

Analysis: SB 193 May Disadvantage Students with Disabilities

[Senate Bill 193](#) (SB 193), a bill to create a statewide education savings account (ESA or voucher) program, states that selecting a voucher has the same effect as “**parental placement**” under the Individuals with Disabilities Education Act (IDEA). As previously [noted](#) by Reaching Higher, this means that **parents and students waive most of their civil rights and potential services provided by IDEA under the bill**. In this new analysis, Reaching Higher highlights public data on educational environments that suggest students with disabilities may face barriers to enrolling in private schools, which may disadvantage students with disabilities relative to their peers in schools. This issue is of direct relevance to SB 193 as currently drafted. Finally, the analysis also provides an explanation of two recently released national reports that are relevant to the SB 193 discussion:

- On December 7, the US Department of Education released a [FAQ document](#) describing the major impacts of the March 2017 Supreme Court Case, *Endrew F. v. Douglas County School District (Endrew F.)*. The FAQ explains how *Endrew F.* **clarifies school districts’ obligations to provide a free, appropriate public education (FAPE) under IDEA**.
- On November 30, the US Government Accountability Office (GAO) released an [analysis](#) of private school choice programs (comparable to SB 193) across the country. The GAO found that participants in **private school choice programs may not always be aware of the changes in how special education is treated under parental-placement. The GAO recommended that Congress require states to notify parents and guardians about changes in federal special education provisions under parental-placement.**

Educational Environments

Each year, as required under Part B, Section 618 of the IDEA, New Hampshire submits data to the US Department of Education on the number and educational environments of children ages 3-5 and students ages 6-21 with disabilities. This data is gathered on an annual basis as part of the **child find** process – an annual requirement for local school districts to identify all children / students (ages 3-21) in their geographic footprint who may require special education services. The data breaks down students by educational environment showing, for example, the number of students with disabilities who are parentally-placed in private school. (Note: for the purposes of this analysis **we focus on grades 1-12 (~students ages 6-21)** as the state reports students with disabilities as parentally-placed in private school beginning at age 6.)

The term parentally-placed in private school refers to situations where students with disabilities are voluntarily enrolled in private school, with private resources covering the cost of their educational expenses. This is separate and distinct from situations where students with disabilities enroll full-time or part-time in private schools (often state-approved specialized institutions), but where the local public school pays for educational expenses.

As will be discussed later, school districts must provide students with a **free, appropriate public education (FAPE)** in the **least restrictive environment (LRE)** – satisfying this requirement for all students can involve any number of arrangements, made available at no cost to students and parents, with private and other specialized institutions. **Parental-placement is a voluntary choice, where FAPE and LRE are not concerns. Any student with disabilities who selects a voucher under SB 193 would be considered parentally-placed.**

Students with Disabilities and Private School Enrollment

Data from 2012 to 2015 (the latest available), show that less than 1% of students with disabilities in New Hampshire are parentally-placed in private school. This is in clear contrast to the general student population, where around 8% of students (ages 6-21) in New Hampshire enroll in private school every year. The contrast is even more evident when one considers the percentage of public and private school enrollment that are students with disabilities: **in public school, students with disabilities (ages 6-21) constitute approximately 15% of the population, whereas in private school, students with disabilities (ages 6-21) who are parentally-placed make up only around 1% of the population.**

Table 1. Students with Disabilities: Enrollment and Educational Environment – Grades 1-12 (~ages 6-21) - 2012-2015

	Row ID	2012	2013	2014	2015
Public School Enrollment	A	172,800	170,259	168,422	166,437
Private School Enrollment ¹	B	15,759	15,580	15,122	14,824
Total Enrollment	C = (A+B)	188,559	185,839	183,544	181,261
Students with Disabilities in Public School/Other non-Parentally-Placed in Private Schools (PPPS) ²	D	25,951	25,665	25,426	25,291
Students with Disabilities PPPS	E	151	173	220	180
Total Students with Disabilities (as defined under IDEA)³	F = (D+E)	26,102	25,838	25,646	25,471
Students with Disabilities PPPS as % of Total Students with Disabilities	G = (E/F)	0.58%	0.67%	0.86%	0.71%
Students with Disabilities in Public School/Other non PPPS as % of Public School Enrollment	H = (D/A)	15.02%	15.07%	15.10%	15.20%
Students with Disabilities PPPS as % of Private School Enrollment	I = (E/B)	0.96%	1.11%	1.45%	1.21%
Private School Enrollment as % of Total Student Enrollment	J = (B/C)	8.36%	8.38%	8.24%	8.18%

1. The New Hampshire Department of Education collects very limited details in terms of private school enrollment. This creates some uncertainty when analyzing enrollment data. For example, under “nonpublic schools” on the state total enrollment files published annually on the New Hampshire Department of Education’s website, there are two rows of data: “special education – elementary” and “special education – secondary” (data shown below).

Total Private School Enrollment

	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>
Special Education - Elementary	234	197	176	167
Special Education - Secondary	386	297	327	261

It is not clear what these counts refer to; however, the New Hampshire Department of Education, Nonpublic School Approval Office provides data for school year 2016-2017 that breaks down enrollment statistics for private schools by grade and town (available [here](#)). This data shows that all students counted in “special education – elementary” and “special education – secondary” are attending state approved private special education programs, indicating these students (in part) are students with disabilities who attend private school as part of their IEPs, with public schools paying for the educational expenses. Given the uncertainty, however, we include these numbers as part of the private school total enrollment.

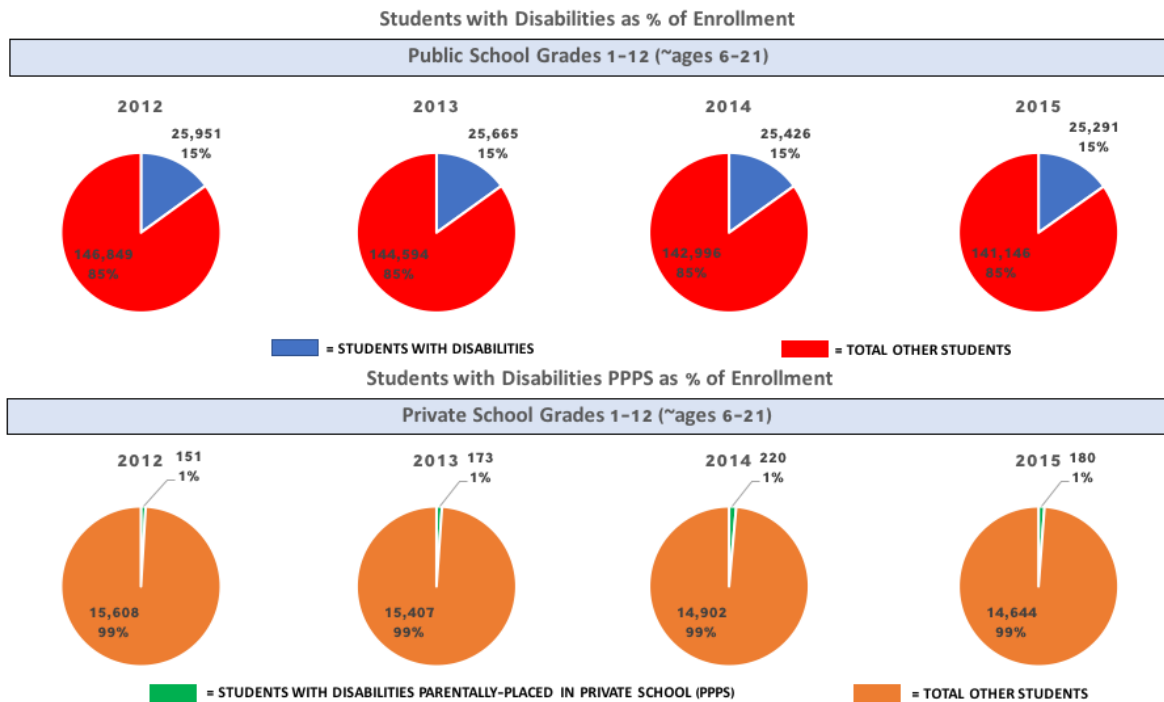
2. Row D includes all students with disabilities not parentally-placed in private school. This includes students receiving special education and related services at a variety of locations including, among others, the regular classroom, a separate facility, and residential institutions.

3. This data may not fully capture the total universe of students who receive supports or accommodations (e.g., students may receive supports through the Medicaid to Schools program or Section 504 of the Rehabilitation Act of 1973); the data in this analysis is specific to what is submitted under IDEA.

Data Sources:

- Special Education Count and Educational Environment, 2012-2015, <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bccee>.
- New Hampshire Enrollment, State Totals – Fall Enrollments by Grade, 2012-2013 – 2015-2016, <https://www.education.nh.gov/data/attendance.htm>.
- 2016-2017 Nonpublic School Enrollments in New Hampshire by Grade and Town, https://www.education.nh.gov/program/school_approval/documents/nonpublicschoolenrollment.pdf.

Figure 1. Students with Disabilities: Enrollment and Educational Environment – Grades 1-12 (~ages 6-21) - 2012-2015



SB 193 Impact

Although each family makes an enrollment decision based upon their unique circumstances, the data – the magnitude and consistency of the different rates at which students with disabilities and other students enroll in private school– strongly indicate there are structural factors causing students with disabilities to enroll in private schools at starkly lower rates (less than 1% vs. around 8% for general student population). What follows, are some likely factors.

- **Private schools** are **not required to admit students with disabilities** and may not be required to uphold either the [Americans with Disabilities Act](#) or [Section 504 of the Rehabilitation Act of 1973](#) (two federal civil rights laws that protect against discrimination).
- **Students with disabilities who are parentally-placed in for-profit private schools are not eligible to receive any IDEA funding** (and such students do not count towards determining the total amount of IDEA funds a school district must spend on students with disabilities who are parentally-placed).¹
- **In public school**, students with disabilities receive special education services from their local school district (i.e., the school district that has jurisdiction over the area where the student lives). However, *if* students with disabilities who are parentally-placed in private school receive special education services, they do so from the school district that has jurisdiction over the area in which the private school is located (e.g., a student from Manchester who is parentally-placed in a private school in Concord, will receive special education services (potentially) from the Concord school district).
- **In public school**, students with disabilities are entitled to an IEP that describes specific, individualized supports and services the school district must provide - **there is no such right in situations of parental-placement.**

¹ According to data from the [New Hampshire Department of Education website](#), there are 14 approved for-profit private schools serving approximately 1,200 students (school year 2016-2017).

- **In public school**, funding to support students with disabilities is based upon the services and supports required under students' IEPs. However, under IDEA, school districts are only obligated to spend a certain amount of IDEA funds on students with disabilities who are parentally-placed in private schools – an amount proportionate to the number of students with disabilities who are parentally-placed in private schools relative to the total number of students with disabilities in the school district's geographic footprint – **once a district has spent that amount, there is no obligation to provide any additional services.**
- **In public school**, parents have the right to be part of the IEP team, whereas in situations of parental-placement, decision-making with respect to special education rests ultimately with the local school district.
- **In public school**, parents and students have clear due process rights to challenge decisions made with respect to a student's education, whereas there are **no such rights (except with respect to child find) in situations of parental-placement.**

Without addressing these structural factors, SB 193 has potential to compound the disparities evident in the data, leading to situations where students with disabilities are excluded from opportunities open to their peers in school. At present, SB 193 does not include safeguards to prevent or mitigate against disproportionate participation rates between students with disabilities and other students.

Recent National Reports Relevant to SB 193 Debate

US Department of Education Q&A Document on recent Supreme Court Ruling

In March 2017, the US Supreme Court issued a unanimous opinion in *Endrew F. v Douglas County School District Re-1*, 137 S. Ct. 988. The case dealt with the scope of school district's obligations under IDEA to provide FAPE - in essence, how high of a standard parents / guardians can hold districts accountable to, in terms of supports provided through a student's IEP. In its ruling, the court clarified the standard and found that school districts must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."² This is a highly-technical, but significant decision. In order to help clarify the takeaways from the court's decision, the US Department of Education (Department) issued a [Questions and Answers](#) (Q&A) Document.

Reaching Higher encourages readers to review the source document from the Department as it is directly from the agency charged with implementing IDEA and other federal special education laws and regulations. We include a brief summary of the key points from the Q&A document, but please note *this should not be considered legal opinion nor advice.*

1. The Basics:

- The court clarified the standard for what school districts must do to meet their obligations under IDEA. Prior to the ruling, there had been some uncertainty about the standard, with some courts upholding a standard that said school districts only had to offer an IEP that would provide a child with more than trivial educational benefits ("*de minimus*").
- The court also clarified the requirement that each child should have the opportunity to meet challenging standards.
- The court did not outline any single test for determining "appropriate progress."

2. Defining "progress appropriate in light of a child's circumstances."

- The court did not define "in light of a child's circumstances."

² US Department of Education, *Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, December 7, 2017, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/ga-endrewcase-12-07-2017.pdf>.

- The Department notes that the decision emphasized the individualized nature of special education and the need to ensure each child has the opportunity to meet challenging objectives.

3. Immediate impact on States and Districts:

- As the Department notes, many schools are already meeting the standard clarified in *Andrew F.* The ruling provides an opportunity for all shareholders to review policies and practices to ensure students are receiving the appropriate supports and opportunities.

It is important to note relative to SB 193, that the standard clarified in *Andrew F.* does not apply to situations of parental-placement. Under SB 193, parents and students waive the right to FAPE and LRE and the due process rights that would allow them to hold school districts accountable to the standard clarified in *Andrew F.*

US Government Accountability Office Report on Private School Choice Programs and Special Education

On November 30, 2017, the US Government Accountability Office (GAO), a nonpartisan independent agency, released a [report](#) on private school choice programs (comparable to SB 193). The report focused on accountability mechanisms, information provided to the public and families, and notification of participants regarding changes that would occur in the provision of special education.

The GAO analyzed 27 different programs operating across the country (as of January 2017). As relates to special education, the GAO had two major findings:

1. The GAO estimates that no more than half of all schools participating in any form of a voucher program mention students with disabilities anywhere on their websites and no more than 53% of private schools participating in voucher programs exclusively for students with disabilities provide disability-related information on their websites.
2. 83% of students enrolled in a voucher program designed exclusively for students with disabilities were in a program that either did not provide information about changes students and families would encounter with special education, or provided inaccurate information regarding such changes.

In part due to these findings, **the GAO recommended that Congress consider requiring states to notify parents / guardians about changes in special education when a child uses a voucher to move from public school to private school.** The GAO also recommended that the Department review and correct information provided by states as relates to IDEA and private school choice.

It is important to note relative to SB 193, that the bill does not compel any entity – not the New Hampshire Department of Education, participating private schools, nor the scholarship organization(s) – to provide parents / guardians with information about how students with disabilities will receive different treatment under IDEA should they take a voucher to enroll in private school.