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with Disabilities Education Act

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FINDING THE WAY BACK HOME: FUNDING FOR HOME SCHOOL CHILDREN UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Samuel Ashby Lambert

The Individuals with Disabilities Education Act provides funding for the special education and related services required by children with disabilities. This funding is available for children who attend either public or private schools. The Ninth Circuit, in Hooks v. Clark County School District, decided that disabled children who are educated at home may be excluded from IDEA funding if they reside in states whose definition of "private school" does not include home schools.

This Note critically examines the analysis of the Hooks court and determines that the court's reasons for deferring to state law categorizations of home schools are not persuasive. Additionally, a survey of state education statutes reveals that the Hooks interpretation of the IDEA creates an arbitrary scheme that both frustrates the purpose of the IDEA and oversimplifies the ways and reasons that states categorize types of schooling. Home schools should be considered private schools for purposes of the IDEA.

INTRODUCTION

The number of children in home schools has swelled in the past decade¹ as a growing segment of the American public has become aware of shortcomings and even dangers associated with public schools.² Many parents are choosing to school at home not just for religious reasons, but also because they are "convinced that their child's interests in education are better served in a home school setting, where the child can receive individualized instruction in a controlled environment."³

1. William Grob, Note, Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities, 16 Ga. St. U. L. Rev. 823, 823 (2000) ("[E]stimates place the number of homeschoolers at nearly 1.5 million . . ."); Barbara Kantrowitz & Pat Wingert, Learning at Home: Does It Pass the Test?, Newsweek, Oct. 5, 1998, at 64, 66 (noting that the number of home school children in the United States in 1998 was five times what it had been in 1990).

2. Public schools have received sharp criticism due to a perception that children sometimes do not even learn how to read or make simple calculations. See, e.g., Paul G. Vallas, Making the Grade: Chicago Schools CEO Tells How He Rescued a Failing System, Denver Post, Apr. 18, 1999, at 1H (suggesting that school system could graduate those "unable to read or compute"). High profile school shootings in the 1990s brought awareness of school violence to a new high. See, e.g., Lynn Schnaiberg, Home Schooling Queries Spike After Shootings, Educ. Wk., June 9, 1999, at 3 (describing dramatic surge of interest in home schooling in the wake of Columbine and other school shootings). Media coverage of school violence will likely continue. See, e.g., Dana Canedy, Florida Teenager Declares Sorrow for Killing Teacher, N.Y. Times, July 27, 2001, at A12.

3. Michael Brian Dailey, Home Schooled Children Gaining Limited Access to Public Schools, 28 J.L. & Educ. 25, 25 (1999). A discussion of the possible merits and disadvantages of home education is beyond the scope of this Note. It is worth mention, however, that the common perception of home school parents and children as primarily

Determined parents won the right to educate their children at home in the face of opposition from those who wanted to make public education not a right, but a duty.⁴ Despite these victories, home educators still face opposition and discrimination. Additionally, parents are challenged by the demands home schooling places on their time and resources. Parents with disabled children face a particularly prohibitive barrier—the high cost of special education and related services. Recognizing these costs, Congress passed the Individuals with Disabilities Education Act (IDEA) to assist handicapped families with children by allocating funds and requiring states to provide special education and related services. However, the recent Ninth Circuit decision in *Hooks v. Clark County School District* denies disabled children who are educated at home the right to benefit from IDEA funds.⁵

Part I of this Note will introduce the IDEA, explain its goals, and discuss the provisions it makes for publicly and privately educated children. Part II will discuss *Hooks* and its consequences for parents who wish to home school a disabled child. Part III will take a closer look at *Hooks*, explore the weaknesses in the court's reasoning, and conclude that the case was wrongly decided. Part III will also examine the laws of various states, illustrating five different ways that states categorize public, private, and home schools, and will apply the *Hooks* analysis to those categories to show that *Hooks* does not produce an interpretation of the IDEA that is workable on a national scale. An IDEA interpretation that includes home schools within the definition of "private school" is workable and better fulfills the purpose of the IDEA to help educate handicapped children. Home school children with disabilities should be afforded the same benefits as children educated in private schools, thereby "strengthening the

religious fanatics and social misfits, respectively, is either misguided or outdated. See, e.g., Roland Meighan, *The Next Learning System* 5–8 (1997) (describing studies in which home school children "performed much better than their school-based counterparts" academically and were better adjusted socially); Grob, *supra* note 1, at 825 (noting that "[w]hat many once called a religious 'fringe' movement today has become mainstream"); see also, e.g., David Guterson, *No Longer a Fringe Movement*, *Newsweek*, Oct. 5, 1998, at 71, 71 (explaining that home educators "are often from the same American mainstream that once frowned on home schooling"); Kantrowitz & Wingert, *supra* note 1, at 66 (stating that "[j]ust a few years ago, home schooling was the province of religious fundamentalists Now it's edging ever closer to the mainstream.").

4. It is beyond the scope of this Note to explore parental rights and interests in education generally or home education specifically. For a journey into that realm see generally Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 *Cap. U. L. Rev.* 887, 890–91 (1996) (reviewing constitutional framework of these cases); Jeff Prather, *Part-Time Public School Attendance and the Freedom of Religion: Yoder's Impact upon Swanson*, 29 *J.L. & Educ.* 553, 553 (2000) (discussing litigation giving rise to parental right to home school); William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 *Akron L. Rev.* 177, 177–180 (2000) (considering the significance of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

5. 228 F.3d 1036 (9th Cir. 2000), cert. denied, 121 S. Ct. 1602 (2001).

role of parents” and creating a “meaningful opportunit[y]” for these parents to educate their children “at school *and* at home.”⁶

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Individuals with Disabilities Education Act was passed in 1975 as the Education for All Handicapped Children Act.⁷ It was passed in order to assist states with the education of disabled children who, as a group, were often ignored or inadequately served by their local schools.⁸ Its stated purpose is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”⁹ Congress found that “it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities.”¹⁰ This Part will look at how Congress crafted the IDEA to achieve these goals, discussing the Act’s general provisions, the formation of Individualized Education Programs, and the IDEA’s strong preference for public education.

A. General IDEA Provisions

The IDEA assists states by providing federal funds for special education and related services. In order to receive federal funding, each state must identify handicapped children and create Individualized Education Programs (IEPs) to meet the particular needs of those children.¹¹ The disabilities targeted by the IDEA include hearing, speech, language, visual, orthopedic, and health related impairments, mental retardation, traumatic brain injury, learning disabilities, serious emotional disturbance, and autism.¹² A variety of services can be provided for children facing these challenges, including speech-language pathology and audiology, physical and occupational therapy, orientation and mobility ser-

6. 20 U.S.C. § 1400(c)(5)(B) (Supp. V 1999) (emphasis added).

7. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1487). This name is pertinent because it shows that the Act was intended “to obviate some mischief, to supply [a particular] inadequacy.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538 (1947).

8. See, e.g., Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 Dick. L. Rev. 613, 615–16 (1999) (noting that in 1975 “Congress found that over half of the eight million children with disabilities in the United States at that time were not receiving appropriate educational services” and that “one million of these children were excluded entirely from the public school system” (citations omitted)).

9. 20 U.S.C. § 1400(d)(1)(A).

10. Id. § 1400(c)(6).

11. Id. § 1412(a)(3)–(4); see also Mark H. Van Pelt, Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wis. L. Rev. 1469, 1475 (explaining how IEPs are prepared).

12. Nat’l Info. Ctr. for Children and Youth with Disabilities (NICHCY), *Questions and Answers about IDEA*, NICHCY News Digest, Jan. 2000, at 3–4, at <http://www.nichcy.org/pubs/newsdig/nd21.htm> (on file with the *Columbia Law Review*).

vices, psychological and social work services, diagnostic and evaluative medical services, and parent counseling and training.¹³

The broad scope of these provisions affects the lives of many American families. It is estimated, for example, that speech, language, and hearing disorders alone “affect one of every 10 people in the United States.”¹⁴ Also, five to ten percent of the population is affected by learning disabilities.¹⁵ Children from these population groups can benefit greatly from the federal funds made available by the IDEA.

B. IEP Formation and Parental Participation

The IDEA mandates that an “IEP [t]eam” develop an IEP for each disabled child.¹⁶ The IEP is the “*modus operandi* of the [IDEA].”¹⁷ It describes the child’s present levels of performance, measurable goals for the future, and the services to be provided by the school.¹⁸ The IEP has considerable power—it can give the child a federally protected right to participate in the activities that it prescribes.¹⁹

Since parents are designated as part of the IEP team, they can and should have influence in the development of their child’s IEP.²⁰ The

13. *Id.* at 5; see also Lauri M. Traub, Comment, The Individuals with Disabilities Education Act: A Free Appropriate Public Education—At What Cost?, 22 Hamline L. Rev. 663, 664, 679 (1999) (discussing some types of services available to disabled children).

14. NICHCY, Speech and Language Disorders (June 2001), at <http://www.nichcy.org/pubs/factshe/fs11.pdf> (on file with the *Columbia Law Review*).

15. NICHCY, Learning Disabilities (Jan. 2001), at <http://www.nichcy.org/pubs/factshe/fs7.pdf> (on file with the *Columbia Law Review*). NICHCY reports that some estimates for learning disabilities range as high as 30%, but indicates that “5% to 10% is a reasonable estimate.” *Id.*

16. 20 U.S.C. §§ 1412(a)(4), 1414(d)(3).

17. *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 368 (1985); see also David M. Engel, Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference, 1991 Duke L.J. 166, 178 (noting that “[t]he IEP is the child’s ticket to an ‘appropriate’ education,” including “transportation, academic instruction, physical education, and extracurricular activities”).

18. 20 U.S.C. § 1414(d)(1)(A).

19. Individualized Education Programs, 34 C.F.R. § 300.350(a) (2000) (“[E]ach public agency *must* . . . [p]rovide special education and related services to a child with a disability *in accordance with the child’s IEP* . . .” (emphasis added)); see also *M.H. v. Mont. High Sch. Ass’n*, 929 P.2d 239, 244–45 (Mont. 1996) (stating that “ordinarily, students do not have a constitutional right to participate in interscholastic sports,” but that “an IDEA-qualified student’s guaranteed right to a free and appropriate public education and related services includes participation in interscholastic sports where such participation is included as a component of the student’s IEP,” and finding that a student’s “federally protected right to participate in interscholastic sports derive[s] solely from the express requirements of his IDEA IEP”); Adam A. Milani, Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports, 49 Ala. L. Rev. 817, 830–31 n.38 (1998) (discussing *M.H.* and related cases).

20. See 20 U.S.C. § 1414(d)(1)(B) (including parents within definition of “IEP [t]eam”); Martin A. Kotler, The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change, 27 U. Mich. J.L. Reform 331, 361–62 (1994) (“Under the [IDEA], the child’s program *must* be developed jointly by the educational agency and

parents “are members of any group that makes decisions on the educational placement of their child.”²¹ Teams also include a regular teacher, a special education teacher, and “a representative of the local educational agency.”²² When developing the IEP, the team considers “the strengths of the child and the concerns of the parents,” as well as the results of the child’s evaluation.²³ Unfortunately, however, parents often do not participate actively in the formation of IEPs.²⁴ This may be due to a lack of understanding or interest, but may also stem from institutional hostility to parental involvement.²⁵

IEP formation has a profound impact on a child, and is especially critical to parents who prefer private education, since the IEP team, in conjunction with local rulemakers,²⁶ has the power to determine whether a child can attend private school and still receive free special education.

the parents.” (emphasis added)); see also *id.* at 361 (“On even a casual review of the [IDEA], the pervasive Congressional insistence that parents be involved in decisions affecting the educational placement of their children is striking.”); Tara J. Parrillo, Comment, *The Individuals with Disabilities Education Act (IDEA): Parental Involvement and the Surrogate Appointment Process*, 74 *Or. L. Rev.* 1339, 1341–42 (1995) (“The choice to involve parents in the decisionmaking process reflects Congress’ belief that the educational opportunities and rights of students with disabilities could best be protected by creating an arena where parents and educators could jointly plan a disabled child’s education.” (citation omitted)). For an account of the specific rights and remedies afforded parents, see generally Engel, *supra* note 17, at 178–79; Parrillo, *supra*, at 1341–50 (explaining parental rights to notice and consent, examination of records, independent evaluation, and due process review).

21. 20 U.S.C. § 1414(f).

22. *Id.* § 1414(d)(1)(B). This list is not exhaustive. See *id.*

23. *Id.* § 1414(d)(3)(A).

24. Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 *U. Dayton L. Rev.* 243, 279 n.316 (1994) (“Despite the active parental role assumed by IDEA, . . . parents provided no input in 70% of the IEPs.” (citation omitted)); see also Engel, *supra* note 17, at 194 (“In social and cultural terms, [the parents’] power and authority relative to the other [IEP team] members is [sic] small. In legal terms, however, their power is great.”).

25. See Kotler, *supra* note 20, at 363, 366 (noting the “strong resentment by educators of the parental right and power under the Act to challenge the educators’ professional judgment” and explaining that “much of the activity of the special educators has focused on attempting to exclude parents from the processes mandated by the Act”); see also Michael S. Knapp et al., *Cumulative Effects of Federal Education Policies on Schools and Districts* 143 (1983) (writing that educators are hostile to parental veto not because it could be costly to schools, but because they do not like their professional judgment to be challenged); Roland K. Yoshida et al., *Parental Involvement in the Special Education Pupil Planning Process: The School’s Perspective*, 44 *Exceptional Child* 531, 533 (1978) (“[A]ttitude data suggest the possibility that a decision making role for parents during planning team meetings may face some strong opposition.”).

26. See *infra* text accompanying note 38 for an illustration of how a local policy can deny home school students access to special services.

C. IDEA Funding Provisions for Public and Private Education

Although the IDEA defines “special education” to include instruction in a variety of locations, “in the classroom, in the home, in hospitals and institutions, and in other settings,”²⁷ it also establishes a “strong preference for educating students with disabilities in regular classes” at “the school the student would attend if not disabled.”²⁸ The IDEA contemplates three educational options: (1) public school; (2) private school by referral from the public school administration; or (3) private school by unilateral parental decision.²⁹ The IEP normally requires the child to attend the local public school, or if the team decides that the public school is unable to provide what the child’s IEP requires, it may refer the child to an adequately equipped private school. In either case the state (assisted by federal IDEA funds) pays any expenses for special education and related services.³⁰

If, however, the parents disagree with an IEP team decision requiring public school attendance, and do not wish their child to attend public school, they can unilaterally decide to place their child in a private school.³¹ In this case they will only be completely reimbursed for special education expenses “if a court or hearing officer determines that the public agency did not make a ‘free appropriate public education’ available to the child in a timely manner.”³²

Some provision, however, is still made for disabled children unilaterally placed in private schools. States do not have to spend their own money on such children but must allocate federal funds to them as a group³³ “by a formula that produces an amount that is proportional to the number of private school children with disabilities as compared to

27. 20 U.S.C. § 1401(25).

28. Judith E. Heumann, U.S. Dep’t of Educ., Questions and Answers on the Least Restrictive Environment Requirements of the Individuals with Disabilities Education Act (Nov. 23, 1994), at www.nichcy.org/pubs/otherpub/doelre.htm (on file with the *Columbia Law Review*); see also 20 U.S.C. § 1412(5)(A) (disfavoring “removal” of children from “the regular educational environment”).

29. 20 U.S.C. § 1412(a); see also Traub, *supra* note 13, at 668–69 (describing funding for each IDEA educational option).

30. 20 U.S.C. § 1412(a)(10)(B).

31. Parents also have procedural safeguards built in to the IDEA allowing them to challenge aspects of an IEP, but a review of the details of parental due process rights under the IDEA is beyond the scope of this Note. To understand the details, see *id.* § 1415 (detailing “[p]rocedural safeguards”); see also *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 368 (1985) (discussing procedural safeguards of IDEA); Goldman, *supra* note 24, at 280–82 (explaining procedural safeguards, and remarking that the effectiveness of a due process hearing “is diminished by the hurdles of information, time, and money”).

32. Traub, *supra* note 13, at 670 (describing 20 U.S.C. § 1412(a)(10)(C)(ii)).

33. “[S]tates are only required to spend proportionate amounts on special education services for this class of students as a whole.” *Veschi v. Northwestern Lehigh Sch. Dist.*, 772 A.2d 469, 472 (Pa. Commw. Ct. 2001).

the total number of children with disabilities in the school district.”³⁴ This means, for example, that if ten percent of the disabled children in a district are placed in private schools by their parents, the district should spend ten percent of its federal IDEA funds on those children. The IDEA thus balances a preference for public schooling with the goal of assisting all disabled children: Privately placed children do not individually receive the free special education and related services that their counterparts in public schools receive, but they collectively benefit from their proportionate share of federal IDEA funds.

II. THE IDEA AND HOME SCHOOLS: *HOOKS v. CLARK COUNTY SCHOOL DISTRICT*

The IDEA distinguishes between public and private schools for purposes of funding, but it does not explicitly define what they are. Consequently, it is not obvious from the outset whether home schools fall under the umbrella of “public” or “private,” or whether they constitute a separate category of their own. This Part will examine the recent Ninth Circuit decision in *Hooks v. Clark County School District*,³⁵ which addresses the issue of whether home schools are private schools under the IDEA.

A. *The Background*

In 1994, William and Catherine Hooks applied for and received a home education exemption from Nevada’s compulsory school attendance law.³⁶ Thereafter, they educated their son Christopher at home. Two years later, Christopher was found to be “medically eligible for speech therapy services.”³⁷ His parents requested that his speech therapy be provided by his local public school. The request was denied, since school policy stated that “students who receive the home-education exemption ‘do not have access to instruction and/or ancillary services with the public schools.’”³⁸ The Hooks family filed suit, claiming that Christopher was a child unilaterally placed in a private school and, as such, was eligible to receive some school speech therapy services under the IDEA.³⁹ The Ninth Circuit determined that state law should govern whether

34. *Forstrom v. Byrne*, Nos. A-2731-99T2, A-2886-99T2, 2001 N.J. Super. LEXIS 215, at *6 (N.J. Super. Ct. App. Div. May 21, 2001). The *Forstrom* court reports that the defendant school district received “\$510 per child” from the federal government. *Id.* at *7. For an explanation of funding and privately placed children, see generally Kenneth R. Warlick, U.S. Dep’t of Educ., Memorandum: Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools (May 4, 2000), at <http://www.nichcy.org/private.htm> (on file with the *Columbia Law Review*).

35. 228 F.3d 1036 (9th Cir. 2000), cert. denied, 121 S. Ct. 1602 (2001).

36. *Id.* at 1037–38; see also Nev. Rev. Stat. Ann. 392.070 (Michie 2000) (providing exemption for home education).

37. 228 F.3d at 1038.

38. *Id.*

39. See *supra* text accompanying notes 33–34.

home schools are private schools, and since under Nevada law “private school” is not defined to include home schooling, the Hooks family lost its case.

B. *Why State Law Governs the Provision of Federal IDEA Funds*

The court provided a three pronged explanation of how the IDEA leaves the definition of “public school” and “private school” up to individual states. First, the court determined that “the plain language does not *compel*” the inclusion of home schooling in the definition of “private school.”⁴⁰ Second, the United States Office of Special Education Programs (OSEP), which was created to “administer[] and carry[] out”⁴¹ the IDEA, issued a policy letter stating that the “determination of whether a home education constitutes private school placement must be made on the basis of state law.”⁴² The court determined that deferring to OSEP is acceptable, since “[t]he Supreme Court has taken guidance from an OSEP policy letter.”⁴³ Third, the court noted that Congress ratified this interpretation when it amended the IDEA,⁴⁴ and “[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation.”⁴⁵

C. *Application of Nevada Law*

After finding that states should define what “public school” and “private school” mean under the IDEA, the court looked to Nevada law to see

40. 228 F.3d at 1040.

41. 20 U.S.C. § 1402(a) (Supp. V 1999).

42. 228 F.3d at 1040 (quoting OSEP Policy Letter to Williams, 18 Indiv. with Disabilities Educ. L. Rep. (LRP) 742, 744 (1992)).

43. *Id.*; see also *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988) (citing OSEP policy letter); *Mary P. v. Ill. State Bd. of Educ.*, 919 F. Supp. 1173, 1179 (N.D. Ill. 1996) (noting that “[i]nterpretive agency letters . . . aid the court ‘insofar as’ or ‘to the extent that’ they do not contradict clear statutory or regulatory mandates,” and that they are given a large degree of deference).

44. See 228 F.3d at 1040 (“[T]he amended IDEA provides . . . that ‘[t]he term “elementary school” means a nonprofit institutional day or residential school that provides elementary education, *as determined under State law.*’” (quoting 20 U.S.C. § 1401(5)) (second alteration in original)). The IDEA was amended in 1997. For a discussion of the history surrounding the 1997 IDEA amendments, see generally Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & Educ. 543, 543 (1999) (including historical analysis of IDEA language and discussing changes introduced by 1997 amendments); Eyer, *supra* note 8, at 626–36 (considering, inter alia, congressional motivations and purposes behind 1997 amendments and their impact on the effects of the statute); Jennifer A. Knox, Comment, *The IDEA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, but Serving Only a Select Few*, 49 Cath. U. L. Rev. 201, 224–40 (1999) (disapproving of additional limitations imposed by 1997 amendments on the provision of funding and services for disabled children placed in private schools).

45. 228 F.3d at 1040 (quoting *United States v. Bd. of Comm’rs*, 435 U.S. 110, 134 (1978)).

whether home education comes under the umbrella of “private school.”⁴⁶ Nevada law provides that private schools are “private elementary and secondary educational institutions,” and that the term “private school” “does not include a home in which instruction is provided to a child excused from compulsory attendance pursuant to [applicable Nevada law].”⁴⁷ The court discussed how this definition comports with the common meaning of the phrase “private school or facility,”⁴⁸ presumably in order to show that the Nevada interpretation is compatible with what could be expected by the drafters of federal law. The court then noted that “[e]xempted educational environments avoid certain regulatory requirements imposed on institutional ‘private schools’ in Nevada,”⁴⁹ implying that since it is easier to be a home school, it is fair to extend fewer benefits to home schooling families.

D. *The Consequences of Hooks*

The outcome of *Hooks* is critical for families because if home schools are regarded as private schools, home school children can receive their proportionate share of federal IDEA funds. If home schools are neither public nor private, they are excluded from even the limited help afforded private school students. Additionally, some school districts allow disabled private school children “to participate in the public school program for . . . particular service[s],”⁵⁰ and yet still exclude home school students.⁵¹ If home schools were considered private schools, home school students could no longer be arbitrarily excluded from a system allowing private students to partially opt in to public services.

46. The *Hooks* family argued that “Christopher [was] . . . a child placed unilaterally in private school by his parents.” Id. at 1039. Under some statutory schemes parents may be able to argue that home schools are a subset of public schools, since there is oversight by public administrators. See *infra* Part III.B.5.

47. 228 F.3d at 1039 (quoting Nev. Rev. Stat. Ann. 394.103 (Michie 2000) and referring to id. 392.070). Nevada actually changed its laws during the course of the *Hooks* case, apparently in reaction to the case, so Nevada law is discussed here in its pre-amendment form. See Michael Farris, Access to Special Services Varies from State to State, Wash. Times, Apr. 25, 2000, at E5 (“Since the [*Hooks*] appeal was filed about a year ago, the Nevada Legislature has approved an amendment that requires local school districts to give the same level of . . . services to home-school students as federal law requires they give to private-school students.”). *Hooks* is still worthy of discussion, though, since it affects families in other states as a precedent-setting interpretation of the IDEA. See, e.g., *Forstrom v. Byrne*, Nos. A-2731-99T2, A-2886-99T2, 2001 N.J. Super. LEXIS 215, at *7 (N.J. Super. Ct. App. Div. May 21, 2001) (citing *Hooks*).

48. 228 F.3d at 1040.

49. Id. at 1038 (citing Nev. Rev. Stat. Ann. 394.130 (mandating that private schools provide instruction in the same subjects required by law for public schools), 394.251 (requiring license for educational institutions), 651.050(2)(k) (subjecting private schools to requirements for places of public accommodation)).

50. *Forstrom*, 2001 N.J. Super. LEXIS 215, at *34.

51. Id. at *3.

The consequences for states, if home schools were counted as private schools, would not be so dramatic. One New Jersey school district, for example “conducted a head count of students qualified to receive the benefit of IDEA funds” and received a “per child” allocation from the federal government.⁵² A child schooled at home “was not included in the head count” because the school district did not consider home school students qualified.⁵³ However, if the school district had not refused to count home school children, it would have received more federal money, which in turn could have been used to help provide services for home school children. This refusal to even count home school students thus looks more like an institutional bias against home schooling⁵⁴ than an effort to protect scarce state resources.⁵⁵

Indeed, including home school children may be the most cost efficient solution for states. It is certainly less expensive for public schools either to pass along some federal funding or to provide some services than to provide for the child’s entire education.⁵⁶ If parents are faced with an all-or-nothing decision, they might be financially compelled to place their child into an all-public education, shifting the entire burden of their child’s education onto the state. Given purported concerns about educational resource scarcity, it is irrational not to allow willing parents to share in the responsibility for their own child’s education.⁵⁷

The consequences stemming from *Hooks* have not gone unnoticed. The Home School Legal Defense Association is already advocating a clarifying amendment to the IDEA:

Congress can fix this problem by clearly stating that the purpose of IDEA was to provide “education for *all* special needs chil-

52. Id. at *6–*7.

53. Id. at *6.

54. See, e.g., Dailey, *supra* note 3, at 30 (noting “public school officials’ intense resentment toward the home schooled movement” and that “[t]hese officials perceive the desire to home school both as a ‘slap in the face’ of the public schools and a disservice to the child’s education”); cf. Jo Anna Natale, *Understanding Home Schooling*, Am. Sch. Bd. J., Sept. 1992, at 26, 26 (explaining negative attitudes of public school advocates towards home schools).

55. See, e.g., Dailey, *supra* note 3, at 29 (“Th[e] opposition argues that . . . it is fundamentally unfair to expend these [limited] resources on home schooled children who have opted out of public schools.”).

56. David W. Fuller, Note, *Public School Access: The Constitutional Right of Home-Schoolers to “Opt In” to Public Education on a Part-Time Basis*, 82 Minn. L. Rev. 1599, 1628 (1998) (“Although some immediate administrative expenses would arise when home-schoolers attend on a part-time basis, the costs of accommodating opt-in requests would usually fall far short of the costs of providing full-time education—which home-schoolers . . . are already free to demand at any time . . .”). Although many complain about part-time attendance straining limited financial resources, “funding structures are often carefully calibrated to take part-time attendance and other complicating factors into account.” Id. at 1627.

57. Fuller remarks that “home-schoolers requesting public school access are simply asking for a subset of an existing benefit in the context of a society with functioning institutions well suited to grant it.” Id.

dren,” and by clarifying the term *private school* to include *all* home schools, regardless of whether a state classifies a home school as a home school or a private school under state law.⁵⁸

This amendment would not actually change the IDEA, but would rather serve to strengthen and reiterate the purpose of the IDEA, which, as argued below, was defeated by the *Hooks* court’s deference to state law.

III. A CLOSER LOOK—WHY *Hooks* Is Wrongly Decided

This Part will argue that the *Hooks* court, by making benefits to disabled children depend on idiosyncratic state laws, interprets the IDEA in a way that is both inconsistent with the purpose of the IDEA and practically unworkable at a national level. In holding that “the IDEA leaves discretion to the States to determine [whether] home education . . . constitute[s] an IDEA-qualifying ‘private school,’” the court relies on plain meaning, the guidance of OSEP’s policy letter, and subsequent congressional ratification of OSEP’s recommendation.⁵⁹ Section A will examine each of these arguments and explain why the *Hooks* court’s reasoning is unconvincing. Section B will sample the laws of various states to show how the *Hooks* standard of leaving the definition of “public school” and “private school” to states is unworkable.

A. *Analyzing the Reasoning in Hooks*

1. *Plain Meaning.* — First, although the plain meaning of “private school” “does not *compel*”⁶⁰ the inclusion of home schools, neither does it compel its exclusion.⁶¹ A common usage of the word “private” is simply to mean “not public,” with “public” and “private” being regarded as the only two possible alternatives.⁶² According to Webster’s Dictionary, “private” can mean something “carried on by an individual independently rather than under institutional or organizational direction or support.”⁶³

58. Home Sch. Legal Def. Ass’n, Ending the Discrimination Against Disabled Home Schooled Students (March 2001), at <http://www.hslda.org/docs/nche/000010/200104270.asp> (on file with the *Columbia Law Review*).

59. *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1040 (9th Cir. 2000), cert. denied, 121 S. Ct. 1602 (2001); see also *supra* Part II.B.

60. *Id.*

61. This is illustrated by the law of North Dakota. See *infra* notes 101–102 and accompanying text; see also, e.g., *State v. Peterman*, 70 N.E. 550, 551 (Ind. App. 1904) (asking “[W]hat is a private school, within the meaning of the statute?” and determining that a residence used for home instruction “would be the school of the child or children so educated, and would be as much a private school as if advertised and conducted as such”).

62. See, e.g., Steven R. Shapiro, Should Bill Clinton Be Immune from Lawsuits on Allegations of Past Acts? No: All Citizens Must Answer to the Law of the Land, 80 A.B.A. J., Aug. 1994, at 41, 41 (referring to public and private character); Edward Rothstein, Under the Heart of Cities, A Failure of Modernism, N.Y. Times, Jan. 27, 2001, at B11 (identifying “public life” and “private life”).

63. Webster’s Third New International Dictionary of the English Language 1804–05 (1993).

The plain meaning of “private school” is not decisive—home schooling can undoubtedly be a form of private school.

2. *The OSEP Policy Letter.* — Next, OSEP’s policy letter should not be followed, since it is contrary to the purpose of the IDEA and is unpersuasive. OSEP would generally be given deference by the court, since it is the agency responsible for administering the IDEA.⁶⁴ However, its interpretation is not binding when it is not persuasive⁶⁵ or when it does not fit the purpose of the statute.⁶⁶

As can be understood from its former title—the Education for All Handicapped Children Act⁶⁷—the IDEA is intended to provide educational support for *all* handicapped children. The stated purpose of the IDEA is, *inter alia*, “to assist States, localities, educational service agencies, and Federal agencies to provide for the education of *all children with disabilities*.”⁶⁸ Congress specifically provides for assistance to children attending public *and* private schools.⁶⁹ Instead of interpreting this to be *exclusive* of home school children, courts should interpret this as an attempt by Congress to *include all* children. An examination of the text of the IDEA shows that Congress added “private schools” in an attempt to make it clear that all disabled children should be included, not just those who attend public schools. For example, one provision refers to “[a]ll children with disabilities residing in the State, including children with disabilities attending private schools.”⁷⁰ Amazingly, OSEP’s interpretation forces this to mean all children, including children attending private schools, but excluding children being educated at home if home schools are not defined as private schools under state law.

An inclusive congressional intent is manifested throughout the provisions of the statute. The IDEA says that a “free appropriate public education”⁷¹ should be “available to all children with disabilities residing in the

64. *Yankton Sch. Dist. v. Schramm*, 900 F. Supp. 1182, 1190 n.3 (D.S.D. 1995) (“Although the agency’s interpretation of statutes and regulations set forth in [OSEP] policy letters are not binding on recipients of IDEA funds, courts give substantial deference to an agency’s interpretation of the statutes and regulations it must administer.”); see also *supra* notes 42–43 and accompanying text.

65. *E.g.*, *Michael C. ex rel. Stephen C. v. Radnor Township Sch. Dist.*, 202 F.3d 642, 649 (3d Cir. 2000) (“This court has held that the level of deference to be accorded such interpretive rules depends upon their persuasiveness.”).

66. *E.g.*, *Mary P. v. Ill. State Bd. of Educ.*, 919 F. Supp. 1173, 1179 (N.D. Ill. 1996) (noting that “the court will defer to the OSEP’s interpretive letter unless it violates the clear meaning or purpose of the statute”).

67. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1487 (Supp. V 1999)); see also *supra* note 7 and accompanying text.

68. 20 U.S.C. § 1400(d)(1)(C) (emphasis added).

69. *E.g.*, *id.* § 1412 (discussing benefits for children attending public and private schools).

70. *Id.* § 1412(a)(3)(A).

71. This does not have to be interpreted to mean only an opportunity to attend public school full time. A “free appropriate public education” is defined in relevant part as “special education and related services that . . . have been provided at public expense,

State”⁷² and even includes children who have been “suspended or expelled from school.”⁷³ OSEP’s interpretation would thus incongruously provide services for children *forced from* public schools, but not provide services to children who *choose* to be educated at home part time. Such a system encourages would-be home educators to simply send their children to public schools with instructions to misbehave enough to get expelled!

Moreover, to the extent that the IDEA was not intended to include all children, Congress made that intent explicit in the text of the Act. The “Limitation” section of the IDEA states that services need not be provided to children aged 3 through 5 and 18 through 21 if state law does not require their attendance at school.⁷⁴ Those aged 18 through 21 may also be excepted if they were not identified as handicapped prior to their placement in an “adult correctional facility.”⁷⁵ It is inconsistent with such specific limitations to think that Congress intended an implicit limitation only for home school children.

The skeptic may wonder why there is no mention of home schools in the IDEA, if Congress was so specific and so intent on being all-inclusive. When the IDEA was originally passed, it may not have occurred to Congress to specifically include home schooling, since it was not as popular then as it is now.⁷⁶ One writer estimates that there were as few as 15,000 children in home schools when the IDEA was first passed.⁷⁷ That was less than one one-hundredth of one percent of the American population at the time,⁷⁸ so it is not far-fetched to think that this group might have been overlooked.

Furthermore, the OSEP policy is unreasonable, given the various state statutory schemes.⁷⁹ First, some statutes do not even define “private school,”⁸⁰ while others allow home schools to be either private or non-private—making the application of *Hooks* either unworkable or arbitrary. Second, it does not make sense for OSEP to single out home schools for possible IDEA exclusion, when many state statutes have a number of cate-

under public supervision and direction, and without charge.” *Id.* § 1401(8). Christopher Hooks could have received his speech therapy under public supervision and at public expense. Part-time attendance is consistent with the statutory definition of “free appropriate public education.”

72. *Id.* § 1412(a)(1)(A).

73. *Id.*

74. *Id.* § 1412(a)(1)(B).

75. *Id.*

76. See *supra* note 1 and accompanying text.

77. Jon S. Lerner, Comment, Protecting Home Schooling Through the *Casey* Undue Burden Standard, 62 U. Chi. L. Rev. 363, 363 n.2 (1995).

78. See Population Estimates Program, U.S. Census Bureau, Historical National Population Estimates: July 1, 1900 to July 1, 1999, at <http://www.census.gov/population/estimates/nation/popclockest.txt> (last revised June 28, 2000) (on file with the *Columbia Law Review*) (estimating 1975 U.S. population at 215,973,199).

79. For a detailed discussion of different state education schemes, see *infra* Part III.B.

80. See *infra* Part III.B.4.

gories—such as church school, denominational school, parochial school, independent school, and private tutoring⁸¹—other than simply the “public” and “private” used in the IDEA. OSEP gives no reason for singling out home schools to pass a state definitional test. States define “home school” and “private school” in the context of their own legislative scheme for education, for reasons completely unrelated to the IDEA—maybe purposefully excluding home schools from “private school” only in order to free home educators from a nest of extra regulations intended for private schools.⁸² OSEP’s policy results in an arbitrary scheme that is against the intent of the IDEA.

3. *Congressional Ratification of OSEP Policy.* — The Ninth Circuit’s reliance on purported congressional ratification of OSEP’s policy letter is unfounded. The *Hooks* court stated:

Congress explicitly ratified OSEP’s view that States must define the ambit of “private schools.” Specifically, the amended IDEA provides *inter alia* that “[t]he term ‘elementary school’ means a nonprofit institutional day or residential school that provides elementary education, as determined under State law.” Elsewhere, the new IDEA’s definition of “secondary school” is likewise committed to “State law.”⁸³

The IDEA leaves the definition of “elementary school” and “secondary school” to state law. What it does not do is leave the definition of “public school” or “private school” to state law.⁸⁴ It is entirely reasonable to think that Congress left the definition of elementary and secondary schools up to state law because Congress did not want to disturb state statutory schemes that may define “elementary” and “secondary” in different ways. Consistent with this interpretation, the IDEA defines “State educational agency” to mean “the State board of education or . . . if there is no such . . . agency, an officer or agency designated by the Governor or by State law.”⁸⁵ Congress would not want to disturb any individual State’s educational scheme—so, if a particular State does not call its agency the

81. See, e.g., Ala. Code § 16-28-12(a) (1995) (listing “public school, private school, church school, denominational school, or parochial school,” or instruction “by a private tutor” as possible educational alternatives); D.C. Code Ann. § 3-205.65(b) (2000) (“The types of schools that can be attended . . . are as follows: a public school, private school, independent school, parochial school, private instruction, or a course of study or home school program”); Mo. Ann. Stat. § 167.031.1 (West 2000) (mentioning “public, private, parochial, parish, home school or a combination of such schools”); Okla. Stat. Ann. tit. 70, § 10-105(A) (West 1998) (requiring attendance at a “public, private or other school”).

82. As in Nevada—the *Hooks* court even mentions these extra requirements. *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1038 (9th Cir. 2000), cert denied, 121 S. Ct. 1602 (2001); see also *supra* note 49 and accompanying text.

83. 228 F.3d at 1040 (alteration in original) (citations omitted) (quoting 20 U.S.C. § 1401(5), (23) (Supp. V 1999)).

84. See 20 U.S.C. § 1401 (defining statute’s terms).

85. *Id.* § 1401(28). Similarly, the fourth and only other time “State law” is mentioned in § 1401 is in the definition of “educational service agency.” *Id.* § 1401(4).

“board of education,” the statute still works. As discussed earlier, the IDEA provides a specific limitation for ages 3 to 5 and 18 to 21, to avoid inconsistency with “State law.”⁸⁶ Given that Congress explicitly spelled out those areas where state laws apply, under the maxim *expressio unius est exclusio alterius*⁸⁷ it is more reasonable to assume that Congress did not intend state law to govern in other areas, such as in the definition of “public school” and “private school.”

The *Hooks* court claims that Congress “explicitly ratified OSEP’s view that States must define the ambit of ‘private schools.’”⁸⁸ If Congress had stated that the word “private” would be interpreted according to state law, or if it had specifically mentioned an exception for children educated at home, a court could find such “explicit[congressional] ratifi[cation]” of the OSEP policy letter. Here, however, an exclusion of home school students is anything but explicit. The *Hooks* court belies the weakness of its argument by overstating its claim.

B. Applying *Hooks* to Various State Statutory Schemes

The *Hooks* court decided that “the ‘determination of whether a home education constitutes private school placement must be made on the basis of state law.’”⁸⁹ Unfortunately, it is not always clear what the laws of different states require, or how they categorize or define home schooling.⁹⁰ This Section extends the IDEA interpretation adopted in *Hooks* to five categories of state law to see how it fares, and concludes that the ruling is poorly adaptable to many state schemes outside Nevada,⁹¹ and will lead to results inconsistent with the intent of the IDEA.

86. Id. § 1412(a)(1)(B); see also *supra* text accompanying notes 74–75.

87. “[T]he expression of one is the exclusion of others” *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). It is beyond the scope of this Note to discuss the use of canons in the context of statutory interpretation. For a start in that direction, see John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 96 & n.370, 119–21 (2001) (referring to academic debate about usefulness of canons, and discussing rule of lenity and canon of avoidance).

88. 228 F.3d at 1040 (emphasis added).

89. Id. (quoting OSEP Policy Letter to Williams, *supra* note 42, at 744).

90. Michael Farris, Chairman and General Counsel of the Home School Legal Defense Association, states that under the doctrine enunciated in *Hooks* “home-schooled students from seven states clearly get services. Students from 11 states clearly do not. In the rest of the states, it is a jumbled mess because home-schoolers can elect between a form of private schooling and a separate category formally labeled home-schooling.” Farris, *supra* note 47, at E5. This Note does not attempt to classify the laws of every state, but instead presents a general idea of the divisions and classifications used in the various statutory or common law schemes.

91. This alone is ordinarily not reason enough to justify a different resolution, since in many areas of law state-to-state comparisons can produce confusing, contradictory, and even absurd results. See, e.g., Steven L. Willborn et al., *Employment Law* ix (2d ed. 1998) (commenting that employment law is an “unruly matrix of laws” and “has no obvious organizing principle” since there is “[n]o central, federal source of employment law”). In this context, however, since the federal government has already intervened to mandate

1. *When Home Schools Are Never Private Schools.* — Some state statutes define “private school” in a way that makes private schooling and home schooling mutually exclusive. Virginia’s statute, for example, says that “[i]nstruction in the home of a child or children by the parent, guardian or other person having control or charge of such child or children shall not be classified or defined as a private, denominational or parochial school.”⁹² Arizona’s statute defines “Private school” as “a nonpublic institution, *other than the child’s home*, where academic instruction is provided for at least the same number of days and hours each year as a public school.”⁹³ Other states with such definitions include Maine,⁹⁴ Nevada,⁹⁵ New Mexico,⁹⁶ and Oregon.⁹⁷ In these states it would be easy to apply *Hooks*, since it is very clear that home schools are not private schools. Not surprisingly, *Hooks* came out of Nevada, one of these states.⁹⁸ The conclusion in these states is as disappointing as it is easy—disabled children receive no federal aid if they are schooled at home.

2. *When Home Schools Can Be Private Schools.* — Unlike the states listed above, some states do not specifically say that home schools cannot also be private schools. In many states, in fact, parents can choose to run their home school as a private school. In some states this may entail adherence to many more regulations and requirements,⁹⁹ but in other states the requirements may not be more burdensome.¹⁰⁰

educational benefits to handicapped children in every state, it is important for the federal courts to interpret the IDEA in a way that produces consistent nationwide results.

92. Va. Code Ann. § 22.1-254(A) (Michie 2000).

93. Ariz. Rev. Stat. Ann. § 15-802(F)(2) (West Supp. 2000) (emphasis added).

94. See Code Me. R. 05-071 ch. 130, § 1(C) (2001) (“‘School’ shall mean any regular instructional program conducted for the purposes of the compulsory attendance law which enrolls *two or more unrelated students*.” (emphasis added)). This might not exclude all home schools, if it is otherwise legal to home school unrelated students.

95. Nev. Rev. Stat. Ann. 394.103 (Michie 2000) (“‘Private schools’ means private elementary and secondary educational institutions. The term *does not include a home* in which instruction is provided to a child who is excused from compulsory attendance . . .” (emphasis added)).

96. N.M. Stat. Ann. § 22-1-2(J) (Michie 1978) (“‘[P]rivate school’ means a school offering on-site programs of instruction not under the control, supervision or management of a local school board, *exclusive of home instruction* offered by the parent, guardian or one having custody of the student.” (emphasis added)).

97. Or. Rev. Stat. §§ 339.030(d), 345.505(2) (1999) (excepting “[c]hildren being educated in the children’s home by a parent or legal guardian” from statutory definition of “Private school”).

98. *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1036 (9th Cir. 2000), cert. denied, 121 S. Ct. 1602 (2001).

99. The *Hooks* court references the extra requirements for private schools that apply in Nevada, although in Nevada home schools cannot choose to become private schools by adhering to those rules. See *id.* at 1038; *supra* note 49 and accompanying text.

100. In Louisiana, for example, the code section requiring compulsory school attendance discusses both private schools and home study. Private schools must have a certain number of sessions and may require certification by the state Board of Elementary and Secondary Education. Home schools are required to “offer a sustained curriculum of quality at least equal to that offered by public schools at the same grade level.” La. Rev.

In *Birst v. Sanstead*, for example, the Supreme Court of North Dakota considered the question whether a home school could also be a private school.¹⁰¹ For years North Dakota had no home school exemption from mandatory school attendance, so families like the Birst family complied with the requirements for private schools, making their own home a de jure private school.¹⁰² When the North Dakota legislature passed an exemption for home schools, the local school district ordered the Birst family to comply with the new home school requirements, rather than the private school requirements that they had been following for years.¹⁰³ The court concluded that “families educating their children at home are free to elect between the private school exception and the new home-based instruction exception to the compulsory school attendance laws.”¹⁰⁴ Under a *Hooks* standard, parents of handicapped children in these states could presumably still qualify for assistance under the IDEA by classifying themselves as private schools, but they might have to comply with additional regulations in order to do so.

3. *When Home Schools Can Be Affiliated with Private Schools.* — Another possibility is that parents may be able to run their home school as a satellite or extension of a private school. In a Colorado case, for example, a father enrolled his children in a private school, but the children “pursued their daily course work in their home.”¹⁰⁵

The school district sought an order compelling the children to attend public school, arguing that their home study needed to be approved by the state Board of Education. The Colorado appellate court stated that as long as an adequate education is provided, “the matter of the sufficiency of the children’s attendance is between them and the independent school in which they are enrolled.”¹⁰⁶ This ruling basically allows private schools in Colorado to sponsor home school students. Such students need not comply with state home school requirements, but only with the private school’s individual requirements. Washington law specifically provides for private school supervision of home education.¹⁰⁷ Simi-

Stat. Ann. § 17.236 (West 2001). It is worth noting that in this provision both private and home schools are technically “nonpublic” schools. *Id.*; cf. *infra* Part III.B.4 (discussing “nonpublic” home schools).

101. 493 N.W.2d 690, 691 (N.D. 1992).

102. *Id.* at 691–92.

103. *Id.* at 692–93. The new exemption for home schools had different requirements than the exemption for private schools. *Id.*

104. *Id.* at 695.

105. *People in Interest of D.B.*, 767 P.2d 801, 801 (Colo. Ct. App. 1988); see also Robin Cheryl Miller, Annotation, Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students, 70 A.L.R.5th 169, 233–234 (1999) (discussing *People in Interest of D.B.*).

106. 767 P.2d at 802.

107. Wash. Rev. Code Ann. § 28A.195.010(4) (West 1997) (providing that “[a]n approved private school may operate an extension program for parents, guardians, or persons having legal custody of a child to teach children in their custody” as long as certain minimum standards of supervision are met).

larly, South Carolina exempts children from general home school requirements¹⁰⁸ if the “instruction is conducted under the auspices of South Carolina Association of Independent Home Schools.”¹⁰⁹

Applying *Hooks* in these states, regular home school students would get no IDEA services. However, if “private school” stretches to include private school extensions or home schools supervised by private schools, then some home school students might get services—subject to the additional inconvenience and expense of maintaining affiliation with a private school.

4. *When Home Schools Are Nonpublic or Non-Nonpublic Schools.* — Another state statutory scheme does not define “private school” at all, but instead distinguishes between “public” and “nonpublic” schools. Mississippi law, for example, requires that parents ensure their children “enroll in and attend a public school or legitimate nonpublic school.”¹¹⁰ The statute defines a nonpublic school as “an institution for the teaching of children, consisting of a physical plant, whether owned or leased, *including a home*, instructional staff members and students, and which is in session each school year,” and states that “[t]his definition shall include, but not be limited to, private, church, parochial and *home instruction* programs.”¹¹¹ Pennsylvania uses the language of “public” and “nonpublic” schools but reaches different conclusions in different provisions about whether home schools are “nonpublic.”¹¹² In at least one provision, home schools are by default non-nonpublic.

OSEP’s recommendation that state law determine whether home schools constitute “private schools” seems out of place in these statutory schemes, where the distinctions between schools are not public/private, but public/nonpublic. Perhaps a strict construction here would find that there are no “private” schools in these states, so only public school children can avail themselves of IDEA benefits. Such an application shows how making benefits depend on state definitions can produce results inconsistent with the purpose of the IDEA. It also raises the question of why OSEP only makes home school services subject to state discretion,

108. S.C. Code Ann. § 59-65-40 (Law. Co-op. 1990) (detailing general requirements for families desiring home school exemption from compulsory public school attendance).

109. Id. § 59-65-45 (Law. Co-op. Supp. 2000). It is unclear, however, whether this would be enough to grant “private school” status under a *Hooks* analysis.

110. Miss. Code Ann. § 37-13-91(3) (Supp. 2000).

111. Id. § 37-13-91(2)(i) (emphasis added).

112. Compare Pa. Stat. Ann. tit. 24, § 13-1327.1(b) (West 1992) (stating that “[a] home education program *shall not be considered a nonpublic school* under the provisions of this act” in subsection titled “Home education program” (emphasis added)), with id. § 9-971A(2) (defining “Nonpublic school” as “*any nonprofit school, other than a public school* within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements” in the context of providing services to children with speech or hearing defects (emphasis added)). Home schools appear to be non-nonpublic schools for purposes of the former provision, and nonpublic schools for purposes of the latter.

when many other types of schools can fall outside the literal bounds of "private."

5. *When Home Schools Might Be Public Schools.* — Home schools in some states may be classified as public schools. California, for example, allows for independent study through local school districts as an "[i]ndividualized alternative education."¹¹³ In some situations a home school student must have his or her program approved and supervised by the local public school through an administrator or administering body. One can argue that since the home school is supervised by the public school, it is actually part of the public school system.

Davis v. Massachusetts Interscholastic Athletic Ass'n illustrates this possibility.¹¹⁴ Melissa Davis was a home school student who was "under the educational jurisdiction of the principal of Norton High School and adhere[d] to a home-school educational plan approved by the Norton School Committee."¹¹⁵ She wanted to try out for the local public school's softball team, but the Massachusetts Interscholastic Athletic Association (MIAA), which "govern[s] and regulate[s] competitive sports among most public secondary schools" in Massachusetts, denied her petition.¹¹⁶ The MIAA based its decision on a rule that required students to be attending school sessions in order to participate in athletic activities.¹¹⁷ The court concluded: "Melissa is in fact attending school sessions. The only difference between Melissa and any other Norton High School student is that she attends classes at home instead of in the Norton High School building."¹¹⁸ The court's opinion thus establishes that Melissa is

113. Cal. Educ. Code § 51745(a)(3) (West Supp. 2001). This option would not, however, be available for unilaterally placed disabled students. See id. § 51745(c) ("No individual with exceptional needs . . . may participate in independent study, unless his or her individualized education program . . . specifically provides for that participation."); id. § 56026 (defining "[i]ndividual[] with exceptional needs" to be the same as a child with a disability as defined by the IDEA). Michael Farris names California as one state in which disabled home school students definitely "get services." See Farris, *supra* note 47, at E5.

114. No. 94-2887, 1995 Mass. Super. LEXIS 791, (Mass. Super. Ct. Jan. 18, 1995); see also Derwin L. Webb, *Home-schools and Interscholastic Sports: Denying Participation Violates United States Constitutional Due Process and Equal Protection Rights*, J.L. & Educ., July 1997, 123, 130-31 (discussing *Davis*); Grob, *supra* note 1, at 834-35 (same); Bill Simmons, *No Place Like Home?*, Boston Herald, Oct. 16, 1994, at B52 (discussing Melissa Davis and other home school children who lack access to public school athletic programs).

David Fuller notes that cases where a home school student claims to be a public school student seem to be more successful when they are aimed at extracurricular activities, rather than when they are focused on part-time school attendance. See Fuller, *supra* note 56, at 1614, 1615 & n.71 ("Generally . . . courts seem to be somewhat more sympathetic to requests involving extracurricular activities than to requests to attend classes on a part-time basis."). How this factor would affect the lawsuits of handicapped children is unknown. Speech therapy, for example, does not seem to be intuitively more similar to either regular curriculum or extracurricular activities.

115. *Davis*, 1995 Mass. Super. LEXIS 791, at *2.

116. Id. at *6 n.3.

117. Id. at *2-*3.

118. Id. at *7.

considered a public school student even though she attends home school.

Similar arguments might prevail in other states. Alaska's code, for example, provides for an exemption from mandatory school attendance where a child "is equally well-served by an educational experience approved by the school board as serving the child's educational interests despite an absence from school, and the request for excuse is . . . approved by the principal or administrator of the school that the child attends."¹¹⁹ The statute here seems to imply that the student "attends" a public school, even though the child is "absent from school." The irony and inconsistency here is that in these circumstances, home school children apparently could qualify under *Hooks* for more IDEA benefits than children in private schools, since they are attending public school.

6. *The Jumbled Mess Created by Hooks*. — This foray into the "jumbled mess"¹²⁰ of state educational law illustrates an important point: Although *Hooks* was decided in a jurisdiction that clearly and unambiguously defines private schools and home schools to be mutually exclusive, an extension of the doctrine to other states reveals that it is unworkable or unclear in some situations, and unfair in others.¹²¹ Each state has its own statutory scheme that works in its own way and can define home schooling as either "private," "nonpublic," or "non-nonpublic," because each definition works within the confines of a single state's system. These orderly schemes become a jumbled mess only when you insert a foreign object—a federal law—and you make the application depend on how each state has happened to define a particular word. For example, imagine a federal law providing health benefits to all state police officers being interpreted to mean that benefits only apply in states where police are called "officers" and not "troopers," because the law applies to police organizations "as defined by State law." An arbitrary denial of benefits is unjustified.

119. Alaska Stat. § 14.30.010(b)(11) (Lexis 2000). The Alaskan statutory scheme also allows other options. The law provides for "attendance at a private school in which the teachers are certificated," which presumably would allow home schooling by a certified parent. *Id.* § 14.30.010(b)(1)(A). The law also specifically mentions an exemption where a child is "educated in the child's home by a parent or legal guardian." *Id.* § 14.30.010(b)(12). And there is also an exemption, appropriate for Alaska, where the child lives more than two miles away from any school or from any "route on which transportation is provided by . . . school authorities." *Id.* § 14.30.010(b)(7). A child exempted under this last provision would probably be educated at home, too, but it is unclear under *Hooks* whether the child qualifies for services.

120. Farris, *supra* note 47, at E5.

121. For example, where two children are being educated at home, and one receives no IDEA benefits simply because her home is not affiliated with a private school. See *supra* Part III.B.3.

CONCLUSION

The IDEA requires states to provide “special education and related services” to a certain extent even to children enrolled in private schools.¹²² The IDEA does not specifically mention whether home schools qualify as private schools, but it does state that “the education of children with disabilities can be made more effective” by “strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.”¹²³

The Ninth Circuit in *Hooks v. Clark County School District*, following the recommendations of OSEP, decided that the question of whether home schools are private schools should be resolved by state law. Such a standard is unworkable since many states do not have a clear or consistent definition of “private school.” The *Hooks* standard also goes against the fundamental purpose of the IDEA, which is to provide some educational services for all disabled children. Other Circuits should not follow the reasoning used by the *Hooks* court, and ultimately the Supreme Court should resolve this issue by interpreting the IDEA to guarantee educational services for all disabled children, regardless of the type of school they attend. Children who are educated at home should receive the same level of services as that enjoyed by private school children, and they should be allowed to attend public schools part time and receive educational services there if such opportunities are made available to children in private schools. Many parents are willing and eager to take upon themselves some of the burden of their child’s education, and it does not make sense to force these parents to choose between special education services and home schooling.

122. 20 U.S.C. § 1412(a)(10)(A)(i) (Supp. V 1999).

123. *Id.* § 1400(c)(5)(B).