrality found in *Perry* and *Cornelius*. The case against requiring viewpoint neutrality in school speech policy operates on two levels. First, the *Hazelwood* standard applies to a far narrower and more specific context than some federal courts choose to recognize. Schools must be given the authority they need, though not more than they need, to regulate the kinds of student speech that attach to the name and symbolic voice of the school. Second, a requirement of viewpoint neutral speech regulation can impel school officials to restrict wide categories of speech in order to regulate the single expression of speech bearing the school’s imprimatur. Simply, a requirement of administrative viewpoint neutrality substantially limits students’ civil liberties by applying a kind of atomic bomb to the free speech landscape when a precision targeting device is better suited.

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876 *Id.* at 169.
877 *Id.* at 171.
878 *Id.* at 171–72.
879 *Id.* at 173.
A. Reigning in Hazelwood

A great deal of the debate over viewpoint neutrality in *Hazelwood* arises not from the language of the opinion itself, but rather from an unnecessary insistence by some federal courts to insert its rule into contexts in which it does not apply. The school imprimatur standard within *Hazelwood* acts as a kind of jurisdictional trigger, confining the Court’s holding to that narrow context. When lower courts ignore the narrow circumstances in which *Hazelwood* applies, they lose sight of the justification for *Hazelwood*’s viewpoint-regulation allowance. This leads to courts’ expanding the reach of *Hazelwood* beyond the circumstances justifying its rule; it is hardly surprising that these courts then read an otherwise-alien viewpoint neutrality requirement into the case.

1. *Morse v. Frederick*’s Affirmation of *Hazelwood*’s Scope

In 2007, the Supreme Court considered a school’s authority to restrict student speech advocating illegal drug use in *Morse v. Frederick*. The Court held that schools have the authority to limit student speech that promotes drug use. The majority acknowledged its holding from *Hazelwood*, the last case it had considered regarding student speech, but ultimately held that it did not apply to the present facts. The Court reasoned that Frederick’s banner displaying the phrase “Bong Hits 4 Jesus” simply would not be reasonably interpreted by a viewer as official school speech; the banner did not trigger *Hazelwood*’s fact-specific imprimatur rule.

Justice Alito, joined by Justice Kennedy, cautioned in concurrence that the Court’s holding should stand as a narrow exception to *Tinker*, not as conceptual fodder for a new rule category. Justice Alito agreed that a public school regulation restricting student promotion of illicit drug use

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880 Waldman, supra note 8, at 64 (“[W]hen evaluating whether *Hazelwood* permits viewpoint discrimination, courts have been influenced, perhaps without realizing it, by the context in which they are applying it. As such, the extension of *Hazelwood* to contexts beyond school-sponsored student speech has directly contributed to the confusion and conflict over whether *Hazelwood* should be interpreted as permitting viewpoint discrimination.”).


882 Id. at 424 (Alito, J., concurring).

883 Id. at 405 (“[Hazelwood] does not control this case because no one would reasonably believe that Frederick’s banner bore the school’s imprimatur.”).

884 Id.

885 Id. at 425 (Alito, J., concurring).
does not conflict with the Constitution, but also identified “such regulation as standing at the far reaches of what the First Amendment permits.”

Alito suggested that *Bethel v. Fraser*, *Hazelwood*, and now *Morse* all function as a set of exceptions to *Tinker* that only take effect under a highly specific set of circumstances.

Adding clarity to a point raised by the majority, Justice Alito emphasized a critical but often ignored aspect of *Hazelwood*: the “pedagogical concern” standard’s sole application to speech that may reasonably be perceived as coming from the mouth of the school itself. “[*Hazelwood*] allows a school to regulate what is in essence the school’s own speech,” Justice Alito wrote; “that is, articles that appear in a publication that is an official school organ.”

*Morse* is significant in the way that it emphasizes *Hazelwood*’s limited applicability and scope. If *Hazelwood* were to apply as broadly as some federal courts suggest, the Court in *Morse* presumably would have applied *Hazelwood* to the facts rather than carve out a new public policy exception for drug-related speech. The Court recognized in its opinion that *Hazelwood* is only triggered in highly specific circumstances, circumstances that the Court felt were not at issue in *Morse*.

2. The School Imprimatur Trigger

The Court in *Hazelwood* held that the question of school-sponsored speech arose only within the context of “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”

Student homework, art projects, and show-and-tell are excluded from *Hazelwood*’s application because they are forms of private expression not entailing government imprimatur. As then-Circuit Judge Alito noted in *Child Evangelism Fellowship v. Stafford*, *Hazelwood* applies only to government-sponsored speech; in other words, speech from

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886 Id. (Alito, J., concurring).
887 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (allowing sanctions against a student for offensively lewd and indecent speech despite a First Amendment challenge).
888 *Morse*, 551 U.S. at 422 (Alito, J., concurring) (“But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.”).
889 Id. at 423 (Alito, J., concurring).
890 *Hazelwood*, 484 U.S. at 271.
“a public school or other government entity [that] aims to convey its own message.”

Unfortunately, many federal courts have overextended *Hazelwood*, applying it to virtually any speech occurring in a school context in such a way that public school boards have almost unlimited regulatory authority over speech in that environment. Courts have reconfigured *Hazelwood* from a limited exception into a general rule.

Yet *Hazelwood* presents itself merely as a device to protect schools from having their names attached to speech reasonably perceived as presenting their own points of view. The Supreme Court in *Hazelwood* repeatedly offered the examples of school theater and school newspapers as communication scenarios in which the public would reasonably perceive school imprimatur. By contrast, student assignments confined to classrooms and student-teacher relationships involve expressions of exclusively private student voice, and thus operate outside of *Hazelwood*’s bounds. Classroom assignments and projects necessarily solicit personal viewpoints and expression from students; consequently, it is not reasonable to expect those activities to be understood as the official voice of the school.

In specific situations of reasonably perceived government imprimatur, *Hazelwood* gives schools the ability to pinpoint specific speech that departs from their pedagogical objectives. Schools do not need to restrict broad categories of speech or limit student expression altogether; rather, they need to restrict and limit specific student communication within those contexts, to avoid a perception that the school is advancing a point of view it does not want associated with its educational voice.

B. Viewpoint in School Curriculum and Messaging

The absence of a viewpoint neutrality mandate in *Hazelwood* is also sensible given the inseparability of viewpoints and pedagogical messaging in the school environment. In *Abington v. Schempp*, the Supreme Court noted that “public schools serve a uniquely public function: the training of
American citizens...**[894] Abington** and other cases emphasize the point that American public schools exist as a device by which students are prepared to enter the larger society as citizens of the sort the government prefers.**[895] While it can certainly be debated what objectives should be incorporated into “the training of American citizens,” the fact remains that such training requires the advocacy of particular viewpoints and the disapproval of others.**[896]

Postmodernism has helped us to an appreciation that even the “information” conveyed in school curricula is never “hard facts and figures” but screened data presented from a cultural perspective. Accordingly, when a society educates its youth, it cannot escape making judgments about the kind of citizens it wants its children to become. Education is inevitably about ultimate truths or perceptions thereof.**[897]

To insert viewpoint neutrality into the **[Hazelwood]** rule (directed as it is to essentially government speech) is both to mistake the nature of the educational enterprise and to drastically affect the ability of schools to control their educational function.**[898]** Viewpoint neutrality makes it impossible for a public school to effectively accomplish its pedagogical mission.**[899]** Simply, viewpoint regulation of government speech allows schools to do what they were established to do.

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**[895]** See Bethel Sch. Dist., 478 U.S. at 681; Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) (“It . . . seems entirely appropriate that the State use ‘public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.’”).

**[896]** Martin H. Redish & Kevin Finnerty, **What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic Educational Paradox**, 88 CORNELL L. REV. 62, 84 (2002) (“Both the selection of topics to be taught and decisions about what is to be taught concerning each topic inherently imply certain choices as to social, moral, or political values . . . . Regardless of which side of this debate one ultimately favors, the implications for present purposes should be clear: it is unrealistic to believe that seemingly value-neutral curricular choices are completely free from significant, if often unstated, substantive value judgments.”).


**[898]** Helen Norton, **Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression**, 37 U.C. DAVIS L. REV. 1317, 1334 (2004) (“[I]n situations where the government is the ‘literal speaker’ – i.e., the entity that is actually saying, writing, or otherwise directly delivering the message – it should be permitted to decline to serve as the ‘dummy’ through which a private ventriloquist projects her views.”); R. George Wright, **School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations**, 31 S. ILL. U. L.J. 175, 187–88 (2007) (“[A] public school’s refusal to sponsor speech it deems incompatible with the shared values of a civilized social order will typically be mediated by someone’s possible acceptance or rejection of the viewpoint of the speech in question, and will therefore be viewpoint-based regulation, reflecting approval of or hostility toward one or more points of view.”).

**[899]** R. George Wright, **Tinker and Student Free Speech Rights: A Functionalist Alternative**, 41 IND. L. REV. 105, 117 (2008) (“A school should not be legally handicapped for fairly taking its democratically
C. Hazelwood’s Implication of the Policy Behind the Government Speech Rule

The Supreme Court has acknowledged the State’s interest and authority to promote its own favored viewpoints. In *Pleasant Grove City v. Summum*, the Court recited the relevant law as follows:


In *Rosenberger v. Rector and Visitors of University of Virginia*, the University of Virginia refused to direct funds generated from student fees toward paying a printing bill for a Christian student newspaper. The Supreme Court reversed the decision from the Fourth Circuit and held that withholding the funds was viewpoint discrimination, which inappropriately infringed on the Free Speech Clause and undermined the neutrality toward religion the Establishment Clause contemplated. Critically, the Court explained that the allocation of student fees did not blur the line “between the University’s own favored message and the private speech of students.”

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903 *Id.* at 845–46.
904 *Id.* at 834; see also *Rumsfeld v. Forum for Acad. and Inst. Rights*, Inc., 547 U.S. 47, 65 (2006) (“We
discriminate based on viewpoint when the speech is the government’s own—a proposition for which, notably, the Court cited Hazelwood.\textsuperscript{905}

In citing Hazelwood for that legal standard, the Court signaled that it viewed that case as implicating the policy behind the government speech doctrine. The affinity between Hazelwood and the government speech cases is clear enough. Additionally, since the educational context is a pristine instance of government interest in communicative autonomy, a public school’s regulation on viewpoint grounds of messages reasonably perceived as bearing its imprimatur is in keeping with the Supreme Court’s recognition of government speech prerogatives.\textsuperscript{906}

Five years after the Court’s decision in Rosenberger, the Ninth Circuit reemphasized the distinction between government speech and individual student expression in Downs v. Los Angeles Unified School District.\textsuperscript{907} In Downs, a teacher brought action under 42 U.S.C. § 1983 against his school district to allow him to post material on a school bulletin board that contrasted with materials placed on the board as part of the district’s Gay and Lesbian Awareness Month.\textsuperscript{908} The Ninth Circuit rejected Downs’s assertion that Hazelwood controlled his case.\textsuperscript{909} The court reluctantly conceded that it was bound under \textit{stare decisis} to interpret Hazelwood according to the viewpoint neutrality lens of the court’s \textit{en banc} holding in Planned Parenthood v. Clark County School District.\textsuperscript{910} However, the court concluded that, notwithstanding Planned Parenthood’s misguided “viewpoint neutrality microscope,” the school’s actions in the present case have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because [it is] legally required to do so.”\textsuperscript{905}

\textit{Rosenberger}, 515 U.S. at 834; \textit{see also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth}, 529 U.S. 217, 229 (2000) (“It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.”).\textsuperscript{906}

\textit{See Pleasant Grove City}, 555 U.S. at 464 (holding that placing a permanent monument in a public park constituted an exercise of government speech not subject to Free Speech Clause scrutiny); Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“To govern, the government has to say something...”). The standards guiding a finding of government speech depart in certain respects from those employed in the Hazelwood analysis — due, no doubt, to the unique educational environment at issue in the latter — but the policy justifications are identical.\textsuperscript{907}

\textit{Downs}, 228 F.3d at 1009.\textsuperscript{908}

\textit{Id.} at 1005.\textsuperscript{909}

\textit{Id.} at 1011.\textsuperscript{910}

\textit{Id.} Though \textit{stare decisis} forced the \textit{Downs} court to view Hazelwood through the flawed interpretation of Planned Parenthood, the court’s reasoning in Downs remained sound. The court correctly concluded that the bulletin board was clear government speech, and the school should consequently not be forced to burden speech bearing its imprimatur with a viewpoint neutrality requirement. \textit{Id.} Downs remains an important case in illustrating the legal distinctions and impact of government and student speech.
did not implicate the court’s own (albeit flawed) prior interpretation of the Hazelwood rule.\textsuperscript{911} The court noted that the only parties with control over the bulletin board’s content were school faculty and staff, and the bulletin board was not open to the public or the student body as a kind of open forum for wide discussion of political views.\textsuperscript{912} The Ninth Circuit cited Rosenberger directly in its justification for granting the school district control over the bulletin board’s content.\textsuperscript{913} The court properly recognized that in situations when the government unequivocally offers its own viewpoint and value system in the public setting, the state must be allowed to protect its voice by restricting content that might be perceived as an extension of the state.\textsuperscript{914} A viewpoint neutrality mandate simply does not fit properly into such an analytical context.

In a similar fashion, the Fifth Circuit considered in Chiras v. Miller whether a high school student could bring action against the Texas State Board of Education for refusal to approve a specific science textbook for state funding.\textsuperscript{915} The court held that when the speech in question is unambiguously the government’s own, the state’s authority to control and protect its message operates independently from any viewpoint neutrality mandate.\textsuperscript{916} Viewpoint neutrality is simply a different requirement for an entirely different kind of speech.\textsuperscript{917}

\textsuperscript{911} Id.

\textsuperscript{912} Downs, 228 F.3d at 1012 (“We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth: LAUSD, by issuing Memorandum No. 111, and Leichman High, by setting up the Gay and Lesbian Awareness bulletin boards. The bulletin boards served as an expressive vehicle for the school board’s policy of ‘Educating for Diversity.’”); Helen Norton, The Measure of Government Speech: Identifying Expression’s Source, 88 B.U. L. Rev. 587, 617 (2008) (“Concluding that the bulletin board’s contents continued to reflect the district’s own expression even when it invited individuals to join and contribute to it, the court held that the district could not be compelled to allow others to distort its position.”).

\textsuperscript{913} Downs, 228 F.3d at 1013 (“When the government is formulating and conveying its message, ‘it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted’ by its individual messengers.”) (quoting Rosenberger, 515 U.S. at 833).

\textsuperscript{914} Id.; see also Burch v. Barker, 861 F.2d 1149, 1158 (9th Cir. 1988) (“[Hazelwood] described the distinction it was drawing between speech protected by standards of Tinker and speech which the educators could regulate as the distinction “between speech that is sponsored by the school and speech that is not.”) (internal citations omitted).

\textsuperscript{915} Chiras v. Miller, 432 F.3d 606, 607 (5th Cir. 2005).

\textsuperscript{916} Id. at 612 (citing Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

\textsuperscript{917} Erwin Chemerinsky, Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools, 42 U.C. Davis L. Rev. 825, 827 (2009) (“There is a critical distinction between the government as speaker in setting the curriculum and the government as regulator in punishing student speech.”).
D. The Effect of Over-Expanding *Hazelwood*’s Scope

The confusion over the role of *Hazelwood* in public schools gives rise to opinions like *Bannon v. Palm Beach*, a case in which the Eleventh Circuit considered whether a school could compel a student to remove Christian words and symbols from a mural painted as part of a school beautification project.\(^{918}\) The court ultimately held that the panels constituted school-sponsored expression and that school had the authority to remove religious content from the panels.\(^{919}\) The problem with *Bannon* does not lie with the court’s conclusion; a strong case can be made (and indeed was made) that a painted panel displayed indefinitely in a school would reasonably bear the school’s imprimatur. However, the court arrived at its holding by unnecessarily analyzing whether the school’s policy was viewpoint-neutral.\(^{920}\) The court acknowledged earlier in the opinion that government expression, even if delivered through the speech of an individual, may be regulated due to its subject matter; no mention is ever made of a viewpoint neutrality requirement.\(^{921}\) However, the court relied on its prior ruling in *Searcey* to extrapolate that *Hazelwood* requires viewpoint-neutrality in the regulation of student speech.\(^{922}\) Though the *Bannon* Court may have arrived at the correct decision, its logic represents a dangerous pattern. *Hazelwood*’s actual language and intent is ignored, leaving courts to apply their own language in any number of incorrect contexts.

In *Fleming v. Jefferson County*, the Tenth Circuit considered the constitutionality of Columbine High School’s policy against religious references on student-designed painted tiles displayed in the school hallways.\(^{923}\) The court upheld Columbine’s policy, citing concerns over religious debates and painful reminders of the school shooting as reasonable pedagogical concerns.\(^{924}\)

In the penultimate paragraph of *Fleming*, the court shored up its argument against a viewpoint neutrality standard with dicta describing the absurd conclusions that can result from a legal standard requiring a school to employ only viewpoint-neutral speech regulation.\(^{925}\) The court considered

\(^{918}\) *Bannon v. Sch. Dist. of Palm Beach Cnty*, 387 F.3d 1208, 1210 (11th Cir. 2004).
\(^{919}\) *Id.* at 1217.
\(^{920}\) *Id.* at 1215.
\(^{921}\) *Id.* at 1213.
\(^{922}\) *Id.* at 1215 n.4; see *Searcey*, 888 F.2d at 1325.
\(^{923}\) *Fleming*, 298 F.3d at 921–23.
\(^{924}\) *Id.* at 934.
\(^{925}\) *Id.*
the burden on schools of having to select between the unattractive options of allowing highly offensive speech, or disallowing patently innocuous or favored speech, all in the name of viewpoint neutrality. The court drove the point home by concluding that, “when posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it.”

Some scholars have suggested that the Rehnquist court passed up a golden opportunity to settle this dispute when it denied certiorari to Fleming in 2003. The facts of the case appeared to set an ideal stage for a firm decision from the court clarifying the gray areas of Hazelwood. The permanent presence of the tiles in school hallways, the tension between creative deference and faculty oversight in the project, and the shroud of emotionality surrounding the dispute in the wake of the Columbine tragedy all seemed to point to the Court confronting the issue head on. However, the Court may well have passed over an opportunity, and its denial of certiorari leaves unanswered Fleming’s provocative argument in favor of focused regulatory targeting of specific viewpoints to protect and facilitate the pedagogical interests of the school whose voice is implicated in the subject speech.

Fleming nonetheless confronted an important reality in school policy. When schools are required to adopt policies that must turn a blind eye to viewpoint, the schools must swing to either extreme on the spectrum of expressive tolerance. The administration must choose between allowing a wide range of student speech — including speech that misrepresents the school’s own voice and interests — and maintaining its pedagogical function through a kind of Draconian comprehensive ban on all speech on the subject in dispute. The dicta from Fleming focus specifically on the latter scenario, but both eventualities are equally plausible and equally unacceptable in a classroom context. In Fleming, the Tenth Circuit recognized that the right of students to express themselves within a First Amendment framework is an essential component of the American

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926 Id.
927 Id.
928 Tobin, supra note 29, at 256 (“[T]he Court missed an opportunity to clarify the Hazelwood test regarding viewpoint neutrality and let stand a holding that suppresses the free speech not only of students, but also of parents and the local community.”); see also Filipp Kofman, Fleming v. Jefferson County: A Need for Viewpoint Neutrality, 22 GEO. MASON U. CIV. RTS. L.J. 151, 176 (2012); Katie Hammett, Comment, School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy, 55 ALA. L. REV. 393, 407 (2003).
Constitutional experience. Yet the court also recognized that a viewpoint neutrality rule manifests its ill fit in the Hazelwood context through inducing awkward and unnecessary overregulation of student speech.

Viewpoint-based regulation provides schools with the tools necessary to maintain control over their own voices and reputation without having to “swing the pendulum” to one end or the other — in other words, either having to leave their apparent imprimatur unregulated, or being forced to protect their interest by eliminating participation in entire categories of speech. Viewpoint-based regulation acts as a kind of precise surgical tool, identifying specific problems without having to forbid student discourse that does not interfere with the school’s educational objectives.

E. A Note on Reasonableness

Critics of this approach to viewpoint-specific restrictions in public schools may well approach a school’s capacity for responsible policy with a certain degree of libertarian cynicism. Government cannot be trusted to implement viewpoint discriminatory policies in a truly responsible and constitutional manner, they might argue, so it is ultimately better to give schools a simple rubric by way of viewpoint neutrality. This concern is not unfounded; after all, many public schools have routinely abused their power by arbitrarily restricting student viewpoints that do not implicate the imprimatur concerns that give rise to Hazelwood’s rule.

In light of these concerns, it is important to emphasize that the viewpoint-specific speech restrictions authorized in Hazelwood must be bounded not only by the “school-imprimatur” circumstance, but also by pedagogical reasonableness in order to be constitutionally authorized.

At any rate, the discussion, whether one supports neutrality or viewpoint-specific restrictions, must operate within the bounds of the assumption that courts may regulate school policy within the rational context of Cornelius and the curricular bounds set forth in Hazelwood.
VI. Conclusion

Courts have vigorously debated the limits of school authority over student speech, specifically a school’s ability to regulate speech on the basis of viewpoint under the terms of Hazelwood. Taken at face value, it is easy to dismiss policies of viewpoint regulation as unduly censorial and instead embrace viewpoint neutrality as the answer to protecting student expression within the schoolhouse gate.935

However, a nuanced and disciplined examination of Hazelwood reveals that courts and scholars may be having the wrong argument.936 The Court intended its holding in Hazelwood to apply only to a specific set of circumstances: namely, theatrical productions, publications, and other publically accessible activities that could reasonably bear the school’s imprimatur. In other words, the Court intended schools to have complete control over speech that appears to be the official voice and opinion of the school and ultimately the government. Viewing Hazelwood in this light, it becomes apparent that schools must be given the authority to regulate this kind of speech, and it is appropriate — indeed intuitive — that such regulation be viewpoint-specific. Were schools given any less authority, the government’s voice would no longer be its own and would instead find itself under the control of a polarizing noise of individual opinions and contradictory viewpoints. Viewpoint neutrality simply has no place within an accurate reading of Hazelwood.

Hazelwood, and the viewpoint regulation it allows, protects schools by granting them the authority they need, no more and no less, to maintain a singular institutional voice and to preserve the learning environment for which they exist to foster in the first place.

continue to operate on public schools’ actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process.”).
936 Waldman, supra note 8, at 123 (“The confusion and dissension over whether Hazelwood permits viewpoint-based restrictions has been an unfortunate byproduct of its overextension.”).
NO CHILD LEFT BEHIND AND SPECIAL EDUCATION: THE NEED FOR CHANGE IN LEGISLATION THAT IS STILL LEAVING SOME STUDENTS BEHIND

Stephanie S. Fitzgerald

I. INTRODUCTION

When speaking out in favor of education reform, President Bush asserted that “too many of [the nation’s] neediest children [were] being left behind.” President Bush and Congress believed the passage of the No Child Left Behind Act of 2001 (“NCLB”) would improve educational opportunities and impact every student in schools across America. The provisions of NCLB, at the core, seek to “drive broad gains in student achievement and to hold states and schools more accountable for student progress.” Despite the intentions of President Bush and members of Congress, some of the nation’s neediest children are still being left behind.

Since NCLB’s passage, the law has remained at the center of education debates and NCLB has been described as the “symbol of all things good and bad in education.” In particular, the changes brought by NCLB to special education have been dramatic and unrealistic; the changes fail to recognize the wide-range of disabilities affecting over six million children in America. In four parts, this article focuses on NCLB’s negative impact on special education. Part II outlines the provisions of NCLB and examines the differences between NCLB and the Individuals with Disabilities Education Act (“IDEA”). Part III provides a detailed explanation of the existing scholarly opinions in support of, and in disagreement with, NCLB. Part IV discusses the current political landscape and NCLB’s pending reauthorization. Finally, Part V, based on an analysis of the issues plaguing...
the current system, suggests a solution to improve the existing relationship between special education and NCLB. Furthermore, Part V addresses the positive aspects and possible shortcomings of implementing the suggested changes prior to the conclusion of the article in Part VI.

II. STATEMENT OF THE LAW

Understanding NCLB’s framework is key to understanding NCLB’s flaws as the Act relates to special education. Part II discusses NCLB’s passage and the requirements NCLB sets for schools and districts. This section concludes with the similarities and differences of NCLB in comparison to the IDEA, another significant educational policy that relates to the education of students with disabilities.

A. NCLB’s Passage

In an effort to decrease the achievement gap and hold states and districts accountable for the education of every American student, Congress reauthorized the Elementary and Secondary Education Act (“ESEA”) through the passage of NCLB in 2001.\textsuperscript{944} When President Bush signed NCLB into law, NCLB authorized some of the most widespread changes to the American school system since the ESEA’s passage in 1965.\textsuperscript{945} NCLB aims “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”\textsuperscript{946} These requirements focus on improving the quality and effectiveness of the education system and raising achievement levels of all students.\textsuperscript{947} Legislators contend successful implementation centers around four main pillars of accountability, flexibility in the use of funding, research-proven effectiveness in instructional methods and


\textsuperscript{947} Cortiella, supra note 9, at 6.
materials in the classroom, and influence, information, and choice for parents.\textsuperscript{948}

B. NCLB Requirements

NCLB’s two primary objectives aim to ensure all students are held to the same academic expectations and that the states and districts use assessments to ensure schools, teachers, and administrators are held accountable for students’ failures to meet proficiency goals.\textsuperscript{949} NCLB uses testing and accountability requirements to assist with the aim of raising and closing the achievement gaps, “based on a goal of ‘100 percent proficiency’ by 2014.”\textsuperscript{950} To reach this goal, NCLB requires schools to test students in grades three through eight annually in reading and mathematics, and to test students in science at least one time each in elementary, middle, and high school.\textsuperscript{951}

In addition to the testing, NCLB requires states to develop academic proficiency goals for all students.\textsuperscript{952} These goals require testing to determine whether all students are meeting the established proficiency goals.\textsuperscript{953} The proficiency standards are also used to determine the level of academic achievement, or adequate yearly progress (“AYP”), students must attain, as measured by the state assessments.\textsuperscript{954} The definition of AYP must specifically address how districts and schools plan to assess student ability and monitor student progress from year to year.\textsuperscript{955} While the provisions of NCLB permit each state to develop a definition for AYP as long as the definition aligns with certain specifications outlined by the federal government.\textsuperscript{956}

These tests and the proficiency standards are important because schools must meet the proficiency goals as a whole to make AYP, and specific

\textsuperscript{948} U.S. DEPT. OF EDUC., supra note 1, at 1.
\textsuperscript{949} 20 U.S.C. § 6301.
\textsuperscript{953} Id. § 6311(b)(3)(A).
\textsuperscript{954} Id. § 6311(b)(2)(B).
\textsuperscript{955} Id. § 6311(b)(2)(C)(iv)-(v).
\textsuperscript{956} Id. § 6311(b)(2)(B).
student populations must also meet proficiency goals for a school to make AYP. These student populations, referred to in the statute as subgroups, include students from low-income backgrounds, from major racial and ethnic groups, with disabilities, and with limited English proficiency. Schools must publicly report the passage rates and include a breakdown of success by subgroup, thus holding schools accountable for the learning of every single student.

C. NCLB’S Relationship to the IDEA

Prior to NCLB, the IDEA contained specifications concerning accountability for the education of students with disabilities; however, these accountability provisions were rarely enforced. This concept of required and enforced accountability for all students is the central difference between the provisions of the IDEA and NCLB. IDEA takes an individualized approach by requiring schools to make specific services available and develop an individualized education program (“IEP”) for each child with a disability. NCLB takes a broader view, emphasizing the need to close achievement gaps on test scores and raise the collective scores of all students to meet state-specific proficiency levels.

NCLB advanced the initiatives of the IDEA by establishing the accountability requirement, changes that likely influenced the 2004 IDEA reauthorization signed by President George W. Bush. The reauthorization coordinated the requirements of NCLB with the IDEA’s guidelines for special education programs and responded to findings that the education of students with disabilities had been stalled by “low expectations and an insufficient focus on applying replicable research on

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957 James E. Ryan, The Perverse Incentives of The No Child Left Behind Act, 79 N.Y.U. L. REV. 932, 940 (2004). For example, if in a certain year, a state determines that eighty percent of students must be proficient on the standardized assessment, then eighty percent of all the students in the school and eighty percent of the students within each subgroup must meet the proficiency standard for a school to make AYP. See id.

958 Id.

959 Judy A. Schrag, No Child Left Behind and Its Implications for Students with Disabilities, 16 SPECIAL EDGE 2, 1 (2003), http://www.calstat.org/publications/pdfs/edge_spring_03.pdf.


961 Aplin & Jones, supra note 8, at 1.

962 Id. at 1.

963 Id.

964 See id. at 19.

965 Id. at 1.
proven methods of teaching and learning." These changes were intended to provide students with disabilities the right to the same education and expectations of their peers in general education classrooms. The 2004 reauthorization elevated the relationship between the IDEA and NCLB to a higher significance, particularly on issues related to the education of children with disabilities by "providing both individualized instruction and school accountability."

III. SCHOLARLY LANDSCAPE

The debate over NCLB finds special education advocates and parents divided; they want high expectations for their students with disabilities but fear that students will ultimately be the party to suffer. The following opinions identify the provisions and aspects of NCLB that scholars believe work for and against special education.

A. Positives of NCLB’s Impact on Special Education

1. Holds Districts Accountable for the Education of all Students

Prior to the enactment of NCLB, states and districts largely excluded students with disabilities from state testing programs. Schools cited various reasons for excluding students with disabilities from testing, including a desire to limit stress for those students, a lack of knowledge regarding test modifications and accommodations, and a goal to raise a school’s overall scores. Regardless of the reasons, the exclusion from

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966 Cortiella, supra note 9, at 8; see also, Richard J. Wenning et al., No Child Left Behind: Who is Included in New Federal Accountability Requirements, in NO CHILD LEFT BEHIND: WHAT WILL IT TAKE? 35, 42 (2002), http://www.edexcellencemedia.net/publications/2002/200202_nclbwillitake/NCLB-report.pdf (noting that in January 2001, of thirty-four states reviewed, ten percent did not have adequate testing and accountability provisions for students with disabilities).
967 Cortiella, supra note 9, at 8.
968 Apling & Jones, supra note 8, at 1.
969 Cortiella, supra note 9, at 10.
972 Wenning et al., supra note 30, at 39.
testing was personally damaging to the students as well as to reform efforts, and the exclusion made it difficult for parents to monitor their child’s progress.\footnote{Id.} Now, NCLB requires states and districts to include students with disabilities in local and statewide assessments\footnote{20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc); see also U.S. DEPT. OF EDUC., FACT SHEET: NO CHILD LEFT BEHIND PROVISION GIVES SCHOOLS NEW FLEXIBILITY AND ENSURES ACCOUNTABILITY FOR STUDENTS WITH DISABILITIES, http://www2.ed.gov/nclb/freedom/local/specedfactsheet.pdf.} and for states and school districts to be held accountable for the performance of those students.\footnote{U.S. DEPT. OF EDUC., FACT SHEET, supra note 38, at 1, 2.} Parents, advocates, and educators now celebrate that students with disabilities count in statewide assessments, fully participate in the assessments, and that their progress is made public.\footnote{Cassandra Cole, Closing the Achievement Gap: What Is the Impact of NCLB on the Inclusion of Students with Disabilities?, 4 CENTER FOR EDUC. POL’Y BRIEF: CLOSING THE ACHIEVEMENT GAP SERIES: PART III 1, 2 (Fall 2006), http://ceep.indiana.edu/projects/PDF/PB_V4N11_Fall_2006_NCLB_dis.pdf.}

2. Allows Districts, Parents, and Lawmakers to Monitor Progress

In addition to testing and monitoring the progress of students with disabilities, each district must publish a report card every year that outlines total and subgroup AYP performance for each school in the district.\footnote{Cortiella, supra note 9, at 18.} Districts must include a wide variety of information in the report cards, including the achievement data aggregated and disaggregated by subgroup, scores in math and reading, percentage of students tested and not tested, and information on indicators used to determine AYP such as graduation rates and teacher qualifications.\footnote{George J. Petersen & Michelle D. Young, The No Child Left Behind Act and Its Influence on Current and Future District Leaders, 33 J.L. & EDUC. 343, 349 (July 2004).} Since districts publicize these results, the report cards provide a means of comparison for parents to evaluate the quality of their child’s education to the education provided at other schools in a district or throughout the state.\footnote{Id.}

3. Availability of Accommodation on Testing

Under NCLB, states must assess at least ninety-five percent of all students and students in each of the five subgroups.\footnote{Margaret J. McLaughlin et al., Accountability for Students with Disabilities Who Receive Special Education: Characteristics of the Subgroup of Students with Disabilities, INST. FOR THE STUDY OF EXCEPTIONAL CHILD. & YOUTH, 1, 3 (September 2006), available at http://www.eric.ed.gov/PDFS/ED509859.pdf.} If students with disabilities need accommodations in order to take the assessments, the
school must provide those accommodations. These accommodations allow the assessments to measure a student’s knowledge and ability without the potential interference of the student’s disability. NCLB specifies that the number of proficient scores on alternate achievement standards should not exceed one percent of all students assessed. This alternate achievement standard is different from the grade-level achievement standards used to measure students in general education classrooms. According to NCLB, individual states are allowed to define alternate achievement standards as long as the standards “align with the State’s academic content standards; [p]romote access to the general curriculum; and [r]eflect professional judgment of the highest achievement standards possible.”

B. Negatives of NCLB’s Impact on Special Education

While proponents of the law believe the accountability and reporting requirements move special education in a positive direction, NCLB’s impact on special education has been widely criticized by lawmakers, educators, and parents across the country. This section shifts from the views of NCLB’s proponents to examine opponents’ views of the law as a cause for major concern.

1. Misplaced Objectives and a Narrow Curriculum

Those in opposition to NCLB argue the law wastes already limited resources on assessments that modify curricula, change or eliminate successful programs that work specifically for students with disabilities, and force low-achieving students out of schools. James E. Ryan argues that rather than focusing on yearly achievement, the assessments and AYP goals are actually more about rigid benchmarks. The requirements of

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981 34 C.F.R. § 300.320(a)(6).
982 Cortiella, supra note 9, at 14.
983 34 C.F.R. § 200.13(c)(2)(i).
985 34 C.F.R. § 200.1(d).
988 Ryan, supra note 21, at 941.
NCLB reduce classroom instruction to one goal: teachers teach so their students pass the state assessments so the school can meet AYP for the year. In response to these pressures, teachers spend increased amounts of time on complex assignments that focus on reading and math; in turn, students receive less instruction in other subjects.

2. Limited Access to General Education Curriculum

In addition to narrowing the curriculum, NCLB also limits access to the curriculum. “If students with disabilities are to meet the goal of achieving at proficient levels by the year 2014, [these students] will need to have access to the general education curriculum.” The requirement poses a challenge because the success of students with disabilities is dependent upon access to the general education curriculum; however, oftentimes students with disabilities do not possess the same necessary skills as their peers to demonstrate knowledge regarding what they have been taught. In short, the meaning of “proficient” within the special education curriculum differs from the meaning of “proficient” for students learning based on a general education curriculum.

3. Special Education Students as Scapegoats for Failure to Meet AYP

Meeting the proficiency requirement can be especially complex and the policies and AYP provisions create concern regarding accountability. In some situations, district administrators blame the performance of students with disabilities on state assessments as being the only factor that keeps a school from reaching AYP. “[E]ducators have been sounding the alarm that . . . special education students . . . are causing their schools” to fall short of the AYP goal. These types of comments could have a negative effect if they were to reach the students’ ears. Furthermore, this blame is

989 Id. at 933.
991 Schrag, supra note 23, at 10.
992 Katherine Nagle et al., Students with Disabilities and Accountability Reform: Challenges Identified at the State and Local Levels, 17 J. DISABILITY POL’Y, STUD. 28, 28 (2006).
993 See Schrag, supra note 23, at 10.
994 U.S. DEPT. OF EDUC. FACT SHEET, supra note 38, at 1.
996 Shah, supra note 35.
997 Daggett & Gloeckler, supra note 59, at 2.
misplaced because NCLB contains a safe harbor provision. This provision addresses concerns that a school would fail to meet AYP because one subgroup failed to meet the state AYP goals. This provision states that schools can avoid being marked as failing if, during the next year, the number of subgroup students below proficiency decreases by ten percent when compared with the assessment results from the preceding year.

4. Limited Funding

Lastly, NCLB fails to take into account the nation’s financial, educational inequalities. High-spending schools outspend low-spending schools “at least three to one in most states.” NCLB does provide funding, but it usually allots to less than ten percent of most schools’ budgets, and the funding amount fails to meet the extreme financial needs of disadvantaged schools. In addition, the high cost of providing intervention services to students who fail to meet AYP is a large concern for educators and lawmakers because these services come with extensive costs.

IV. CURRENT POLITICAL LANDSCAPE

Congress should have addressed all of the flaws and criticisms surrounding NCLB when the law was scheduled for reauthorization, but the legislation is still overdue for renewal. Part IV addresses Congress’s reauthorization efforts and describes President Obama’s proposed solution to fix NCLB’s failing provisions. This section concludes by presenting three viewpoints surrounding the relationship between NCLB and the education of students with disabilities.

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999 Id.
1002 Id.
1003 Id.
1004 Cole, supra note 40, at 4.
Congress’s last serious attempt to rewrite NCLB occurred in 2007, but legislators made no progress because education groups and teachers’ unions opposed a provision regarding merit pay.\textsuperscript{1006} Efforts for reauthorization increased in 2011 as legislators from both parties began discussing an alternative way to effectively and fairly monitor student progress and hold schools accountable.\textsuperscript{1007} Despite these efforts, as of April 2013, Congress has still not reauthorized NCLB or re-written the law.

In response to the growing criticism of the law, the Obama Administration created and released a blueprint for the reauthorization of NCLB in March 2010,\textsuperscript{1008} which makes the receipt of funding conditional on districts taking action to improve schools and prepare students for life beyond high school.\textsuperscript{1009} The blueprint calls for a “broad overhaul” of the NCLB and proposes to “reshape divisive provisions that encouraged instructors to teach to tests, narrowed the curriculum, and labeled one in three American schools as failing.”\textsuperscript{1010} President Obama’s proposed blueprint includes measures for accountability and consequences for failure but it eliminates the deadline for one hundred percent proficiency in 2014.\textsuperscript{1011} Instead, students would leave high school ready for a college or a career.\textsuperscript{1012}

The blueprint also specifically addresses meeting the needs of diverse learners, a group in which students with disabilities are included.\textsuperscript{1013} In addition to the existing programs, a reauthorization of NCLB would result in increased attention to including students with disabilities and improving their outcomes.\textsuperscript{1014} This attention would focus on better teacher preparedness to educate students with disabilities, improved, more accurate assessments, and a diverse curriculum that incorporates learning to meet the needs of every student.\textsuperscript{1015}


\textsuperscript{1007} Adequate Yearly Progress, supra note 50.

\textsuperscript{1008} U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM; THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010).

\textsuperscript{1009} Dillon, supra note 70.


\textsuperscript{1011} Adequate Yearly Progress, supra note 50.

\textsuperscript{1012} Dillon, supra note 70 (noting that, as of February 2010, the National Governors Association had started coordinating efforts to write standards defining what it means for a student to leave high school ready for a career or college).

\textsuperscript{1013} U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM, supra note 72, at 19.

\textsuperscript{1014} Id. at 5.

\textsuperscript{1015} Id. at 20.
The blueprint’s proposal to improve the education of students with disabilities falls within one of the categories in the debate that has emerged over NCLB and its effect on students with disabilities.1016 The first argues that districts and schools should stay the course and tough it out; the second contends that students with disabilities should stay in the accountability system, but be evaluated against different standards based on different assessments; and the third maintains that districts and schools should completely remove students with disabilities from the NCLB accountability system “because it is unreasonable and unfair.”1017 Based on the description of the blueprint, the changes fall somewhere between the first and the second viewpoints. The blueprint recommends staying on course in the sense that the same programs will stay in place, but aims to provide increased attention to students with disabilities. In addition, the blueprint also falls within the second viewpoint based on the suggestion of continued accountability with the addition of testing modification.

V. MENDING THE BROKEN RELATIONSHIP BETWEEN NCLB AND SPECIAL EDUCATION

The opinion expressed in the third viewpoint is a valid assertion; as it stands, NCLB’s accountability system is unreasonable, unfair, and essentially unrealistic for students with disabilities. The problem with the third option, however, is that it suggests that legislators, educators, and parents give up on students with disabilities; this solution itself is unreasonable, unfair, and unrealistic. Instead, the federal government must recognize the unattainable expectations set by NCLB and reevaluate the current system by setting attainable goals for students with disabilities according to the students’ needs.

A. Proposal

Congress should address the needs of special education students in NCLB by adapting the four main pillars of the law to fit the needs of students with disabilities. As noted in Part II, NCLB centers on research-proven effectiveness in instructional methods and materials in the classroom; accountability; the availability of parental influence,

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1016 See Daggett & Gloeckler supra note 59, at 1.
1017 Id.
information, and choice; and flexibility in the use of funding.\footnote{1018} After evaluating NCLB and the costs and benefits to special education, the following proposal is based on the ability to revamp the relationship between special education and the four pillars in an ideal legislative environment. The four aforementioned pillars should work in conjunction with the IEP requirements outlined in the IDEA. Collaboration between the two most significant educational policies in the nation’s history will provide students with disabilities access to an inclusive education system directly tailored to their needs.

1. Research-Proven Effectiveness in Instructional Methods and Materials in the Classroom

The first way to address the issues plaguing the system is to change the assessments used in special education classrooms. Instead of testing students using the general standardized tests, states should develop specific assessments for students with disabilities. The assessments should test all subject matters, not just reading, math, and science. As a result, the assessments will not constrain students with disabilities to a rigid, narrow curriculum. In addition, the new assessments should focus on the instructional methods and materials used in special education classrooms. By assessing students in the same way they are taught, the assessments will reflect the effectiveness of the instruction. This solution is not meant to suggest that states should create an individualized assessment for each student; rather, it suggests that lawmakers and educators evaluate the methods of instruction used in special education classrooms and develop assessments based on these key methods.

The purpose of an alternate assessment is two-fold: not only will such an assessment test students’ knowledge and abilities, but this type of assessment will provide concrete evidence into the effectiveness of chosen instructional methods. If students with disabilities are tested in the same way they are instructed, but still struggle to meet certain goals or objectives, then it is possible that the issues arise out of the instructional methods.

2. Accountability Through IEPs, AYP, and Frequent Assessments

While alternate assessments would remove students with disabilities from school accountability numbers as a whole, this approach still mandates accountability for students with disabilities through the use of

\footnote{1018} U.S. DEPT. OF EDUC., supra note 1, at 1.
IEPs, the creation of a separate AYP standard, and an increase in the frequency of assessments. Traditionally, IEPs focus on a student’s grasp of basic academics, “access, and/or functional skills and have had little relationship to a specific academic area or grade-level expectations.”1019 In addition to the standard IEP process, this proposal recommends that IEPs also include an additional section pertaining to the state assessment. This section should outline specific goals and objectives a student should grasp based on the content of the assessment.

In turn, this aspect provides the ability to monitor progress based on the creation of separate AYP standards for use in special education classrooms. The definition of AYP should be similar to the definition used for students in the general education curriculum who take the general state assessments; the definition must specifically address how districts and schools plan to assess student ability and monitor student progress as tailored to special education curriculums.1020 This separate definition of AYP should include the addition of two assessments per year for students with disabilities, one near the beginning of the academic year and one near the end. This will allow teachers, administrators, and parents to see how a child is learning at the beginning of the academic year and then evaluate the child at the end of the year. By testing twice in an academic year, progress may be measured over time. In addition, districts can monitor, address, and correct issues in a more timely manner. These changes allow for different, yet intertwined, ways to hold districts accountable for student progress.

3. Influence, Information, and Choice for Parents

This proposal maintains parental input in their child’s education while also conforming their child’s education to a broader set of standards. Typically, parents are involved in the creation of their child’s IEP as part of a larger IEP development team.1021 The team is also comprised of at least a special education teacher, a regular education teacher, and a representative from the local educational agency.1022 By heightening the importance and significance of the IEP regarding standardized assessments, parents can still provide input regarding the totality of their child’s education. With assessments twice per year, parents will be able to see, through the goals

1021 Ballum, supra note 83, at 7.
1022 Id.
and objectives outlined in their child’s IEP, how their child progressed from assessment to assessment.

Districts and schools should provide information to parents detailing the types of special education services and assessments offered. If parents are unsatisfied with the options provided at their child’s school, the parents should have the opportunity to voice this opinion and work with the rest of the IEP team to develop a reasonable solution. Districts, schools, and parents should use all means necessary to provide the best education for the student.

4. Flexibility in the Use of Funding

As with the implementation of any type of law or proposal, there must be a source of funding. This proposal proceeds on the assumption that while the states will maintain control over the educational system, the federal government will still provide some funding for special education programs. The state programs must conform to general requirements established by the federal government, such as the inclusion of mandatory accountability procedures in IEPs, testing twice per academic year, and a definition of AYP that conforms with a series of specifications.

This proposal also depends on flexibility in the way federal funding is used to support special education programs. The assessment change alone requires that states have the ability to experiment with different types of assessments. As a result, the federal government should permit the states to use the money in furtherance of continuous improvement of their special education programs. In turn, the states may use federal funding on all aspects of their special education programs.

B. Response to These Changes

These changes would likely be praised by some and condemned by others, just as NCLB has been throughout the past 10 years. While the proposal does not provide an absolute cure for every flaw within NCLB, it maintains the positive aspects while avoiding the aforementioned criticisms.

The proposal still includes testing accommodations, accountability provisions, and the ability for parents, lawmakers, and educators to monitor student progress. It also builds accommodations into the assessment by creating assessments that conform to the everyday instruction students
receive. The assessments create accountability for the tests themselves and for the instructional methods used in classrooms. When reviewing the scores, lawmakers, educators, and parents can assess a student’s progress in the same classroom with the same instructor over the period of one year.

The proposal also seeks to address the common criticisms of NCLB explained in Part III. This proposal addresses misplaced objectives in districts and schools by creating two separate assessment benchmarks and assessing students modeled on daily instruction. The sole focus shifts away from achieving AYP; instead, the proposal implements a definition of AYP that molds to the special education classroom by creating two assessments to monitor progress and instruction as outlined in students’ IEPs. The new assessments also address the criticism that NCLB requirements result in a limited curriculum, as they will focus on all subject matters. Finally, this proposal combats the criticism that students with disabilities serve as scapegoats when districts or schools fail to meet AYP. By implementing an AYP requirement specific to the special education classroom and curriculum, it removes students with disabilities from the overall AYP equation and eliminates the possibility of blame while still keeping a method to track progress.

Despite the ability to keep the positives and address most of the criticisms addressed in Part III, the proposal is not perfect. It is likely that critics will argue that the experimentation and development of assessments will take too long and prove too costly. While these arguments are recognized, the make up of special education classrooms has changed and districts and schools need to adapt; costs and implementation times should not bar these students from “a fair, equal, and significant opportunity to obtain a high-quality education.”

VI. CONCLUSION

Congress needs to reauthorize NCLB in a way that will stop leaving special education students behind. NCLB placed the spotlight on an increasing achievement gap, prompted new conversations, and introduced Congress to the need for change in the nation’s educational system. NCLB’s focus on accountability revealed that states must act to avoid a path where students with disabilities only encounter low expectations. By altering NCLB’s key provisions, the special education curriculum will be

one based on the individual and unique needs of the students.

In contrast, however, lawmakers, educators, and parents must recognize that immediate, dramatic improvement in educational performance is also unrealistic with the state of the current system. Experimentation will serve as a useful tool as districts and schools seek to realign instructional programs. In time, this experimentation will lead to services and opportunities that support and allow special education students to succeed. A new definition of AYP tailored specifically to special education classrooms, combined with a revised set of specific assessments that adapt to the needs of students with disabilities, can bring positive change in special education classrooms across the nation.