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Everything is Bigger in Texas: Including the Horrendously Inadequate Attempts at Providing Special Education and Related Services to All Children with Disabilities

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COMMENTS

EVERYTHING IS BIGGER IN TEXAS: INCLUDING THE HORRENDOUSLY INADEQUATE ATTEMPTS AT PROVIDING SPECIAL EDUCATION AND RELATED SERVICES TO ALL CHILDREN WITH DISABILITIES

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* St. Mary's University School of Law, J.D., May 2022. University of Arkansas, B.S., 2018. I write this piece out of immeasurable respect for students, their families, educators, and all those involved in special education in Texas. I wrote my comment to shed light on the continuous flaws within special education in Texas by utilizing educators', parents', and advocates' own words. Our legal and political system needs to significantly overhaul Texas' special education practices to better serve our schools and students with disabilities.

I dedicate this piece to my mother, Amy Booterbaugh, and father, Matt Booterbaugh. My mother is a perfect example of a genuine, selfless, and faithful woman who taught me what it means to love unconditionally, serve compassionately, and pray endlessly. In addition to being supportive, generous, and humble, my father has dedicated his life to providing for our family, teaching me invaluable life lessons, and, above all, fiercely accepting all that encompasses being my father. There will never be enough words or actions to thank my parents for the sacrifices they have made in shaping the person I am today, but I will spend my lifetime trying.

I want to thank Corey Bakker, Monica Piper, Monica Piper's son, and Nagla Moussa for taking the time to share their stories with me. Together, we will continue to fight for children with disabilities because, in the words of Chief Justice Roberts, a child's education "must be '*specialy* designed' to meet a child's '*unique* needs' through an '*[i]ndividualized* education program.'" Additionally, I want to thank Professor Farrer, who motivated me when I was overwhelmed as a 1L student, helped me become a stronger writer, and assisted me through the stressful job search process.

Most importantly, I want to thank my family for always encouraging me to be the best version of myself. To my sister and brother for keeping my spirits up throughout this process. To my

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Nonny and Poppa for always keeping me in their thoughts and prayers. To my grandparents, Jill, and Joe, for being there for me even though they live far away.

Finally, a special thank you to Volume 23 and 24 Staff Writers and Editorial Board members. I have met lifelong friends through *The Scholar*, and I am incredibly grateful for this wonderful experience. Due to everyone's support and encouragement, this piece will further our mission of "giving a voice" to children with disabilities in Texas who are otherwise unable to fully voice the lack of services currently provided on their own.

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INTRODUCTION

If you know one person with autism, you know one person with autism. They’re all such unique individuals. They’re unique in their learning. They’re unique in their behaviors. It requires a unique approach in order to best teach any individual on the spectrum.

—Maureen Lacert¹

According to the Centers for Disease Control and Prevention (CDC), one in fifty-four children in the United States is diagnosed with an autism spectrum disorder (ASD).² ASD is a condition that affects individuals differently, and the characteristics can appear in varying degrees, ranging

1. Ellen O’Leary, *Everyone with Autism Isn’t the Same*, BOS. (Apr. 2, 2015), <https://www.boston.com/news/health/2015/04/02/everyone-with-autism-isnt-the-same> [perma.cc/ZA9U-MT8G] (quoting Maureen Lacert, the clinical director of Nashoba Learning Group, special education teacher and behavior analyst expert, on her opinion of the public’s perception of autism).

2. *See Autism Spectrum Disorder (ASD)*, CDC (Mar. 25, 2020), <https://www.cdc.gov/ncbddd/autism/data.html> [perma.cc/A2DN-UYPY] (citing conclusions from the CDC’s estimates on the number of children with ASD from their Autism and Developmental Disabilities Monitoring Network); *see also* Matthew J. Maenner et al., *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years*, CDC (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/ss/ss6904a1.htm?s_cid=ss6904a1_w#suggestedcitation [perma.cc/VUP3-XEZU] (noting the statistic was published in 2020, but the data is from 2016); *see also Autism Statistics & Rates in 2021*, ELEM (May 10, 2021), <https://www.joinsproutherapy.com/studio/autism/statistics-and-rates> [https://perma.cc/S9Z3-SPZB] (recognizing that autism is a common developmental condition).

from mild to severe.³ Autism is a complex, lifelong, nonprogressive neurological disorder that significantly affects verbal and non-verbal communication, relationships, self-regulation skills, and social connections.⁴ Even though autism is a lifelong disorder with no known cure, vigilant training and sensitive care can potentially create improvements by reducing symptoms, improving cognitive ability, improving daily living skills, and maximizing the ability of the individual to function and partake in society.⁵

In 2015, the cost of caring for individuals with autism in the United States was \$268 billion; however, statistics expect this total to increase to \$461 billion by 2025.⁶ Moreover, the costs for continuous, lifelong behavioral and medical treatment for a single person with ASD are estimated to be up to two million dollars.⁷ The most effective treatments available are: applied behavioral analysis (ABA), speech therapy, pharmacological therapy, occupational therapy, physical therapy, and the

3. *E.g.*, *Definition of Autism*, AUTISM AWARENESS CTR. INC., <https://autismawarenesscentre.com/definition-autism/> [perma.cc/3EY6-DD2C] (listing the numerous traits and characteristics that a person diagnosed with autism might experience); *see also* *What is Autism?*, AUTISM SOC'Y, <https://www.autism-society.org/what-is/> [perma.cc/BE8V-YKJT] (highlighting traits such as: “repeating sounds or phrases (echolalia), repetitive movements, preference for sameness and difficulty with transition or routine, rigid or highly restricted and intense interests, extreme sensitivity to or significantly lower sensitivity to various sensory stimuli” experienced by individuals with autism).

4. *E.g.*, *Definition of Autism*, *supra* note 3 (outlining categories of impairments typically observed in individuals with autism); *see also* *What is Autism?*, *supra* note 3 (characterizing autism as: nonverbal, atypical speech patterns, trouble understanding nonverbal communications, difficulty making and keeping relationships, difficulty maintaining conversational back-and-forth communications).

5. *See* *Treatment and Intervention Services for Autism Spectrum Disorder*, CDC, <https://www.cdc.gov/ncbddd/autism/treatment.html> [perma.cc/78BZ-K9VM] (last modified Sept. 23, 2019) (introducing the different types of treatment available to those with autism especially being no treatment cures ASD. The types of treatments change depending on age, challenges, and differences).

6. *See* *Autism Statistics & Rates in 2021*, *supra* note 2 (reporting that treating autism has high economic costs. For an adult, services can cost anywhere between \$175 billion and \$196 billion a year. For a child, services can cost between \$61 and \$66 billion per year).

7. *See* Catherine Lord & Somer L. Bishop, *Autism Spectrum Disorders Diagnosis, Prevalence, and Services for Children and Families*, 24.2 SOC'Y FOR RSCH. CHILD DEV. 1, 3 (2010) <https://files.eric.ed.gov/fulltext/ED509747.pdf> [https://perma.cc/N4W5-SQ3F] (detailing that the costs for children and adults with autism are vastly different. Additionally, these costs differ even more when an individual also has an intellectual disability in addition to autism); *see also* *Autism Statistics & Rates in 2021*, *supra* note 2 (“It is estimated that the lifetime cost of autism can be as high as \$2 million per person.”).

use of assistive technology.⁸ Out of all possible treatments, it is important to emphasize that ABA is the top treatment among healthcare professionals, school districts, and clinics.⁹ ABA is the most popular treatment because it improves an assortment of skills by encouraging positive behavior, discouraging negative behaviors, and continuously measuring the child's progress.¹⁰ ABA therapy, however, costs around \$47,000 per year for Board Certified Behavior Analyst (BCBA) services.¹¹ Additionally, clinical or at-home ABA therapy with BCBA services would cost an additional \$15,000 per year.¹² The Autism Insurance Act (AIA) of 2008 requires all private insurance companies to provide coverage for "diagnosis, treatments, psychological services, consultations, behavioral therapies, care services, and medication for individuals with ASD" until the individual turns twenty-one years old.¹³ Despite AIA covering some critical services, the provision has an annual cap of only \$36,000 per individual with ASD.¹⁴ Therefore, most parents

8. *E.g. Treatment Options*, AUTISM SCI. FOUND., <https://autismsciencefoundation.org/what-is-autism/treatment-options/> [perma.cc/8MNT-X5N3] (identifying the types of treatments for individuals with ASD as: behavioral, dietary, medication, communication, and complementary and alternative medicine); *see also Treatment and Intervention Services for Autism Spectrum Disorder*, *supra* note 5 (noting that for the best possible prognosis it is important to have an early diagnosis of ASD and provide quick steps towards services).

9. *See Treatment and Intervention Services for Autism Spectrum Disorder*, *supra* note 5 (affirming the ABA approach is a highly favorable form of treatment for individuals with ASD); *see also* Fran Smith, *Educators Deal with the Growing Problem of Autism*, EDUTOPIA (Mar. 19, 2008), <https://www.edutopia.org/autism-school-special-needs> [perma.cc/GS4K-F9A8] (quoting Patricia Krantz, executive director of Princeton Child Development Institute, "The research literature is clear . . . [t]he only approach that has systematically documented its effectiveness is ABA.").

10. *See Treatment and Intervention Services for Autism Spectrum Disorder*, *supra* note 5 (last modified Sept. 23, 2019) (affirming the ABA approach is highly favorable form of notable treatment for individuals with ASD).

11. *See id.* (estimating the average rate of BCBA consulting services is \$120 per hour).

12. *See Funding Overview*, SPECIAL LEARNING INC., [https://www.special-learning.com/article/funding_overview#:~:text=Applied%20Behavioral%20Analysis%20\(ABA\)%20Therapy,a%20BCBA%20line%20therapy%20program](https://www.special-learning.com/article/funding_overview#:~:text=Applied%20Behavioral%20Analysis%20(ABA)%20Therapy,a%20BCBA%20line%20therapy%20program) [perma.cc/255L-3PZN] (sharing the average estimated costs associated with the treatment and therapy at-home being at thirty dollars per hour).

13. *See id.* (discussing how legislation has helped families and individuals with ASD receive treatment, services and care due to insurance companies being notoriously uncooperative. Legislative requirements help families to receive the support or reimbursement they should be entitled to from their insurance company).

14. *See id.* (indicating that although the AIA expands access to services for ASD they are also limited by a monetary cap. Families should be aware of caps when dealing with their insurance company and the issues this may cause).

who have a child with ASD heavily rely on the services provided by the public school system.¹⁵

One of the greatest challenges public schools currently face is the dramatic increase of children diagnosed with ASD due to parents relying on public school districts.¹⁶ The law requires every school district to provide a free, “appropriate” education to all students, yet school budgets are not increasing as quickly as the number of children diagnosed with special needs.¹⁷ Therefore, the “appropriate” education standard is constantly declining because school districts barely provide the minimum standard of education, while parents seek more than basic services for their children.¹⁸

In this comment, I argue that without immediate action, the “corrections” made by the Texas Legislature to meet the appropriateness requirement for special education will result in imminent peril for students with autism as well as their parents.¹⁹ In Section I, I will briefly discuss the history of Federal and Texas legislation governing special

15. See Smith, *supra* note 9 (citing the executive director of the Virginia Institute of Autism, Michael McKee, for observing the increase of tension between parents’ expectations for their children with ASD and what school districts are willing to provide. Parents are willing to fight for the delivery of services and programs or turn to private schools as an alternative to underserving public schools).

16. See *id.* (stressing how the number of special needs students dramatically increases leads to schools grappling with choices of having to offer free appropriate education without increasing funding). See generally Maya Riser-Kositsky, *Special Education: Definition, Statistics, and Trends*, EDUC. WK., (Dec. 17, 2019), <https://www.edweek.org/teaching-learning/special-education-definition-statistics-and-trends/2019/12> [perma.cc/VE7B-PAER] (pointing out that in the 2019–20 school year, 11% of all students with disabilities were diagnosed with autism alone, compared to 5.8% from 2009–10).

17. See Smith, *supra* note 9 (explaining how the Special Education Expenditure Project conducted a study for the U.S. Department of Education, which found that special classes, therapists, aides, transportation, and facilities for an autistic student cost an average of nearly \$19,000 a year, or roughly triple the cost for a typical child); see also Riser-Kositsky, *supra* note 16 (highlighting the number of students in the U.S. with disabilities has grown from 13.1% of all students in 2009–10, to 14.4%, almost 7.3 million, in 2019–20).

18. See generally Smith, *supra* note 9 (expounding on the conflicts faced by school administrators and teachers from the growing pressure from parents advocating for excellent special education programs and services).

19. See generally Aliyya Swaby, *Texas Lawmakers Boosted Special Education Funding this Year, Prompting Hope for More from Advocates*, TEX. TRIB. (May 31, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/31/texas-lawmakers-address-improper-special-education-spending/> [perma.cc/4S8U-33LL] (summarizing the legislative provisions impacting special education funding and their purposes, including reporting on how Texas plans to spend federal grant money for special education).

education, as well as the U.S. Supreme Court's history of cases surrounding public education. Even though the Individuals with Disabilities Education Act (IDEA) is paramount for special education, the Act is substantially dense, and its language is complex.²⁰ Thus, Section II provides a basic outline of the overall purpose of the IDEA and highlights important takeaways resulting from Part B of IDEA. Section III lays out significant events that illustrate how Texas is continuously failing to meet IDEA requirements and how Texas differs from other states also receiving funding from IDEA.²¹ Lastly, in Section IV, I offer real and abstract solutions to address the problems within Texas' Special Education Program.²²

I. HISTORY OF SPECIAL EDUCATION LAW

A. Federal History

During President Lyndon B. Johnson's administration, the Elementary and Secondary Education Act of 1965 (ESEA) initiated a widespread plan addressing the discrimination of educational opportunities for economically disadvantaged children.²³ The ESEA became the statutory

20. See generally Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2010) (establishing guidelines for the education of individuals with disabilities).

21. See Alejandra Matos, *Texas Needs to Find up to \$3.3 Billion to Bring Special Education Services up to National Standards*, HOUS. CHRON. (Aug. 10, 2018, 6:25 PM), <https://www.houstonchronicle.com/news/investigations/article/Texas-may-pay-up-to-3-billion-to-raise-special-13146845.php?converted=1> [perma.cc/9GPY-GWSU] (unearthing that the Texas Education Agency set an illegal cap on the number of students receiving special education services); see also Andrea Zelinski, *For Fourth Straight Year, Texas Special Education "Needs Assistance," Feds Say*, HOUS. CHRON. (July 4, 2019), <https://www.houstonchronicle.com/politics/texas/article/For-fourth-straight-year-Texas-special-education-14070637.php> [perma.cc/NMT5-A9B9] (bemoaning Texas' underperformance in special education benchmark standards for the fourth consecutive year).

22. See Matos, *supra* note 21 (emphasizing that students with disabilities bear the burden of budget cuts, and thus lose key supports and resources); see also Zelinski, *supra* note 21 (“[T]he Texas Education Agency explicitly told the Department of Education it cannot promise that students with disabilities would receive an appropriate education or be identified, located and evaluated in accordance with IDEA until June 30, 2020.”).

23. See Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VA. COMMONWEALTH UNIV. (2016), <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> [perma.cc/XK87-RJEQ] (summarizing the purpose and goals of the ESEA as a commitment to equal access to education). See generally *Legislative History of Special Education*, ADVOC. INST., <https://www.advocacyinstitute.org/>

foundation for drafting early special education legislation.²⁴ Although the ESEA Amendments of 1965 were the first grant programs particularly created for children with disabilities at the federal level, the 1966 Amendments established grant programs for educating children with disabilities at the local level.²⁵ The ESEA Amendments of 1970, later renamed Part B of IDEA, established a central grant program for local and state agencies.²⁶ Most importantly, the ESEA Amendments of 1974 first suggested that all students with disabilities should have an appropriate education.²⁷

By the 1970s, despite the enactment of ESEA, only a minimal number of children with special needs were being educated in public schools.²⁸ Specifically, in 1975, the Senate Report states:

academy/Dec10IDEA35/Special_Ed_Legislative_History.pdf [https://perma.cc/XU3G-7ZRB] (outlining the legislative history of special education beginning from 1965).

24. *See generally* *Legislative History of Special Education*, *supra* note 23 (indicating that the ESEA was the first piece of legislation filed to begin addressing issues in education, but more particularly special education).

25. *See id.* (differentiating the purpose and scope of the Amendments made to the ESEA in 1965 and 1966).

26. *See id.* (detailing the additions and evolutions made to the IDEA so that more programs could be created under the legislation).

27. *See id.* (suggesting that before this Amendment to the legislation that an appropriate education was not required for children with disabilities).

28. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 195 (1982) (“[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education.”); *see also* Jean Crockett, *How Children with Disabilities Came to Be Accepted in Public Schools*, UNIV. OF FLA. NEWS (Dec. 7, 2015), <https://news.ufl.edu/articles/2015/12/how-children-with-disabilities-came-to-be-accepted-in-public-schools.html> [perma.cc/TH2T-GHG6] (emphasizing that the general belief was children with disabilities could not learn, and thus were excluded from the classroom and denied an appropriate education that addressed their needs). *See generally* Victoria Brignell, *When the Disabled Were Segregated*, NEWSTATESMAN (Dec. 15, 2010), <https://www.newstatesman.com/society/2010/12/disabled-children-british> [perma.cc/9R8Z-U87P] (describing how children with special needs used to be segregated from the rest of society in the United Kingdom and United States, during twentieth century, by placing individuals in institutions for their own well-being and the good of society. For example, in 1913, Britain enacted the Mental Incapacity Act which led to approximately 40,000 men and women being locked away, finding them “morally defective.” Additionally, while being hospitalized, individuals suffered severe emotional and physical abuse. For example, “[i]f the nurses took a dislike to a child, they would hold her under the water in a bath until she started to go blue . . . [o]n one occasion, the nurses held a child under the water for too long and the child drowned.”).

[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.²⁹

This quickly changed after the enactment of the Education for All Handicapped Children Act (EAHCA) of 1975, which established a right to public education for all children, regardless of whether they had a disability.³⁰ Additionally, the EAHCA became an independent law and root source of federal funding for special education.³¹ EAHCA mandated free, appropriate public education for all individuals with disabilities and established the requirement for individualized education programs (IEPs).³² The EAHCA Amendments of 1986, currently known as Part C of the IDEA, mandates services for developing inclusive statewide early intervention programs for infants.³³ Lastly, the EAHCA Amendments of 1990 were renamed and are currently known as IDEA.³⁴ Under IDEA, states who accept federal funding for public education must

29. S. REP. NO. 94-168 at 8 (1975).

30. See *Legislative History of Special Education*, *supra* note 23 (reaffirming that all students with disabilities receive due process and access to an appropriate and free public education). *But cf.* Brignell, *supra* note 28 (explaining how disabled African Americans were especially prone to suffer in the hands of institutions, such as enduring harsh living conditions, poor medical treatment, and overcrowding. For example, African Americans who were disabled “near Baltimore had more than 2,700 patients in the 1950s, 800 more than its official maximum capacity. Black men, women and children with disabilities . . . were housed by this institution in poorly ventilated cell blocks and windowless basement rooms with drains on the floor instead of toilets.”).

31. See *Legislative History of Special Education*, *supra* note 23 (codifying federal funding for the purpose of special education in public schools for students with varieties of disabilities).

32. See *id.* (mandating the use of individualized education programs (IEPs) for students with disabilities so that they have an appropriate education); see also Crockett, *supra* note 32 (detailing how IEPs allow teachers to experiment with teaching approaches so that students with disabilities gain the necessary skills needed to progress, collect data to address learning problems, and track student progress).

33. See *Legislative History of Special Education*, *supra* note 23 (“Mandated services for preschoolers and established the Part H program to assist states in the development of a comprehensive, multidisciplinary, and statewide system of early intervention services for infants (now known as Part C).”).

34. See *Legislative History of Special Education*, *supra* note 23 (summing how what was once the ESEA and the EAHCA evolved into the IDEA due to the influence of the No Child Left Behind Act).

provide individualized or special education to qualifying students with disabilities.³⁵ The IDEA outlines specific guidelines for Free Appropriate Public Education (FAPE).³⁶ The overall goal of special education and its legislation is to meet the individual needs of students with disabilities.³⁷

Although not every child with a disability falls under IDEA or EAHCA, the enactment of these two acts is instrumental in guaranteeing a free public education to millions of children with special needs each year.³⁸ However, it is imperative to remember that IDEA only provides the *minimum requirements* every state must meet to receive federal funding for special education.³⁹ Therefore, state laws and regulations may exceed the federal requirements, but state law cannot take away rights provided by federal law to individuals.⁴⁰

35. See generally 20 U.S.C. § 1400(c)(6) (“While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.”); 20 U.S.C. § 1461(a) (“The purpose of this part is—(1) to provide Federal funding for personnel preparation, technical assistance, model demonstration projects, information dissemination, and studies and evaluations, in order to improve early intervention, educational, and transitional results for children with disabilities; and (2) to assist State educational agencies and local educational agencies in improving their education systems for children with disabilities.”).

36. See 20 U.S.C. § 1401(9) (“The term ‘free appropriate public education’ means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.”).

37. See 34 C.F.R. § 300.1 (ensuring that children with disabilities are guaranteed an education that will meet their unique needs).

38. See *Legislative History of Special Education*, *supra* note 23 (reiterating how important legislative developments in special education are in creating an accessible public education system).

39. See *The Individuals with Disabilities Education Act (IDEA)*, TEX. PROJECT FIRST, <https://www.texasprojectfirst.org/node/38> [perma.cc/MBM7-P47C] (indicating laws can go beyond IDEA; however, state laws cannot take away rights provided to them under federal law); see also *Special Education: Federal Law vs. State Law*, UNDERSTOOD, <https://www.understood.org/articles/en/special-education-federal-law-vs-state-law> [perma.cc/459Q-MVVX] (“State laws can’t contradict IDEA, and they can’t provide less than the federal law requires.”).

40. See *The Individuals with Disabilities Act (IDEA)*, *supra* note 39 (indicating the need for parents to become educated in the different sections of the act, dependent on the age of their child). See generally *Special Education: Federal Law vs. State Law*, *supra* note 39 (explaining regulations

B. *History of Court Cases*

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

—Chief Justice Earl Warren⁴¹

In the landmark decision of *Brown v. Board of Education*, the U.S. Supreme Court held segregation within public schools illegal, thereby eliminating race-based segregation as a matter of law.⁴² Regarding education rights, the Court stated, “education is perhaps the most important function of state and local governments.”⁴³ Chief Justice Warren continued, “[i]t is the very foundation of good citizenship”⁴⁴ Based on the *Brown* decision, one of the first pieces of federal legislation enacted to provide federal funding to assist Local Education Agencies (LEAs) in meeting the needs of educationally deprived children was the 1965 ESEA.⁴⁵

During the early 1970s, *P.A.R.C. v. Commonwealth* and *Mills v. Board of Education* used the *Brown* holding to specifically illuminate the issue of education for children with disabilities.⁴⁶ In both cases, the courts

in a digestible format to parents and offering resources to support parents of children with disabilities).

41. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (quoting Chief Justice Earl Warren, writing for the unanimous Supreme Court of the United States).

42. *See id.* at 493 (introducing the beginning of educational reform by eliminating segregation based on race).

43. *Id.*

44. *Id.*

45. *See generally The Right to Education*, DISABILITY JUST., <https://disabilityjustice.org/right-to-education/> [perma.cc/Z9CW-S4K8] (showing how the *Brown* decision provided the constitutional foundation for education reform. Parents were able to push for more equal educational opportunities and move for additional legislation relating specifically to children with disabilities).

46. *See Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (expanding on *P.A.R.C.* to prohibit the exclusion of children with disabilities in the education system based on insufficient funds); *see also The Right to Education*, *supra* note 45 (describing that disability rights activists began pressing for equal educational opportunities for all children following the *Brown* decision). *See generally* Pennsylvania Ass’n for Retarded Child. v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (describing the standard in Pennsylvania is to establish free public education for children with mental disabilities).

extended the *Brown* decision by using the Due Process Clause of the Fourteenth Amendment to enable parents of children with disabilities with specific rights to challenge local laws that denied their children the right to a public education.⁴⁷ Both cases held that all children, regardless of their disability, “must be provided access to an adequate, publicly supported education.”⁴⁸ After the holdings in *P.A.R.C.* and *Mills*, twenty-seven other federal courts followed the two decisions’ precedent, which eventually led to the federal legislature enacting the 1975 EAHCA, now called IDEA.⁴⁹

Board of Education v. Rowley was the first case to address the term “appropriate” under IDEA’s requirements of FAPE.⁵⁰ After reviewing the legislative history and intent of IDEA, the Court held, “the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education.”⁵¹ The Court reasoned the “‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational

47. See *Pennsylvania Ass’n for Retarded Child.*, 334 F. Supp. at 1266 (permitting every individual between the ages of six and twenty-one access to free public education appropriate to the child’s capacities); see also *Mills*, 348 F. Supp. at 878 (requiring the District of Columbia to provide every child a free and publicly supported education, regardless of the degree of the child’s mental, physical, or emotional disability).

48. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 193 (1982). See generally *Pennsylvania Ass’n for Retarded Child.*, 334 F. Supp. at 1260 (mandating that children with disabilities are entitled to free, public education, and placement in a special class is preferred); *Mills*, 348 F. Supp. at 878 (holding no children with disabilities shall be excluded from an education unless provided an adequate alternative suited to their needs).

49. See *Rowley*, 458 U.S. at 194 (acknowledging the principles established in *P.A.R.C.* and *Mills* are the principles that significantly guided the drafters of the Act. The Senate Report discussed *P.A.R.C.* and *Mills* then immediately described the 1974 statute as having “‘incorporated the major principles of the right to education cases.’”) (quoting S.Rep. No. 94–168 at 8 (1975)).

50. See *id.* at 179, 186 (“This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act . . . [s]uch review requires us to consider two questions: What is meant by the Act’s requirement of a ‘free appropriate public education’? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415?”).

51. *Id.* at 192 (recognizing the process of providing special education and related services to disabled children is not guaranteed to produce any particular outcome. Thus, the Court’s role in defining the meaning of “appropriate” was limited by Congress not deciding on a particular level afforded of public education).

benefit to the child.”⁵² Discussing the importance of the procedural safeguards of the IDEA, the Court stated it is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard.”⁵³ It is important to remember that even though the state satisfied the standard imposed by Congress, the Court expressly confined their analysis only to the facts within *Rowley* because Amy Rowley was performing above average in the regular classrooms of a public school system.⁵⁴

In the landmark decision of Honig v. Doe, the Supreme Court held that a school district may not unilaterally exclude or expel “disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities”⁵⁵ The *Honig* decision created the “ten-day rule,” which permits a school to suspend a student for no more than ten days without parental consent.⁵⁶ As a result of this decision, a child may now be expelled for no more than ten days for disciplinary infractions and no

52. *Id.* at 201–02 (establishing the IDEA only provides a minimum standard to specialized education services. Therefore, even though children with disabilities are entitled to educational benefits, the Court explained, school districts do not have to “maximize” each disabled child’s potential. Observing the Act requires States to “educate a wide spectrum” of children with disabilities and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end,” the Court declined “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”).

53. *Id.* at 205–07 (citations omitted) (highlighting how the IDEA allows parents a significant role in the decisions regarding their child’s special needs services. Additionally, the Court applied a two-pronged test for issues regarding procedural safeguards under the IDEA: first, whether the state complied with the procedural safeguards set forth in the act and second, whether the student’s IEP is reasonably calculated to enable the student to benefit from their educational plan. If the state met the two requirements, then the state has met the standard imposed by Congress).

54. *See id.* at 184 (Plaintiff Amy Rowley was a first grader with impaired hearing. Her school district offered an IEP under which Amy would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. The district proposed that Amy’s classroom teacher speak into a wireless transmitter and that Amy use an FM hearing aid designed to amplify her teacher’s words; the district offered to supply both components of this system).

55. *Honig v. Doe*, 484 U.S. 305, 306 (1988).

56. *See id.* at 306, 328–29 (creating a rule for states to abide by regarding the disruptive conduct of disabled children in classroom settings).

more than forty-five days for dangerous behavior involving drugs or weapons under IDEA.⁵⁷

C. Texas History

The Supremacy Clause, which lies under Article VI, Section II of the United States Constitution, grants Congress the authority to adopt laws that bind every state regardless of contrary state law.⁵⁸ Even when Congress has not entirely displaced state regulation in a specific area, state law is preempted when it conflicts with federal law.⁵⁹ Thus, any Texas law is preempted by federal law to the extent it conflicts with IDEA.⁶⁰

Despite preemption by IDEA, in 2004, the Texas House Public Education Committee, concerned with the high expenses associated with special education services, proposed a “cap” on either the amount of State funding or amount of students eligible for special education services as a way to limit the cost of special education.⁶¹ Shortly after their

57. See 20 U.S.C. § 1415(k)(1)(B) (“School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days”); see also 20 U.S.C. § 1415(k)(1)(G) (allowing school personnel to remove a student with disabilities from an educational setting “for not more than 45 school days” in cases where the student possesses a weapon or illegal drugs at school or on school premises).

58. See U.S. CONST. art. VI, cl. 2 (authorizing the laws made under United States authority supreme law); see also *Supremacy Clause*, MERRIAM-WEBSTER L. DICTIONARY, <https://www.merriam-webster.com/legal/supremacy%20clause> [perma.cc/EL9X-ERTC] (“[A] clause in Article VI of the U.S. Constitution that declares the constitution, laws, and treaties of the federal government to be the supreme law of the land to which judges in every state are bound regardless of state law to the contrary.”).

59. See, e.g., MICHAEL S. ARIENS, *AMERICAN CONSTITUTIONAL LAW AND HISTORY*, 278 (2nd ed. 2016) (demonstrating through a flow chart how to recognize if a State law is preempted by federal law. Some indications of a preempted law include whether the federal law explicitly states it supersedes or whether the state law actually conflicts with federal law).

60. Cf. *id.* at 278 (asking “[d]oes the state law ‘actually conflict’ with federal law, either because ‘compliance with both federal and state regulations is [a] physical impossibility’ or because state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?’” If the answer is yes, it is preempted, but if no, it is not, unless it is preempted for another reason).

61. See Hailey Janecka & Amber King, *Texas’ Performance-Based Monitoring Analysis System*, in CHAPTER 14. SCHOOL LAW UPDATE (2018): THE STATUS OF SPECIAL EDUCATION IN TEXAS (2018) (discussing how the 79th Texas Legislature’s concern with special education costs led to a special education representation indicator in the Performance-Based Monitoring Analysis System of Texas school districts).

recommendation, without consulting the federal government, Texas Legislature, or State Board of Education, the Texas Education Agency (TEA) implemented a special education representation indicator.⁶² When the percentage of children with disabilities exceeded 8.5% of the total enrolled population, TEA would assign a higher performance level to the school.⁶³ Therefore, “the higher the performance level assigned to a school, the lower the school’s performance rating.”⁶⁴ Not only was this performance indicator kept from the federal government, but TEA also succeeded in keeping their 8.5% target from the public view entirely.⁶⁵

Fast-forward *twelve years*, as a result of a series of Houston Chronicle articles, the 8.5% performance indicator was brought to the attention of the United States Department of Education and the Office of Special Education Programs (OSEP), and led to a formal investigation.⁶⁶ Due to pressure from the investigation, on May 22, 2017, Governor Abbott signed a new state law to “prohibit the use of a performance indicator that solely measures the performance” of Texas school districts based on the total percentage of enrolled students receiving special education services under the IDEA.⁶⁷

62. See *id.* (explaining what Texas’ Performance-Based Monitoring Analysis System is and how it came to be used in regards to special education in Texas).

63. See *id.* (explaining the concern with high cost of special education services and emphasizing the TEA’s 8.5% cap led to the systematic denial of services by school districts to tens of thousands of families).

64. *Id.* See generally Brian M. Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children Out of Special Education*, HOUS. CHRON. (Sept. 10, 2016), <https://www.houstonchronicle.com/denied/1/> [perma.cc/K5VJ-NTVU] (investigating the Texas Education Agency’s 8.5% enrollment cap on special education services and the resulting exclusion of eligible students from special education programs. Schools in Texas are serving 46% fewer children than in 2004. The lowest levels are in big cities including Houston and Dallas, and it is hurting students who do not speak English at home the most).

65. See Rosenthal, *supra* note 64 (identifying several ways TEA avoided public and government scrutiny, such as never issuing a public announcement or explanation of the 8.5% indicator and claiming the enrollment indicator was not a cap but an “indicator” of school performance).

66. See *id.* (reporting the Chronicle’s findings of Texas’ noncompliance with federal regulation to the U.S. Department of Education); see also Janecka & King, *supra* note 61 (discussing the TEA’s response to questioning by the OSEP. TEA provided information showing how there were no inconsistencies with IDEA and OSEP and stated TEA was responsive to all questioning).

67. *Enclosure to Texas Part B 2017 Monitoring Visit Letter*, U.S. DEP’T OF EDUC. 1 (2017), <https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-enclosure.pdf>.

Although TEA deprived students of receiving special education and services, in 2015, the Texas Legislature tried to impact special education positively.⁶⁸ During the 84th Texas Legislature, services for children with disabilities received increased attention.⁶⁹ Because of \$14.4 million in funding, roughly 1,970 children gained access to autism services through the Health and Human Services Autism Program.⁷⁰ The 85th Texas Legislature also passed a bill to license BCBAs and assistants, despite the same bill failing to pass during the 84th Texas Legislature.⁷¹ The passing of the BCBA licensure bill was significant because it increased the number of certified behavior analysts in Texas, ultimately preventing “unqualified persons from representing themselves as experts in behavior analysis.”⁷² Additionally, the 85th Texas Legislature required TEA to create a grant program to assist public school districts in providing innovative services for students with autism.⁷³ The grant programs mandated the incorporation of: “[1] evidence-based and research-based design; [2] use of empirical data on student achievement and improvement; [3] parental support and collaboration; [4] use of technology; [5] meaningful inclusion; and [6] the ability to replicate the program for students statewide.”⁷⁴

68. *See generally 2018 Update: Autism Services in Texas*, TEX. COUNCIL FOR DEVELOPMENTAL DISABILITIES (May 1, 2018), <https://tcdd.texas.gov/texas-autism-services-updates/> [perma.cc/TWN2-6A49] (discussing steps taken by the Texas Legislature and federal government to “expand and improve” programs and services for individuals with ASD and their families).

69. *See id.* (listing the allocation of \$8.1 million to fund grants to train on the use of applied behavior analysis, the success of the State Autism Program, and the establishment of the Texas Autism Council).

70. *See id.* (contrasting the number of children in 2014 receiving services to the number of children in 2015 from 295 to 1970).

71. *See id.* (contrasting the 84th and 85th Texas Legislatures in regard to the bill for BCBA).

72. *Id.*

73. *See id.* (describing the House Bill 21 grant program mandating TEA to provide innovative services to students with autism in public school districts. A total of ten grants may be awarded with the maximum amount per grant per year of \$1 million for two years).

74. *Id.*

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

A. Overview of IDEA

From the beginning, IDEA's main goal was "[t]o 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 and prepare them for further education, employment, and independent living."⁷⁵ Congressional findings acknowledged, "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society," and "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."⁷⁶ Congress sought to achieve its goal by: (1) strengthening the role of parents; (2) ensuring access to the general curriculum; (3) focusing on teaching and learning while reducing unnecessary paperwork requirements; (4) assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities; (5) giving increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling; and (6) encouraging parents and educators to work out their differences by using non-adversarial means.⁷⁷

IDEA is divided into four parts: Subchapter I – General Provisions; Subchapter II – Assistance for Education of All Children with Disabilities; Subchapter III – Infants and Toddlers with Disabilities; and Subchapter IV – National Activities to Improve Education of Children with Disabilities.⁷⁸ My comment will only address school-aged children relevant to Part B, particularly focusing on children with autism, because Texas continuously fails to adhere to requirements within this section.⁷⁹

75. 34 C.F.R. § 300.1.

76. 20 U.S.C. § 1400(c)(1).

77. See 20 U.S.C. § 1400(c) (listing the methods and practices Congress has found contribute to a more effective special education program).

78. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2010).

79. See *State Performance Plan and Annual Performance Report*, TEX. EDUC. AGENCY, [https://tea.texas.gov/reports-and-data/data-submission/state-performance-plan#:~:text=in%20purp osive%20sampling.-,State%20Determinations,Performance%20Report%20\(APR\)%20annually \[perma.cc/Q4YH-7MF2\]](https://tea.texas.gov/reports-and-data/data-submission/state-performance-plan#:~:text=in%20purp osive%20sampling.-,State%20Determinations,Performance%20Report%20(APR)%20annually [perma.cc/Q4YH-7MF2]) (commenting Texas scoring reflects either “Needs Assistance” or “Needs

B. *Part B of IDEA*

Part B of IDEA establishes educational requirements for children with disabilities from ages three to twenty-one.⁸⁰ Part B also emphasizes the importance of including parents in decisions regarding the education of their children.⁸¹ Under IDEA, school districts must comply with six main principles in order to receive funding for special education services: appropriate education, an evaluation, IEP, parental participation, least restrictive environment, and procedural safeguards.⁸²

1. *Free Appropriate Public Education (FAPE)*

FAPE requires every state to provide special education, including related services, at public expense without charge to meet state educational agency standards; to include appropriate preschool, elementary, or secondary school education; and meet IEP requirements under IDEA.⁸³

2. *Appropriate Evaluation*

Children suspected of having a disability are entitled to an evaluation to determine whether the student requires special education

Intervention” from 2007 to 2018); *see also* 20 U.S.C. § 1401(3)(A) (“The term ‘child with a disability’ means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”).

80. 20 U.S.C. § 1412(a)(1)(A).

81. *See* 20 U.S.C. § 1414(a)(1)(B) (acknowledging parents have rights equal to state authorities to request initial disability evaluation and requiring advance notice to parents if a state agency unilaterally purposes the initiation of disability evaluation); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205–06 (1982) (speculating Congress’s intent was to allow parents of children with disabilities a place at the table in nearly all of the administrative decisions regarding the special education services provided to their child).

82. *See Individuals with Disabilities Education Act (IDEA)*, AM. PSYCH. ASS’N (Aug. 2017), <https://www.apa.org/advocacy/education/idea#:~:text=Part%20B,state%20and%20local%20school%20districts> [perma.cc/V24E-QP8W] (outlining the basic requirements a school district must comply with in order to receive financial support by IDEA).

83. 20 U.S.C. § 1401(9); *see Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 72 (1999) (holding the applicable two-step test for deciding whether a service is a “related service” under IDEA. It must first be determined whether the service in question qualifies as a “supportive service.” If the court finds the service to be a supportive service, then the court must determine whether the supporting service is excluded as a medical service).

services.⁸⁴ Evaluation assessments use various tools and strategies to ascertain a child's functional, developmental, and academic abilities.⁸⁵ Title 20 prohibits evaluations from discriminating based on a racial or cultural basis and must be administered in the language most likely to result in accurate information based on the child's abilities.⁸⁶

3. *Individualized Education Program (IEP)*

IDEA defines an IEP as “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with Section 1414(d) of this title.”⁸⁷ Under Section 1414(d), every IEP, regardless of the child's disability, must contain six components: (1) a statement of the student's present level of educational performance; (2) a statement of measurable yearly goals; (3) detailing how the child's progress throughout the year will be measured; (4) a statement of the specific special education and related services required; (5) a statement of any accommodations required for academic assessments; and (6) the projected date the special education services will begin and the anticipated duration, frequency, and location of the services.⁸⁸ When developing the child's IEP, the IEP team should consider the child's strengths, the parents' concerns, the results of the child's evaluation, and the child's developmental needs.⁸⁹

4. *Parental Participation*

Under IDEA, parents and educators are equal partners in the formulation of their child's IEP.⁹⁰ Throughout IDEA, Congress emphasizes the significant role that parents play as their child's primary

84. See 20 U.S.C. § 1414(b)(2) (establishing children suspected of disability must receive a variety of assessments and results predicated on any single measure are insufficient).

85. *Id.*

86. 20 U.S.C. § 1414(b)(3)(A)(i)–(ii).

87. 20 U.S.C. § 1401(14).

88. 20 U.S.C. § 1414(d)(A)(i).

89. 20 U.S.C. § 1414(d)(3)(A).

90. See 20 U.S.C. § 1414(a)(1)(B) (proclaiming parents' equivalent authority to request evaluations and requiring parents receive notice of child's progress); see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205–06 (1982) (concluding Congress placed equal emphasis on procedures giving parents participation during all administrative decisions, and upon measuring the IEP against substantive standards).

advocate regarding the interests of their child.⁹¹ When identifying the group of individuals composing an IEP team, Congress specified the child's parents first, then continued listing the different types of educators required.⁹² Because parents are members of their child's IEP team, they have a significant voice in the development of the IEP.⁹³ Not only do parents have the ability to bring forth any information and evaluations they have for their child to the IEP team for review, but they can also voice their concerns during the formation of the IEP.⁹⁴

5. *Least Restrictive Environment*

Students with disabilities must receive education alongside students without disabilities to “the maximum extent appropriate.”⁹⁵ According to 2019 data, 64.8% of special education students spend eighty percent or more of their time in general education classes.⁹⁶ Removing a student with disabilities from a general educational environment is allowable only “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁹⁷

91. See U.S.C. § 1414(a)(1)(B) (requiring the inclusion, notification, consent, or approval of parents in decision-making and delivery of services to the child); see also *Rowley*, 458 U.S. at 205–06 (emphasizing the importance of including parents in nearly all of the administrative decisions regarding the special education services provided to their child); see also NAT'L CTR. FOR LEARNING DISABILITIES, IDEA PARENT GUIDE 5–6 (2006) (describing IDEA requires every state to provide at least one parent training and information center (PTI), and the primary purpose for PTI is to provide parents with information about special education, so they may effectively participate in the decisions of their children's educational needs).

92. 20 U.S.C. § 1414(d)(1)(B).

93. See 20 U.S.C. § 1415(b) (guaranteeing parents access to all records, evaluations, placements, and meetings regarding their child); see *Rowley*, 458 U.S. at 207 (“The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.”).

94. See 20 U.S.C. § 1414(c)(1)(A)(i), see also 20 U.S.C. § 1414(d)(3)(A).

95. 20 U.S.C. § 1412(a)(5)(A).

96. See *Riser-Kositsky*, *supra* note 16 (comparing data from 1989, where only 31.7% of students spent 80% or more of their time in general education classes).

97. 20 U.S.C. § 1412(a)(5)(A). Compare *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (determining whether the school district complied with the least restrictive environment provision by using a two-part test. “First . . . whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education . . . we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.” The court

6. *Procedural Safeguards*

At the core of IDEA lies the importance of a cooperative process between parents and school districts “to ensure that the rights of children with disabilities and parents of such children are protected.”⁹⁸ If a state receives educational funding from IDEA, the state must implement and maintain procedural safeguards holding the state accountable, and provide parents with certain guarantees concerning FAPE.⁹⁹ A few of the procedures include a parent’s right to receive copies of all educational records, contest the findings of any evaluation or goals of an IEP, and resolve any dispute regarding their child’s education through an objective hearing.¹⁰⁰

IDEA, however, does not state which party bears the burden of proof at impartial due process hearings.¹⁰¹ Prior to the *Schaffer v. Weast* decision in 2005, circuit courts were divided on whether the school district or the party seeking to change the IEP should bear the burden of proof regarding a student’s IEP being reasonably calculated to provide an educational benefit.¹⁰² Seven Circuits, including the Second¹⁰³ and

held that the school district satisfied the provision, even though the child with disabilities was placed in a segregated special education classroom, because keeping the child in a regular classroom wasn’t feasible), *with Flour Bluff Indep. Sch. Dist. v. Katherine M. ex rel. Lesa T.*, 91 F.3d 689, 694–95 (5th Cir. 1996) (explaining the transfer of a child with disabilities from a general classroom to a segregated special education classroom satisfied the least restrictive environment provision. It did not make financial sense to force the school district to hire sign language teachers for one or two students to be in a regular classroom versus utilizing the teachers at the regional day schools with a larger number of hearing-impaired students. Thus, the court determined the controlling factor in this case was the regional school’s ability to deliver superior quality of services).

98. 20 U.S.C. § 1400(d).

99. 20 U.S.C. § 1415(a).

100. 20 U.S.C. § 1415(b)(6)(A)–(B).

101. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 54 (2005) (“Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.”).

102. *See id.* at 61–62 (recognizing contrary regulations where some states require the burden of proof always fall on the school district); *see also* Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social-Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 12 U.C. DAVIS J. JUV. L. & POL’Y 133, 163–64 (2008) (noting the split among circuit courts, including some states adopting statutes and regulations assigning the burden of proof during IDEA hearings).

103. *See M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000) (deciding parents bore the burden of proving private school placement was appropriate, even though the school district failed to meet its burden of proving the appropriateness of the child’s IEP. The court explained the only reason the burden fell on the parents was because they wanted tuition

Third,¹⁰⁴ believed the burden of proof should fall on the school district because they are better able to prove the appropriateness of a child's IEP.¹⁰⁵ By contrast, five circuits, including the Fifth¹⁰⁶ and Sixth,¹⁰⁷ placed the burden upon the party seeking to change the IEP, which is usually the parents.¹⁰⁸

reimbursement. Due to the parents choosing a private school who accepted learning disabled students *only*, the burden falls on them to prove such restrictive, non-mainstream environment was essential to provide their child with an appropriate education); *see also* Karger, *supra* note 102, at 165 (restating the Second Circuit placed the burden of proof on school districts, except for claims involving tuition reimbursement).

104. *See* *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219–20 (3d Cir. 1993) (providing several reasons for placing the burden on the school district: (1) if the burden fell on the parents to prove the school failed to comply with IDEA, then that would undermine IDEA's core purpose; (2) schools have a major advantage when a dispute arises under IDEA because they have specialized training and authority over employees personally involved with the student's education; and (3) "the Act's strong presumption in favor of mainstreaming . . . would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom."); *see also* Karger, *supra* note 102, at 165–66 (finding the Third Circuit provided a comprehensive argument in favor of allocating the burden on the school districts, except in occurrences when the parents want a more restrictive environment). *Contra* *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (distinguishing *Oberti's* ruling because "of the clear congressional preference for inclusion," the burden will fall on the parents when *they* request a more restrictive environment, not the school district).

105. *See* Karger, *supra* note 102, at 165 (listing the seven circuits placing the burden on the school districts: D.C. Circuit, First Circuit, Second Circuit, Third Circuit, Seventh Circuit, Eighth Circuit, and Ninth Circuit).

106. *See* *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 255–56 (5th Cir.1997) (summarizing a handicapped boy named Michael had physically violent episodes. While attending school, his behavior worsened, and Michael's parents placed him in a residential treatment center but had to bring him home when they could no longer afford the private treatment. Using a four-factor test created by the Fifth Circuit, the court determined the IEP in place for Michael was appropriate and affirmed the district court's refusal of reimbursement to Michael's parents. Further, the court affirmed the district court's award of court costs to the school district, even though the district filed suit after Michael's parents had won the administrative hearing); *see also* *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986) ("[T]he Act creates a 'presumption in favor of the education placement established by [a child's] IEP', and 'the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.'").

107. *See* *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990) ("[N]othing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute . . . Absent more definitive authorization or compelling justification, we decline to go beyond strict review to reverse the traditional burden of proof.").

108. *See* Karger, *supra* note 102, at 136, 165 (noting the five circuits that placed the burden onto the parents: Fourth Circuit, Fifth Circuit, Sixth Circuit, Tenth Circuit, and Eleventh Circuit).

On November 14, 2005, in *Schaffer v. Weast*, the U.S. Supreme Court held the party challenging a child's IEP bears the burden.¹⁰⁹ The Court began its analysis with the traditional allocation of the burden of proof, requiring plaintiffs to carry the risk of failing to meet the elements of their claims.¹¹⁰ Even though IDEA is silent on which party bears the burden, Congress previously expressed its approval of the general rule when applied to administrative proceedings under the Administrative Procedure Act.¹¹¹ Additionally, the Court relied heavily on IDEA's language requiring school districts to share all records the school possesses with the child's parents.¹¹² Thus, the Court assumed parents have "the firepower to match the opposition" because they have access to experts and school records.¹¹³ The Court acknowledged that if the burden was on the school district, it might encourage the schools to allocate more resources to create a student's IEP.¹¹⁴ However, the Court was quick to dismiss this argument because school districts already have an incentive to create adequate IEPs to avoid costly litigation in the administration of IDEA.¹¹⁵

Justice Ginsburg's dissent noted the burden of proof should be placed on the school district when considering issues of fairness and convenience, because "the school district is . . . in a far better position to

109. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005) (answering the question of which party bears the burden of persuasion at an administrative hearing, since the parties agreed the burden of production was not relevant in the case); *see Karger, supra* note 102, at 138 (defining burden of persuasion as the burden of convincing factfinders the alleged facts are true by a preponderance of the evidence).

110. *See Schaffer*, 546 U.S. at 56 ("When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."); *see also Karger, supra* note 102, at 163–64 (pointing out only the Fourth and Sixth Circuits placed the burden on the parents because of the traditional rule of burden allocation. Whereas the Fifth, Tenth, and Eleventh Circuits place the burden on the parents because IDEA gave deference to the educational expertise of the school district).

111. *See Schaffer*, 546 U.S. at 57 (asserting that Congress has spoken for their preference for burden of proof and courts have adhered to the general rule).

112. *See id.* at 60 (reiterating Congress' view that parents have the right to review their child's records as schools are obliged "to safeguard the procedural rights of parents . . .").

113. *Id.* at 61.

114. *See id.* at 59 (conveying how IDEA heavily relies on the school districts to meet their goals, thus Petitioner's argument that every IEP is invalid until the school district proves otherwise cannot stand).

115. *See id.* (approximating litigation costs between \$8,000 and \$12,000 per hearing).

demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so."¹¹⁶ Additionally, the facts of this case go directly against the Court's presumption that school districts have enough incentive to carry out their responsibilities, without placing the burden on them.¹¹⁷ According to the facts, Montgomery County did not provide Brian's needed services until the district court placed the burden onto the school district.¹¹⁸ The Court figured assigning the burden of proof to school districts would encourage schools to allow more resources into individualized education programs to avoid litigation; however, the legislature has not provided any insight into allocating costs between educational resources and litigation costs.¹¹⁹ If Montgomery's school district initially supplied the education services to Brian instead of after receiving the burden, then the lawsuit and associated costs would have been avoided.¹²⁰

Fortunately, the Court's decision only affected the split between the circuits, leaving the question of whether states can adopt legislation that places the burden on the school districts unaddressed.¹²¹ Due to the

116. *See id.* at 64; *see also* Karger, *supra* note 102, at 162, 195 (stressing which party has greater access to information and knowledge are relevant considerations regarding issues of convenience and fairness).

117. *See* Karger, *supra* note 102, at 161–62, 186 (explaining how this case was an example of evidentiary equipoise, if evidence presented is equally divided between two parties, then the party bearing the burden of persuasion will not prevail). *But see* Schaffer, 546 U.S. at 62–63 (Stevens, J., concurring) (joining the majority opinion based on his presumption that school officials properly fulfill their duties under the law).

118. *See* Schaffer, 546 U.S. at 55, 66 (recognizing Montgomery County Public Schools (MCPS) originally provided Brian placement in either of two middle schools in which the parents were not satisfied with. After a hearing that ruled in favor of the school district, Brian's parents brought a civil suit against the school district. At the same time the district court concluded the burden of persuasion is on the school district, MCPS decided to offer Brian placement with a special learning center at a high school).

119. *See id.* at 58–59 (“IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. Moreover, there is reason to believe that a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair . . .”).

120. *See id.* at 66 (Ginsburg, J., dissenting) (“Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided.”)

121. *See id.* at 61–62 (declining to rule on whether states can override the traditional burden allocation rule, by creating laws or regulations that place the burden onto the school districts); *see also* Karger, *supra* note 102, at 208 (noting that the question of which party bears the burden of proof in IDEA due process hearings is still being discussed at the state level).

Court declining to address the issue at the state level, five states kept their statutes or regulations in effect after *Schaffer* was decided, assigning the burden of proof to the school districts.¹²² Additionally, several states, including Virginia, New York, New Jersey, and Hawaii, introduced bills assigning the burden of proof to the school districts.¹²³ Consequently, Justice Breyer's dissent is being applied slightly, in practical terms, because states are able to decide the burden allocation for IDEA due process hearings.¹²⁴

C. *Post-Schaffer: The Importance of Endrew F. v. Douglas County School District RE-1 for Children with Autism*

Thirty-five years after *Rowley*, the U.S. Supreme Court extended its decision in *Endrew F. v. Douglas County School District RE-1* by establishing a standard to determine whether a child is receiving sufficient educational benefits required by IDEA.¹²⁵ The Court distinguished the facts in the present case from *Rowley* because Endrew had autism that affected his cognitive functioning, reading, language, and social skills, making a mainstream classroom impracticable, while Amy Rowley only had impaired hearing.¹²⁶ Because Endrew was not in a

122. See Karger, *supra* note 102, at 209–11 (listing West Virginia, Connecticut, Delaware, Illinois, and Minnesota as the states that kept their statutes and regulations post-*Schaffer*).

123. *Id.* at 209.

124. See *Schaffer*, 546 U.S. at 69 (Breyer J., dissenting) (viewing that Congress left it up to the states to decide where the burden lies); see also Karger, *supra* note 102, at 208 (comparing the varying responses after *Schaffer*; some adopting rules contrary to the decision).

125. See *Endrew F. ex rel. Joseph F. V. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996 (2017) (acknowledging that the Court will address the more difficult problem that was expressly declined in *Rowley* which was “to establish any one test for determining the adequacy of educational benefits” under the Act (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982))).

126. Compare *Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, No. 12-CV-2620-LTB, 2014 WL 4548439, at *1 (D. Colo. Sept. 15, 2014), *aff'd sub nom. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 798 F.3d 1329 (10th Cir. 2015), *vacated*, 137 S. Ct. 988, 197 (2017), and *vacated sub nom. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 694 F. App'x 654 (10th Cir. 2017) (“Petitioner struggles with the ability to communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. He has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which, in turn, interferes with the learning environment. He also has many maladaptive behaviors that interfere with his ability to participate, including eloping, dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. In addition, Petitioner presents with many severe fears—such as dogs, flies, and using a new or public bathroom—which severely limits his ability to function in school or in the community.”), with *Bd. of Educ. v. Rowley*, 458 U.S. 176, 184, 185 (1982) (distinguishing Amy Rowley, who was a first grader with impaired hearing,

mainstream classroom, the Court stated that *Rowley* did not apply because a student's IEP does not have to work toward grade-level advancement if it is not a reasonable goal.¹²⁷ Therefore, if a student is not able to be in a regular classroom, then their educational program must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹²⁸ Before the Court vacated the judgment by the Tenth Circuit and remanded the case, Chief Justice Roberts emphasized that a child's education must be "'specially designed' to meet a child's 'unique needs' through an '[i]ndividualized education program.'"¹²⁹ Following remand, the district court concluded that Petitioner and his parents met their burden to prove the school district failed to create an appropriately ambitious IEP.¹³⁰ Thus, the school district was required to reimburse Petitioner for his private school placement because the district failed to provide Endrew with a FAPE.¹³¹

Even though Schaffer and Endrew both dealt with parents seeking reimbursement for their child's tuition, only upon remand were Endrew's parents successful in their request.¹³² Endrew's parents satisfied their burden of proof by relying on facts within their previous hearings, such as the Tenth Circuit's vacated decision, added with the improved standard

receiving specialized instructions in a regular classroom, and achieved passing marks and advanced from grade to grade).

127. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 998, 1000–01 (2017) ("It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom but is satisfied with barely more than *de minimis* progress for those who cannot.").

128. Endrew F., 137 S. Ct. at 1000 (clarifying how the term "appropriately ambitious" can shift depending on each student. A child in a regular classroom considers grade-level advancement appropriately ambitious, but educational programs tailored to the specific needs of children like Endrew are also considered appropriately ambitious).

129. *See id.* at 1001 (restating, for the Tenth Circuit to fully comprehend, that the "absence of a bright-line rule . . . should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'")

130. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE 1, 290 F. Supp. 3d 1175, 1185–86 (D. Colo. 2018) (holding that the individualized education program had not been analyzed properly to assist in the students' progress in consideration of his circumstances because it did not give Endrew the opportunity to meet challenging objectives).

131. *Id.* at 1186 (asserting parents are entitled to reimbursement when the school districts violate the IDEA and "the education provided by the private school provide[s] the child with a FAPE in that it is reasonably calculated to enable the child to receive educational benefits.").

132. *See id.* at 1186 (concluding all of the Supreme Court decisions, regarding IDEA, come down to requiring parents to prove, by a preponderance of the evidence, that the school district failed to comply with the federal standards of FAPE).

created by the Supreme Court.¹³³ However, it is important to realize they had the resources to carry on the fight that few parents possess to meet their burden of proof.¹³⁴ Thus, despite the positive outcome for Andrew and his parents, the ruling is quite ironic when analyzing how they satisfied the burden of proof.¹³⁵

III. WHY IS TEXAS CONTINUOUSLY RESISTING TO COMPLY WITH IDEA'S REQUIREMENTS?

Our goal for Texas is to ensure that special education provides support to our students with disabilities on an individualized basis, because legally and morally our students deserve access to the same programs that could lead to academic success.

—Texas Education Agency¹³⁶

After reading the above quote, one could assume Texas finally addressed its mistakes and would begin to rebuild its disastrous special education program.¹³⁷ That assumption would be incorrect.¹³⁸ For

133. *See id.* at 1180–81 (demonstrating the Petitioner relies upon the Tenth Circuit's ruling that "[t]his is without question a close case, but we find there are sufficient indications of [Petitioner's] past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard," created by the Court's ruling that the new standard is "markedly more demanding" than the merely more than *de minimis* test applied by the Tenth Circuit).

134. *See* Christina A. Samuels, *Special Education Is Broken*, EDUC. WK. (Jan. 8, 2019), <https://www.edweek.org/teaching-learning/special-education-is-broken/2019/01> [perma.cc/4HBN-B8HX] (noting while parents have rights in special education, those rights are not reasonably available to everyone).

135. *Cf.* Andrew F., 290 F. Supp. 3d at 1186 ("[T]he law is clear that parents are entitled to reimbursement under the IDEA if: (1) the school district violated the IDEA; and (2) the education provided by the private school provides the child with a FAPE in that it is reasonably calculated to enable the child to receive educational benefits.").

136. TEX. EDUC. AGENCY, SPECIAL EDUCATION STRATEGIC PLAN 3 (Apr. 23, 2018), <https://tea.texas.gov/sites/default/files/SPED%20Strategic%20Plan%20April%202023%20Final.pdf>

137. *See e.g.*, Shelby Webb, *Denied Again: Students Still Fighting for Special Education*, HOUS. CHRON. (Nov. 14, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Students-denied-special-education-failing-schools-14831755.php> [perma.cc/45VV-WV6C] ("On the surface, it seems TEA is more alert and active on special ed issues, . . . 'But if you really start to look at what they've done, even the stuff in their plans, really not much has been accomplished.'").

138. *But see* Shelby Webb & John Tedesco, *Study Finds Texas Students Kicked out of Special Ed Less Likely to Graduate, Go to College*, HOUS. CHRON. (Oct. 29, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Study-finds-Texas-students-kick>

example, in 2004, TEA arbitrarily decided to implement a de facto percentage cap on the number of students qualified to receive special education services.¹³⁹ Additionally, as a result of Texas illegally reducing the amount of state financial support for special education, the state now owes \$223 million to the federal government.¹⁴⁰ Lastly, Texas' Special Education Program has never received a satisfactory result from the monitoring visits conducted by OSEP and continuously ranks toward the bottom of all states for disability inclusion.¹⁴¹

A. *Texas Illegally Capping Special Education Services at 8.5%*

In 2004, TEA implemented a Performance-Based Monitoring Analysis System (PBMAS), which included a special education representation

ed-out-of-special-14572629.php [perma.cc/3APH-B4J3] (“[T]EA officials said they agreed that students with disabilities should be provided appropriate services so they can have equitable access to educational attainment. ‘This is why the agency has developed a comprehensive strategic plan and is acting on it to enhance opportunities for students with disabilities in Texas’ . . .”).

139. See Matos, *supra* note 21 (reporting that a federal audit exposed a de-facto cap that the TEA set up on special education services for more than a decade which was below the national average of thirteen percent); see also Lynn Murphy, *Texas Public School Finance: The Special Education Struggle*, U. TEX. AT AUSTIN: LBJ SCH. OF PUB. AFF. (Sept. 19, 2019), <https://lbj.utexas.edu/texas-public-school-finance-special-education-struggle> [perma.cc/V6SX-UD95] (stressing the violation of federal requirements that Texas committed due to its capped special education program with an estimated cost of 3.3 billion dollars to re-track the program).

140. See Aliyya Swaby, *Texas Estimates it May Owe Feds \$223 Million After Illegally Decreasing Special Education Funding*, TEX. TRIB. (Apr. 5, 2019, 12:00 PM), <https://www.texastribune.org/2019/04/05/texas-estimates-it-may-owe-feds-223-million-special-education-funding/> [perma.cc/6YTT-NQA9] (addressing the fact that the U.S. Department of Education has warned Texas about a financial penalty due to the reduction in funding for special education programs. Texas recognized that \$33 million would be owed due to illegally decreasing the funds, which they considered only a fraction of the special education grant, so it “wouldn’t hurt students.”).

141. See *State Performance Plan and Annual Performance Report*, *supra* note 79 (listing USDE/OSEP’s four State Determinations: 1) Meets Requirements, 2) Needs Assistance, 3) Needs Intervention, and 4) Needs Substantial Invention. OSEP’s State Determinations for Texas are charted from 2005–2020 as: 2005–2006 Needs Assistance; 2006–2007 Needs Intervention; 2007–2008 Needs Assistance; 2008–2009 Needs Assistance; 2009–2010 Needs Assistance; 2010–2011 Needs Intervention; 2011–2012 Needs Assistance; 2012–2013 Needs Intervention; 2013–2014 Needs Intervention; 2014–2015 Needs Assistance; 2015–2016 Needs Assistance; 2016–2017 Needs Assistance; 2017–2018 Needs Assistance); see also Elizabeth Lewis, *Federal Findings on Special Education in Texas Should be a Call to Change*, UT NEWS (Feb. 5, 2018), <https://news.utexas.edu/2018/02/05/special-education-in-texas-needs-to-be-changed/> [perma.cc/8T36-D37Q] (criticizing Texas for not only failing to provide support to students with disabilities, but also to adults with disabilities and allies. The cap mandated by TEA is only “part of a broader failure to guarantee rights of Texans with disabilities.”).

indicator (SERI) of 8.5% that measured the percentage of enrolled students who received special education services.¹⁴² A federal investigation concluded the SERI negatively impacted the identification rate of children with disabilities in Texas, despite TEA's numerous attempts to deny that the SERI was not "designed to reduce special education enrollment in order to reduce the amount of money the state has to spend on special education."¹⁴³ The data provided by TEA demonstrates that the number of children identified with disabilities declined by 32,000 students from 2003–2004 to 2016–2017 school years, while the total number of students enrolled increased by more than one million.¹⁴⁴ Additionally, during OSEP's investigation, they found that "some [school districts] took actions specifically designed to decrease the percentage of children identified as children with disabilities under the IDEA to 8.5 percent or below."¹⁴⁵ As a result of the investigation, the U.S. Department of Education concluded that Texas' SERI failed to obey federal law because the system failed to properly identify, locate, and evaluate all children who needed special education services.¹⁴⁶

Due to the findings within the investigation, OSEP required Texas to implement a strategic plan, including specific activities to address the

142. *U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring*, U.S. DEP'T OF EDUC. (Jan. 11, 2018), <https://www.ed.gov/news/press-releases/us-department-education-issues-findings-texas-individuals-disabilities-education-act-monitoring> [perma.cc/BW97-XCK4].

143. Letter from Penny Schwinn, Deputy Comm'r of Acads., Tex. Educ. Agency, to Hon. Sue Swenson, Acting Assistant Sec'y, U.S. Dep't of Educ., (Nov. 2, 2016) https://static.texastribune.org/media/documents/OSERS_Response_2016_.pdf [[<https://perma.cc/W5L4-UMPZ>]] ("[T]he allegation that the special education representation indicator is designed to reduce special education enrollment in order to reduce the amount of money the state has to spend on special education is clearly false."); see *U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring*, *supra* note 142 (showing that OSEP discovered the SERI which provided a decline of identification rates of children with disabilities); see also Murphy, *supra* note 139 (summarizing Texas not only failed to provide FAPE to every student, they also did not identify every child with a disability within Texas).

144. *U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring*, *supra* note 142 (presenting statistics which shows a decline in students with disabilities identified under IDEA following 2004).

145. *Enclosure to Texas Part B 2017 Monitoring Visit Letter*, *supra* note 67

146. See *U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring*, *supra* note 142 (listing additional areas in which TEA failed to comply with Federal law, such as failing to provide a free appropriate public education available to all children with disabilities and failing to fulfill supervising and monitoring responsibilities required by IDEA).

correction requirements outlined in OSEP's letter.¹⁴⁷ Within the Texas Special Education Strategic Plan, the TEA stated that "[t]here has always been, and will continue to be, a need for strong advocacy from parents for their children."¹⁴⁸ The strategic plan's purpose was to support special education students by trying to meet student needs for the benefit of society and to be an important part of an integrated education system.¹⁴⁹

For schools to stay below the 8.5% cap, special education programs denied access to children and placed them in other alternative programs, as suggested in *T.C. v. Lewisville Independent School District*, as the potential cause for the school district kicking S.C., a minor child, out of their special education program.¹⁵⁰ S.C. was three years old when she was diagnosed with ASD, "sensory issues," and a nine-month delay in social skills.¹⁵¹ While attending a public school in Minnesota, she was eligible for special education services because of her ASD and speech impairment disability.¹⁵² However, S.C. and her family moved to Texas, and in 2004 Lewisville ISD "determined that S.C. no longer met the eligibility criteria under either autism or speech impairment, and she was dismissed from special education and related services."¹⁵³ S.C.'s family conducted a private evaluation where the doctor said S.C. did not have an

147. See TEX. EDUC. AGENCY, *supra* note 136 (stating that in order for Texas to make better efforts to create a special education program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," there must be a strategic plan mandated by OSEP).

148. *Id.*

149. See *id.* (balancing compliance with federal regulations and student focused results).

150. See *T.C. v. Lewisville Indep. Sch. Dist.*, 4:13CV186, 2016 WL 705930, at *2 (E.D. Tex.—Feb. 23, 2016, no pet.) (concluding, after district and independent evaluations, Lewisville ISD determined S.C. was only eligible for a Section 504 plan, even though the independent evaluations suggested S.C. required special education services); see also Rosenthal, *supra* note 64 ("More than a dozen . . . administrators from across the state . . . [said] they have delayed or denied special education to disabled students in order to stay below the 8.5 percent benchmark. They revealed a variety of methods, [such as] putting kids into a cheaper alternative program known as 'Section 504' . . .").

151. *T.C.*, 2016 WL 705930, at *1.

152. *Id.* ("S.C. attended school in the Bloomington, Minnesota Public Schools, where she was determined to be eligible for special education and related services as a child with an autism spectrum disorder and speech/language impairment. In addition to her special education classroom placement, S.C. received speech therapy and occupational therapy while she was a student in Minnesota.").

153. *Id.*

ASD, but determined S.C. was still eligible for special education services due to other disabilities.¹⁵⁴ After receiving the results, Lewisville ISD conducted another evaluation and determined that S.C. was only eligible for a Section 504 plan but not special education services.¹⁵⁵

Finally, in 2017, Governor Abbott and the Texas Legislature implemented a new law prohibiting the use of school performance indicators that solely measure the total number or percentage of enrolled children receiving special education and related services under the IDEA.¹⁵⁶ Following the new state law, U.S. Secretary of Education Betsy DeVos said, “Every child with a disability must have appropriate access to special education and related services that meet his or her unique needs”¹⁵⁷ DeVos went on to state, “Far too many students in Texas had been precluded from receiving supports and services under IDEA . . . [w]hile there is still more work to be done, leaders in the state have assured me they are committed to ensuring all students with disabilities can achieve their full potential”¹⁵⁸

Although SERI was eliminated, studies show how Texas’ 8.5% cap on special education services has impacted children.¹⁵⁹ According to the University of California-Davis and Cornell University, the results of their studies “suggest that students who are denied access to (special education) services experience significant declines in educational

154. *See id.* at *2 (“Dr. Lurie recommended that S.C. be qualified for special education services under OHI, speech impaired, and learning disabled, and that she receives instruction in a 1:1 or small group setting in a ‘slower-paced’ classroom, with assistance with organizational and study skills.”).

155. *See id.* (determining S.C. was eligible for a Section 504 plan and a personalized plan, based off S.C.’s doctor’s evaluation); *see generally* Rosenthal, *supra* note 64 (describing Section 504 as an alternative to special education programs that prevent “discrimination through accommodations, such as preferential seating or extra times on tests.”).

156. *See* TEX. EDUC. AGENCY, *supra* note 136 (“SB 160 signed by governor on May 22, 2017, effective immediately, codified at TFC 29 § 29.001”).

157. Lauren Camera, *DeVos Orders Texas to Identify, Help Students Illegally Shut Out of Special Education*, U.S. NEWS (Jan. 11, 2018), <https://www.usnews.com/news/education-news/articles/2018-01-11/devos-orders-texas-to-identify-help-students-shut-out-of-special-education> [<https://perma.cc/TF4J-9RFR>].

158. *Id.*

159. *See* Brian M. Rosenthal, *How Texas Keeps Tens of Thousands of Children Out of Special Education*, HOUS. CHRON. (Sept. 10, 2016), [https://www.houstonchronicle.com/denied/1/\[perma.cc/K5VJ-NTVU\]](https://www.houstonchronicle.com/denied/1/[perma.cc/K5VJ-NTVU]) (asserting that TEA’s 8.5 percent enrollment cap led to the systemic denial of services for tens of thousands of students of every race and class within the state).

attainment.”¹⁶⁰ Additionally, they discovered those students whose disabilities are minor and who lost services were “52 percentage points less likely to graduate from high school, and nearly 38 percentage points less likely to enroll in college.”¹⁶¹ In failing to ensure the needs of Texans with disabilities, by using SERI for over a decade, Texas officials need to realize their poor decisions will result in an ongoing and pervasive problem that demands attention.¹⁶²

B. Texas Illegally Reduces its Contributions for Special Education Funding

Under IDEA, one condition for states to receive federal funding—“the maintenance of state financial support” (MFS) clause—prohibits a state from reducing the amount of financial support made available for special education and related services below the amount for the previous fiscal year.¹⁶³ In 2012, Texas decreased its funding for special education services by roughly \$33.3 million from the previous year.¹⁶⁴ After the U.S. Department of Education concluded that Texas violated federal law by reducing funds for children with disabilities, Texas challenged their finding in court.¹⁶⁵ At the Fifth Circuit, Texas argued that the reduction resulted from decreases in enrollment and the level of services required.¹⁶⁶ However, when the Department of Education notified Texas of their opportunity to seek a waiver of the MFS provision, Texas refused to do so.¹⁶⁷ Consequently, “the Department of Education issued

160. Webb & Tedesco, *supra* note 138.

161. *See id.* (elaborating those students with mild learning disabilities who were kicked out of special education services were less likely to graduate high school or enroll in college, according to the first academic study of how Texas’ cap on special education services impacted children).

162. *See generally id.* (noting that students were less likely to obtain helpful resources once they were removed from special education. Further, students accustomed to the support of special education services may experience profound negative effects once the help is taken away).

163. *Tex. Educ. Agency v. U.S. Dep’t of Educ.*, 908 F.3d 127, 135 (5th Cir. 2018) (citing 20 U.S.C. § 1412(a)(18)(A) (“The State does not reduce the amount of State financial support for special education and related services.”)).

164. *See id.* at 132 (stating Texas did not dispute its choice to reduce state funding for special education services by \$33.3 million).

165. *See id.* at 131 (listing Texas’ arguments, including their opinion that the MFS requirement exceeded Congress’ spending power).

166. *See id.* (using Texas’ weighted-student model to justify the shortfall in funds compared to the decrease in enrollment).

167. *Cf. id.* (providing the facts before the court; “[t]he Department warned Texas that it was at risk of having its funds reduced the following fiscal year and informed Texas it could satisfy

a proposed determination that Texas was ineligible for \$33.3 million of future grants [under IDEA Part B] because of the shortfall in both aggregate and per capita state funding.”¹⁶⁸ The Fifth Circuit upheld the federal government’s decision and found Texas’ system “creates a perverse incentive for a state to escape its financial obligations merely by minimizing the special education needs of its students.”¹⁶⁹ As a result of the violation, in 2019, Texas lawmakers approved a budget of an estimated \$223 million in state funds to pay off the financial penalty to the federal government.¹⁷⁰

C. Texas’ Results from OSEP’s Monitoring Visits Since 2005

According to IDEA, “it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities.”¹⁷¹ In order to receive federal funding from IDEA, each state must have its rules, regulations, and policies conform with the Act.¹⁷² Since Texas uses IDEA funding, it is mandatory to develop a six-year performance plan that assesses Texas’ efforts to implement the requirements and purposes of IDEA.¹⁷³ Illustrated through the State Performance Plan (SPP), Texas shows how it will continuously improve the implementation of IDEA, including

the MFS requirement by showing that the total amount of state funding was no less than that of the previous fiscal year . . . The Department notified Texas of the opportunity to seek a waiver of the MFS provision, but the state did not do so.”).

168. *Id.* at 130.

169. *Id.* at 135 (ruling against Texas because the state had clear notice that Texas’ interpretation of the IDEA requirements wasn’t sufficient).

170. *See Swaby, supra* note 19 (breaking down the \$223 million penalty: \$33 million covers immediate expenses to pay the federal penalty for the 2012 reduction; \$74 million settled violations for 2017 and 2018; and \$116 million to prevent another penalty in 2019).

171. 20 U.S.C. § 1400(c)(6).

172. *See* 20 U.S.C. § 1407(a)–(b) (“Each State that receives funds under this chapter shall ensure that any State rules, regulations, and policies relating to this chapter conform to the purposes of this chapter . . . [s]tate rules, regulations, and policies under this chapter shall support and facilitate local educational agency and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards.”).

173. *See* 20 U.S.C. § 1407(a) (addressing the requirements of rulemaking under state administration); *see also* 20 U.S.C. § 1416(f) (“If a State educational agency determines that a local educational agency is not meeting the requirements of this subchapter, including the targets in the State’s performance plan, the State educational agency shall prohibit the local educational agency from reducing the local educational agency’s maintenance of effort under section 1413(a)(2)(C) of this title for any fiscal year.”).

updates through the Annual Performance Report (APR) submitted to the OSEP every February.¹⁷⁴ In 2005, OSEP began conducting annual reports based on Texas' APR, OSEP's monitoring visits, and additional public information, resulting in one of four possible state determinations.¹⁷⁵ Unfortunately, it is no surprise that Texas has yet to receive a satisfactory result from OSEP, with the most recent result being "needs assistance" from 2019–2020.¹⁷⁶

D. Various Viewpoints Regarding Texas' Special Education Program

1. Interview with Corey Bakker, SLC Teacher at Cobb Middle School in Frisco ISD

During an interview with Corey Bakker,¹⁷⁷ Bakker was asked whether she had any exposure to special education outside of Texas.¹⁷⁸ This question established whether Bakker had another perspective when comparing special education programs between Texas and other jurisdictions.¹⁷⁹ Bakker said, "the only exposure [she has] is kids coming in from other states and having to figure out their work and talk to their former teachers."¹⁸⁰ Her previous students also transferred from Florida, Louisiana, Oklahoma, New York, New Jersey, and other

174. See *State Performance Plan and Annual Performance Report*, *supra* note 79 (outlining the steps for Texas' State Performance Plan and Annual Performance Report for IDEA funding).

175. See *id.*

176. See Andrea Zelinski, *For the Fourth Straight Year, Texas Special Education "Needs Assistance," Feds Say*, HOUS. CHRON. (July 4, 2019) <https://www.houstonchronicle.com/politics/texas/article/For-fourth-straight-year-Texas-special-education-14070637.php> [perma.cc/NMT5-A9B9] (according to the U.S. Department of Education, for the fourth year in a row, Texas needs assistance complying with federal law to provide special education services to children with disabilities). See generally *State Performance Plan and Annual Performance Report*, *supra* note 79 (listing each year OSEP has deemed Texas' Determination Status as "Needs Assistance").

177. See Telephone Interview with Corey Bakker, SLC Teacher at Cobb Middle School (Nov. 28, 2020) (recognizing Corey Bakker has been involved with Texas' Special Education Program since she was fifteen because her mom was a special education paraprofessional while Bakker was growing up. As a result of watching her mom work with special education students, Bakker decided to get involved with special education by becoming a special education teacher. Bakker has been teaching in Texas' public-school districts for twelve years).

178. See *id.* (determining whether Bakker was aware of how different states treat special education).

179. See generally *id.* (providing information from other states helps show where Texas is failing with special education).

180. *Id.*

northern states.¹⁸¹ Bakker's response was very interesting because northern states "divvy out their funding for [special education], they actually have those special education kids in an entirely different building separate from those with general education."¹⁸² According to Bakker, there are benefits to having a separate building for children with ASD because they "have different rooms that are specific to sensory needs [and] specific to functional needs . . . whereas the way [Texas] does it, we are kind of confined to our little area or two classrooms within . . . [the general education building which results in our students not having] as many of those opportunities with resources."¹⁸³ Based on Bakker's personal experiences, one of the disadvantages of having two classrooms is that general education students tend to be scared and do not know how to interact with her students because sometimes they are present during unexpected behaviors.¹⁸⁴

While interviewing Bakker, it was important to ask her questions regarding TEA and the administrative side of her responsibilities as an SLC teacher in Texas.¹⁸⁵ She answered whether she thought Texas was meeting IDEA's federal standards.¹⁸⁶ She said, "No, not at all."¹⁸⁷ Bakker went on to say, "Our class numbers are increasing with the intention that the number of actual classes decreases, because that's what TEA likes to see and reward. Resulting in our students not getting a quality education, but rather a minimal one with exhausted staff who are expected to choose quantity over quality."¹⁸⁸ The next question asked was whether she is informed when Texas fails the OSEP's annual

181. *See id.* (listing the different states Bakker has been exposed to while working in special education).

182. *See id.* (providing more support to Bakker's knowledge and credibility of comparing Texas' special education system with other states' systems).

183. *Id.*

184. *See id.* (describing an incident when one of Bakker's students had a problem with understanding to keep his clothes on. Unfortunately, a general education student witnessed the student completely expose himself to a girl for attention. The girl's dad was very upset and told Bakker that her special education students shouldn't be exposed to the general population).

185. *See generally id.* (supporting her qualifications for commenting on the Texas special education system).

186. *See id.* (recalling that every state must meet minimum requirements to receive federal funding).

187. *Id.*

188. *Id.*

monitoring visits.¹⁸⁹ Bakker responded, “we are not made aware of the [monitoring visits] every year, [but] last year we were made aware of an audit they did on Frisco ISD . . . and it is a big part of this huge program overhaul.”¹⁹⁰ One of the appalling changes the school district is focusing on is increasing the teacher per student ratio which ultimately diminishes educational benefits due to less facetime with students.¹⁹¹ Another change the district is implementing is adding “pressure on [the teachers] to focus more on academics rather than functional skills,” such as tying their shoes or bathing independently.¹⁹² In Bakker’s opinion, this change is “going to make [her students] go off on a trajectory that doesn’t even need to be touched.”¹⁹³

From Bakker’s perspective, the district is allocating funds by “what’s going to look best to the parents and the community, rather than what actually needs to happen.”¹⁹⁴ Bakker added, “I understand the bigger population is the general population . . . [so, funding and resources are] going to be focused on a little bit more [on general education,] . . . [but] we don’t have enough funding to open up more middle school programs.”¹⁹⁵ She went on to illuminate that “communication at the district level is gone . . . [and] at this point a lot of teachers feel like it’s not about the kids anymore, it’s about making connections and networking.”¹⁹⁶ Not only do “the majority of SLC teachers disagree with this path and direction and feel like our voices and concerns are

189. *Id.*

190. *Id.*

191. *See id.* (providing examples of increases in performance from her current students, because COVID-19 has given her the opportunity to teach on a 1:1 ratio. One student was struggling with in-person classes, but once classes went online, he began rapidly mastering his goals).

192. *Id.* (supporting further Texas’ indifference for adequately supporting the needs of special education students).

193. *Id.* (portraying a “domino effect due to the curriculum change,” because the student “won’t be able to get accepted into homes once they leave” the school system. If the individual doesn’t get into the home, then “their parents will be responsible for their care,” worrying about what will happen for years to come).

194. *Id.* (inferring one of the biggest reasons FISD is against opening more middle school programs is due to the district potentially having a negative perception within the education community).

195. *Id.*

196. *Id.*

being ignored. Those of us who disagree, and raise our concerns, are being flush[ed] out of the program.”¹⁹⁷

Unfortunately, Bakker’s interview accurately reflects the continuous failed attempts by TEA, and it also reiterates how imperative it is to create a sincere, transforming solution for Texas’ Special Education Program.¹⁹⁸

2. *Interview with Monica Piper, Board Member for National Autism Association of North Texas and Founder and BCBA of Stepping Stones Consulting Services*

While interviewing various perspectives on Texas’ Special Education Program, Monica Piper¹⁹⁹ is not only a mother of a child with autism but also runs her own private BCBA consulting service.²⁰⁰ Piper became BCBA certified after seeing how quickly therapy worked for her child following her child’s diagnosis.²⁰¹ Piper and her family lived in Chicago before moving to Texas.²⁰² In an interview, she was asked if she could provide some insight on the differences between Chicago and Texas special education programs.²⁰³ Piper said, “when we were in Chicago it was completely different than Texas.”²⁰⁴ She explained that when her

197. *Id.* (identifying Tracy Cartas, Executive Director of Special Education for FISD, as the key person for who is responsible for making the decisions that caused these problems). *See generally Change of Leadership and Direction for Special Education Department in Frisco ISD*, CHANGE.ORG, <https://www.change.org/p/parents-supporters-of-frisco-isd-resignation-of-tracy-cartas-executive-director-special-education-in-frisco-isd> [perma.cc/DFG6-YQWB] (petitioning to have Tracy Cartas resign for having “a history of making drastic changes with little input from school staff, teachers, and families.” As of October 28, 2021, 1,166 petitioners have signed).

198. *See generally* Telephone Interview with Corey Bakker, SLC Teacher, Cobb Middle School (Nov. 28, 2020) (describing TEA and Texas’ continuous shortcomings regarding Special Education Program).

199. *See generally* Telephone Interview with Monica Piper, Board Member, National Autism Association of North Texas, Founder and BCBA, Stepping Stones Consulting Services (Nov. 29, 2020) (explaining Monica Piper has a son who began showing signs of ASD around eight or nine months but was officially diagnosed with ASD at the age of two. Piper received an undergraduate degree in psychology and then received her MBA and then worked for roughly seven years. After learning of her child’s diagnosis, Piper went back to school and received her Master’s in psychology, specializing in BCBA).

200. *See generally id.* (following her Master’s, Piper then founded her own BCBA consulting service).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

child started grade school, she learned that most Chicago suburbs' school districts cover the approximate thirty-thousand dollar tuition of children with ASD to attend private autism school, with "amazing staff."²⁰⁵ However, Piper said, "when we started looking at Texas when we were moving down here and I started making phone calls . . . and I literally asked, 'Do you offer tuition for private schools?' and they answered, 'No.' Like, it was the craziest question."²⁰⁶

Due to Piper being involved with her child, as well as her clients, the question asked was whether she has seen a change in Texas' Special Education Program spanning from the last ten years.²⁰⁷ Piper answered, "when we moved down to [Texas], we were very impressed with Frisco, but this was ten years ago, when it was smaller and more personalized . . . I do know there [are] a lot of issues going on in FISD, and a lot of parents have been really unhappy lately."²⁰⁸ Piper added, "[Tracy Cartas] has made a lot of changes that people are very unhappy about. I think we're losing a lot of really good teachers and paras [sic] because it's turned into [being] all about the money . . . [and] what cuts down the costs, [a]nd it's not in the best interest of the students."²⁰⁹

After interviewing Monica Piper, it's clear her experiences depict Texas school districts are shifting more towards balancing their budgets, at whatever cost, leaving students and parents frustrated and concerned.²¹⁰

3. *Interview with Nagla Moussa, President of the National Autism Association of North Texas*

It was a privilege to interview Nagla Moussa,²¹¹ not only is she the President of National Autism Association of North Texas, but Moussa

205. *See id.* (noting the school district only recommended students who had autism that were low to mid functioning, meaning children that are nonverbal or minimally verbal).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020) (Nagla Moussa got involved in the disability field because she began attending ARD meetings for her son with autism, who is now thirty-three-year-olds. Moussa was appointed to TEA, as part of the Special Education Continuing Advisory Committee, and worked on the committee for six years.

was previously appointed to TEA as part of the Special Education Continuing Advisory Committee for six years.²¹² One of the first questions asked was whether she was aware of Texas' 8.5% SERI while serving on the TEA Advisory Committee.²¹³ Moussa stated, "we reviewed the due process cases every quarter . . . and [TEA] would ask us for our concerns during the advisory committee meetings, and repeatedly, I let them know that I was seeing a lot of students being turned down for services, saying they're not eligible."²¹⁴ It wasn't until Moussa stepped down from the advisory committee, "when the story broke about the 8.5% [SERI] . . . I actually testified to the federal government about the fact that I made TEA aware of [students being ineligible] several times."²¹⁵

Moving on to the topic of funding, another question asked was whether she witnessed the federal government restricting Texas' funds, as a repercussion of Texas not meeting the IDEA standard.²¹⁶ Moussa answered, "You have to understand, the federal government is only funding twenty percent of the cost of IDEA . . . [and] serving special education students is very costly, and if [they] are only giving twenty percent of what each district needs, then the rest of it has to fall on the state, and on the county."²¹⁷ She added, "I think, because they only fund twenty percent, when it comes to their monitoring system, they sort of slap your wrist...but in terms of withholding money, I haven't seen [Texas] get docked from the twenty percent they are supposed to get for IDEA services."²¹⁸ According to Moussa, the first changes she would make if she was in charge of special education funding in Texas would be to hold a special election for school bonds and use the funding to hire qualified teachers, to hold an annual training session for the teachers, and to hire enough paraprofessionals to create a viable student to teacher

She is President of the National Autism Association of North Texas and President of Moussa's Autism Consulting).

212. *Id.*

213. *Id.*

214. *Id.*

215. *See id.* ("I can tell you that the TEA staff wasn't very happy with my testimony, but the truth is the truth . . . I wasn't going to lie . . . the kids needed help.").

216. *Id.*

217. *Id.*

218. *Id.*

ratio.²¹⁹ Moussa's main concern is, currently, "a major amount of the [school] bonds will go to football team's equipment. Texas is really big on football, and not big on special education . . . special education isn't a priority. Education, in general, isn't a priority in Texas."²²⁰

Following Moussa's response regarding funding, the next question asked was, in her opinion, what is the first step to fixing Texas' Special Education Program.²²¹ Moussa stated, "The first step in the right direction would be to change the mentality about special education, especially with the politicians . . . they're very concerned that if they spend money, then they won't get re-elected."²²² Expressing her frustration, Moussa added, "Texas has a seven or eight-billion dollar rainy day surplus they aren't using. So, looking at [Texas'] education system, and how bad it's failing . . . why not tap into the rainy-day fund and fix the special education program . . . it starts with [Texas'] politicians, they have the power to decide how to spend funds."²²³

IV. SOLUTIONS

*Though the price of providing [special education] services sounds high,
the cost of not providing them over the long run is much higher to
society, both fiscally and morally.*

—Cheryl Fries²²⁴

219. *Id.*; see *School Bond Election*, BALLOTEDIA, https://ballotpedia.org/School_bond_election [perma.cc/858C-WAL9] ("School bond measures generally do not receive as much attention as candidate elections or state-wide ballot measures, but they are an important way in which citizens can guide school policy.").

220. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020); see H. Drew Blackburn, *It's Time To Stop Spending Tens of Millions of Dollars On High School Football Stadiums*, TEX. MONTHLY (May 16, 2016), <https://www.texasmonthly.com/the-daily-post/mckinney-stop-tens-millions-dollars-high-school-football-stadiums/> [perma.cc/JVQ5-JK2M] (revealing the millions of dollars that school districts are willing to spend on football stadiums).

221. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020).

222. *Id.*

223. *Id.*

224. Matos, *supra* note 21 (Statement from Cheryl Fries, co-founder of the Texans for Special Education Reform and a parent of a child with disabilities).

It is essential to remember that both sides of the political aisle have agreed that education is an important civil rights issue.²²⁵ So, why is Texas always trying to shortchange their education programs?²²⁶ We may never know the answer to this question; nevertheless, state control that leads to inadequate, inequitable, and insufficient educational opportunities is not an American value.²²⁷ Therefore, a simple resolution to Texas' problem can be solved using a two-step process.²²⁸ First, Texas needs to appreciate the significance of public education through a positive lens.²²⁹ Once Texas develops this new mentality, the second step is to invest sufficient funds for education at the outset.²³⁰ If Texas implements this solution, they will end up paying less now, or substantially more later.²³¹

225. See generally Daarel Burnette, *Should There Be a Federal Right to Education?*, EDUC. WK. (Jan. 7, 2020), <https://www.edweek.org/education/should-there-be-a-federal-right-to-education/2020/01> [perma.cc/2P6J-ZCST] (discussing the shortcomings in education reforms such as No Child Left Behind and disparities in school funding).

226. See *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 130 (5th Cir. 2018) (asserting that Texas reduced state funding for special education by \$33.3 million).

227. See Burnette, *supra* note 225 (“States have an important role to play in education to ensure excellent schools, and the federal government can partner along with states to help them achieve that.”).

228. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that separate educational facilities are inherently unequal and violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution); see also Burnette, *supra* note 225 (asserting the federal government should care about the quality of education for children on the national level to reduce opportunity gaps).

229. See *Brown*, 347 U.S. at 493 (establishing that education is an equal right for all individuals); see also Burnette, *supra* note 225 (arguing for the recognition of the federal right to education in order to have lawmakers, politicians, and states alleviate the shortcomings in education).

230. See Burnette, *supra* note 225 (advocating for the creation of “incentives for states to do the right thing, which is basically close the opportunity gap, which will lead to closing a large part of the achievement gap. Then once we have a model in place for states and the language that we would need for federal legislation to do this, then you start attaching Title I dollars to these new federal conditions.”).

231. See *id.* (proposing that unless laws do not change at the federal level, the federal government will continue to be a part of the problem); see also Matos, *supra* note 21 (“Though the price of providing those services sounds high, the cost of not providing them over the long run is much higher to society, both fiscally and morally.”).

A. *Shifting Texas' Mentality Towards Special Education*

Texas' illegalities have left a bad taste throughout the public.²³² Not only is the public outraged, but most of the issues stem from disinterested state and local officials who only view special education through the lens of an equation.²³³ An equation which projects that the costs for providing *adequate* services substantially outweighs the benefits for each individual student.²³⁴ Thus, the solution to this problem *should be* straightforward; state and local officials need to change their special education mindset.²³⁵

However, the solution isn't simple because Texas would rather pride itself on having the largest and most expensive high school football stadiums in the country, than provide every student with the appropriate resources in order to succeed.²³⁶ In Texas, the average high school head

232. See Shelby Webb, *Lost Time*, HOUS. CHRON. (May 7, 2020), <https://www.houstonchronicle.com/news/investigations/article/federal-law-students-denied-special-education-15253514.php> [perma.cc/BTK4-P62F] (explaining that Texas "should serve as more of a cautionary tale than a role model for other states," and TEA's efforts have been "completely ineffectual"); see also Webb, *supra* note 137 ("We have ruined a generation of kids . . . and we are about to ruin another generation with the inaction from TEA and the complete complacency.").

233. See Rosenthal, *supra* note 64 (outlining how Texas officials created a system to decide the percentage of children who will receive special education services).

234. See *id.* (accusing Texas officials, stating they implemented the 8.5% cap to keep thousands of disabled children out of special education, while saving TEA billions of dollars).

235. See Webb & Tedesco, *supra* note 138 (quoting Mark Alter, a Professor of Educational Psychology and Special Education at New York University, saying penalizing school districts for exceeding a limit on special education "cuts out the heart and soul and the spirit of the legislation"); Kiah Collier, *Texas Supreme Court Rules School Funding System is Constitutional*, TEX. TRIB. (May 13, 2016, 9:00 AM), <https://www.texastribune.org/2016/05/13/texas-supreme-court-issues-school-finance-ruling/> [https://perma.cc/L5U6-VJEJ] ("The Texas Supreme Court . . . issued a ruling upholding the state's public funding system as constitutional, while also urging state lawmakers to implement 'transformational, top-to-bottom reforms that amount to more than Band-Aid on top of Band-Aid.'").

236. See Annmarie Toler, *Why is Texas High School Football so Special?*, USA FOOTBALL (Sept. 14, 2017), <https://blogs.usafootball.com/blog/4410/why-is-texas-high-school-football-so-special> [perma.cc/3VS3-RP2R] ("Allen Eagle Stadium has a seating capacity of 18,000 and a price tag of \$59.6 million . . . Alamo Stadium seats 23,000 and just underwent a \$35 million renovation . . . with new turf, added seating, a new press box and a digital scoreboard . . . Katy Legacy Stadium . . . is currently the most expensive high school football stadium in the country. It carries a \$72.1 million price tag and 12,000 seating capacity."); see also Blackburn, *supra* note 220 ("As a part of a \$220 million bond package, McKinney ISD is adding [a] . . . 12,000-seat high school football stadium that will cost a total of \$62.8 million . . . the stadium, set to open in 2017, will cost \$50.3 million itself with \$12.5 million used from a previous bond package passed in 2000 . . ."); see also Chris Shelton, *After \$285 Million Bond Sheldon ISD Nears Debuts of New Football Stadium, High*

football coach's salary is \$90,911.80, yet the average teacher's salary is \$54,335.²³⁷ The difference in salaries is a perfect illustration of why Texas' priorities need to shift.²³⁸ Texas' lawmakers need to realize high school football isn't profitable, and their reluctance to provide legally adequate funding for education will continue to cost them more in the years to come.²³⁹ Texas' mentality should mimic the vision of the Department of Justice Disability Rights Section, which is "access, inclusion, and equal opportunity for people with disabilities through Justice."²⁴⁰

B. Appropriating Funds Towards Special Education

According to the National Education Association 2020 Rankings and Estimates Report, Texas was ranked 45th for public school current

School, CHRON (Sept. 5, 2019), <https://www.chron.com/neighborhood/atascocita/schools/article/After-285-million-bond-Sheldon-isd-nears-debuts-14417151.php> [perma.cc/MQA3-UFQY] ("Sheldon ISD is shelling out nearly \$200 million for a new high school, football stadium . . . [t]here will be no track around the field, giving attendees a closer look at the action at the \$29 million venue."); see also Audrey Larcher, *Texas Must Prioritize Public Education Over High School Football*, DAILY TEXAN (Sept. 19, 2017, 11:55 PM), <https://thedailytexan.com/2017/09/19/texas-must-prioritize-public-education-over-high-school-football> [perma.cc/233N-RHAE] ("Several districts have erected jumbotrons, which help audiences watch plays but don't do a lot for students working hard to improve endurance. Katy upgraded its stadium with bond money before remembering it had an elementary school to be built.")

237. See Corbett Smith, *An Inside Look At the Finances Behind HS Football in the Dallas Area*, DALL. MORNING NEWS (July 15, 2017, 2:55 AM), <https://www.dallasnews.com/high-school-sports/2017/07/15/an-inside-look-at-the-finances-behind-hs-football-in-the-dallas-area/> [perma.cc/V7KJ-HQR4] (finding the average salary for a high school head coach was \$90,911.80); see also Eva-Marie Ayala, *How Much Do Texas Teachers Get Paid? Depends on Where the Classroom Is*, DALL. NEWS (Jan. 18, 2019, 12:00 PM), <https://www.dallasnews.com/news/education/2019/01/18/how-much-do-texas-teachers-get-paid-depends-on-where-the-classroom-is/> [perma.cc/G5CZ-SZXD]; cf. Larcher, *supra* note 236 ("[T]he Fort Worth Star-Telegram reported that Lake Travis High School's head coach earned \$155,156 annually—compared to the average \$49,758 salary the district pays teachers.").

238. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020).

239. See Matos, *supra* note 21 (noting Texas must find \$3.2 billion to provide special education services to students who were formally denied the services); see also Smith, *supra* note 237 (reasoning that the money spent towards high school football is not worth it, as the sport is "rarely profitable.").

240. See *Disability Rights Section*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/disability-rights-section> [perma.cc/T5T4-Y8SF] (describing the mission: "[t]o advance the nation's goal of equal opportunity, integration, full participation, inclusion, independent living, and economic self-sufficiency for people with disabilities through enforcement, regulation, and technical assistance.").

expenditures per student.²⁴¹ Meaning, Texas spent \$14,967 less per student compared to New York, who was ranked number one, and \$3,212 less per student compared to the national average.²⁴² As a result, Texas' local property taxpayers are beginning to pay more per student than Texas' government because the state refuses to adequately pay their share for public education.²⁴³ It is important to recall Texas is only spending \$9,782 per student, yet the average cost for a student with ASD is \$19,000 per school year.²⁴⁴ Therefore, Texas' lawmakers not only have to increase funding for the general education program, but they must allocate additional funding towards special education services.²⁴⁵

Additionally, Part B of IDEA permits Congress to contribute up to forty percent of the average student spending for special education services, but most states only receive fifteen to twenty percent from the federal government.²⁴⁶ Despite special education advocates and union members lobbying at state capitals and in Washington D.C. for the full forty percent to be given for special education funding, it has yet to result in an increase of funding.²⁴⁷ Consequently, the state bears the burden of providing the rest of the funds, and in Texas' fiscal year 2018, special education funding made up 8.1% of the state's total Tier I funding

241. See NAT'L EDUC. ASS'N RSCH., RANKINGS OF THE STATES 2019 AND ESTIMATES OF SCHOOL STATISTICS 2020 35 (Jul. 2020) (comparing the national average per-student expenditure in 2018-19 was \$12,994, but Texas' was only \$9,782).

242. See *id.* (noting New York's average per-student expenditure in 2018-19 was \$24,749).

243. See generally Aliyya Swaby, *Texas' School Finance System is Unpopular and Complex*, TEX. TRIB. (Feb. 15, 2019, 12:00 AM), <https://www.texastribune.org/2019/02/15/texas-school-funding-how-it-works/> [perma.cc/2RYK-P4TR] (emphasizing that "as local property values have grown, Texas' share of public education has shrunk.").

244. See *Funding Overview*, *supra* note 12 ("Annual funding levels vary dramatically across the country, with an average range from \$4,000 to \$10,000 for students without disabilities and \$10,000 to \$20,000 for students with disabilities."); see also *Understanding Special Education Funding*, UNDERSTANDING SPECIAL EDUC., <https://www.understandingspecialeducation.com/special-education-funding.html> [https://perma.cc/9S9M-ZVZ4] (providing statistics to show that special education costs are increasing rapidly but unfortunately, funding is not readily unavailable).

245. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020).

246. See *Understanding Special Education Funding*, *supra* note 244 (outlining that special education funding from the federal government only makes up around fifteen percent, leaving the local school districts to carry the burden of the remaining costs).

247. See *id.* ("It seems obvious to most of us that if the federal government has mandated special education services under IDEA they should have a plan in place that adequately funds these programs and services"); see also Murphy, *supra* note 139.

amount.²⁴⁸ However, as of August 31, 2020, Texas' Economic Stabilization Fund (ESF, commonly known as the Rainy Day Fund) had a balance of \$10 billion.²⁴⁹ Texas has the largest Rainy Day Fund in the nation.²⁵⁰ The ESF was originally created “to prevent sudden, massive cuts to schools, health care, higher education, and other services that rely on General Revenue.”²⁵¹ However, it wasn't intended to correct a chronic underfunding state service, such as special education services.²⁵² According to the Texas Commissioner, one of the recommendations provided was to redirect a portion of severance taxes currently designated for the ESF.²⁵³ However, the report didn't mention where the funds would be transferred to.²⁵⁴ Therefore, a short-term solution to this problem would be to redirect the funds to the special education program and pay the billions of dollars for the services Texas illegally failed to

248. See TEX. COMM'N ON PUB. SCH. FIN., FUNDING FOR IMPACT 153 (Dec. 31, 2018), <https://tea.texas.gov/sites/default/files/Texas%20Commission%20on%20Public%20School%20Finance%20Final%20Report.pdf> (noting Texas' special education funding made up \$3 billion of the \$37.1 billion in the state's total Tier I fund amount).

249. See *Texas Comptroller Glenn Hegar Announces Transfer of \$2.3 Billion to State Highway and Rainy Day Funds*, COMPTROLLER.TEXAS.GOV (Nov. 24, 2020), [https://comptroller.texas.gov/about/media-center/news/20201124-texas-comptroller-glenn-hegar-announces-transfer-of-23-billion-to-state-highway-and-rainy-day-funds-160624080000#:~:text=\(AUSTIN\)%20%E2%80%94%20Texas%20Comptroller%20Glenn,percent%20of%20the%20total%20transfer.\[perma.cc/4XPH-C9RE\]](https://comptroller.texas.gov/about/media-center/news/20201124-texas-comptroller-glenn-hegar-announces-transfer-of-23-billion-to-state-highway-and-rainy-day-funds-160624080000#:~:text=(AUSTIN)%20%E2%80%94%20Texas%20Comptroller%20Glenn,percent%20of%20the%20total%20transfer.[perma.cc/4XPH-C9RE]) (reporting the new balance of ESF will be \$10.7 billion, after Texas Comptroller Glenn Hegar, transfers the funds).

250. TJ Costello et al., *The Texas Economic Stabilization Fund*, COMPTROLLER.TEXAS.GOV (Sept. 2016), [https://comptroller.texas.gov/economy/fiscal-notes/2016/september/rainy-day.php#:~:text=Texas%20has%20the%20nation's%20largest,fiscal%202016%20was%20%249.7%20billion.\[perma.cc/A26B-3G49\]](https://comptroller.texas.gov/economy/fiscal-notes/2016/september/rainy-day.php#:~:text=Texas%20has%20the%20nation's%20largest,fiscal%202016%20was%20%249.7%20billion.[perma.cc/A26B-3G49]).

251. *The Rainy Day Fund*, EVERY TEXAN, https://everytexan.org/images/IT_2017_02_Primer_RainyDayFund.pdf [perma.cc/S6LM-23MZ] (last updated Dec. 2018).

252. Cf. *id.* (relaying the Fund cannot be used to cure areas where there is “chronic underfunding.”).

253. TEX. COMM'N ON PUB. SCH. FIN., FUNDING FOR IMPACT 56 (Dec. 31, 2018), <https://tea.texas.gov/sites/default/files/Texas%20Commission%20on%20Public%20School%20Finance%20Final%20Report.pdf>.

254. See *id.* (The Commission received reports suggesting a high likelihood that the state would receive a significant influx of additional revenues from existing revenue streams (including the sales tax and severance tax) for the upcoming biennium. To ensure long-term funding stability for the education and tax reforms contemplated herein; the legislature should ensure that any revenue streams dedicated toward these goals are sufficiently stable to meet the anticipated cost growth in future biennia.).

provide.²⁵⁵ To reiterate, if Texas would have followed the requirements in IDEA, and didn't try to cheat the system, it wouldn't be in this financial predicament.²⁵⁶

Texas' lawmakers should strive for the moral and long-term financial benefits that would result from the mentality shift and increased funding for special education.²⁵⁷ Morally, parents of a special needs child in a low-income district could be assured the local and state officials have their child's needs in the best interest instead of worrying about court fees that would result if their child wasn't receiving adequate services.²⁵⁸ Additionally, if local and state officials respected children with disabilities, and valued them at the same level as football programs, our society would be more inclusive of these children.²⁵⁹ Financially, Texas wouldn't be forced to pay penalty fees because they would abide by the federal standards.²⁶⁰ Additionally, if Texas began to appropriate funds towards special education, then some of the funding could go towards parent training sessions to make the parents more knowledgeable about the services accessible for their child.²⁶¹ In order for Texas to gain respect for their educational programs, they must change their mentality about education by valuing the importance of a child's education, instead of viewing the costs of services as a burden.²⁶²

255. See Matos, *supra* note 21 (“[Texas] officials estimate that it will cost the state billions of dollars to provide special education services to an additional 189,000 students who need them.”).

256. See Rosenthal, *supra* note 64 (revealing that Texas “had the lowest special education rate in the country.”).

257. See generally Matos, *supra* note 21 (advocating that lawmakers should consider increased funding for special education).

258. Telephone Interview with Corey Bakker, SLC Teacher at Cobb Middle School (Nov. 28, 2020).

259. See Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa's Autism Consulting (Dec. 6, 2020); see also Telephone Interview with Corey Bakker, SLC Teacher at Cobb Middle School (Nov. 28, 2020).

260. See Rosenthal, *supra* note 64 (investigating the reason Texas officials implemented the 8.5% cap to save the TEA billions of dollars).

261. See Telephone Interview with Monica Piper, Board Member for National Autism Association of North Texas and Founder and BCBA of Stepping Stones Consulting Services (Nov. 29, 2020); see also Telephone Interview with Corey Bakker, SLC Teacher at Cobb Middle School (Nov. 28, 2020).

262. See *Individuals with Disabilities Education Act (IDEA)*, *supra* note 82 (emphasizing that IDEA was created in order to alleviate the disadvantages students with disabilities faced when it came to education).

CONCLUSION

In 1990, Congress appreciated that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”²⁶³ IDEA was created to ensure children with disabilities were given the ability to take part in equal educational opportunities.²⁶⁴ Reiterating Chief Justice Roberts, a child’s education “must be ‘*special*ly designed’ to meet a child’s ‘*unique* needs’ through an ‘*i*ndividualized education program.”²⁶⁵ The underlying issue throughout this comment was simple, Texas shortchanged children with disabilities in order to save state funds.²⁶⁶ Texas officials and TEA should be ashamed they illegally took advantage of Texas students, as well as their parents, in order to balance their budgets.²⁶⁷

Throughout this comment, Texas’ illegalities were highlighted, revolving around special education, which demonstrated the lack of responsibility Texas’ lawmakers and TEA have for special education.²⁶⁸ Tens of thousands of children have and will continue to fall between the cracks if TEA doesn’t fully devote itself to a significant overhaul of its special education practices.²⁶⁹ TEA should start by shifting their state of mind towards students with disabilities into a genuine outlook instead of a negative burden.²⁷⁰ Texas has done a horrendous job at providing

263. 20 U.S.C. § 1400(c).

264. 20 U.S.C. § 1400(c)(1).

265. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

266. *See Tex. Educ. Agency v. U.S. Dep’t of Educ.*, 908 F.3d 127, 130 (5th Cir. 2018) (describing how Texas reduced the support for special education, and as a consequence, was reduced allocation of funds of the same amount); *see also* Rosenthal, *supra* note 64 (explaining how TEA “has avoided scrutiny by claiming other factors have caused the special ed drop.”).

267. *See Tex. Educ. Agency*, 908 F.3d at 133 (“Because Texas appropriated about \$33.3 million less in 2012 than in 2011, the state can hardly be said to have made those funds available in any practical way.”); *see also* Rosenthal, *supra* note 64 (conveying how TEA has denied to respond to any accusations “unless there [is] proof a specific student [has] been treated illegally because of the policy.”).

268. *See* Alexandria Booterbaugh, *Everything is Bigger in Texas: Including the Horrendously Inadequate Attempts at Providing Special Education and Related Services to All Children with Disabilities*, 24 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. (forthcoming 2022).

269. *See generally* Rosenthal, *supra* note 64 (noting TEA systematically denied special education services to tens of thousands of children).

270. Telephone Interview with Nagla Moussa, President of the National Autism Association of North Texas and President of Moussa’s Autism Consulting (Dec. 6, 2020).

adequate services for children with ASD because Texas officials have repeatedly blamed the federal government and local school districts, yet refuse to take responsibility for their fault.²⁷¹ Additionally, federal, state, and local officials must work closely with each other, ensuring that eligible students are identified and receive the services guaranteed by law.²⁷² Congress needs to contribute the full forty percent they promised in IDEA, Texas' lawmakers need to stop placing the burden of educational funds on local property taxes, and school districts need to realize they have the most interaction with their students and should feel comfortable communicating at the district level.²⁷³ The human right to appropriate education should not be a partisan issue resulting from the political climate. Individuals with disabilities deserve more. Children with disabilities deserve more. Texans with disabilities deserve more.

271. *See generally* Tex. Educ. Agency, 908 F.3d at 127.

272. 20 U.S.C. § 1400(c)(6) (“While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law”).

273. *See* Swaby, *supra* note 243 (expressing how school districts mainly receive their funding from two sources: local property taxes and the State); *e.g.*, *Understanding Special Education Funding*, *supra* note 244 (advocating for a change in the current system as special education is experiencing the brunt of it).