INSTITUTE FOR JUSTICE

Testimony of Erica Smith
For the Kansas House of Representatives
House Standing Committee on Education
Concerning HB 2174
Held on February 18, 2015

My name is Erica Smith and I am an attorney at the Institute for Justice. Thank you for allowing me to testify on the Tax Credit for Low Income Students Scholarship Program Act's impact on special-needs students, specifically on their entitlement to special-education services.

The Institute for Justice is a non-profit public interest law firm headquartered in Arlington, Virginia, a suburb of Washington, D.C. Since opening our doors in 1991, we have worked on legal issues in four areas: property rights, economic liberty, the First Amendment Free Speech Clause, and school choice. In the fourth area, school choice, we assist legislators interested in creating school-choice programs to ensure that whatever programs are passed can withstand subsequent legal challenge. If such challenges are filed against the constitutionality of the program, we help the state protect the program by intervening in the lawsuit on behalf of parents. We consider ourselves the lawyers to the school choice movement.

Summary of Testimony

As currently written, the Tax Credit for Low Income Students Scholarship Program Act ("Act" or "Scholarship Program") is based on a bit of a misunderstanding of the rights of disabled students under federal law. Section 57(f) of the Act reads, "An eligible student's participation in this program by receiving an educational scholarship constitutes a waiver to special education services provided by any school district, unless such school district agrees to provide such services to the qualified school." In reality, this is only partly true.

901 N. Glebe Road, Suite 900 Arlington, VA 22203 (703) 682-9320 (703) 682-9321 Fax
general@ij.org www.ij.org

Under federal law, a parent's decision to place her disabled child in a private school waives the child's *individual* right to a "free appropriate public education" (FAPE) from their local educational agency (LEA); but federal law still entitles private-school students to some special-education services as a *class*. Federal law obligates LEAs to spend an equitable proportion of their federal funds for disabled students on services for disabled students in private schools. However, it is important to understand that under federal law, the LEAs have broad discretion on how to spend these funds, and many disabled students will not have all (or any) of their special needs met by their LEA if they transfer to private school.

Thus, this body should either strike or clarify the Act's waiver provision so that it could not possibly be construed to conflict with federal law. In addition, we recommend inclusion of a provision requiring notification of parents of disabled children who wish to participate in the Scholarship Program that by agreeing to participate in the Scholarship Program and transferring their child to private school, they are giving up their individual right to special-education services (FAPE) from their LEA.

Existing Rights of Disabled Students

The federal Individuals with Disabilities Education Act (IDEA) provides various rights to disabled students. 20 U.S.C. § 1400 *et. seq.*; *see also* 34 C.F.R. § 300 *et. seq.* (implementing federal regulations). Most importantly, IDEA requires LEAs to provide each public-school student with a disability with FAPE. *See* 20 U.S.C. § 1412(a)(1). In order to accomplish this, IDEA requires that each public-school student have an individualized education plan (IEP) that is developed jointly by the school staff and the student's parents. IEPs must include any special-education services that the child needs, free of charge.

Disabled students who are parentally placed[1] in private school, however, have no individual entitlement to FAPE. 34 C.F.R. § 300.137. Thus, when parents decide to participate in the Scholarship Program, they are waiving their entitlement to an IEP, and to FAPE.[2]

[1] Parentally placed disabled private-school students must be distinguished from students placed in, or referred to, private schools by public agencies because their public schools could not adequately meet the

The only right that parentally placed private-school students have to special-education services under IDEA is a *class* entitlement (as opposed to an *individual* one). LEAs must allocate a proportionate share of funds received from the federal government to disabled private-school students. 20 U.S.C. § 1412(a)(10)(A)(i). In other words, if 10 percent of a school district's disabled students are enrolled in private schools, the school district has to set aside 10 percent of its federal IDEA funding for these students as a collective group. While LEAs have to consult with the private schools and parents of the disabled students before determining how to allocate the money, it is ultimately in the LEA's discretion how to spend it. So for instance, a LEA may decide to spend the money to hire an extra speech therapist, even though only some of the disabled private-school students need such a therapist, while declining to spend any money on other programs, even though some of the disabled private-school students need physical therapy or behavior therapy. Thus, parentally placed private-school students often do not receive from the government all (or any) of the special-education services they would have received in public school, and have to pay for these services out of pocket, obtain them from their private school, or forego them.

Although state and local funds could supplement the federal funding, 20 U.S.C. § 1412(a)(10)(A)(ii)(IV), the State and the LEAs rarely spend more money than they have to on private-school students. In addition, Kansas law does not appear to provide parentally placed, disabled private-school students with any relevant additional rights to those provided by federal law.

---

student's needs—the latter category of students are still entitled to all the rights they would have if they were still in public school. *See* 20 U.S.C. § 1412(a)(10)(B). It is also possible that a parent could decide to place her disabled child in the private school in the course of challenging the public school's IEP as inadequate, and then seek a retroactive determination that she is entitled to reimbursement from her LEA if an administrative board or a court does in fact decide the public school was inadequate for that child—but that is an unusual circumstance.

[2] Importantly, if a parent decides to leave the Scholarship Program and re-enroll their IDEA-eligible child in the public school system, that child once again becomes entitled to FAPE.

Analysis of the Act's Current Waiver Provision

Thus, as currently written, the Act's waiver provision does not precisely describe the rights of disabled students participating in the Scholarship Program. The waiver provision could possibly be interpreted as conflicting with the federal requirement that disabled students that have been parentally placed in private schools have an entitlement, as a class, to an equitable portion of federal IDEA funds.

Removing this provision, however, would also not change the legal reality that disabled students participating in the Scholarship Program waive their *individual* entitlements under IDEA, including to special-education services.

Conclusion

The waiver provision should thus be modified to only refer to waiver of individual rights to FAPE, or alternatively, struck completely—as Bill 2035 proposes. Indeed, there is no reason the Act must speak to the waiver issue at all, as this area is already covered by federal law.

However, it is important to note that if this body does decide to strike the provision, parents who wish to participate in the Scholarship Program should still be notified that they are waiving their individual rights to special-education services under federal law. This can go a long way to preventing any misunderstanding about what parents and their children are entitled to under the Scholarship Program.

Thank you for the opportunity to testify.