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SPECIAL EDUCATION AND THE PRIVATE SCHOOL STUDENT: THE MISTAKE OF THE IDEA AMENDMENTS ACT

I. INTRODUCTION

Until the mid-twentieth century, school boards did not allow children with disabilities to attend public schools because administrators considered the costs excessive and the children uneducable. In 1975, Congress attempted to change this practice by passing the Education for All Handicapped Children Act, since renamed the Individuals with Disabilities Education Act ("IDEA" or "the Act").

Congress's passing of the IDEA was a major step in advancing the rights of the disabled. Children afflicted with mental and physical disabilities were no longer hidden away in institutions, but allowed to attend public schools and receive the special education and related services they needed. Unfortunately, the Act was ambiguous and resulted in different interpretations by courts regarding the extent of coverage for disabled students voluntarily attending private schools.

Until Congress's recent passage of the IDEA Amendments Act of 1997 (the "Amendments Act"), some courts restricted the IDEA requirements, while others relied upon the Education Department General Administrative Regulations ("EDGAR" or "regulations") to order school boards to provide services to disabled private school children. The courts following EDGAR held that such services must be provided where there would be no "significant additional costs . . . borne by the state" and where the services will "neither add to nor sub-

4. See infra Part IV.
6. 34 C.F.R. §§ 76, 300 (1996). For a discussion of EDGAR, see infra Part II.
tract from the religious environment." Many private school children benefited from the decisions of these courts by being able to attend the school of their choice and still receive the assistance they needed.

On June 4, 1997, Congress delivered a major blow to the disabled by passing the IDEA Amendments Act of 1997. The Amendments Act essentially destroys a court’s ability to require a school board to pay for the education of a disabled child who voluntarily attends a private school. Many children that the IDEA was designed to help will now be unable to receive proper assistance due to costs their families are unable to bear.

This Comment examines the case law leading to Congress’s passage of the Amendments Act, with a focus on three recent decisions from the Second, Fifth, and Seventh Circuits. Further, this Comment criticizes the Amendments Act and proposes a more equitable solution for courts faced with the task of interpreting the IDEA as it applies to private school children. Part II outlines the sections of the IDEA, EDGAR, and the Amendments Act relevant to funding for private school students. Part III discusses how the Supreme Court has addressed Establishment Clause challenges regarding publicly funded programs provided on private school grounds, and Part IV analyzes three recent circuit court decisions that attempted to determine whether the IDEA requires on-site services for private school children. Finally, Part V addresses the need for congressional reevaluation of the Amendments Act and proposes legislation outlining how a court should analyze a request of a disabled private school student for special education and related services under the IDEA. Absent some type of action, the long-term effects of the IDEA Amendments Act will be devastating on the rights of the disabled American child. Many disabled children voluntarily attending private schools will be denied needed special education and related services at their schools.

II. BACKGROUND

In 1975, Congress passed the EAHCA, (now the IDEA), in an attempt to unify the states’ methods of educating children with disabilities and to guarantee every disabled child a “free appropriate public education,” ("FAPE"). The IDEA is designed to offer “full educational op-

10. 20 U.S.C. §1400(c)(1994). The IDEA defines a “free appropriate public education” as “special education and related services that . . . have been provided at public expense . . .
portunities to all children with disabilities." The Act attempts to accomplish this goal through the federal government's underwriting of a portion of each child's educational costs. In turn, states receiving assistance assure the federal government that each disabled child will have access to a free appropriate public education provided by the state in the least restrictive environment. In addition, the free appropriate public education must be based on an "individualized education program" designed specifically to meet the child's educational and disability needs.

States participating in the program receive funds from the federal government based on the number of qualified disabled students within the state. States distribute these funds to school boards according to the individual needs of the disabled students within each school district. In order to accommodate the individual needs of disabled students, the IDEA provides that as an alternative to attending a public school that has inadequate facilities, a disabled child may enroll in a private school at no cost to the child's parents. The decision of whether the public school has inadequate facilities must be made "by meet the standards of the State educational agency, ... include an appropriate preschool, elementary, or secondary school education, ... and ... are provided in conforming with the individual education program required under the IDEA." Id. § 1401(a)(18). See also Dixie Snow Huefner, Judicial Review of the Special Educational Program Requirements Under the Education For All Handicapped Children Act: Where Have We Been and Where Should We Be Going?, 14 HARV. J.L. & PUB. POL'Y 483, 484-85 (1991).

12. See id. § 1411.
13. Id. § 1412(2)(B).
14. Id. § 1412(5)(B). This environment is one in which: children with disabilities ... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of children with disabilities from their regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

15. Id. § 1401(20). The individualized education program requires that the proper educational representative, the teacher, the parents, and if appropriate, the child, develop a written statement setting forth the following: (a) the child's present level of educational performance, (b) annual goals and short-term objectives, (c) the services to be provided to the child, both in special and regular educational programs, (d) any needed transition services, (e) projected starting and ending dates, and (f) proper evaluation criteria, procedures, and schedules to determine if the program goals are being met. Id.
16. See id. § 1411(a)(1).
17. For an example of how Wisconsin distributes funds received under the IDEA, see WIS. STAT. § 115.88 (1995-96).
the state or appropriate local educational agency."\(^{19}\)

The IDEA also provides for children voluntarily enrolled in private schools by their parents, but on a different level than public school students.\(^{20}\) Because the child is voluntarily placed in the private school by his or her parents, the school district is not required to pay the student's private school tuition\(^ {21}\) but does have some responsibilities imposed on it by EDGAR.\(^ {22}\) EDGAR states that school districts must "provide students enrolled in private schools with a genuine opportunity for equitable participation"\(^ {23}\) in the special education programs. Benefits of the private school programs "must be comparable in quality, scope, and opportunity for participation" to those received by public school students.\(^ {24}\)

Many school boards supply the general opportunity for equitable participation by requiring private school children to receive needed services at a public school, a neutral facility, or a mobile trailer.\(^ {25}\) A problem develops when a child's disability is such that he or she only benefits from the service if it is provided during instruction. One such disability is a hearing impairment. A child in need of a hearing assistance device or sign language interpreter would find these services useless unless they were provided in his or her private school classroom. Herein lies the issue that many lower courts have grappled with and that Congress answered with the Amendments Act: whether the IDEA requires a school board to provide special education and related services at a private school for a voluntarily enrolled student.

While the IDEA specifically provides that voluntarily placed private school children must have access to special education and related services, neither its language or the language of EDGAR specify to what extent a school board must pay for the services or whether the services must be provided on-site. Congress clarified this issue through the

\(^{19}\) 20 U.S.C. & 1413 (a) (4) (B) (1).

\(^ {20}\) The IDEA requires that States "to the extent consistent with the number and location of children with disabilities in the state who are enrolled in private schools, provid[e] for such children special education and related services." \( Id. \) § 1413(a)(4)(A). Similarly, the regulations require that "[e]ach [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." 34 C.F.R. § 300.452.

\(^ {21}\) \( Id. \) § 300.403.

\(^ {22}\) \( Id. \) §§ 76, 300.

\(^ {23}\) \( Id. \) § 76.651(a)(1).

\(^ {24}\) \( Id. \) § 76.654(a).

Amendments Act. The Amendments Act states that the IDEA "does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school of facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."\(^{26}\) Essentially, the Amendments Act eliminated a court's ability to require a school board to pay for a private school student's special education, regardless of the circumstances. Whether a disabled private school student's needs are paid for is completely at the discretion of the school board.

Congress's interpretation of the IDEA appears contrary to what the legislative history suggests regarding on-site program participation by private school students. The legislative history suggests that Congress intended on-site participation in the program by private school students. In the Education of the Handicapped Amendments of 1974, Congress attempted to specifically provide for private school students by implementing a "bypass" program.\(^{27}\) If a school board was unable or unwilling to provide for participation by private school students, the Commissioner of Education was required to "bypass" the school board and pay for the child's services directly.\(^{28}\)

In 1983, the House more directly addressed the problem of limited services offered to private school students by identifying the actual dilemma. Using Missouri law as an example, the House stated that the prohibition of a state educational agency from offering special services to private school children results in "local school systems only [being able to] provide special services . . . before or after school hours, on Saturdays and only on public school premises."\(^{29}\) This legislative history suggests that Congress intended private school students to benefit from the IDEA and did not intend to restrict these students to only off-site services.

The Supreme Court has not offered any insight in interpreting Congress's intent on the issue of where services under the IDEA must be offered. It has only rendered an answer as to whether the services are forbidden from being provided on parochial school grounds under the Establishment Clause.\(^{30}\) As outlined below, the Court has held that the

26. Id. at § 612(a)(10).
28. Id.
on-site provision under the IDEA does not violate the Constitution's Establishment Clause.

III. SUPREME COURT DECISIONS

Although the Supreme Court has not given any direction as to whether the IDEA requires a school board to provide on-site private school special education and related services, it has resolved some related issues. Specifically, the Court has resolved issues relating to possible Establishment Clause violations of providing public funds to parochial schools and their students. The Establishment Clause of the United States Constitution states, "Congress shall make no law respecting an establishment of religion . . . ."\(^3\) This section of the First Amendment prohibits the intertwining of religion and government, commonly referred to as mixing church and state. As discussed below, many school boards have contended that providing a state-funded service in a religious institution violates the Establishment Clause. It was not until the 1993 decision of *Zobrest v. Catalina Foothills School District*\(^2\) that the Supreme Court decided that providing special education and related services on parochial school grounds did not violate the Establishment Clause.

A. The Lemon Test and Its Early Interpretations

The first test to determine whether a statute providing funds to parochial schools crosses the line separating church and state was set out in 1971 by the Supreme Court in *Lemon v. Kurtzman*.\(^3\) *Lemon* involved a statutory program that authorized the reimbursement by the government to private schools for teaching expenses such as salaries and textbooks.\(^3\) The *Lemon* Court considered criteria which had been developed over the years and delineated an exclusive, three-part test under which a statute of this type would be unconstitutional. The test

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31. U.S. CONST. amend. I.
33. 403 U.S. 602 (1971).
34. The unconstitutional statutes consisted of Rhode Island's 1969 Salary Supplement Act and Pennsylvania's Nonpublic Elementary Education Act. The Rhode Island statute "provide[d] for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per pupil expenditure on secular education is below the average in public schools." *Lemon*, 403 U.S. at 602. The Pennsylvania statute "authorize[d] the state Superintendent of Public Instruction to 'purchase' certain 'secular educational services' from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and instructional materials." *Id.*
stated: "[T]he statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" If the statute failed to meet any of the elements, it would be unconstitutional. The statute in Lemon was found to violate the third "excessive entanglement" element. Although the Lemon test continued to be applied by the courts, its vagueness, as well as the Court's own applications of it, left many commentators and courts unsure of its validity.

B. The Zobrest Decision

The Supreme Court's decision in Lemon and other subsequent cases left many parents concerned about how the Court would deal with the issue of disabled children attending private schools. Many commentators believed that special education and related services were still able to be provided on-site at the parochial school without violating the Establishment Clause.

After a number of lower courts had offered inconsistent opinions regarding whether services provided at parochial schools violated the Establishment Clause, the Supreme Court clarified the issue in Zobrest v. Catalina Foothills School District in 1993. James Zobrest was a high school student who attended elementary school at a public school for the deaf and attended junior high at an Arizona public school. While he attended junior high, the school district assigned him a sign-language

35. Id. at 612-13 (quoting Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970) (citation omitted)).
36. Id. at 620.
37. See, e.g., Martin, supra note 1, at 564-65. In 1985, the Supreme Court decided two cases on the same day regarding the Establishment Clause and the providing of public funds to benefit parochial school children. School District of Grand Rapids v. Ball (473 U.S. 373 (1985)) and Aguilar v. Felton (473 U.S. 402 (1985)) involved programs that utilized federal funds to pay public school employees who teach in parochial schools. Both programs were struck down under the Lemon test because they had the effect of advancing religion, violating both the second and third prongs of the test. However, these cases have since been overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997).
38. See supra note 37.
40. Id. at 123-24. See also Martin, supra note 1, at 571.
41. See GUERNSEY, supra note 39, at 124.
42. 509 U.S. 1 (1993).
43. Id. at 4.
When James entered high school, his parents enrolled him in a Catholic school and requested the public school board to continue to provide the interpreter at the Catholic school. The school board denied the request because it felt that providing the service at a private school would violate the Constitution's Establishment Clause. Mr. and Mrs. Zobrest, along with many legal commentators, felt this denial violated their Free Exercise Clause rights to choose where to send their child to school. In effect, the Zobrests felt forced to choose between their religion and a publicly-funded interpreter.

The Zobrests filed an action in district court claiming first "that the IDEA and the Free Exercise Clause required the school board to provide James with an interpreter" at his Catholic school and second that such action would not violate the Establishment Clause. The district court granted summary judgment in favor of the school board, reasoning that a publicly funded "interpreter would act as a conduit for the religious inculcation of James, thereby promoting James's religious development at government expense," an action which violated the Establishment Clause.

On appeal, the Ninth Circuit Court, applying the Lemon test, determined that "by placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a 'joint sponsor' of the school's activities," an action which violated both the second and third prongs of the Lemon test, creating a "symbolic union

44. Id.
45. Id.
46. Id.
49. Huefner, supra note 47, at 16.
50. The Free Exercise Clause of the United States Constitution's First Amendment prohibits the government from acting in a manner that would inhibit one's ability to freely exercise their religion. U.S. CONST. amend. I. It states, "Congress shall make no law . . . prohibiting the free exercise [of religion]." Id.
52. Id.
53. Id. at 5.
54. Id.
55. See supra note 35 and the accompanying text.
of government and religion . . . ." The court of appeals also determined that the Zobrests' Free Exercise rights were not violated because the state's compelling interest in protecting the Establishment Clause justified the religious burden.

In a 5-4 decision written by Chief Justice Rehnquist, the Supreme Court reversed the Ninth Circuit Court of Appeals, concluding that the Establishment Clause does not prohibit a school district from placing a public employee in a sectarian school under the IDEA. Justice Rehnquist reiterated the court's consistently-held assertion that "government programs [such as the IDEA] that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Furthermore, because the IDEA distributes funds to children based on their disability and not on what school they attend, parents have "no financial incentive . . . to choose a sectarian school." The only benefit received by the school would be the tuition paid by James's parents for his enrollment. Further, by allowing parents the "freedom to select a school of their choice, [the IDEA] ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of the individual parents."

The Catalina Foothills School District contended that providing James with an on-site interpreter would violate the prior holdings of School District of Grand Rapids v. Ball and Meek v. Pittenger. The Court, however, found the respondent's reliance on these cases "misplaced." The Court held that extending aid to James did not impermissibly directly subsidize the private school and that any indirect financial benefit received by the school resulted from the parents' indi-

57. Id.
58. Id.
60. Id. at 8. The Supreme Court referred to such cases as Mueller v. Allen, 463 U.S. 388 (1983), and Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986). Both cases held that the Establishment Clause was not violated by a state statute allowing taxpayers to deduct educational expenses for children who attend sectarian schools.
62. Id.
63. Id.
64. 473 U.S. 373 (1985). Ball has since been overruled. See supra note 37.
65. Zobrest, 509 U.S. at 12 (citing Meek v. Pettenger, 421 U.S. 349 (1975)).
66. Id at 13.
The Court further found that the interpreter's function is merely "to transmit everything that is said in exactly the same way it was intended." The Court differentiated this function from that of a parochial school teacher or guidance counselor whose job is to instruct, stating that an interpreter "will neither add to nor subtract from that environment."

The Zobrest decision left unresolved many issues regarding the analysis of FAPE disputes. The requirements of school boards under the IDEA is an issue that has caused great confusion among the lower courts. The Zobrest majority chose only to address whether the Establishment Clause was violated and not whether the IDEA required a sign language interpreter to accompany James to school. This was a key oversight because now if the IDEA does not require school boards to provide special education and related services on-site at private schools in at least some situations, as the Amendments Act provides, the Zobrest holding is insignificant.

IV. RECENT CIRCUIT COURT DECISIONS

Although Zobrest was a small victory for children with disabilities attending private schools, it left unresolved whether the IDEA requires a school board to provide special education and related services to these children on-site. Three circuit court cases, decided just prior to the passage of the Amendments Act, attempted to answer this question. Unfortunately, consistency among these decisions was minimal.

A. K.R. v. Anderson Community School Corp.

K.R. v. Anderson Community School Corp., a 1996 Seventh Circuit case, involved a seriously disabled six-year-old girl, K.R., who required a full-time instructional assistant. K.R. was eligible under the IDEA to receive special educational and related services. K.R. needed help with "positioning for activities, reaching and grasping, self-help skills,

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67. Id. at 12.
68. Id.
69. Id.
70. For a discussion of some differing, lower court opinions, see infra Part IV.
71. 81 F.3d 673 (7th Cir. 1996), vacated, 117 S. Ct. 2502 (1997).
72. Id. at 676. K.R. suffered from many disabilities including "myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create[d] difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair." Id.
73. Id.
motor movements, mobility, and expression." The local school board told K.R.'s parents that if K.R. attended the public schools, she would receive "related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant," but that she would not receive the necessary services on-site or a full-time instructional assistant if she attended the parochial school. Despite this decision, K.R.'s parents enrolled her in the private school where she was provided with transportation to the therapy services at the public school, but not with an assistant. K.R.'s parents insisted that the IDEA required the school board to provide the full-time instructional assistant at K.R.'s parochial school and because the school board refused the service, filed suit in the District Court of Southern Indiana.

The district court agreed with K.R.'s parents, stating that the IDEA requires schools to provide "special education and related services designed to meet the needs of private school children." Further, the court stated that these services "must be comparable in quality, scope, and opportunity for participation" to services provided to public school children as outlined in EDGAR. The court agreed with K.R.'s parents that a child in need of a full-time instructional assistant would only benefit if the assistant regularly attended class with her.

The Seventh Circuit disagreed with the district court about the extent of comparable benefits that a school board must provide to disabled children attending private schools. The Seventh Circuit determined that the comparability requirement of EDGAR Section 76.654(a) was limited to "program benefits that [a school district] provides," and that the limitation allows school districts discretion over

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74. Id.
75. Id.
76. Id.
77. Id.
79. Id. at 1221-22 (quoting 34 C.F.R. § 300.452).
80. Id. at 1222 (quoting 34 C.F.R. § 76.654(a)).
81. Id.
83. This section of EDGAR states that "program benefits that [a school district] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the [school district] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a).
84. Anderson, 81 F.3d at 679.
what benefits to provide to private school students. The court did note, though, that "when benefits are provided [to private school students], . . . they [must] be comparable to benefits for public school students." The court reasoned that, because K.R. was offered the opportunity to receive the full-time instructional assistant at the public school, Anderson Community School fulfilled its obligations under EDGAR to offer comparable benefits along with a "genuine opportunity for equitable participation." In a broad holding, the Seventh Circuit concluded that the IDEA does not require a school board to provide on-site private school services to disabled students. "Rather," the court concluded, "public schools are given discretion under the law and will only provide voluntarily placed private school children a genuine opportunity for equitable participation."

The Seventh Circuit never addressed the Establishment Clause issue because the school board never raised the issue. An entirely different result may have occurred had the court analyzed the duties of K.R.'s instructional assistant, as done in Zobrest. A full-time instructional assistant clearly is more involved with a child's educational development than a sign language interpreter. If the court determined that the instructional assistant's duties had the effect of advancing religion or adding to the religious environment, the on-site provision of K.R.'s instructional assistant would have been denied altogether. To hold otherwise would contradict Zobrest, Lemon, and the Establishment Clause.

The Seventh Circuit's interpretation of the IDEA and EDGAR is consistent with the Amendments Act. It allows school boards almost complete discretion to decide what students are entitled to particular services. This interpretation defeats the purpose of the IDEA. By allowing school boards to decide what services to provide to voluntarily enrolled private school students, under the reasoning set forth in Anderson and the Amendments Act, a school board could satisfy its "genuine opportunity" requirement by only offering services to students who attend public schools. This result, however, seems to contradict Congress's original intent to allow private school students "equitable" participation. Offering certain services only at the public school, particularly in a situation where a child can only benefit from the service if

85. Id.
86. Id.
87. See Id. at 678-79.
88. Id. at 680.
89. Id.
it is received during instruction, would not be equitable at all. In fact, it may actually preclude the child from attending the private school altogether.

B. Russman v. Sobol

Later in 1996, the Second Circuit ruled on an issue similar to the one faced by the Seventh Circuit in Anderson. Until the age of nine, Colleen Russman, a mentally disabled student, attended a publicly-funded school set aside for students with disabilities. In 1991, Colleen’s parents and the Watervliet, New York school district agreed that Colleen should be “mainstreamed” into a regular classroom. This goal required that Colleen have access to a consultant teacher and a teacher’s aid as well as speech and occupational therapy. The Russmans asked the school district to implement Colleen’s individual education program at the Catholic school that her two sisters attended. The school district denied the Russmans’ request, stating that providing a consultant teacher and a teacher’s aid at Colleen’s school would violate the Establishment Clause. The school district did agree, however, to provide speech and occupational therapy at a neutral site. Because the Russmans could not afford the support services, they enrolled Colleen in the public school and filed an action claiming that the IDEA required the school district to provide the on-site services to Colleen.

The District Court of Northern New York agreed with the Russmans that the failure to provide on-site services was a violation of the IDEA and its regulations. The court followed an analysis similar to that followed by the Supreme Court in Zobrest v. Catalina Foothills School District. As the Zobrest Court recognized a large distinction between the duties of a classroom teacher and a sign language interpreter, the district court judge in Russman found no distinction between the duties of a consultant teacher, a teacher’s aid, and a sign lan-

90. 85 F.3d 1050 (2d Cir. 1996), vacated, 117 S. Ct. 2502 (1997).
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
99. See supra text accompanying notes 68-69.
guage interpreter. As in Zobrest, Colleen’s special education teachers would “neither add to nor subtract from the sectarian environment.”

On appeal, the Second Circuit affirmed the district court’s decision, broadly interpreting Zobrest. In applying the test for an Establishment Clause challenge outlined in Zobrest, the Second Circuit determined: “First, the assistance is a neutral government service made available without regard to religion. Second, the [services will be provided] at [Colleen’s school] solely because of a decision made by the Russman family. Third, the special education benefits flow directly to Colleen and do not financially benefit [her school].”

The Second Circuit continued by clarifying what types of publicly funded services are allowed in a private school. The court found no distinction between “mechanical assistance, such as verbatim translations by sign language,” as in Zobrest, and cognitive assistance such as a teacher’s aid and consultant. The court reasoned that “[t]o hold otherwise would interpret Zobrest in a way that distinguishes between students with physical disabilities . . . and those with mental disabilities . . . for purposes of the IDEA.”

The court’s interpretation of Zobrest may have expanded the holding much further than the Supreme Court had anticipated. The Second Circuit did not analyze or even differentiate the tasks of a mechanical assistant and a cognitive assistant. The court stated that distinguishing between students with different disabilities would be an incorrect inter-

100. Russman, 945 F. Supp. at 42-43. The judge found that the duties of the consulting teacher involved one half hour per day teaching the child and one half hour per day consulting with the child’s classroom teachers. The duties of the teaching aide consisted of teaching support. Id. at 42.

101. Id.


103. The court enumerated the test as follows:

Under Zobrest, the provision of governmental services to a religious school will survive a First Amendment challenge if: (i) the services are provided in a neutral manner without regard to religion; (ii) the services are provided at the parochial school not as a result legislative choice but rather as a result of private choice of the individual utilizing the services; and (iii) the funds traceable to the government do not “find their way into the sectarian schools’ coffers.”

Id. at 1053 (quoting Zobrest, 509 U.S. at 10). See also supra text accompanying notes 61-64.

104. Russman, 85 F.3d at 1053-54 (citation omitted).

105. Id. at 1054 (“The primary purpose of both a sign language interpreter and a teaching aid is solely to make the material intelligible to the disabled student, not to create a particular religious message or to advance a particular religious viewpoint.”).

106. Id.
pretation of Zobrest. However, Zobrest appears to distinguish only between services provided, not individual disabilities. In the religion-based curriculum of a parochial school, a cognitive assistant may have to teach a mentally disabled child in a way that directly promotes religious beliefs so that the child understands what is being taught in his or her classes. This type of assistance could violate the Establishment Clause holding of Zobrest.

The second part of the Russman decision interpreted the IDEA to determine whether it required the Watervliet School District to provide Colleen’s special education teachers at her Catholic school. The Second Circuit agreed with the K.R. v. Anderson Community School Corporation court that the IDEA affords different rights to private school students than public school students. It disagreed, though, with the Seventh Circuit’s view that “Congress intended to give disabled students voluntarily attending private school a lesser entitlement.” The Second Circuit believed that the difference stemmed from the IDEA’s language professing that the states’ provision requirement is only limited “to the extent consistent with the number and location of disabled children voluntarily in private schools.”

In its review of the IDEA’s language, the Second Circuit concluded that the denial of such on-site services could occur only where “economies of scale in providing the services at [the private school] exist” or where there would be “significant additional costs . . . borne by

107. Id. at 1054.
108. The Supreme Court’s focus throughout Zobrest was on the specific service of providing a sign language interpreter. The Court ended its decision with the statement that “[i]f a handicapped child chooses to enroll in a sectarian school, the Establishment Clause does not prevent the school district from furnishing him with a sign language interpreter . . . .” Zobrest, 509 U.S. at 13-14 (emphasis added).
110. 81 F.3d 673 (7th Cir. 1996), vacated, 117 S. Ct. 2502 (1997).
111. Russman, 85 F.3d at 1056.
112. Id. (quoting Anderson, 81 F.3d at 678).
113. Id. (quoting 20 U.S.C. § 1413(a)(4)(A)).
114. Id. The court offered as an example of permissible discretion a situation where one occupational therapist can effectively aid three students and a school district employs three occupational therapists and fourteen students disabled students. In this situation, the school board would not be required to provide a therapist at a private school if only one disabled student attended the private school because the per student cost of the therapist would be higher at the private school. However, an on-site therapist would be required to be provided by the school board if five of the fourteen students attended the private school because the cost of providing the therapist at the private school would be identical to that at the public school. Id.
the state."\textsuperscript{115} The court reasoned that where the costs are identical in providing the services at a public and private school, it would "make little sense" to provide the services only at the public school.\textsuperscript{116} Had the court interpreted the IDEA differently, disabled private school students would be limited to receiving "little more than after-school services."\textsuperscript{117}

This holding was a very liberal interpretation of both the \textit{Zobrest} decision and the IDEA. Parents of almost any disabled child in the Second Circuit can now send their child to a private school for only the cost of tuition. The problem is that this could result in astronomical expenses for school boards. Any child that requires only a purely automated assistive device, such as a wheelchair, hearing FM system, or specially designed desk, would receive it from the state because the cost incurred would be the same no matter where the child attends school. The problem is determining where to draw the line with the economies of scale. If a school board employs three occupational therapists for every fourteen disabled students at a public school, what is the minimum number of students that must attend the private school before therapy will be received on-site?\textsuperscript{118} Economies of scale would say five, but what would happen if six attended the private school? One therapist might not be effectively able to aid all six, requiring a new therapist to be hired. Situations like this could lead to a shortage of funds reflecting back to the students that the school boards are attempting to aid.

\textbf{C. Cefalu v. East Baton Rouge Parish School Board}

In \textit{Cefalu v. East Baton Rouge Parish School Board},\textsuperscript{119} the Fifth Circuit offered a burden shifting test that acts as a compromise between the Seventh and Second Circuit's holdings. The facts were very similar to those in \textit{Zobrest}.\textsuperscript{120}

Charlie Cefalu suffered from a hearing impairment and required an on-site sign language interpreter.\textsuperscript{121} Charlie attended a public school until 1993 when his parents enrolled him in a private school following the

\begin{itemize}
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 1057.
  \item \textsuperscript{118} See \textit{supra} note 114.
  \item \textsuperscript{119} 103 F.3d 393 (5th Cir. 1997), withdrawn and superseded on reh'g by 117 F.3d 231 (5th Cir. 1997).
  \item \textsuperscript{120} For a review of the facts in \textit{Zobrest}, see \textit{supra} notes 43-49 and the accompanying text.
  \item \textsuperscript{121} \textit{Cefalu}, 103 F.3d at 395.
\end{itemize}
Zobrest decision. As in Anderson and Russman, the school board refused to provide the needed special services at Charlie's private school and the Cefalus filed suit.

The District Court for the Middle District of Louisiana agreed with the decision of the District Court of Southern Indiana in Anderson which had been handed down just three months earlier. In fact, the Cefalu court "adopt[ed the] opinion in Anderson as its opinion in this case." The district court granted summary judgment in favor of the Cefalu's and required the school board to provide Charlie with an interpreter at his private school.

On appeal, the Fifth Circuit vacated the district court's decision and remanded the case in light of a new burden shifting test. The Fifth Circuit's burden shifting test required "the private school student [to] make an initial showing of a genuine need for on-site services, based upon more than mere convenience." If the student shows a genuine need, the school board must provide the services unless it can show a justifiable reason, either economic or non-economic, for denying the services. Should the school board carry its burden, the student must then show "that the [school board's] position is inconsistent with the IDEA and its regulations, or is not rationally supportable, or is otherwise arbitrary."

This test combined the "school board discretion" holding in Anderson and the "economies of scale" holding in Russman. The Fifth Circuit reasoned that although the IDEA does not mandate on-site services for voluntarily enrolled private school students, the refusal of on-site services inhibits these students' right to a "genuine opportunity for equitable participation." However, the court went on to state that "these limited resources must be distributed in a manner that allows the provision of necessary services to the greatest number of qualified students . . ." Therefore, the court reasoned that discretion should be "exercised

122. Id.
123. Id.
125. Id.
126. Cefalu, 103 F.3d at 398-99.
127. Id. at 398.
128. Id.
129. Id.
130. Id. at 397 (quoting 34 C.F.R. § 76.651).
131. Id.
in a way that assures the private school student a 'genuine opportunity for equitable participation in the program,' but, that also considers the 'number of eligible private school students and their needs.'

In essence, this decision narrows the Russman holding. Cefalu holds that on-site private school services usually will be required when the provision cost is the same at the public school. However, should a school district offer a justifiable reason for denial, such as excessive travel by state employees or a showing that the child would receive comparably greater benefits than her public schoolmates, the school has the discretion to deny the services.

The Fifth Circuit dismissed the Establishment Clause issue in Cefalu with one sentence: "In June 1993, the Supreme Court held that a public school district did not violate the Establishment Clause by providing services under the IDEA to students voluntarily attending [private] schools." Because the facts in Cefalu are almost identical to those in Zobrest, the Fifth Circuit's Establishment Clause interpretation does not affect Cefalu, but it could create a problem for lower courts. The Zobrest court found that providing an on-site sign language interpreter did not violate the Establishment Clause because the interpreter would "neither add to nor subtract from [the sectarian] environment." This conclusion was reached after an analysis of the duties performed by the interpreter. Lower courts could interpret the Fifth Circuit's holding to mean that no IDEA services provided by a public school district would violate the Establishment Clause. It is doubtful that this was the Supreme Court's intent.

V. A PROPOSED SOLUTION

It is clear from the three different holdings of the Second, Fifth, and Seventh Circuit Courts that there existed a great need for a unified interpretation of the IDEA's requirements on school districts. Congress's passage of the IDEA Amendments Act of 1997 would appear to have solved this problem. Unfortunately, though, in Congress's tunnel-visioned attempt to create uniformity among the courts, the Amendments Act will result in hurting many of the children that Congress designed the IDEA to help.

The Amendments Act states that the school boards are not required

132. Id. at 396 (quoting 34 C.F.R § 76.651).
133. Id. at 398.
134. Id. at 395 (referring to Zobrest v. Catalina Foothills Sch. Dist. 509 U.S. 1 (1993)).
to pay for special education and related services of children voluntarily attending private school. In other words, regardless of the cost or individual child's circumstances, the decision of whether a school board pays for a disabled private school child's needs is completely up to the school board. A related service, such as a hearing aid, could cost the same whether the child attends a public or private school and could still be denied simply because of their school choice. A mentally disabled child, ready to be mainstreamed into a regular classroom, may benefit more by attending the same private school where his or her siblings attend and where his or her mother teaches, but could still be denied services. Even if the cost would be less to the school board because the child's mother would act as an aid, services such as a wheelchair or speech therapist could be denied. Legislative history and common sense suggest that this is not what Congress intended.

This Comment recommends that Congress rescind the Amendments Act and require school boards to provide on-site special education and related services to disabled, private school children based on a case by case analysis. Courts should still be allowed to render the final decision regarding where services should be provided because each disabled child's situation is different. The following is a proposal for the analysis of cases in which the parent of a disabled, private school child requests a school board to provide on-site special education and related services. The five step analysis is intended to be used by courts, but could also be enacted as a guideline for school boards to follow.

In sum, the analysis is composed of the following steps: First, the court should identify the nature of each needed service. Second, the needed service should be analyzed in light of the second and third prongs of the Lemon test. Third, the court should determine whether the cost of the service differs if it is provided at the child's private school rather than a neutral site. Fourth, in the case of non-economic denial, the court should determine if the school board's "position is inconsistent with the IDEA and its regulations, or is not rationally supportable, or otherwise arbitrary." Finally, in the case of an economic denial, the court should decide if, based on the child's disability, the offsite service actually provides a "general opportunity for equitable participation with benefits comparable to those received by public school students."

1. Identify the nature of each needed service. The court must first

136. Cefalu, 103 F.3d at 398.
137. 34 C.F.R. § 76.651(a)(1).
determine whether the child requires an assistive technical device or the assistance of a state employee. If the child only needs a technical device to assist him or her in receiving instruction, such as an FM hearing system or a Braille reader, the analysis will stop here and the school district should provide the device. An assistive technical device will merely "transmit everything that is said in exactly the same way it was intended" as outlined in Zobrest. Further, the cost of supplying such a device will be the same no matter which school the child attends. The device may require occasional maintenance, but courts should view this as an additional service subject to the rest of the analysis. Whether maintenance will be provided on site will be up to the discretion of the school board.

Anderson, Russman, and Cefalu all involved the services of a state employee, so under this five-part analysis these courts would continue to the next step.

2. Analyze the needed service in light of the second and third prongs of the Lemon test. Although the Zobrest court never mentioned the Lemon test, it analyzed the tasks required of a sign language interpreter compared to that of a classroom teacher in order to determine whether it constituted a violation of the Establishment Clause. As was done in Zobrest and Russman, a court must analyze the requested service to determine whether it would have the "primary effect of promoting religion" or mixing government and religion. This analysis is necessary because if the provided service violated the Establishment Clause, the IDEA could not require the service.

To prevent a public employee from promoting a parochial school's religious doctrine, a court may have to distinguish between cognitive and interpretive services, as the Second Circuit failed to do in Russman. Depending on the extent of the cognitive assistance needed, the state-provided aid may actually be advancing the religious teachings of a parochial school in an attempt to help the child understand the day's instruction. This would result in an "excessive entanglement of government with religion" and the court should deny the on-site service. However, if the service is to be provided in a non-secular private school, the analysis may continue no matter what the outcome of this test.

138. Huefner, supra note 47, at 27.
139. Zobrest, 509 U.S. at 12.
141. See supra text accompanying notes 105-106.
142. Zobrest, 509 U.S. at 12.
3. **Determine whether the cost of the service differs if it is provided at the child’s private school rather than a neutral site.** Should a court determine that a service will cost the same regardless of its location, the service should be provided at the child’s private school unless the school board presents a non-economic, justifiable reason for denial. This element of the test utilizes the “economies of scale” view presented in Russman and Cefalu, but does not require the initial showing of on-site need as required by Cefalu.\(^4\) The drafters of the IDEA clearly intended private school students to benefit from the program and the Supreme Court has agreed that services should be provided to students based on need, not based on where they attend school.\(^4\)

**Cefalu** required a showing of a genuine need, not one of mere convenience, in order for a school board to provide on-site services.\(^4\) This required showing makes little sense when the purpose of the IDEA is to benefit disabled students regardless of whether they attend a public or private school.\(^4\) If the cost is the same to provide the service on-site at the private school, there is no reason why the child should be required to show an on-site genuine need. Providing the service at the student’s private school for mere convenience may actually be more beneficial for the child. Private school classrooms are traditionally smaller in student enrollment than public school classrooms, so the child will receive more individual attention. Additionally, as in Colleen Russman’s case, if a child’s siblings already attend the private school, the disabled child may feel more comfortable when he or she is “mainstreamed” into a regular classroom knowing that his or her siblings are close by. When differences in cost are not a determining factor, the burden should not be on the student to show on-site need, but on the school to show some non-economic reason for denial.

Should the court determine that the cost will be more to provide the service on the private school premises, the school board should be allowed the discretion to determine how it will create a genuine opportunity for participation by the child. The East Baton Rouge Parish School Board in Cefalu likely would have a strong argument not to provide the sign language interpreter at Charlie Cefalu’s school. Economies of scale would dictate that even if there is only one other student in Char-
lie's grade at the public school, while he attended the private school, the cost to provide the interpreter would double. One interpreter for each child at each school would have to be hired, but if both children attended the public school, only one would be needed. However, the only way this argument would work is if the other child is in all of the same classes as Charlie. If Charlie is the only hearing impaired student in the fourth grade, a separate interpreter would have to be assigned to his classes, while the other interpreters service children in the other grades. If another interpreter must be hired for Charlie, it would make little difference, cost-wise, where the services are performed.

Anderson and Russman also involved children requiring personal aid; however, the children in these cases had much more serious disabilities than those faced by Charlie Cefalu. Economies of scale arguments would be much less effective in these cases. These children require individual attention from their consultant teachers and instructional assistants. A second child could not utilize the services of these aids, therefore, the cost will be the same whether the children attend the public or private school. Provision of the on-site consultant teacher and instructional assistant should be mandated barring any Constitutional issue.

4. In the case of non-economic denial, determine if the school board's "position is inconsistent with the IDEA and its regulations, or is not rationally supportable, or otherwise arbitrary."148 This is the last element of the Cefalu test. When a school board denies services based on a non-economic concern, the student should still be afforded the opportunity to dispute the validity of the reason. Justifiable reasons for denial other than cost will be rare. The IDEA was established to help fund the special education needs of individual children with disabilities.149 Its purpose is economic.150 Most reasons for denial will either be economically rooted or, if non-economic, inconsistent with the IDEA or arbitrary.

A school board could attempt to argue that providing the service at a parochial school would violate a state statute prohibiting such an action even though it would not violate the Establishment Clause. Unfortunately for the state, the federal IDEA would preempt the state statute and require the service be provided on-site. This would clearly be within the intent of the framers as the pass-through system of non-

148. Cefalu, 103 F.3d at 398.
149. See 20 U.S.C. § 1400(b)(7),(8) and (c).
participating states indicates.\textsuperscript{151}

5. \textit{In the case of on-site denial, determine whether the off-site service actually offers benefits comparable to that of the public school children.} When a school board offers a justifiable reason, economic or non-economic, for on-site denial, the school board has discretion to determine where the service will be provided. However, the court’s final step in this analysis must be to determine if the services that will be provided actually offer a genuine opportunity for equitable participation with benefits comparable to those provided to public school students. This type of analysis must be done on a case by case basis weighing many factors.

If a school board chooses to only offer the services at a neutral site or on public school grounds, the court must look at the totality of the circumstances regarding the education of the child. Because the IDEA focuses on providing for the individual student,\textsuperscript{152} the court should consider the nature of the services offered by the school board in relation to the individual child’s needs. Physical, occupational, and some forms of speech therapy would not significantly hinder a child’s education if they were not provided at the child’s school. However, many disabilities, such as a hearing impairment or one requiring some form of personal assistance, do not allow dual enrollment. In these situations, a child would be precluded altogether from attending the private school because to benefit from the instruction, the service would have to be provided during class. This may violate a child’s right to a genuine opportunity for equitable participation as well as his or her right to comparable benefits.\textsuperscript{153}

In the event the court determines that the child’s needs would be better served at the school he or she attends, the court should order that the services be provided at the private school. In making this determination, the court should also weigh the economies of scale of all the services needed by the child, not just the costs of the individual services. The child’s family situation, such as where the child’s siblings attend school, may also be taken into account. Finally, the court should consider any condition unique to the child that may affect his or her educational development.

\textsuperscript{151} See \textit{supra} text accompanying notes 27-29.

\textsuperscript{152} See 20 U.S.C. §§ 1400(c), 1401(a)(19) (discussing the individualized education program).

\textsuperscript{153} 34 C.F.R. § 76.654.
VI. CONCLUSION

For over two decades, courts have wrestled with interpreting the IDEA and its predecessor, the EAHCA. The issue of whether a public school board is required to provide special education and related services at a private school voluntarily attended by a disabled child has most recently surfaced since the Supreme Court’s decision in Zobrest v. Catalina Foothills School District.\(^\text{154}\) Congress answered this question with the passage of the IDEA Amendments Act, allowing the school boards to determine whether or not they will pay for the special education at a private school. Due to the excessive costs of special education and related services and the lack of funds available to school boards, Congress has essentially taken away these services for private school students. To date, the Supreme Court has vacated and remanded the Anderson and Russman cases in light of the Amendments Act.\(^\text{155}\) Cefalu was originally vacated and remanded in light of the test the Fifth Circuit offered.\(^\text{156}\) However, in July 1997, the Fifth Circuit granted a petition for rehearing and, following the Amendments Act, found that the school board was not required to provide Charlie with a sign language interpreter.\(^\text{157}\)

It appears as though Congress was not fully aware of the impact that the Amendments Act will make. In essence, Congress has impeded the disabled peoples’ rights movement by dictating where disabled children must be educated. Disabled children have a statutory right to a “free appropriate public education.” Whether that right is provided should not depend on the name of a child’s school.

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\(^{154}\) 509 U.S. 1 (1993).


\(^{156}\) Cefalu v. East Baton Rouge Parish Sch. Bd., 103 F.3d 393, 398-99 (5th Cir. 1997) withdrawn and superseded on reh’g by 117 F.3d 231 (5th Cir. 1997).