

THE PREVAILING VOICE IN CHOICE IN SCHOOLING: THE BALANCING RIGHTS OF PARENTS, CHILDREN AND THE COURTS

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In this paper, drawing on international conventions, national and state statute law and case law we consider rights of parents and children to determine schooling choice in Australia and the United States of America (US). In both countries, parents have been given clear rights to direct the education of their children, but within limitations. We examine also children's rights to educational choice and whether children's rights may curtail the rights of parents in some circumstances. Finally, we examine the involvement of courts in curtailing rights of parents to determine schooling for their children, within the context of family law in family breakdown. The best interests of the child are often used as the framing consideration in such decisions. We also examine the factors the courts consider to determine the best interests of the child, and the extent to which, in matters educational, quality of schooling arises an issue. Overall, we conclude that while a focus on children's best interests is endorsed in both countries, in education, as in many areas, children have limited opportunities to contribute to decisions about their future.

I INTRODUCTION: PARENTAL RIGHT TO CHOOSE SCHOOLING FOR THEIR CHILDREN IN AUSTRALIA AND THE US

In both Australia and the US, considerable freedom exists around the choice of schooling for a child. In both countries, parents¹ have an established right to choose the educational environment for their child², including a conditional right to home school a child. Parents may choose to educate their child in public (government) and private (non-government) schools, including both secular and nonsecular schooling.

One difference between education in Australia and the US is the extent to which the public purse is used to support student places in both public and private schooling. In Australia, funding for students in private schools has been established for some fifty years, at the same time allowing the Australian federal government to control the nature of schooling and accountability of such schools. In the US, some schools, especially those with a religious basis, operate with little or no federal financial support. The extent to which a private school in the US is in receipt of public funding will govern the extent to which schools must comply with state and federal statutes, in turn affecting parents' and children's rights in schools.³

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In Australian policy, parental involvement in education is seen as critical to children's success. The Federal and state ministers of education⁴ have identified parents as 'the first educators of their children',⁵ with parents seen as partners in education with schools. Statute, policy, and case law, most notably the 'DOGS' case challenging public funding to religious private schools,⁶ assert parental right to choose whether their child is educated in public or private schooling.⁷

Funding for Australian public schools occurs through state and federal funding, and is not dependent on local taxes. While all students will be provided with a place at their closest public school, they may also enrol at public schools outside their neighbourhood through direct approach to a school, unless zonal requirements such as enrolment ceilings have been reached or specialist studies or programs are offered.⁸

Parental rights as to the nature of schooling are restricted, however, in Australia. Again, due to requirements to gain government funding, all schools, whether public or private, must conform to federal and state legislation. Proposals for new schools, including private schools, must meet guidelines including facilities, qualified staff and policies such as student safety. The school must indicate its curriculum, which must be accredited by the relevant state authority.⁹ While home schooling is allowed, parents must demonstrate that they have capacity to do so and will follow an approved program of study with their child.¹⁰

In the US, expectation in public schooling is that children will attend the school in the community where they live, due to financial support based on local property taxes in addition to state and federal sources of support. However, one of the most fundamental and clearly established constitutional rights under the Liberty Clause of the Constitution is that parents can direct the education of their children.¹¹ In *Pierce v Society of Sisters* ('*Pierce*'),¹² in a challenge to a state law seeking to force *all* children to be enrolled in public schools, the Supreme Court declared that the child

is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹³

The Liberty Clause right of parents to make educational choices for their children is far from absolute, and has generally been limited to parental choice of the venue for instruction,¹⁴ as opposed to parental right to object to and control public school curriculum.¹⁵ In *Mozert v Hawkins County Board of Education*,¹⁶ where a parent in Tennessee objected to an assigned text on religious grounds, the Court held that the school's refusal to assign an alternative text was not a violation of the Liberty or Free Exercise of Religion¹⁷ clause, and hence parents could not control curriculum choice in public schools. This was reinforced in *Brown v Hot, Sexy, and Safer Productions, Inc.*,¹⁸ when the First Circuit refused to find a school district liable to parents in damages where the school had failed to send home a consent form prior to requiring all students to attend an objectionable assembly addressing AIDS Awareness. The court of appeals passed over the school's failure to seek parent permission as falling within the broad penumbra of curriculum. In general, the limited public funding of private schools (and associated policy controls that exist in Australia) means that parents in the US may control the curriculum in private schools.¹⁹

II CHILDREN'S RIGHTS IN EDUCATION

Given that children are the key stakeholders in education, the question arises as to what rights children are given in education, in general, and in decision-making about their choice of schooling.

A key difference in law between Australia and the US arises through provision of constitutional individual rights in the US *Constitution*. Such rights in the US form the basis for much litigation, including litigation in education, as seen in the cases on parental rights just discussed. The Australian *Constitution* by contrast does not bestow similar individual rights and Australia has no national Bill of Rights. In general, rights in Australia are statute-based rights in specific circumstances or for specific groups,²⁰ or rights implied in case law, for example, the right to freedom of expression.²¹ While individual rights have been established in two Australian state and territory charters of rights,²² they do not override federal or state statute law but would apply in full force in the absence of any Commonwealth law in conflict.²³

In Australian education policy, children are rarely mentioned, and never as responsible for their own education. Children's rights in general in Australia occur through importation of conventions such as the United Nations *Convention on the Rights of the Child* ('CRC')²⁴ into various Australian laws, such as family law. Ratification and importation of such international conventions into Australian law are hence important for identification of rights.²⁵

The CRC establishes that children have the right to education, with compulsory education at least for primary school,²⁶ intended initially not only to ensure children's educational opportunities but also to protect children against work exploitation. There is little sense in Australian policy, however, that children have a 'right' to direct their own school choice and enrolment. For example, although entitlement to enrol in any public school in Australian policy is couched in terms of students, guidance on enrolment by various authorities is directed at parents' actions in enrolling children.

While children in Australia have an explicit or implicit right to education,²⁷ as espoused in the CRC, education is also compulsory from five years of age until at least 16.²⁸ When children do not participate as required by law, their parents are held responsible, unless the child is deemed 'uncontrollable'.²⁹ Children do have an implied right to natural justice and procedural fairness when they are to be suspended or excluded from school due to problem behaviour,³⁰ rights in rather negative circumstances.

While also, albeit later, signatory to the CRC,³¹ the US is one of only two of 195 parties to the CRC not to have ratified the Convention. In contrast to Australia and many other nations, the US does not necessarily ratify such international Conventions because of legal precedence of its Constitution and Bill of Rights.³² The US does not have a right to education directed to children, phrased in some countries under the rubric 'the best interest of the child'.³³ Instead, the rights of the child in the US to an education are framed within the constitutions and statutes of the 50 states requiring that parents send their children to a school.³⁴ As is evident in the next paragraph, though, the US law on parent and student rights has become somewhat attenuated in the sense that the law's obligation requiring parents to send their children to school can be offset by the law's granting constitutional rights to children.

Constitutional rights may provide children in the US with the basis for stronger individual rights in education than Australian children hold.³⁵ The US Supreme Court in 1969 declared in *Tinker v Des Moines Independent Community School District* ('*Tinker*')³⁶ that students have constitutional rights and that those rights do not stop at the schoolhouse gate.³⁷ In *Circle Schools v Pappert* ('*Pappert*')³⁸ the Third Circuit reviewed the constitutional rights of both parents and their children in the context of a Pennsylvania statute that permitted students to decline to recite the Pledge of Allegiance in school but then required 'written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag'.³⁹ In invalidating the State statute, the Third Circuit held that the parental

notification provision ‘unconstitutionally [trod] on students’ First Amendment right [not to speak as well as] ... school plaintiffs’ First Amendment associational rights’.⁴⁰ Thus children in the US would appear to have much stronger opportunities to control their own education than children in Australia.

In the following two sections, we discuss areas where individual parental rights to direct the education of their children may be curtailed in law, whether by the views of children themselves, or by the courts.

III CURTAILING OF PARENTS’ RIGHTS IN EDUCATION BY CHILDREN’S RIGHTS IN AUSTRALIA AND THE US

Article 14 of the CRC indicates that while parents have the right to provide direction to a child, this should be in a manner ‘consistent with the evolving capacities of the child’. The CRC recognises that responsibility for children to be involved in decision-making about their own futures should evolve as they mature. ‘Child’ is defined under the CRC as up to the age of 18, the age at which one is identified as an adult in Australia. Clearly children do not change from toddlers to adults overnight.

Given the limited extent of children’s rights in education in Australia, however, no legislation or legal decisions have been identified where children’s rights with respect to education have been found by a court as superior to their parents’ rights. Overall, as noted, the child is rarely mentioned in educational legislation and policy except as recipient of actions and policy, and as students with responsibilities such as good behaviour.

Following again principles of the CRC and from English case law, however, Australian law in the seminal ‘*Marion’s case*’⁴¹ has recognised that children may have sufficient maturity to be given decision-making responsibility. Their rights may override the rights of their parents in medical decisions, although again the authority of parents or courts may override the decision of the child if it is determined to be in the child’s best interests.⁴² Although distinguished from the English case *Gillick*⁴³ as it involved a child deemed unable to give consent to medical procedures, the Australian medical ‘*Marion’s case*’ endorsed the *Gillick* ‘mature child’ principle, recognising a child’s developing right to make binding decisions about medical advice and treatment as they become more mature, and that ‘the rule of the parents’ absolute authority over minor children [should be] abandoned’.⁴⁴ However, the lack of challenges means that the issue of competing rights in education remains unresolved by Australian courts.

Despite children’s individual constitutional rights in the US, the relationship between parents’ and children’s rights in education in the US is not unambiguous. The massive infusion of federal statutes in the US that have served largely to federalise public education have not defined clearly the relationship between parents and their children in enforcing the rights contained in those statutes.

The US Supreme Court’s 1969 declaration in *Tinker*⁴⁵ that students have constitutional rights and that those rights do not stop at the schoolhouse gate,⁴⁶ raised tantalising speculation as to whether the rights of children can be asserted apart from, or even in opposition to, the interests of parents. The issue as to how one might balance rights of parents and rights of their children in making education decisions has almost invariably lacked a controvertible question since rights that students may be asserting, as in *Tinker*, generally also represent the parental viewpoints in the home.⁴⁷

In his provocative dissent in *Wisconsin v Yoder*,⁴⁸ where the US Supreme Court upheld a Free Exercise Clause⁴⁹ exemption for Amish parents from the State of Wisconsin's requirement that all children attend school until age 16, Justice Douglas queried whether the interests of the Amish parents could be the basis for 'vindicat[ing] not only their own free exercise claims, but also those of their high-school-age children'.⁵⁰ Starting from the premise that '[r]eligion is an individual experience',⁵¹ Justice Douglas suggested that 'if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections'.⁵²

Courts in the US have severed children's and parents' rights when both have sought legal remedies on the same matter. In *JS v Blue Mountain School District*,⁵³ students in Pennsylvania suspended after creating a fake MySpace profile for their principal, which suggested that the principal was a paedophile, won on a Free Speech claim. But the Court rejected the *parents'* Liberty Clause claim that the school had infringed their Liberty Clause right to determine their children's education and overstepped its authority by punishing their daughter, stating 'the School District's actions in no way forced or prevented JS's parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove of her conduct'. Similarly, in *Pappert*,⁵⁴ where the Third Circuit had found the statute requiring reporting children's non-participation in the Pledge of Allegiance to parents unconstitutional, based on the students' rights, the Court refused to determine whether the statute violated the parents' 'fundamental liberty interest ... in the education of their children', infringing the rights of parents to determine their children's education, 'by imposing restrictions unrelated to legitimate educational concerns'.⁵⁵

In *Brown v Hot, Sexy, and Safer Productions, Inc*,⁵⁶ discussed previously, the First Circuit refused to find a school district liable to parents in damages where the school had failed to send home a consent form prior to requiring all students to attend an objectionable assembly addressing AIDS Awareness. While the court of appeals passed over the school's failure to seek parent permission as falling within the broad penumbra of curriculum, the more interesting question not presented in the facts is whether the teen-aged students might have had a right to attend the assembly even if their parents had refused to authorise their attendance. In effect, does a child's 'right to knowledge' within the context of a school's curriculum override a parental opposing view. Unfortunately, this is the issue that still remains unresolved, or to express it differently, an issue that has presented a justiciable question.

The Liberty Clause right of parents to make educational choices for their children is far from absolute, the emerging rights of students temper somewhat the rights of parents. While some courts have flirted with the notion that students may have constitutional rights separate from their parents, courts have yet to assert that students have rights that are directly opposed to those of their parents.

IV CURTAILED PARENTAL CHOICE OF EDUCATION BY THE COURTS IN AUSTRALIA AND THE US

A matter of interest in parents' and children's rights in educational choice and decision-making is the extent to which choice of schooling may be curtailed by the courts. One area where this occurs is in family law when a marital relationship has broken down and parents disagree about appropriate schooling for their child. Choice of schooling may then be determined by the courts on the basis of competing parental rights or rights of the children involved.

A Courts and School Determination in Australian Family Law

In Australia, family disputes that reach the court are under federal jurisdiction under the *Australian Constitution*.⁵⁷ Modern Australian family law, under extensive revisions in 1995 to the *Family Law Act 1975* (Cth) ('*FLA*'), does not refer to 'custody' of children, but parental responsibilities. Both parents are expected to maintain responsibility for children in a family breakup, and also to have shared responsibility and physical caring, including residence, for children. While the preferred resolution is to manage parenting arrangements and divorce settlements by negotiated agreement, court-mediated where necessary, a percentage of family breakdowns do head to the federal Family Court of Australia for resolution.⁵⁸

Two principles of the *UN Convention on the Rights of the Child* are incorporated directly into the *Family Law Act*. The first principle is that the paramount concern in decisions on the future of children in a marital breakdown is the *best interests* of the child.⁵⁹ The second principle is the right for children to express their views on any matters affecting them, and to have weight given by any court to those views in terms of the child's maturity or level of understanding.⁶⁰ This would on the face give children more say in their education than is available in general law. However, under the *FLA*, children are not expected to speak directly in the court. Their views are presented through a family report prepared by a court consultant, or by an independent child lawyer (ICL) appointed by the court if deemed necessary.⁶¹ An ICL is not an advocate for the child's views but provides an independent judgment about their child's best interests.

Court considerations of the best interests of the child in Australian family case law consider a range of factors for schooling. Two predominant issues are: the school location, especially when one parent wishes to relocate; and, private versus public schooling, especially with respect to who should pay school fees.

In *W & R*,⁶² a court noted reluctance to be involved in 'micro-manag[ing] every aspect of the post-separation relationship of two estranged parents who cannot agree about children's issues', wanting to intervene 'as little as possible and only to the extent that the welfare or interests of the child requires it'.⁶³ In this case, the mother wished to relocate from Australia to New Zealand, with the children to accompany her, with subsequent impact not only for continued relationships with the father but also their schooling.

Consideration of the 'best interests of the child' in the decision included discussion of their current schooling arrangements, with continuity of schooling deemed most important in conjunction with 'glowing' reports that the children were 'excel[ling] academically and socially' at their present school, although they were reported to be 'well-balanced, resourceful, resilient and adaptable children [who would] thrive in any learning ... environment in Brisbane or New Zealand'.⁶⁴ Lack of information on potential schooling for the children if relocated was a consideration: 'nothing was filed by the mother from the school she intends to send them to so as to allow me to compare and contrast what it offers with what the children are currently receiving'.⁶⁵ The mother was unsuccessful.

By contrast, a mother who had initially taken her children to Ireland in contravention of the Hague Convention on Child Abduction⁶⁶, was then allowed by the Australian court to relocate to Ireland with the children, with such relocation seen as being in their best interests. Supporting the move, in addition to recognition of family support in Ireland, were 'a report from the school [the older girl] had attended [in Ireland], which spoke in "glowing terms" of her assimilation into the school and her progress', and that as she 'had already experienced schooling in Ireland ... [she] would "readily make the adjustment again"'. Further, as the second child 'had not commenced his

primary schooling, there would be no disruption to his academic progress'.⁶⁷ In another relocation case, however, a mother was not allowed to relocate with children permanently to Scotland as the court considered this would not be in the best interests of the children, particularly with regard to their schooling in Australia.⁶⁸ While no criticism was made of proposed schools in Scotland, the stage of schooling (near-completion) of one child was a factor in the court order.

Court determination of school arose again in *Green & Knowles*, where parenting orders by a trial judge were challenged in appeal. The initial trial judge had questioned whether the parents were 'seeking that he decide which school the children should attend' or should give one parent the responsibility:⁶⁹

... My usual modus operandi in these things is unless somebody can persuade me that a particularly-given school is contrary to the best interests of a child, rather than make the choice of which school I more often — and I'm not saying I will do it, but I more often make a decision that X or Y will make the decision as to which school the children are to go to ...⁷⁰

As the children were attending a private school that required both parents to spend considerable time driving, the father proposed the children should attend a state school equidistant from each of the parents.⁷¹ An Independent Children's Lawyer supported the mother's proposal that the children remain at the private school. The trial judge had stated that the father had not established that 'the nature or standard of education provided to [the son] by the school, particularly in response to his special needs, is inadequate in any way',⁷² and the appeal court considered that appropriate weight had been given to the relative benefits of the private school and the proposed state school.⁷³ The appeal being dismissed, the children remained at the private school.

A case that demonstrates very direct court intervention in choice of school in Australian family law is *Leland & Seward*,⁷⁴ which was the subject of another appeal against an initial agreement of parenting orders in heard proceedings under a trial judge. The issue in this interesting case is that the mother, who brought the appeal, had sought orders the children should be home schooled while the father had sought orders they attend the local public school. Both parents were members of the Seventh-Day Adventist Church. An appointed Independent Children's Lawyer (ICL) submitted that the children should attend a private school conducted by the Seventh-Day Adventist Education Department. The father undertook to pay half the fees and other educational expenses. The mother suggested a public primary school and high school, arguing issues with transport and fee costs. According to the counsel for the ICL, the children were

all bright children ... and [w]e would hope to maximise their opportunities on an educational basis and we believe that [the school] would offer them greater opportunities in that regard. ... [The school] reflects the parents' values. There's a Bible class each day for the children. ... It caters ... for the Seventh Day Adventist tenets [as it] ... doesn't organise any sporting commitments or activities or anything of that nature on the Saturday.⁷⁵

The initial judgment concurred with this recommendation and ordered a school that had not been the choice of either parent. The appeal failed as a mistake of fact by the trial judge could not be established. The children would attend the Seventh Day Adventist school.

The previous discussion shows that determination of a school as in the best interests of the child is strongly based on a court determination of a child's emotional wellbeing and maintenance of relationships with parents and siblings. Interestingly, school quality in terms of educational outcomes does not appear to play a major part and is rarely evident in court decisions. In *Pavel*

& Pavel,⁷⁶ while the progress of the children in their current school was noted, their academic achievement was a lesser factor than emotional stability. In another case, one of the mother's arguments for having changed a child's school in breach of a parenting agreement, was that the education at the previous school 'was less than optimal'. No evidence was provided to support this statement, however, with the child reported to have 'flourished' at both the original school and the new school. The court supported the return of the child to the original school.⁷⁷ While reports on the perceived children's views on their schooling satisfaction were considered in evidence, they do not appear to be a determining factor in the final court decisions.

*Dreyfus & Kearney*⁷⁸ provides an example where a child was given voice, albeit indirectly, although not the prevailing voice. At issue was which secondary school a child should attend. The initial judge ruled in favour of the mother's choice, with subsequent appeal by the father that the original decision was based on material errors of fact: 'the father's commitment to pay school fees, the mother as the more intuitive in her parenting capacity and the *child's views* [emphasis added]'.⁷⁹ As no appealable error was established, the original decision was upheld.

The choice of school disputed by the parents for their son in this case was between 'two upper echelon private boys school'. The son expressed a preference for one of the schools, particularly on the grounds of sporting programs and competition. A report by his current school counselor indicated that he was willing to attend either school of his parents' choice, but was 'aware that [choice of school]' will be decided in a court case'.⁸⁰ In considering the boy's views, the trial judge noted that the boy's rationale involved

the types of considerations likely to influence any child's choice of schools. That is, friendships, the continuance of established networks and the opportunity to excel in a perceived less competitive environment. The child's views in favour of [K School] thus warrant considerable weight.⁸¹

The father supported the son's first choice of school although it had not been his own first preference, and considered that the boy's first preference had 'a superior academic reputation, in terms of Higher School Certificate results, than H School', and 'a unique educational methodology designed to take its students learning above expectations', as well as good sporting reputation.⁸²

It was further stated that the mother and father agreed that school choice was not determined by 'which is the better school' but by the Court deciding 'the child's best interests'. Again, the court considered that the boy was 'likely to succeed whichever school is chosen'.⁸³

The parties agree the choice of school is not determined by which is the better school. Rather, as the discussion above revealed, resolution of this issue requires the Court decide the issue by reference to the child's best interests ... the evidence does not enable me to determine the better school. No doubt, even if armed with information, which might make it easier to make such a determination, it is likely this would be something about which minds would differ. ... the Court is asked to decide between two upper echelon boys schools. ... The child is intelligent and excels academically. ... At both schools, he is highly likely to continue to excel academically. I do not accept his academic or university prospects are advanced at one school in preference to the other.⁸⁴

The appeal court endorsed the trial court decision—the mother's choice of school prevailed, influenced strongly by the previous lack of financial support by the father for the son and uncertainty that he would pay the private school fees.⁸⁵ In considering the appeal, and finding no basis for error, the court held that the trial judge had given due weight to the child's views and rationale for school choice.⁸⁶

By contrast, a case involving the father's preference for a boarding school for his sons did give weight to the older son's views.⁸⁷ The father considered the boarding school to have excellent standards and opportunities; the mother preferred a public school where the boys could maintain a home life with 'love, support and understanding'.⁸⁸

After considering the best interests of the child, and primary consideration of maintaining meaningful relationships with both parents, the court concluded that the older child should commence as a boarder at the private school. A strong influence in the decision was that the older boy was nearly 14 years of age and indicated he wanted to attend the boarding school.

B Courts and School Determination in US Family Law

In the US, in contrast to Australia, family law is state jurisdiction. While the US has not ratified the CRC, legislation in each state indicates that the best interests of the child are to be considered in marital disputes. However, no right appears to have been given to children to have their voices or views heard as a matter of course in divorce disputes. The *Uniform Marriage and Divorce Act*, a text prepared to provide consistent standards and to assist states to manage 'no fault divorce', includes court consideration of the wishes of the child 'as to his (sic) custodian'. However, states that have not adopted the UMDA have discretion as to whether to consult with the child on their views.⁸⁹ Only a small number of states has adopted the UMDA. Overall, in the US, the terminology and philosophy of parental 'custody' of children are still in place.

US litigation of custodial and noncustodial parent conflicts has frequently involved the right to direct their child's education.⁹⁰ In large part reflecting the constitutional right of parents to direct their children's education, parents in the US are viewed as the persons best qualified to act in their children's best interest.⁹¹ Thus, legal issues reflecting the nature of a child's education are most likely to be litigated in terms of parents' choices for their children. As parents are still granted 'custody' of children, courts have determined that the parent who has sole legal custody has the right to make decisions concerning their child's education, including the choice of schools, unless the custody order contains a contrary provision. In the absence of challenges to the fitness of a parent to make educational decisions for his or her children, courts are likely to uphold parental choices.

While not arising from the CRC, US courts have held that the 'best interests of the child' should be a determining factor in considering choice of schooling in joint custody relationships.⁹² In *Anderson v Anderson*, a mother was not allowed to homeschool her child, given the scholastic improvement in the child's performance when she attended a public school one year after changing from home schooling. The child's primary residence was with the mother. The child had shown poor academic performance in primary school when living with the mother, but improved considerably when attending the public school. The mother was in full-time employment but had only a high school diploma and no established curriculum for her home schooling.

Choosing the best school to meet a child's best interests has not been so easily resolved by US courts. In *Bird v Starkey*,⁹³ where the mother had slightly more custody than the father (51.4% v 48.6%), the mother preferred a local school that had funding resource problems, while the father preferred a school that was doing well on standardised test scores. The original matter had been resolved by a trial court, and the Supreme Court of Alaska did not make a further judgment. However, since the child had been attending the mother's choice of a school for half of a school year, the supreme court suggested that the child's experiences may be important in determining whether the current placement met the 'physical, emotional, mental, religious, and social needs of the child'.⁹⁴

A New York appeals court, in a relocation case *Grathwol v Grathwol*,⁹⁵ addressed whether a joint custody award to divorced parents who would live and share equally the custody of their child in a designated New York county could be modified. The mother sought sole custody in order that she could accept a full-time teaching position in another county. The mother was identified as the ‘child’s primary attachment figure’, the person with whom he felt most safe and secure. The mother sought relocation to a city where she would have a full-time teaching position which would bring medical benefits. She was allowed to relocate with the child because of the positive impact the new position was perceived to have by eliminating the stress caused by her prior financial instability, enabling a more adequate provision for the child.

A relocation case in the US, similar to those in Australia under the Hague Convention, provides background for considering the cultural and language contexts for children’s education and development. In *Abbott v Abbott*,⁹⁶ the US Supreme Court held, following a divorced, custodial mother’s taking her son from his birth country (Chile) to the US without the father’s consent, that the Chilean father’s *ne exeat* (a writ to restrain a person from leaving the country, or the jurisdiction of the court) right granted by a Chilean family court constituted a ‘right of custody’ under the Hague Convention. In upholding the veto rights of the Chilean father concerning the mother’s removing the child from Chile, the Court observed that ‘[f]ew decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb’.⁹⁷ However, worth noting is the three-Justice dissent in *Abbott* that was critical of the majority and noted that even returning the child to Chile would not permit the father’s veto to determine ‘any number of decisions that are vital to A.J.A.’s physical, psychological, and cultural development’, such as the kind of school he attends.⁹⁸

The cases just discussed have involved public school choices. Over half of US states have statutes permitting courts to decide, in assigning support responsibilities between parents, the extent to which the best interests of children are served by the particular needs of special or private schools.⁹⁹ In *Witt v Ristaino*,¹⁰⁰ a father was directed to pay almost two-thirds of the cost of educating four children at a Roman Catholic school because the children had ‘particular education needs’ (not special education needs), had always gone to a Roman Catholic schools and had done well. The factors to be considered in such matters include: (i) children’s educational history; (ii) children’s performance; (iii) family history; (iv) whether the private school choice was made before marriage; and (v) parents’ ability to pay for private school. The court noted that the best interests of the child are identified as predominant considerations in determining the choice of school.

A particular educational need of a child to remain in private school includes consideration of the child’s history of attending a private school and whether a continuation of the child’s education in that setting is in the *child’s best interest*. A child’s successful continuation of his or her education in a proven academic environment is generally found to be in his or her best interests.¹⁰¹

A trial court should consider whether to attend or remain in a special or private school is in a child’s best interest and whether and how parents are required to contribute to that expense.¹⁰²

If these factors work against parents, however, particularly on financial grounds, then the court presumption will be for the child to attend a public school.

Consultation with, and approval by, non-custodial parents is required if indicated in the divorce agreement, if the non-custodial parent is expected to contribute.¹⁰³ In *Cleveland v*

Cleveland,¹⁰⁴ the divorce decree required the noncustodial father to pay for private residential schools for the children, provided he approved of the schools. Just notifying the father of change, without meeting the requirement to get permission, meant that the mother was not entitled to reimbursement for schools where the children had changed attendance.

An area of interest for children's rights in educational choice in the US lies in the role parents play as surrogates under the IDEA.¹⁰⁵ While IDEA is designed to improve education provision and rights to the free appropriate public education (FAPE) for children, parents are in fact accorded an extensive catalogue of rights including consent to evaluations;¹⁰⁶ inclusion as members of the Individualized Education Program (IEP)¹⁰⁷ teams of their children; IEEs at public expense;¹⁰⁸ examination of the records of their children;¹⁰⁹ written prior notice when school officials propose or refuse to initiate or change the identification, evaluation, or educational placement of children;¹¹⁰ serving as members of groups making decision regarding placements;¹¹¹ and, an impartial due process hearing to challenge issues associated with the education of their children.¹¹² Under IDEA, the term 'parent' includes 'a natural, adoptive, or foster parent of a child', and 'an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare'.¹¹³ With this expanded definition of a parent, Congress 'establishe[d] a range of persons who may be considered a parent for purposes of IDEA, but did not require that any and all such persons must be granted statutory rights'.¹¹⁴ Sorting out who is entitled to represent the child's interests as a parent under the IDEA's broadened definition has thus seemingly been shifted to the school administrator and to the courts when litigation ensues. The *Individuals with Disabilities Education Act* (IDEA), that accords significant rights to students with disabilities and makes parents the agents responsible for acting on behalf of their children to assert and protect those rights, does not, however, address who is to make the decisions where parents divorce, or the role of children in such views.

Overall, then, in the US, state laws have considered a range of educational matters under custodial issues in family law: rights to choose home schooling, neighbourhood schools, parent's financial stability, attendance at a private school, and the need for consultation. Federal laws (IDEA) establish parents as surrogates. The positions of parents are viewed within a framework of best interests of the child: the language of the custody provision, the educational performance of the child before and after custody disputes, including testimony of teachers and administrators, and finally, the interests of the parents.

V CONCLUSION: EDUCATIONAL CHOICE AND THE NEED FOR GREATER CHILDREN'S VOICE

The discussion in this article shows that in the apparently straightforward educational matter of school choice for a child, legal contexts provide many players and complex scenarios in Australia and the US, and no doubt in many other countries. Overarching are government law and policy that both enable and restrict the schooling options available for parents and children. Overarching is the requirement that children will attend school for a considerable part of their childhood. What attendance may mean can vary, and parents in Australia and the US can choose the educational environment. In Australia, homeschooling is permitted if parents conform to curriculum requirements. In the US, as one case shows, when inadequate homeschooling is identified, formal school attendance will be required.

In both countries, parents have considerable authority to direct the education of their child through school choice, although not necessarily in terms of curriculum content. In both countries, public school curriculum is controlled at district, state or national levels. In Australia, private school curriculum is also controlled, although such schools may, and most often do, offer religious and/or other extra curricular learning for their students. In the US, private schools have more freedom in the curriculum they offer, and may be more influenced by parental choice.

In general law and policy in both countries, little authority and positive power are given to the children who are the school students. They are the passive participants in what is arguably their most important activity during childhood. The United Nations Convention on the Rights of the Child, to which Australia is signatory, indicates that children should have increased responsibility in decision-making affecting their futures, in accord with their growing maturity. This applies in education as well as other matters. In Australian case law outside education we see that this principle is recognised. In the US, while not a signatory to the CRC, individual constitutional rights have been found to follow students through the school gate. In neither Australia nor the US, however, there is no case precedence as to when children's rights might surpass the rights of their parents.

We accept that in most family environments choice of school will be a family discussion, with children acceding to parental wishes or able to influence their parental choices. Throughout legislation and policy in general, however, school choice and enrolment are framed in terms of parental actions, not the actions of the children. An interesting exception is under the IDEA legislation in the US, where the focus is the child, and the authority of parents is as surrogates for their child.

It is only when we examine family law in both Australia and the US that we see where the rights of parents and children may conflict, who has authority, and when the courts will step in. Australian family law gives rhetorical voice to children in family law matters. Some of the Australian case law discussion demonstrates that children's views are to be heard on all matters including schooling. As the case law demonstrates, however, their views are expressed through the voices of others. No example was found where applying due weight to the views of a child on schooling matters led to the child's views predominated against parents. Similarly, in the US, while the best interest of the child is a prevailing focus, no family law cases establish the superiority of children's voice in the determination of these interests. Parental custody gives the most rights to a custodial parent, taken by the courts, not the children.

The discussion of case law in the previous sections is not exhaustive, but is indicative of trends within judgments. Available research evidence, then, indicates that little notice is taken of a child's views in practice. As Fitzgerald noted for Australian family law:

representation of the child within the legislation acts to position children in a way that ensures they remain at 'arm's length' from the decision-making processes. As such, claims that children are central to the policy and processes of Australian family law are more representative of current rhetorical discourse than they are of any right of the child, or of any real concern to invite children to participate in the decision-making processes that determine their future residence and contact arrangements.¹¹⁵

We would argue that when the best interests of the child are the paramount concern in all matters, and especially in education, the voice of the child should be increasingly heard. All countries around the world aspire to full school participation and retention rates. Schools seek to reduce truancy and problem behaviours. National and international policies see education as

critical for the social and economic welfare of individuals as well as national economic wellbeing. Recognition that children should be actively engaged in negotiating their own education seems a logical basis to enhancing the student experience and achieving these overall goals.

[t]he mounting demands for children 'to have a say' have ... heightened unresolved tensions about the relationship between the moral status of children and wider political and social power relations and practices (particularly the rights of parents) which constitute and govern children's participation in the decisions that will shape their future lives ...¹¹⁶

We have examined competing rights in school choice. At present, those with the least voice, are the children.

Keywords: school choice; parental rights; children's rights; court determination; children's best interests; student voice.

ENDNOTES

- 1 In this article, we do not define 'parent'. Both within Australia and the US, the term is defined in many ways and differently in each state within the two countries. Both countries have Indigenous populations where family relationships are extensive. In general, the term is used to indicate any person with authority to determine schooling for a student based on familial or carer responsibilities.
- 2 Our consideration of 'child' is for children under 18 years of age, consistent with the definition of the UN Convention on the Rights of the Child (Art 1).
- 3 See Joy Cumming and Ralph Mawdsley, 'The Nationalisation of Education in Australia and Annexation of Private Schooling to Public Goals' (2012) 17(2) *International Journal of Law and Education* 7; Ralph Mawdsley and Joy Cumming, 'Government Regulation of Nonpublic Schools in the United States' (2012) 17(1) *International Journal of Law and Education* 39.
- 4 Australia is a Commonwealth or federation of six states and two territories, hereafter 'states'. The Australian *Constitution* specifies specific areas of responsibility for the Commonwealth government under s 51. Where the *Constitution* is silent on areas of responsibility, since the seminal *Engineers' case (Amalgamated Society of Engineers v Adelaide Steamship Co Ltd)* (1920) 28 CLR 129, an interpretation that reserves those powers to the states is not in place, unlike the specific expectations of the constitutions of the US and Canada. Education is not specifically noted as an area of Commonwealth or Australian federal government in the Australian Constitution, and is an area of contention between the Commonwealth government and the states. However, the Australian government has increased direction of education policy at the national level through use of power of the purse. Decisions are generally made by federal and state ministers of education.
- 5 Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), *National Goals for Schooling in Australia* ('Adelaide Declaration') (1999) <http://www.mceecdya.edu.au/mceecdya/adelaide_declaration,11576.html>. A less strong statement is expressed in the more recent 'Melbourne Declaration' where education is a 'collective responsibility of' government, schools and parents and schools (at 7), 'share[d]' with schools (at 4), and, in '[p]artnership' with parents (at 10) (MCEETYA, *Melbourne Declaration on Education Goals for Young Australians* (2008) <<http://www.mceecdya.edu.au/mceecdya/>>).
- 6 *Attorney-General (Vic); Ex Rel Black v The Commonwealth* ('DOGS case') [1981] HCA 2 (citing the (now defunct) *Schools Commission Act* 1973 s13(4)(b) as to '(t)he prior right of parents to choose whether their children are educated at a government school or a non-government school': at [14]).
- 7 See, eg, *Education Act 2004* (ACT) s 128(a): 'parents have the right to choose a suitable educational environment for their children'; *Education Act 1990* (NSW) s 4(b) 'education of a child is primarily the responsibility of the child's parents'; *Education And Early Childhood Services (Registration And Standards) Act 2011* (SA) s 9(1)(c) 'the rights of parents to access a diverse range of education ...

- providers’; *Education and Training Reform Act 2006* (Vic) s 1.2.1(d) ‘parents have the right to choose an appropriate education for their child’.
- 8 See, eg, Department of School Education (DSE) (NSW) <<http://www.schools.nsw.edu.au/gotoschool/enrolment/index.php>>; Department of Education, Training and Employment (DETE) (QLD) *School Enrolment Management Plans* (31 July 2012) <<http://education.qld.gov.au/schools/catchment/>>; Department of Education and Early Childhood Development (DEECD) (Vic) *Welcome to Primary School. A Parent’s Guide to Victorian Government Schools* (Melbourne) (2011).
- 9 See, eg, *Education (Accreditation of Non-State Schools) Regulation 2001* (Qld) reg 7.
- 10 *Education Act 2004* (ACT) ch 5; *Education Act 1990* (NSW) pt 7 div 6; *Education Act* (NT) s 20E; *Education (General Provisions) Act 2006* (Qld) pt 5; *Education Act 1972* (SA) s 76D; *Education Act 1994* (Tas) s 17; *Education and Training Reform Act 2006* (Vic) div 2; *School Education Act 1999* (WA) div 6.
- 11 US *Constitution*, Amend XIV, s 1 (‘No State shall ... deprive any person of life, liberty, or property, without due process of law’). See also *Runyon v McCrary*, 427 US 160, 178 (1976); *Johnson v City of Cincinnati*, 310 F 3d 484, 499 (6th Cir, 2002).
- 12 268 US 510 (1925).
- 13 Ibid 535.
- 14 See generally Ralph Mawdsley, ‘The Changing Face of Parents’ Rights’ (2003) 1 *Brigham Young University Education and Law Journal* 165.
- 15 See Laura J Bach, ‘For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and The Religion Clauses of The First Amendment’ (2004) 38 *Valparaiso University Law Review* 1337, 1376–80 (2004). See also *Mozert v Hawkins County Public Schools*, 765 F 2d 75 (6th Cir, 1987); *Axon-Flynn v Johnson*, 151 F Supp 2d 1326, 1339–41 (D Utah, 2001).
- 16 827 F 2d 1058 (6th Cir, 1987).
- 17 US *Constitution*, Amend I (‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’).
- 18 68 F 3d 525 (1st Cir, 1995).
- 19 See, eg, *Meyer v Nebraska* (‘*Meyer*’) 262 US 390 (1923). The ostensible purpose of the state statute enacted by the Nebraska legislature in 1919 was ‘to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals’ (at 401). This case, examining a challenge to curricular content in non-public schools, looked at the limits imposed by the statute on ‘the power of parents to control the education of their own [children]’, and determined that while the state is still allowed to establish its public school curriculum and to compel students to attend school, it did not control curriculum choice in non-public schools that could be influenced by parental values.
- 20 See, eg, the *Disability Standards for Education 2005* (Cth) which provides students with disability with the right to quality educational provision and participation.
- 21 First raised in *Nationwide News v Wills* (1992) 177 CLR 1, the implied freedom is narrow and is more a restriction on authorities than an individual right.
- 22 The Victorian *Charters of Human Rights and Responsibilities Act 2006* (‘*CHRR* (Vic)’); the Australian Capital Territory *Human Rights Act 2004* (‘*HRA* (ACT)’).
- 23 *CHRR* (Vic) ss 28, 29, 30; *HRA* (ACT) s 30.
- 24 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577 page 3 <<http://www.unhcr.org/refworld/docid/3ae6b38f0.html>> adopted and opened for signature in late 1989, entered into force September 1990.
- 25 Australia signed the CRC 22 August 1990, ratified 17 December 1990.
- 26 Article 28.
- 27 The right to education is only identified in legislation in three Australian states or territories: *Education Act 2004* (ACT) s 7 (‘right to high quality education’), as well as in the *HRA* (ACT) s 27A (‘right to have access to free, school education appropriate to his or her needs’); *Education Act 1990* (NSW) s 4; *School Education Act 1999* (WA) s 3.
- 28 See, eg, *Education Act 1994* (Tas) s 4(1).

- 29 See, eg, *Education (General Provisions) Act 2006* (Qld) s 176; *Education Act 1990* (NSW) s 23; *School Education Act 1999* (WA) s 38; *Education Act 1994* (Tas) s 6.
- 30 See, eg, *Education (General Provisions) Act 2006* (Qld) s 288C; NSW Department of Education and Training, *Suspension and Expulsion of School Students – Procedures* (2011), 3 §5.0.4 ‘procedural fairness is generally recognised to have two essential elements ... the right to be heard ... the right of a person to a fair and impartial decision’.
- 31 16 February 1995.
- 32 L Rutkow and J T Lozman, ‘Suffer the Children?: A Call for United States Ratification of the United Countries Convention on the Rights of the Child’ (2006) 19 *Harvard Human Rights Journal* 161.
- 33 Constitution of South Africa, ch 2 (Bill of Rights), s 28 (‘A child’s best interests are of paramount importance in every matter concerning the child’).
- 34 See, eg, *Ohio Re. Code* s 3321.04 (‘Every parent of any child of compulsory school age ... must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education.’).
- 35 See, however, Leah J Tulin, ‘Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?’ (2007) 95 *Georgetown Law Journal* 1979, 1994 (observing that, ‘notwithstanding the fact that the United States has signed the Convention on the Rights of the Child (CRC), the prevailing interpretation of US constitutional law is largely ambivalent with respect to protecting minors’ individual rights’).
- 36 393 US 503, 506 (1969). The *Tinker* challenge resulted from students wearing black armbands to a public school to protest the Vietnam war; school policy banned the wearing of such armbands with students to be suspended until they complied with the policy. The students challenged on grounds the policy violated their constitutional right to free speech under the First Amendment.
- 37 *Ibid* (‘students, and teachers, [do not] shed their constitutional rights to freedom of speech at the schoolhouse gate’).
- 38 381 F 3d 172 (3d Cir, 2004).
- 39 *Ibid* 174, citing to 25 Pa Stat § 7–771(c).
- 40 *Ibid* 180–81, 182.
- 41 *Dept of Health and Community Services v JWB and SMB* (‘*Marion’s case*’) [1992] HCA 15.
- 42 NSW Law Reform Commission, *Young People and Consent to Health Care (Report 119)* (2008).
- 43 *Gillick v West Norfolk and Wisbech Area Health Authority* (‘*Gillick*’) [1986] AC 112.
- 44 *Ibid* 9–11.
- 45 393 US 503, 506 (1969).
- 46 *Ibid* (‘students, and teachers, [do not] shed their constitutional rights to freedom of speech at the schoolhouse gate’).
- 47 *Ibid* 503 (the three middle school students’ use of the peace symbol to oppose the war in Vietnam resulted from a meeting held in a parent’s home).
- 48 406 US 205 (1972).
- 49 The First Amendment to the US Constitution declares that, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...’. The Free Exercise Clause protects the practice of religious beliefs where restrictions against the practice are not ‘neutral and generally applicable’ [*Employment Div v Smith*, 494 US 872 (1990)]; the Clause also creates a Free Exercise exception that prohibits government review of the decisions of religious organisations in regulating and discharging their ministerial employees [*Hosanna-Tabor Evangelical Lutheran Church v Equal Employment Opportunities Comm’n*, 132 S Ct 694 (2012)].
- 50 *Wisconsin v Yoder* 406 US 205 (1972), 241 (Douglas J, dissenting).
- 51 *Ibid* 243.
- 52 *Ibid* 242.
- 53 650 F d 915 (3d Cir, 2011).
- 54 381 F 3d 172 (3d Cir, 2004).
- 55 *Ibid* 183.
- 56 68 F 3d 525 (1st Cir, 1995).

- 57 Section 51(xxii) ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’; confirmed *AMS v AIF and AIF v AMS* [1999] HCA 26.
- 58 2003 statistics indicated 14% of divorces required Court intervention and overall some one per cent court determination (R M Fitzgerald, *Children Having a Say: A Study on Children’s Participation in Family Law Decision Making* (PhD Thesis, Southern Cross University, 2009). It is unlikely statistics have improved since then.
- 59 CRC art 3(1) ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’; incorporated in the *FLA* s 60CA ‘Child’s best interests paramount consideration in making a parenting order’.
- 60 CRC art 12(1) ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law’. Incorporated in the *FLA* s 60CC(3)(a) [court determination of a child’s best interests will include] any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views.
- 61 *FLA* s 60CD(2): The child’s views may be presented to the court through a report or through an independent children’s lawyer who is required ‘to ensure the child’s views are fully put before the court’.
- 62 [2006] FamCA 25; both parents were originally from New Zealand and had moved to Australia. After separation, the Family Court ruled that their three children would reside with the mother on condition she did not relocate. The father applied for a reversal to the residential order as the mother wished to relocate to New Zealand, arguing better education and employment opportunities for herself and resultant better conditions for her children, and to be closer to her family. Even without relocation, the father wanted shared residential status. The mother’s response was to seek to retain the residential status, with preference for relocation.
- 63 Ibid [44].
- 64 Ibid [9], [17]. In cases examined in this paper, all children were reported to be doing well at school, or to have improved at their current school, and all were ‘resilient’ to possible change.
- 65 *W & R* [2006] FamCA 25 [369(d)].
- 66 Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction* (Hague XXVIII) (*‘Hague Convention’*)(25 October 1980) <<http://www.unhcr.org/refworld/docid/3ae6b3951c.html>>.
- 67 *Champness & Hanson* [2009] FamCAFC 96, [73].
- 68 *In the Marriage Of: R (Husband) and R (Wife) the Child Representative* [1997] FamCA 49, [11].
- 69 [2010] FamCAFC 248, [5] (one child had health issues, the dispute centred around his schooling and provision by the trial judge to the mother of decision-making responsibility regarding education and special needs).
- 70 Ibid [41] (Transcript, 15 October 2008, 7).
- 71 Ibid [105].
- 72 Ibid [127].
- 73 Ibid [161].
- 74 [2008] FamCAFC 823.
- 75 Ibid [30].
- 76 [2011] FamCA 1066.
- 77 *Shrine & Murphy* [2011] FamCA 65, [163].
- 78 [2010] FamCA 1054, [2011] FamCAFC 7.
- 79 *Dreyfus & Kearney* [2011] FamCAFC 7, [10].
- 80 *Dreyfus & Kearney* [2010] FamCA 1054, [44].

81 Ibid [49].
82 Ibid [28].
83 Ibid Headnote.
84 Ibid [36]–[40].
85 Ibid [59].
86 *Dreyfus & Kearney* [2011] FamCAFC 7, [43].
87 Pollard & Iver (No 2) [2007] FMCAfam 814.
88 Ibid [3].
89 R M Stahl, “‘Don’t Forget About Me’: Implementing Article 12 of the United Nations Convention on the Rights of the Child” (2007) 24(3) *Arizona Journal of International & Comparative Law* 803, 814.
90 See Ralph Mawdsley, ‘Noncustodial Parents’ Right to Direct the Education of Their Children’ (2005) 199 *Education Law Reporter* 545, 553–58 (discussing the relationship between the constitutional right of parents to direct their children’s education and best interest of the child analysis under state law).
91 See, generally, Ralph Mawdsley, ‘Parental Right to Direct the Education of Their Children in the US: What About the Rights of Children?’ (2011) 16 *International Journal of Law and Education* 55.
92 *Anderson v Anderson* 56 S W 3d 5 (Tenn Ct App, 1999).
93 914 P 2d 1246 (Alaska, 1996).
94 Alaska Statute 25.24.150(c)(1).
95 727 N Y S 2d 825 (N Y App Div, 2001).
96 *Abbott v Abbott*, 130 Supreme Court 1983 (2010).
97 Ibid 1991.
98 Ibid 2000.
99 See generally, Barbara R Bergmann and Sherry Wetchler, ‘Child Support Awards: State Guidelines vs Public Opinion’ (1995) 29 *Family Law Quarterly* 483, 485.
100 *Will v Ristaino*, 701 A 2d 1227 1234 (Md Ct Spec App, 1997) (upholding the apportioning of costs of children’s private school education 65% to noncustodial parent and 35 to custodial parent, which was less than noncustodial parent’s 76% proportionate share of parties’ income, and determining that noncustodial parent, who had monthly income of approximately \$2,100, could afford expenses of private school tuition).
101 Ibid 14 (citing to *Valure v Valure*, 696 So 2d 685, 687 (La Ct App, 1997)).
102 *Will v Ristaino*, 701 A 2d 1227, 1234 (Md Ct Spec App, 1997), 15–16.
103 *Cleveland v Cleveland* (‘*Cleveland*’) 289 A 2d 909 (Conn, 1971).
104 289 A 2d 909 (Conn, 1971).
105 The *Individuals with Disabilities Education Act* (IDEA) is a comprehensive US federal affirmative obligation statute that requires social services agencies to provide evaluations and special education services for children with disabilities from birth to age three and local educational agencies (eg, public school districts) to provide evaluations and special education services for children with disabilities from age three to high school graduation, or, if a child does not graduate, until the twenty-second birthday.
106 20 *USC* § 1414 (a)(1)(C).
107 Ibid § 1414 (d)(1)(B).
108 Ibid § 1415 (b)(1).
109 Ibid § 1415 ((b)(1).
110 Ibid § 1415 (b)(3), (c).
111 Ibid § 1414 (f).
112 Ibid § 1415(f).
113 Ibid § 1401 (23). This statutory addition is reflected in language in the 1999 Department of Education regulations. See 34 C F R: § 300.20 (a)(1), (3).
114 *Taylor v Vermont Department of Education* (‘*Taylor*’) 313 F 3d 768 (2d Cir, 2002), 778.
115 R M Fitzgerald, *Children Having a Say: A Study on Children’s Participation in Family Law Decision Making* (PhD Thesis, Southern Cross University, 2009) 66.
116 Ibid 12.