

Marquette Benefits and Social Welfare Law Review

Volume 20
Issue 1 *Fall*

Article 4

2018

Lessons Learned From Texas' Special Education Cap

Raj Salhotra

Follow this and additional works at: <https://scholarship.law.marquette.edu/benefits>



Part of the [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), and the [Education Law Commons](#)

Recommended Citation

Salhotra, Raj (2018) "Lessons Learned From Texas' Special Education Cap," *Marquette Benefits and Social Welfare Law Review*: Vol. 20: Iss. 1, Article 4.

Available at: <https://scholarship.law.marquette.edu/benefits/vol20/iss1/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Benefits and Social Welfare Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

LESSONS LEARNED FROM TEXAS' SPECIAL EDUCATION CAP

Raj Salhotra*

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION | 70 |
| II. LEGAL RESPONSIBILITIES TO STUDENTS WITH DISABILITIES | 71 |
| <i>A. Free and Appropriate Public Education (FAPE)</i> | 72 |
| <i>B. The Individualized Educational Program (IEP)</i> | 73 |
| <i>C. Least Restrictive Environment</i> | 74 |
| <i>D. The Child Find Requirements</i> | 75 |
| <i>E. State Education Agency Oversight</i> | 76 |
| <i>F. Funding Allocations</i> | 76 |
| <i>G. Summary of the IDEA</i> | 77 |
| <i>H. Section 504 of the Rehabilitation Act</i> | 77 |
| <i>I. Americans with Disabilities Act (ADA)</i> | 78 |
| <i>J. Section 504 Versus the ADA Versus the IDEA</i> | 79 |
| <i>K. Response to Intervention (RtI)</i> | 80 |
| III. CRISIS IN TEXAS | 81 |
| <i>A. Causes of the TEA Policy</i> | 83 |
| <i>B. Impact of TEA's Policy</i> | 84 |
| IV. AFTERMATH OF THE TEA'S POLICY | 86 |
| <i>A. Long-Term Costs and Benefits of TEA's Policy Change</i> | 90 |
| V. SCHOOL FUNDING RECOMMENDATIONS | 93 |
| VI. GENERAL POLICY RECOMMENDATIONS | 94 |
| VII. CONCLUSION | 95 |

*Raj Salhotra is a Harvard Law School Graduate who received his JD in 2018. For this project, he would like to thank Professor Michael Stein who directed his research and provided invaluable support along the way.

I. INTRODUCTION

Supporting students with disabilities is personal for me. As a child, I grew up with a debilitating speech disability; I could not complete a single sentence without stuttering. I vividly remember students teasing me, and I remember the shame of being unable to speak “perfectly.” But I was lucky; my school had a speech therapist. Through repeated sessions with her, coupled with my parents’ encouragement and support from teachers (especially Ms. Sanford, the theater teacher), I overcame my stutter.

Unfortunately, for many students, this is not the reality. I think about my former student Jim, whom I taught in 12th grade math.** Jim has an “emotional disturbance;”¹ specifically, he has anxiety and depression stemming from his parents’ physical and emotional abuse. While our school correctly identified Jim as requiring special education services, his Individualized Education Plan (IEP)² was not followed faithfully, his annual Admission Review and Dismissal meetings³ were poorly attended, and he did not receive the supports he needed for his upper-level math classes.*** Jim ultimately graduated high school; however, he was not prepared for life after high school. Partially due to the lack of transition planning, Jim did not matriculate to community college for three years. Although he has recently started at a local community college, Jim did not receive all the services to which he was entitled.

This reality of students not receiving their special education services is unfortunately common in Texas. In fact, in 2004, the Texas Education Agency (TEA), Texas’ state education agency, created a rating system wherein a school district could only earn a perfect score if less than 8.5% of its students received special

**I have changed his name to protect his identity.

1. Andrew M. I. Lee, *The 13 Conditions Covered Under IDEA*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea> (last visited Oct. 15, 2018).

2. 20 U.S.C. § 1414(d)(1)(A)(i) (2012).

3. *Admission, Review, and Dismissal (ARD) Process*, NAVIGATE LIFE TEXAS, <https://www.navigatelifetexas.org/en/education-schools/ard-process> (last visited Oct. 15, 2018).

***I taught Jim AP Statistics, and I was not able to provide all the supports he needed. Moreover, none of our campus’ special education specialists knew the AP Statistics content.

education services.⁴ More than 96% of school districts responded to this standard by lowering their population of students receiving special education services to 8.5% or less.⁵ If Texas' school districts had remained at the national average of 13% of students receiving special education services, 250,000 more children would have received services.⁶ Even if we assume Texas' educational practices meet national standards (as the TEA claimed)⁷ and half of those students would not have needed special education services, that still leaves 125,000 students who did not receive the services and support they deserved.

This paper explains how this system came about, the laws the policy violated, the reforms made since this policy came to light, and finally what steps Texas should still take. Specifically, Section II explains the legal framework including Section 504 of the Rehabilitation Act, the Individuals with Disabilities in Education Act, the Americans with Disabilities Act, and Response to Intervention (RtI) regulations. Section III delves deeply into Texas' situation and the TEA's policy. Section IV identifies the steps the Texas Legislature, the TEA, and the United States Department of Education (U.S. Department of Education) have already taken. Section V offers specific policy recommendations regarding potential next steps. Finally, Section VI reiterates the central lesson of Texas' story—students must be first and connects this policy back to the individual students affected.

II. LEGAL RESPONSIBILITIES TO STUDENTS WITH DISABILITIES

Congress enacted the Individuals with Disabilities in

4. *Performance-Based Monitoring Analysis System 2004-2005 Manual*, TEX. EDUC. AGENCY 76-77, available at <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last accessed Oct. 15, 2018).

5. Brian M. Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, HOUS. CHRON. (Oct. 22, 2016), <https://www.houstonchronicle.com/denied/2>.

6. 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>.

7. Letter from Penny Schwinn, Deputy Comm'r of Acads., Tex. Educ. Agency, to Sue Swenson, Acting Assistant Sec'y, Off. of Special Educ. and Rehab. Servs. [OSERS], U.S. Dep't of Educ. (Nov. 2, 2016), <https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/tea-response-to-osersletter.pdf>; Telephone Interview with Brian M. Rosenthal, State Bureau Reporter, Hous. Chron. (Feb. 8, 2018).

Education Act (IDEA), formerly known as the Education for All Handicapped Children Act, in 1990.⁸ The IDEA's main goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."⁹ Under the IDEA, there are thirteen possible categories of disabilities: (1) Specific Learning Disability; (2) Other Health Impairment; (3) Autism; (4) Serious Emotional Disturbance; (5) Speech and Language Impairment; (6) Visual Impairment; (7) Deafness; (8) Hearing Impairment; (9) Deaf and Blind; (10) Orthopedic Impairment; (11) Intellectual Disability; (12) Traumatic Brain Injury; and (13) Multiple Disabilities.¹⁰ The IDEA has several parts that can be broken down into several pillars: (1) the Free and Appropriate Public Education (FAPE); (2) the Child Find requirements; (3) the Individualized Educational Plan (IEP); (4) the Least Restrictive Environment; (5) the monitoring requirements for the State Education Agency; and (6) the funding allocations.¹¹

A. Free and Appropriate Public Education (FAPE)

The IDEA requires school districts to provide every student with a disability with a FAPE defined as "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, 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."¹² While this definition provides some guidance, the term "appropriate" is vague¹³ and

8. Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILDREN 25, 29 (1996), <https://pdfs.semanticscholar.org/16b1/c6fda4e8be11fa56b0bc77f70553ee2572bf.pdf>.

9. 34 C.F.R. § 300.1 (2018).

10. 34 C.F.R. § 300.8 (2012).

11. 20 U.S.C. §§ 1412(a)(1), (3) to (5), (11), (17) (2012). I have necessarily left out several provisions within the law including the provision of services for toddlers in Part C of IDEA and some of the grants in Part D of the IDEA.

12. 20 U.S.C. § 1401(9) (2012).

13. Matt Saleh, *What is an "Appropriate" Education?*, SMART KIDS WITH LEARNING DISABILITIES, INC. <https://www.smartkidswithld.org/getting-help/know-your-childs->

has produced significant litigation.¹⁴

In particular, in *Board of Education v. Rowley*, the Supreme Court said that an “appropriate education” was one where the student gets some academic benefit and makes some progress.¹⁵ In other words, because the student in *Rowley* was earning high grades, the Court held the standard met.¹⁶ In particular, the Court noted that the FAPE must be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”¹⁷ This standard remained in place for several years until 2016 when in *Endrew F v. Douglas County School District*, the Supreme Court ruled that a FAPE meant “more than *de minimis*” improvement and instead requires students to make appropriate progress.¹⁸ The Court forcefully found that for students with disabilities, schools cannot provide education that “aims so low [and] would be tantamount to sitting idly . . . awaiting the time when they were old enough to drop out.”¹⁹ Therefore, under current law, the IDEA requires schools to ensure students with disabilities are making appropriate progress beyond just passing.

B. The Individualized Educational Program

The IDEA mandates that each school working with the student, her parent/guardian, and her teachers, create an Individualized Educational Program (IEP) for every student with a disability.²⁰ The IEP must include: (1) a “statement of the child’s present levels;” (2) a “statement of measurable annual goals;” (3) a “description of how . . . progress . . . will be measured;” (4) a “statement of the special education and related services” a child must receive; (5) an “explanation of the extent [] to which the child will not participate with non-disabled children;” (6) a “statement of any individual appropriate

rights/childs-rights-appropriate-education-child-ld/ (last visited Nov. 5, 2018).

14. See, e.g., *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

15. *Rowley*, 458 U.S. at 189.

16. *Id.* at 209-10.

17. *Id.* at 204.

18. *Endrew F.*, 137 S.Ct. at 1001.

19. *Id.* (internal quotations omitted).

20. 20 U.S.C. §§ 1412(a)(4) (2012); 20 U.S.C. § 1414(d) (2012) (defining the group of individuals which compose the IEP team).

accommodations;” and (7) the “projected date for the beginning of the services.”²¹ The IEP must also be updated annually through a meeting of a student, her teachers, and her parent/guardian.²² In Texas, these meetings are called Admission, Review, and Dismissal (ARD) Meetings.²³ Finally, the IDEA requires parent involvement in the creation of an IEP,²⁴ and parents have due process rights to challenge an IEP or any treatment of their child under the IDEA.²⁵ The IEP serves as the “planning tool and a map for services and interventions,”²⁶ as it guides all instructional decisions regarding a child with a disability. Moreover, some scholars have referred to the IEP as the “sine qua non” of the IDEA, as there is “no document more significant to districts, agencies, administrators, teachers, parent and educational advocates.”²⁷ The school must then follow the IEP when educating a student to ensure the student makes “appropriate progress.”²⁸

C. Least Restrictive Environment

The IDEA requires that schools educate students with disabilities in the Least Restrictive Environment (LRE) possible. Specifically, the IDEA requires that “to the maximum extent appropriate, children with disabilities . . . [must be] educated with children who are not disabled” and that children with disabilities can be removed from the traditional classroom “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary

21. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I) to (VII) (2012).

22. *When the IEP Team Meets*, CENTER FOR PARENT INFORMATION & RESOURCES (last updated Mar. 2017), <https://www.parentcenterhub.org/meetings>.

23. *Admission, Review, and Dismissal (ARD) Process*, NAVIGATE LIFE TEXAS, <https://www.navigatelifetexas.org/en/education-schools/ard-process> (last visited Oct. 15, 2018).

24. The Understood Team, *The Difference Between IEPs and 504 Plans*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/504-plan/the-difference-between-ieps-and-504-plans> (last visited Oct. 15, 2018).

25. See, e.g., 34 C.F.R. § 300.502(b)(1) (2012).

26. William H. Blackwell & Zachary S. Rossetti, *The Development of Individualized Education Programs: Where Have We Been and Where Should We Go Now?*, 4 SAGE OPEN 1, 1 (2014), <http://journals.sagepub.com/doi/pdf/10.1177/2158244014530411>.

27. Stephen W. Smith, *Individualized Education Programs (IEPs) in Special Education—From Intent to Acquiescence*, 57 EXCEPTIONAL CHILDREN 6, 6 (1990).

28. *Andrew F.*, 137 S. Ct. at 992.

aids and services cannot be achieved satisfactorily.”²⁹ While this standard is vague—in particular the phrase “to the maximum extent appropriate”—it has become more demanding as schools are better equipped to educate students with disabilities.³⁰ The courts have also strengthened the LRE standard, most notably in *Oberti v. Board of Education of Borough of Clemenston School District* wherein the Third Circuit held that schools have the burden of showing that students with disabilities cannot be educated alongside students without disabilities.³¹ Quite simply, the LRE provisions create a strong presumption in favor of educating students with disabilities in general education classes as opposed to resource rooms or special education classrooms.³²

D. The Child Find Requirements

The IDEA requires schools and school districts to identify, locate, and evaluate” all students with disabilities who are within their district regardless of whether the student attends public school, private school, is homeschooled, or is homeless.³³ Because of the infant and toddler program in Part C of the IDEA, this obligation begins when a student is three and ends when a student is twenty-one or she graduates from high school, whichever is earlier.³⁴ Once a school district identifies a student as potentially having a disability, it must evaluate the student.³⁵

29. 20 U.S.C. § 1412(a)(5)(A) (2012).

30. Amanda Morin, *Least Restrictive Environment (LRE): What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/special-education-basics/least-restrictive-environment-lre-what-you-need-to-know> (last visited Nov. 5, 2018). See generally Steven J. Taylor, *Caught in the Continuum: A Critical Analysis of the Principle of the Least Restrictive Environment*, 13 J. OF THE ASS'N FOR THE SEVERELY HANDICAPPED 41, 41-42 (1988), http://coddc.org/Documents/S%20Taylor%20article-scanned_CAUGHT%20IN%20THE%20CONTIN.pdf; Allan G. Osborne, Jr. & Philip Dimattia, *The IDEA's Least Restrictive Environment Mandate: Legal Implications*, 61 EXCEPTIONAL CHILDREN 6, 12-13 (1994) (discussing possible legal implications if schools fail to restructure classrooms to accommodate students with severe disabilities).

31. *Oberti v. Bd. of Educ. of Borough of Clemenston Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993).

32. TEX. EDUC. AGENCY & STATEWIDE PROGRESS IN THE GENERAL CURRICULUM NETWORK, *The Least Restrictive Environment (LRE): Question & Answer Document*, (revised Jan. 4, 2016), https://pgc.esc2.net/sites/Pgc/files/PGC_LRE_QA.pdf.

33. 20 U.S.C. § 1412(a)(3)(A) (2012).

34. Martin et. al., *supra* note 8 at 37.

35. Martin et. al., *supra* note 8 at 31.

If the parent is not satisfied with the evaluation, she may request an “Independent Educational Evaluation at public expense.”³⁶ Therefore, a school district that does not evaluate every child within its boundaries who may have a disability is in violation of the IDEA’s Child Find requirements.

E. State Education Agency Oversight

The IDEA requires every State Education Agency to ensure the performance of child find, creation of IEP, and provision of FAPE requirements are met.”³⁷ Moreover, the IDEA mandates that the U.S. Secretary of Education “require States to monitor implementation of this subchapter by local educational agencies [i.e. school districts].”³⁸ Taken together, these sections impose significant responsibilities on the State Education Agency and require the U.S. Department of Education to investigate a State Education Agency if it is not fulfilling its responsibilities.³⁹

F. Funding Allocations

While the IDEA has several mandates, there is significant funding that comes along with it. For example, in Fiscal Year 2017, federal funding for the IDEA programs was about \$13 billion.⁴⁰ These funds are apportioned to the states as grants that the states then allocate to school districts to fulfill the IDEA requirements.⁴¹ The IDEA allows the federal government to pay up to 40% of a state’s total spending on special education services;⁴² however, recent federal allocations have only accounted for about 14.5% of total expenditures.⁴³ This

36. 34 C.F.R. § 300.502(b)(1) (2012).

37. 20 U.S.C. § 1412(a)(11)(A) (2012).

38. 20 U.S.C. § 1416(a)(1)(C)(i) (2012).

39. 20 U.S.C. §§ 1416(a)(1) to (3) (2012).

40. Aria Bendix, *Trump’s Education Budget Revealed*, THE ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/education/archive/2017/03/trumps-education-budget-revealed/519837>.

41. U.S. DEP’T OF EDUC., SPECIAL EDUCATION—GRANTS TO STATES: PROGRAM DESCRIPTION (last modified May 5, 2016), <https://www2.ed.gov/programs/osepgts/index.html>.

42. 20 U.S.C. § 1411(a)(2)(B)(ii) (2012).

43. Michael Griffith, *A Look at Funding for Students with Disabilities*, 16 EDUCATION COMMISSION OF THE STATES, 1-3 (Mar. 2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf>; Interview with Thomas Hehir,

underfunding creates a reality wherein states and localities must increase their share of funding thereby creating perverse incentives to cut special education services.

G. Summary of the IDEA

After discussing the six major provisions of the IDEA, it is worth briefly explaining how they all fit together. First, the IDEA requires that all schools provide students with disabilities with a FAPE. Second, to actualize the FAPE, schools must create an IEP for each student with a disability. Third, when educating a student with a disability, the school must do so in the LRE. Fourth, school districts have Child-Find obligations which require them to identify and evaluate *all* students within their district boundaries who have a disability. Fifth, the state education agencies must monitor and ensure all school districts are fulfilling their responsibilities. Finally, the IDEA provides states funding to carry out its mandates.

H. Section 504 of the Rehabilitation Act

The Rehabilitation Act of 1973 (the Rehab Act) was one of the nation's first disability rights laws, and Section 504 of the Rehab Act (Section 504) states that an "otherwise qualified individual with a disability in the United States . . . shall [not], solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁴⁴ The regulations state that "program or activity" includes both local education agencies and institutions of higher education.⁴⁵ Moreover a qualified individual with a disability includes "any person who: (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."⁴⁶ If a school evaluates

Former Dir., U.S. Dep't of Educ. Office of Special Educ. (Mar. 7, 2018).

44. 29 U.S.C. § 794(a) (2012).

45. 29 U.S.C. § 794(b)(2) (2012).

46. 34 C.F.R. § 104.3(j)(1) (2018). The Americans with Disabilities Act Amendments Act (Amendments Act), P.L. 110-325, amended the ADA and Section 7 of the Rehabilitation Act of 1973, which contains the disability definition for Section 504. The Amendments Act became effective on January 1, 2009. The Amendments Act

a student and determines that Section 504 covers her, that student is then eligible for a variety of accommodations under Section 504.⁴⁷ In the classroom setting, this can include extended time or preferential seating.⁴⁸

I. Americans with Disabilities Act

While the IDEA and Section 504 are the two statutes that most directly control special education, the Americans with Disabilities Act (ADA) also plays a role by prohibiting discrimination based on disability against any person who “(i) has a physical or mental impairment that substantially limits one or more major life activities, (ii) a record of such an impairment, or (iii) [is] regarded as having such an impairment.”⁴⁹ Specifically, Title III of the ADA requires public accommodations to provide reasonable accommodations to anyone with a disability unless there is an “undue burden” on the organization or business.⁵⁰ Public accommodations include, for example, schools⁵¹ and the College Board which administers the SAT.⁵² Reasonable accommodations under the ADA could include everything from installing a ramp for wheelchair users to providing extra time on the SAT to allowing certain students to sit in the front of the class during a summer camp.⁵³

affected the meaning of the term “disability” in the ADA and Section 504, most notably by requiring that “disability” under these statutes be interpreted broadly.

47. Mary Durham, *A Parent's Guide to Section 504 in Public Schools*, GREATSCHOOLS.ORG (Jun. 13, 2018), <https://www.greatschools.org/gk/articles/section-504-2>.

48. See Alison Esposito Pritchard et al., *Academic Testing Accommodations for ADHD: Do They Help?*, 21 LEARNING DISABILITIES 67-78 (2016); Durham, *supra* note 47.

49. 42 U.S.C. § 12102(1) (2012).

50. 42 U.S.C. §§ 12182(a), (b)(2)(A)(iii) (2012).

51. Deborah Leuchovius, *ADA Q&A: Back to School*, PACER CENTER (last visited Oct. 15, 2018), <http://www.pacer.org/publications/adaqa/school.asp>.

52. THE COLLEGE BOARD, *Services for Students with Disabilities: Ensuring Accommodations on College Board Exams*, <https://www.collegeboard.org/students-with-disabilities> (last visited Oct. 15, 2018).

53. Leuchovius, *supra* note 51 at 2; THE COLLEGE BOARD, *Services for Students with Disabilities: Typical Accommodations*, <https://www.collegeboard.org/students-with-disabilities/typical-accommodations> (last visited Oct. 15, 2018); Lilia Melikechi, *A Camp for Everyone!: A Guide to Including Children of All Abilities in Summer Camp Programs*, UNITED CEREBRAL PALSY OF DELAWARE 97, <http://ucpde.org/wp-content/uploads/2015/06/a-camp-for-everyone-a-guide-to-including-children-of-all-abilities-in-summer-camp-programs.pdf> (last visited Nov. 5, 2018).

J. Section 504 Versus the ADA Versus the IDEA

IDEA, Section 504, and the ADA all affect education, so it is important to consider the interplay among these three statutes. First, all three statutes can affect and cover a student.⁵⁴ In that circumstance, a student will always receive the greatest protections.⁵⁵ Second, the ADA's primary effects are: (1) making the school itself more accessible (installing ramps for example) and (2) ensuring extracurricular activities—which are not covered by the IDEA or Section 504—are accessible.⁵⁶ Third, while Section 504 and the IDEA only apply to entities receiving federal funds, the ADA applies to every non-religious public accommodation.⁵⁷

Beyond these differences among the ADA, IDEA, and Section 504, it is important to consider specific differences between the IDEA and Section 504, as they are the two statutes most directly affecting the education of students with disabilities. Broadly, these differences can be summarized as: the IDEA provides greater services for students, expanded protections for parents, and increased costs for schools and school districts. Importantly, if a student qualifies for services under the IDEA and Section 504, a school district must provide services under the IDEA.⁵⁸ Some specific differences between the two programs include:

Under the IDEA, parents have due process rights to challenge a school district's actions; however, under Section 504 they do not.⁵⁹

Under the IDEA, parents must be present to craft an IEP; however, under Section 504, parents may (but do not have to be) be present to determine what services a school will provide.⁶⁰

Under the IDEA, the school must review the IEP annually; however, Section 504 does not mandate a specific renewal

54. Andrew M. I. Lee, *ADA: Protecting Your Child's Civil Rights*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/ada-protecting-your-childs-civil-rights> (last visited Oct. 15, 2018).

55. *Id.*

56. Leuchovius, *supra* note 51, at 2-3.

57. Lee, *supra* note 54.

58. *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996).

59. The Understood Team, *supra* note 24.

60. The Understood Team, *The Difference Between*, *supra* note 24; See also Laurie U. deBettencourt, *Understanding the Differences Between IDEA and Section 504*, 34 TEACHING EXCEPTIONAL CHILDREN 16, 18-19 (2002).

period.⁶¹

Under the IDEA, a school must create an IEP which has specific requirements⁶² (see Section IIb); however, under Section 504, there are no requirements for a written plan.⁶³

K. Response to Intervention

Beyond the IDEA, the ADA, and Section 504, Response to Intervention (RtI), although not codified in statute, is an important policy that can have legal implications. During President George W. Bush's administration, the U.S. Department of Education created RtI, a three-tiered early intervention program that would prevent or mitigate the need for special education.⁶⁴ In Tier I, the teacher provides general high-quality instruction to all students.⁶⁵ If a student is not making adequate progress, the teacher should shift to Tier II interventions such as small-group instruction.⁶⁶ During Tier II, schools should conduct assessments to measure progress and determine which students can return to general Tier I instruction and which students should be shifted to Tier III interventions.⁶⁷ During Tier III, teachers should provide

61. The Understood Team, *supra* note 24; See also deBettencourt, *supra* note 60, at 20.

62. The Understood Team, *supra* note 24.

63. The Understood Team, *supra* note 24.

64. Lynn S. Fuchs et. al, *Response to Intervention: A Strategy for the Prevention and Identification of Learning in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEA 2004 AND BEYOND 115, 132-33 (Elena L. Grigorenko, ed., Springer Publishing 2008); Renee Bradley et al., *Response to Intervention*, 38 JOURNAL OF LEARNING DISABILITIES 485 (2005); Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why, and How Valid is It?*, 41(1) READING RESEARCH QUARTERLY 93, 93 (2006); Jose L. Martin, *Understanding the Modern Menu of Public Education Services for Struggling Learners: RtI Programs, Section 504, and Special Education*, RTI ACTION NETWORK (last visited Nov. 5, 2018), <http://www.rtinetwork.org/learn/ld/understanding-the-modern-menu-of-public-education-services-for-struggling-learners-rti-programs-section-504-and-special-education> (last visited Nov. 5, 2018).

65. Edward S. Shapiro, *Tiered Instruction and Intervention in a Response-to-Intervention Model*, RTI ACTION NETWORK, (last visited Nov. 5, 2018); Telephone Interview with Douglas Fuchs, Professor of Special Educ. and Nicholas Hobbs Chair of Special Educ. and Human Dev. in the Vanderbilt University Dep't of Educ. (Feb. 9, 2018).

66. *Id.*

67. *Id.*

individualized instruction with high-quality proven techniques.⁶⁸ While some hoped RtI would be a huge success, the evidence suggests that it has failed, as schools are not implementing it with fidelity.⁶⁹ Importantly, the U.S. Department of Education clarified that RtI “cannot be used to delay or deny the provision of a full and individual evaluation” under the IDEA.⁷⁰

III. CRISIS IN TEXAS

The Texas Education Agency (TEA) uses a policy called Performance-Based Monitoring Analysis System (PBMAS)⁷¹ that tracks more than 40 performance criteria to gauge the performance of school districts.⁷² In 2004, the TEA added the percentage of a school district’s students in special education as a performance criterion.⁷³ The TEA set the benchmark at 8.5%, meaning that a school district could only earn the highest rating if it had fewer than 8.5% of its students receiving special education services.⁷⁴ In 2000, Texas had a special education rate of 12%, which was below the national average.⁷⁵ Nevertheless,

68. Ruth A. Ervin, *Considering Tier 3 Within a Response-to-Intervention Model*, RTI ACTION NETWORK,

<http://www.rtinetwork.org/essential/tieredinstruction/tier3/consideringtier3> (last visited Nov. 9, 2018); Telephone Interview with Douglas Fuchs, Professor of Special Educ. and Nicholas Hobbs Chair of Special Educ. and Human Dev. in the Vanderbilt University Dep’t of Educ. (Feb. 9, 2018).

69. Rekha Balu et. al, *Evaluation of Response to Intervention Practices for Elementary School Reading*, U.S. DEPT OF EDUC. 87, 92-93 (Nov. 2015), <https://ies.ed.gov/ncee/pubs/20164000/pdf/20164000.pdf>; Telephone Interview with Douglas Fuchs, Professor of Special Educ. and Nicholas Hobbs Chair of Special Educ. and Human Dev. in the Vanderbilt University Dep’t of Educ. (Feb. 9, 2018).

70. Memorandum from Melody Musgrove, Dir., Office of Special Educ. Programs [OSEP], U.S. Dep’t of Educ., to State Dirs. of Special Educ. 2 (Jan. 21, 2011), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>.

71. *2018 Performance Based on Monitoring Analysis System Manual*, TEX. EDUC. AGENCY, <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last visited Oct. 15, 2018).

72. See generally *2018 Performance Based on Monitoring Analysis System Manual*, TEX. EDUC. AGENCY 17-76, <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last visited Oct. 15, 2018); Telephone Interview with Brian M. Rosenthal, State Bureau Reporter, Hous. Chron. (Feb. 8, 2018).

73. *Performance-Based Monitoring Analysis System 2004-2005 Manual*, *supra* note 4, at 76-77.

74. *Performance-Based Monitoring Analysis System 2004-2005 Manual*, *supra* note 4, at 77; *2016 Performance-Based Monitoring Analysis System Manual*, TEX. EDUC. AGENCY 64 <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last accessed Oct. 15, 2018); Rosenthal, *supra* note 6.

75. Rosenthal, *supra* note 6.

the TEA instituted the cap to take a “first stab” at reducing over-identification in special education.⁷⁶ Low scores on the PBMAS could require a school district to complete a “Corrective Action Plan”, lead to site visits from the TEA, and, if the scores were low enough, possibly even affect funding.⁷⁷ When this policy came to light in 2016 through a *Houston Chronicle* investigation, TEA argued that the percent of students in special education was not a cap and simply one of many indicators.⁷⁸ However, school districts did not interpret it that way.⁷⁹ For example, one Houston teacher remembers being told “not to diagnose dyslexia before second grade.”⁸⁰ Moreover, a teacher in Tyler, Texas stated: “[w]e were basically told in a staff meeting that we needed to lower the number of kids in special ed[ucation] at all costs.”⁸¹

Once the policy was in place, the TEA began enforcing it with site visits and Continuous Improvement Plans. In 2007, the TEA notified Laredo Independent School District (hereinafter ISD) that because its special education rate was at 11% (down from 13.5% two years ago) and thus higher than the benchmark it would be subject to a site visit.⁸² Moreover, in 2010, Gatesville ISD,⁸³ Morgan ISD,⁸⁴ and Karnack ISD⁸⁵ all submitted

76. Rosenthal, *supra* note 6.

77. Rosenthal, *supra* note 6.

78. Rosenthal, *supra* note 6.

79. Rosenthal, *supra* note 6.

80. Transcript of Hearing before Houston Independent School District at 537, <https://assets.documentcloud.org/documents/3247455/HISD-Testimony.pdf> (last visited Jan. 18, 2019).

81. Rosenthal, *supra* note 6.

82. Letter from Laura Taylor, Deputy Assoc. Comm’r for Program Monitoring and Interventions, Tex. Educ. Agency, to Veronica Guerra, Superintendent, Laredo Indep. Sch. Dist. (Feb. 26, 2008), <https://www.documentcloud.org/documents/3146183-Letter-Summarizing-Monitoring-Visit-and-Sanctions.html>.

83. *2010-2011 Continuous Improvement Plan, Special Education Monitoring System*, GATESVILLE INDEP. SCH. DIST. (2010), <https://www.documentcloud.org/documents/3105534-Gatesville-ISD-Corrective-Action-Plan.html> [hereinafter *Gatesville ISD CIP*].

84. *2009-2010 Continuous Improvement Plan, Special Education Monitoring System*, MORGAN INDEP. SCH. DIST. (2009), <https://assets.documentcloud.org/documents/3146185/Morgan-Isd.pdf> [hereinafter *Morgan ISD CIP*].

85. *2010-2011 Continuous Improvement Plan, Special Education Monitoring System*, KARNACK INDEP. SCH. DIST. (2010), <https://assets.documentcloud.org/documents/3105525/Karnack-ISD-Corrective-Action-Plan.pdf> [hereinafter *Karnack ISD CIP*].

Continuous Improvement Plans to the TEA. These plans detailed how the school districts would reduce enrollment in special education.⁸⁶ Additionally, districts like Houston ISD, instituted policies requiring special education rates to be lower than 8.5%.⁸⁷ Overall, the TEA's policy was effective at reducing the special education population, as more than 96% of school districts reduced their populations of special education students after the TEA instituted the benchmark.⁸⁸

A. Causes of the TEA Policy

Before getting to the real effects of this policy on students, it is worth asking why did the TEA pursue such a policy? The TEA argues this policy was put in place to reduce the problem of "over-identification."⁸⁹ However, this explanation seems inadequate given that: (1) when the policy was put in place, Texas had a lower proportion of students receiving special education services than the nation at-large⁹⁰ and (2) while there may have been some over-identification among African-Americans, there was *under-identification* among ELL and Latino students.⁹¹

Rather than over-identification, money may have been a greater driver of this policy. Educating a student with a disability in special education is nearly double the cost of educating the same student in a general education setting.⁹² Moreover, because the federal government only pays 14% of the cost, state and local governments face a significant financial burden when providing special education services.⁹³ This cost

86. *Gatesville ISD CIP*, *supra* note 83; *Morgan ISD CIP*, *supra* note 84; *Karnack ISD CIP*, *supra* note 85.

87. *2011-2012 Comprehensive Program Improvement Plan*, HOUSTON INDEP. SCH. DIST. (2011), <https://assets.documentcloud.org/documents/3247452/HISD-Comprehensive-Program-Improvement-Plan.pdf>.

88. Rosenthal, *supra* note 6.

89. Rosenthal, *supra* note 6.

90. Rosenthal, *supra* note 6.

91. Brian M. Rosenthal, *Denied: Texas Schools Shut Non-English Speakers Out of Special Ed*, HOUS. CHRON. (Dec. 10, 2016), <https://www.houstonchronicle.com/denied/4>; Interview with Thomas Hehir, Former Dir., U.S. Dep't of Educ. Office of Special Educ. (Mar. 21, 2018).

92. Rosenthal, *supra* note 6.

93. Griffith, *supra* note 43, at 3; Interview with Thomas Hehir, Former Dir., U.S. Dep't of Educ. Office of Special Educ. (Feb. 26, 2018).

reached \$3 billion for Texas in 2002.⁹⁴ Additionally, in 2003, Texas cut education funding by over \$1 billion.⁹⁵ The TEA therefore faced the reality of a smaller budget and rising education costs. As such, the TEA may have balanced the budget by reducing the number of students receiving special education services.⁹⁶ While some argue that money did not influence the TEA's decision, the timing of the policy and the purely random selection of the 8.5% target suggests monetary concerns contributed to this decision.⁹⁷

B. Impact of TEA's Policy

Perhaps the most important question is: what effect did this policy change have on students? At a purely quantitative level, the percent of Texas' students receiving special education services fell from nearly 13% in 2004 to 8.5%.⁹⁸ In fact, more than 96% of school districts in Texas had a lower proportion of students receiving special education services in 2016 as compared with 2004.⁹⁹ The U.S. Department of Education noted that between 2003 and 2016, 32,000 fewer Texan children received special education services while the population of children in Texas schools increased by 1 million.¹⁰⁰ However, the percent of students receiving Section 504 plans roughly doubled¹⁰¹; perhaps because Section 504 plans are cheaper than providing special education services. Research also shows that if Texas had maintained the share of students receiving special education services, 250,000 more students would have received services.¹⁰² In particular, the policy greatly affected English Language Learner (ELL) students whose parents did not speak English and thus had more difficulty advocating for their

94. Rosenthal, *supra* note 6.

95. Rosenthal, *supra* note 6.

96. Interview with Dustin Rynders, Att'y, Disability Rights Tex. (Feb. 21, 2018).

97. Rosenthal, *supra* note 6.

98. Rosenthal, *supra* note 6.

99. Rosenthal, *supra* note 5.

100. Letter from Ruth E. Ryder, Acting Dir., Office of Spec. Educ. Programs, U.S. Dep't of Educ., to Mike Morath, Comm'r, Tex. Educ. Agency (Jan. 11, 2018), <https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-letter.pdf> [hereinafter *OSEP Visit Letter*].

101. Rosenthal, *supra* note 6.

102. Rosenthal, *supra* note 6.

children.¹⁰³ Finally, during this time, the number of students withdrawing from schools increased by 30%¹⁰⁴ suggesting some students may have left school because they did not receive services.

On a more individual level, there were some blind students who were denied special education services.¹⁰⁵ There were also stories of kids remaining in RtI programs for years¹⁰⁶ or RtI being required before providing special education services.¹⁰⁷ In fact, one parent noted that “the referral for an initial evaluation in Texas was delayed for three and a half years so that the child could receive ten minutes of RtI intervention each day.”¹⁰⁸ The TEA argued that RtI usage grew because it was effective at reducing false identification of students qualified for services.¹⁰⁹ However, research showed that students on RtI were less likely to succeed than students receiving special education services.¹¹⁰

Finally, there were heartbreaking stories of students unable to receive support. For example, Teresita Gutierrez, a longtime district staffer and former vice principal said that she was “ordered to make it hard to get into special education . . . We just had to watch them fail.”¹¹¹ Another parent was told that “speech therapy had been eliminated for high school students who stutter.”¹¹² Perhaps former Deputy Secretary of Education Frank Holleman summed it up best: “if a child is moved just to meet some arbitrary number, that’s the type of thing that can affect a

103. Rosenthal, *supra* note 91.

104. Brian M. Rosenthal, *Denied: Special Ed Cap Drives Families Out of Public Schools*, HOUS. CHRON. (Dec. 29, 2016), <https://www.houstonchronicle.com/denied/7>.

105. Brian M. Rosenthal, *In Texas, Even Blind Children Can’t Always Get Special Education*, HOUS. CHRON. (Jan. 19, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Texas-even-blind-and-deaf-children-can-t-10822708.php>.

106. *OSEP Visit Letter*, *supra* note 100, at 3.

107. Rosenthal, *supra* note 6.

108. Enclosure with Letter from Ruth E. Ryder, Acting Dir., Office of Spec. Educ. Programs, U.S. Dep’t of Educ., to Mike Morath, Comm’r, Tex. Educ. Agency 7 (Jan. 11, 2018) <https://www2.ed.gov/fund/data/report/idea/partbdsrpts/dms-tx-b-2017-enclosure.pdf>.

109. Aliyya Swaby, *Expecting Spike in Special Ed Students, Advocates Push for Better Services*, TEX. TRIB. (Jan. 19, 2017), <https://www.texastribune.org/2017/01/19/advocates-pushing-increase-quality-not-just-number>.

110. *See generally, id.*

111. Rosenthal, *supra* note 5.

112. Rosenthal, *supra* note 5.

child's entire educational career and entire life. That needs to stop immediately."¹¹³ Quite frankly, the TEA's policy failed thousands of kids.

IV. AFTERMATH OF THE TEA'S POLICY

The TEA's policy continued largely unnoticed from 2004 until September 10, 2016 when *Houston Chronicle* reporter Brian Rosenthal published the first article in his seven-part Denied series.¹¹⁴ Immediately after the article came out, the TEA,¹¹⁵ the Texas Senate,¹¹⁶ and the Texas House of Representatives¹¹⁷ promised to review the policy and take action where needed. While disability rights advocates feared these statements would be perfunctory,¹¹⁸ everything changed on October 3, 2016 when the Department of Education demanded that the TEA investigate the policy and report back in 30 days.¹¹⁹

On November 2, 2016, the TEA replied to the US Department of Education denying that there was ever a cap on special education enrollment and arguing that there was no "systematic denial of [] services."¹²⁰ Nevertheless, the TEA promised to remind school districts about their Child-Find

113. Rosenthal, *supra* note 5.

114. *See generally*, Rosenthal, *supra* note 6.

115. Brian M. Rosenthal, *TEA Says It Will Conduct 'Detailed Review' of Special Ed Target*, HOUS. CHRON. (Sept. 15, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/TEA-says-it-will-conduct-detailed-review-of-9223835.php>.

116. Brian M. Rosenthal, *Some Officials Vow to Fight Limits Put on Special Ed*, HOUS. CHRON. (Sept. 18, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Officials-vow-to-endlimits-put-on-special-ed-9218706.php>.

117. Brian M. Rosenthal, *Straus: 'Students Who Need Special Education Should Not Be Kept Out of It'*, HOUS. CHRON. (Sept. 16, 2016), <https://www.chron.com/news/politics/texas/article/Straus-Students-who-need-special-education-9225939.php>.

118. Interview with Dustin Rynders, Att'y, Disability Rights Tex. (Feb. 21, 2018).

119. Letter from Sue Swenson, Acting Assistant Sec'y, Office of Spec. Educ. And Rehab. Servs., U.S. Dep't of Educ., to Mike Morath, Comm'r, Tex. Educ. Agency 2 (Oct. 3, 2016), <https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/letter-to-mike-morath-10-03-2016.pdf>.

120. Letter from Penny Schwinn, Deputy Comm'r of Acads., Tex. Educ. Agency, to Sue Swenson, Acting Assistant Sec'y, Off. of Special Educ. and Rehab. Servs. [OSERS], U.S. Dep't of Educ. (Nov. 2, 2016), <https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/tea-response-to-osersletter.pdf>.

responsibilities and that RtI could not be used to delay the provision of special education services.¹²¹ The TEA, however, did not offer a plan to support students who may have been denied services.¹²² The TEA did ultimately send the letter to all school districts¹²³ and also conducted a listening tour with the U.S. Department of Education.¹²⁴ While on this listening tour, the American Federation of Teachers (AFT) released a survey showing that 59% of teachers in Texas believed that “under-identifying children with special needs was a problem in their school district.”¹²⁵ This report coupled with the listening tour and disability rights advocates’ threat to sue the TEA if it did not end its policy of using the 8.5% benchmark¹²⁶ created momentum for the 2017 Texas Legislature to take significant action to address this policy.¹²⁷

The 2017 Texas Legislative session commenced on January 10, 2017,¹²⁸ and advocacy to reform the state’s special education system began immediately. For example, Texas legislators filed 51 bills designed to improve the provision of special education services.¹²⁹ Moreover, Governor Greg Abbott declared that

121. *Id.*

122. Brian M. Rosenthal, *TEA Suspends Special Education Enrollment Target*, HOUS. CHRON. (Nov. 2, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/TEA-suspends-special-education-cap-10534865.php>.

123. Letter from Penny Schwinn, Deputy Comm’r of Acads., Tex. Educ. Agency, to Texas school district administrators (Nov. 17, 2016), https://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letter_s/Reminder_about_Important_District_Responsibilities_under_the_Individuals_with_Disabilities_Education_Act.

124. *Texas Listening Sessions*, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES BLOG (Nov. 5, 2016), <https://sites.ed.gov/osers/2016/11/texas-listening-sessions>.

125. *Special Education Survey Reveals Yet Another Example of How Texas is Underfunding Services to Our Most Vulnerable Children*, TEXAS AFT (Dec. 16, 2016), <https://www.texasaft.org/hotline/special-education-survey-highlights-harmful-results-underfunding-schools>.

126. Brian M. Rosenthal, *Disability Advocates Threaten to Sue Texas Over Special Education Cap*, HOUS. CHRON. (Jan. 30, 2017), <https://www.chron.com/news/politics/texas/article/Disability-advocates-threaten-to-sue-Texas-over-10894185.php>.

127. Aliyya Swaby, *For Special Ed Advocates, One Bill Down and Many More on the Line*, TEX. TRIB. (May 11, 2017), <https://www.texastribune.org/2017/05/11/special-ed-advocates-one-bill-down-and-many-more-line>.

128. *Texas Legislative Sessions and Years*, LEG. REFERENCE LIBR. OF TEX. (last visited Nov. 5, 2018), <https://lrl.texas.gov/sessions/sessionYears.cfm>.

129. Brian M. Rosenthal, *Watch Live: Texas Lawmakers Debate Special Education Bills*, HOUS. CHRON. (Apr. 4, 2017),

“Texas w[ould] fix” its special education system.¹³⁰ Despite the bold pronouncements and the introduction of 51 bills, the Texas Legislature only passed three bills related to special education: (1) SB160 which eliminated the 8.5% benchmark and prohibited the TEA from ever using a benchmark on special education services;¹³¹ (2) SB436 which expanded transparency of and access to the State’s special education continuing advisory committee;¹³² and (3) SB1153 which codified parents’ rights to receive information about their child’s records.¹³³ Although these three bills were important, the session adjourned in May 2017 with the Legislature having done: (1) nothing to support students who may have been denied services,¹³⁴ (2) almost nothing to increase funding for special education,¹³⁵ and (3) nothing to increase resources for teacher training.¹³⁶

Given the Legislature’s inadequate response, the U.S. Department of Education continued its investigation. Although the U.S. Department of Education promised to release their report in June 2017, they actually released it in January 2018.¹³⁷

<https://www.houstonchronicle.com/news/politics/texas/article/Lawmakers-to-start-debating-special-education-11042363.php>.

130. Brian M. Rosenthal, *Abbott: ‘Texas Will Fix’ Its Embattled Special Education System*, HOUS. CHRON. (Apr. 3, 2017),

<https://www.chron.com/news/politics/texas/article/Abbott-Texas-will-fix-its-embattled-special-11046397.php>.

131. S.B. 160, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB160>.

132. S.B. 436, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB436>.

133. S.B. 1153, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB1153>.

134. See S.B. 927, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB927>; H.B.

3437, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB3437>;

Rosenthal, *supra* note 129.

135. Aliyya Swaby, “Disappointed” House Accepts Senate’s Changes to School Finance Bill, TEX. TRIB. (Aug. 16, 2017),

<https://www.texastribune.org/2017/08/15/house-school-finance>.

136. Kate Kuhlmann, *Bills Addressing Educators in the 85th Texas Legislature*, TEACH THE VOTE BLOG (Jun. 1, 2017),

<https://www.teachthevote.org/news/2017/06/01/bills-addressing-educators-in-the-85th-texas-legislature>. See also S.B. 529, 85th Leg., Reg. Sess. (Tex. 2017),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB529>.

137. Aliyya Swaby, *Feds Say Texas Illegally Failed to Educate Students with Disabilities*, TEX. TRIB. (Jan. 11, 2018),

<https://www.texastribune.org/2018/01/11/federal-special-education-monitoring-report>.

The report concluded that Texas violated the IDEA's Child Find and monitoring requirements.¹³⁸ The letter then mandated that the TEA provide specific remedial steps to the U.S. Department of Education.¹³⁹ Although the letter did not specify a timeline, Governor Abbott asked the TEA to complete a draft plan within seven days.¹⁴⁰ The TEA's initial draft plan called for: (1) adding new staff members to monitor Texas school districts; (2) locating students who may not have received the services to which they were entitled and then providing any services they may need; and (3) developing resources to support school districts' implementation of IDEA.¹⁴¹

After releasing the plan, the TEA sought public comment on it.¹⁴² After a month of public comment, the TEA revised its plan and released a second draft plan for public comment.¹⁴³ This second version is more detailed and offers: (1) greater specificity regarding increased monitoring, (2) greater support for districts that are struggling to support students with disabilities, (3) a streamlined process for the TEA to review school districts, (4) outreach to parents of students who may have been denied special education services, (5) the provision of compensatory services for all students below 21 to whom school districts denied services under the old policy, (6) increased training and support for general education teachers so they are better able to implement Section 504 and the RtI process, and (7) greater parent engagement via creating a call center for parents to ask questions.¹⁴⁴ While this new plan has a price tag of nearly \$212

138. Enclosure with Letter from Ruth E. Ryder, Acting Dir., Office of Spec. Educ. Programs, U.S. Dep't of Educ., to Mike Morath, Comm'r, Tex. Educ. Agency 1 (Jan. 11, 2018) <https://www2.ed.gov/fund/data/report/idea/partbdsrpts/dms-tx-b-2017-enclosure.pdf>.

139. *Id.* at 14.

140. Swaby, *supra* note 137.

141. *TEA Plan and Response to the Monitoring Letter (INITIAL DRAFT PROPOSAL)*, TEX. EDUC. AGENCY 1, 2, 5, 7, https://static.texastribune.org/media/documents/TEA_Initial_Draft_Proposal.pdf?_ga=2.260985226.66128983.1542079097-1246146937.1525469966.

142. *TEA Opens Online Survey on Special Education Corrective Action Draft Plan*, TEX. EDUC. AGENCY (Jan. 23, 2018), https://tea.texas.gov/About_TEA/News_and_Multimedia/News_Releases/2018/TEA_opens_online_survey_on_special_education_corrective_action_draft_plan.

143. Mark Wiggins, *TEA Seeking Public Input on Special Education Plan*, TEACH THE VOTE BLOG (Apr. 3, 2018), <https://www.teachthevote.org/news/2018/04/03/tea-seeking-public-input-on-special-education-plan>.

144. *See generally, Draft Special Education Strategic Plan*, TEX. EDUC. AGENCY (Mar. 2018),

million over five years, the TEA has identified funding sources from within its state-apportioned funds and federal funding under the IDEA.¹⁴⁵ In short, this second draft seems to be a robust plan with greater specifics and funding sources and should help improve Texas' special education system.

A. Long-Term Costs and Benefits of TEA's Policy Change

The TEA has released a strong plan to reform special education in Texas, and it contains significant monetary and non-monetary costs and benefits.

At the most fundamental level, the plan will increase spending on special education. While the TEA has allocated the \$212 million to implement the plan, there has been no corresponding increase in funding for school districts.¹⁴⁶ Because the TEA has removed the 8.5% cap, mandated greater outreach to parents, and forced school districts to identify students who may have been denied services, there will necessarily be more kids receiving special education services now than before the policy change.¹⁴⁷ This means that the education system will spend more on special education thereby requiring more money from both the state and local school districts. However, because the state has not apportioned more funding for education, local school districts will be forced to bear a greater funding share. Given their stretched budgets, this will result in: (1) cuts in funding for other core services; (2) shortages in providing special education services; or (3) increases in Texas' already high property taxes.¹⁴⁸ As such, some school districts view this new plan as an "unfunded mandate."¹⁴⁹

Because of the monetary costs, the Legislature may not

https://static.texastribune.org/media/documents/Draft_SPED_Strategic_Plan_-_March_19.pdf.

145. *Id.* at 40.

146. Aliyya Swaby, *Texas School Administrators Warn They Need Money for Likely Spike in Special Education*, TEX. TRIB. (Apr. 16, 2018), <https://www.texastribune.org/2018/04/16/tea-richardson-special-education>.

147. *Id.*

148. 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), <https://www.houstonchronicle.com/news/investigations/article/Texas-may-pay-up-to-3-billion-to-raise-special-13146845.php>.

149. Swaby, *supra* note 146.

fund this plan,¹⁵⁰ and the TEA may therefore be unable to administer it. As such, to actually implement this plan, Democrats may be forced to compromise on other issues such as transgender rights or immigration in order to get Republicans to fund special education. While this may seem surprising, during the 2017 Texas Legislative Session, the Texas House Freedom Caucus, a group of conservative members, led the “Mother’s Day Massacre” wherein they blocked over 100 bipartisan bills because of “perceived marginalization” by House Republicans.¹⁵¹ This type of brinksmanship may continue and block any progress on funding for special education.

Beyond just funding, the TEA’s plan will require hiring more special education professionals at the state-level to handle oversight, at the district level to manage special education programs, and at the school level to lead special education classrooms. However, Texas currently faces a shortage of teachers generally¹⁵² and a lack of special education professionals specifically.¹⁵³ If Texas has an undersupply of special education personnel, the state will either need to pay more (unlikely given the politics) or do without high-quality personnel thereby jeopardizing the efficacy of the plan.

Despite the costs of the TEA’s plan, legislators and advocates should focus on its benefits. First, Texas has a legal responsibility under the IDEA to provide special education services to all qualified students.¹⁵⁴ The TEA’s plan will ensure Texas meets the requirements and avoids losing federal funding. In particular, if Texas does not faithfully execute the TEA’s plan, the U.S. Department of Education is likely to levy harsh

150. Alejandra Matos, *In Plan to Fix Special Education, Texas Education Agency Will Spend \$212 Million*, HOUS. CHRON. (Apr. 24, 2018), <https://www.chron.com/news/politics/texas/article/In-plan-to-fix-special-education-Texas-Education-12861402.php>.

151. Bob Daemrich & John Jordan, *Slideshow: “Mother’s Day Massacre” of Bills in the Texas House*, TEX. TRIB. (May 14, 2017), <https://www.texastribune.org/2017/05/14/slideshow-mothers-day-massacre>.

152. Rishika Dugyala, *More Than Half of Texas Public School Students Are in Districts Where Teacher Certification Isn’t Required*, TEX. TRIB. (Feb. 7, 2018), <https://www.texastribune.org/2018/02/07/texas-school-districts-hiring-uncertified-teachers-has-some-worried-ab>.

153. Alejandra Matos, *Texas Expects Thousands More Special Education Students. But Where Are the Teachers?*, HOUS. CHRON. (Sept. 6, 2018), <https://www.houstonchronicle.com/news/politics/texas/article/Texas-expects-thousands-more-special-education-13207693.php>.

154. OSEP Visit Letter, *supra* note 100 at 4.

punishments given that it has already warned Texas.¹⁵⁵ Additionally, the TEA's plan will help Texas avoid lawsuits from individual parents that can result in millions of dollars in legal fees and settlements.¹⁵⁶

Second, implementing this plan effectively, which includes better identification of students in early grades and improved implementation of RtI, can save money in the long-run. For example, on average, special education costs \$9,369 more than a general education, so if a child is receiving services for all thirteen years of school, the additional cost is \$121,797.¹⁵⁷ However, by faithfully executing this plan, schools may be able to identify students earlier, provide them services, and transition them out of special education thereby saving money in the long run.¹⁵⁸ Moreover, providing high-quality transition services ensures that students with disabilities can graduate from high school and either matriculate to college, enter the workforce, or pursue another post-secondary path. Such a policy will also reduce long-term social service spending.¹⁵⁹

Third, advocates should argue that this plan is morally right. Philosopher John Rawls proposed the "veil of ignorance" and explained that a policy was only fair if a person would accept it not knowing "his place in society, his class position or social status; nor . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like."¹⁶⁰ In other words, if a person does not know whether or not she will have a disability, would she find the policy regime to be acceptable? Considering this thought experiment, Texans would

155. *OSEP Visit Letter*, *supra* note 100 at 1; Letter from Sue Swenson, Acting Assistant Sec'y, Office of Spec. Educ. And Rehab. Servs., U.S. Dep't of Educ., to Mike Morath, Comm'r, Tex. Educ. Agency 2 (Oct. 3, 2016), <https://www2.ed.gov/about/offices/list/osep/events/2016/texas-listening-sessions/files/letter-to-mike-morath-10-03-2016.pdf>.

156. *See, e.g., Federal Judge Approves Record \$6.7 Million Settlement in Special Ed Case*, WRIGHTSLAW (Aug. 19, 2005), <http://www.wrightslaw.com/news/05/porter.settlement.htm>.

157. *Background of Special Education and the Individuals with Disabilities Education Act (IDEA)*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19029.htm> (last visited Nov. 5, 2018).

158. Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 FUTURE OF CHILDREN 97, 107-08 (2012).

159. *See* Alia Wong, *Escaping the Disability Trap*, THE ATLANTIC (Jun. 15, 2016), <https://www.theatlantic.com/education/archive/2016/06/escaping-the-disability-trap/487070>.

160. John Rawls, A THEORY OF JUSTICE 11 (REVISED ED. 1999).

not be comfortable supporting the status quo. The consequences for a student with a disability, in terms of a denial of special education services or the provision of subpar services, are too high. Because the current policy regime fails the thought experiment, Texas should embrace the TEA's plan that will support students with disabilities.

V. SCHOOL FUNDING RECOMMENDATIONS

Although Texas has discontinued the 8.5% threshold and the TEA has outlined a plan to improve special education services in Texas, one aspect missing from this discussion has been school funding. Quite frankly, as mentioned earlier, without a significant increase in funding for special education services, we will likely not deliver high-quality special education services to students with disabilities.

Beyond just the amount of funding, Texas should consider how it funds special education. Currently, Texas funds special education based on a weighting system which depends on the location of the student. For example, a student who receives home-bound services gets a weight of 5.0 (i.e. five times the basic per-pupil allotment); whereas, a student in the resource room gets a weight of 3.0 (i.e. three times the basic per-pupil allotment).¹⁶¹ This funding formula arguably encourages school districts to push kids into more intensive programs even if they do not need it.¹⁶² Another flaw with the current system is that it does not account for the types of services a child receives¹⁶³; as such, a child may be in a resource room but receiving services that require more than three times the basic allotment. Therefore, one improvement could be moving to a system like Wyoming's wherein the state reimburses school districts for 100% of approved expenditures regardless of which setting the student is in.¹⁶⁴ Alternatively, Texas could pursue a model like

161. *Issue: Adjustments and Weights in the Texas School Finance System*, TEX. ASS'N OF SCH. BDS. 3, <https://www.tasb.org/legislative/documents/weights.pdf> (last visited Nov. 5, 2018).

162. Telephone Interview with Scott Hochberg, Fmr. Tex. State Rep. (Feb. 28, 2018).

163. *Issue: Adjustments and Weights in the Texas School Finance System*, TEX. ASS'N OF SCH. BDS. 3, <https://www.tasb.org/legislative/documents/weights.pdf> (last visited Nov. 5, 2018).

164. William Hartman & Robert Schoch, *Wyoming School Funding Model Recalibration: Special Education Funding Analysis*, AUGENBLICK, PALAICH & ASSOCIATES 4 (2017), <https://www.wyoleg.gov/InterimCommittee/2017/SSR->

Vermont wherein the state funds a certain number of full-time employees based on the school district's size.¹⁶⁵ Again, this change would allow school districts more flexibility than simply allocating funds based on the placement of a child.

VI. GENERAL POLICY RECOMMENDATIONS

Beyond school funding, there are a few other areas wherein the TEA and local school districts can improve.

(1) Create a parents know-your-rights training.

As described in Section IIg, the IDEA provides parents with several due process rights; however, many parents are unaware of these and are demanding training.¹⁶⁶

(2) Share best practices across school districts.

Because Texas has 1,031 school districts,¹⁶⁷ the TEA should facilitate a knowledge transfer among the districts. For example, El Paso School District has handled special education services quite well and should share its success with other districts.¹⁶⁸

(3) Provide clear guidance on using RtI.

Research suggests that RtI implementation and therefore efficacy varies across school districts.¹⁶⁹ The TEA should therefore offer instructions regarding RtI and then support principals and teachers so they can implement it with fidelity.

(4) Consider technology solutions to provide real-time feedback.

11292017AppendixD.pdf.

165. *State Funding for Students with Disabilities: All States All Data*, EDUC. COMM'N OF THE STATES (2015), <http://ecs.force.com/mbdata/mbquest3D?rep=SD10>.

166. Jennifer Laviano & Julie Swanson, *Parents, Know Your Special Education Rights*, SALON (Aug. 27, 2018), <https://www.salon.com/2017/08/27/parents-know-your-special-education-rights>.

167. Derrick Meador, *Texas Education and Schools: A Profile on Texas Education and Schools*, THOUGHTCO. (Mar. 18, 2017), <https://www.thoughtco.com/texas-education-and-schools-3194483>.

168. Telephone Interview with Jennifer Shugert, Legis. Dir., Tex. H.R. (Feb. 26, 2018).

169. John J. Hoover et al., *National Implementation of Response to Intervention (RTI): Research Summary*, UNIV. OF COLO.-BOULDER (2008), <https://www.nasdse.org/Portals/0/NationalImplementationofRTI-ResearchSummary.pdf>; Telephone Interview with Douglas Fuchs, Professor of Special Educ. and Nicholas Hobbs Chair of Special Educ. and Human Dev. in the Vanderbilt University Dep't of Educ. (Feb. 9, 2018).

Part of the challenge with special education is the immense paperwork;¹⁷⁰ however, technology and automation provide an opportunity to reduce some of this. In particular, software that can interact with a teacher's gradebook and the special education forms can reduce the burden on teachers.¹⁷¹

Each of these steps alone will make a small impact; however, taken together and coupled with changes to the school finance system and the improvements that the TEA proposed, they can have a huge impact on special education services in Texas.

VII. CONCLUSION

Providing students with disabilities an opportunity to flourish academically is not only morally right but also legally required under the IDEA. While Texas had a history of providing such services, particularly to students with dyslexia,¹⁷² everything changed in 2004 when the TEA began using the number of students receiving special education services as a metric for grading school districts. The TEA set a threshold of 8.5% meaning that any school district that had more than 8.5% of its students receiving special education services could not achieve the highest rank. Unsurprisingly, school districts and administrators viewed this as a cap, so they reduced number of the students receiving special education services. The average number of students receiving special education went from 13% in 2004 to exactly 8.5% in 2015. In total, if Texas had maintained its percentage of students receiving special education services, 250,000 more children would have been enrolled in special education. Although some disability rights advocates identified this trend, Brian Rosenthal, a reporter from

170. Lee Hale, *Behind the Shortage of Special Ed Teachers: Long Hours, Crushing Paperwork*, NPR (Nov. 9, 2015), <https://www.npr.org/sections/ed/2015/11/09/436588372/behind-the-shortage-of-special-ed-teachers-long-hours-crushing-paperwork>; Telephone Interview with Zeph Capo, Vice President, Am. Fed'n of Teachers, (Mar. 1, 2018).

171. Shaun Heasley, *Schools Doing Little to Ease Special Ed Paperwork Burden*, DISABILITY SCOOP (Feb. 22, 2016), <https://www.disabilityscoop.com/2016/02/22/schools-paperwork-burden/21940>; Telephone Interview with Zeph Capo, Vice President, Am. Fed'n of Teachers (Mar. 1, 2018).

172. Interview with Thomas Hehir, Former Dir., U.S. Dep't of Educ. Office of Special Educ. (Mar. 7, 2018).

the *Houston Chronicle*, brought the policy to light in a series of stories published between September 2016 and January 2017.

When the TEA was asked about this policy, it argued that Texas was over-identifying children as needing special education services and that research and new pedagogical techniques, in particular RtI, supported this policy of 8.5%. Unfortunately, none of the TEA's answers resonate. First, while Texas may have been over-identifying some African American students, Texas *under-identified* English Language Learners.¹⁷³ Second, research shows RtI has been ineffective nationally, and Texas' reading scores have stalled and gaps between students without disabilities and those with disabilities have persisted. Third, 8.5% seems to be completely random, as the only reference to this number is in a Washington D.C. case wherein a court found that 8.5% of students receiving special education services was the *floor* not the ceiling.¹⁷⁴ Ultimately, it seems that the TEA's decision may have been driven by funding, given it came soon after the Texas Legislature cut billions from education.

Once the TEA's system became public, both the Texas Legislature and the U.S. Department of Education took steps to remedy the situation. At the state-level, the 2017 Texas Legislature passed laws permanently ending the TEA's special education benchmark, increasing parental rights, and strengthening the state's special education committee. At the federal-level, the U.S. Department of Education found the TEA in violation of the IDEA and ordered corrective action. The TEA responded by releasing a detailed draft plan explaining its ideas not only to identify and support students who may have been denied special education services but also to expand training for parents and teachers. While this draft plan has not gone into effect, it seems like a promising next step that can end this sad chapter in Texas' educational history. However, one important question remains: what lessons we can draw from this entire ordeal; what can Texas' story teach other cities and states?

(1) Rights alone are not enough.

While the IDEA, Section 504 of the Rehab Act, and the ADA provide specific rights for students and parents, the law alone is not sufficient. Instead, parents and students need advocates who can both explain what rights they have and help ensure students

173. *Id.*

174. *DL v. D.C.*, 860 F.3d 713, 728 (D.C. Cir. 2017).

receive what they deserve.

(2) Funding matters.

Texas' special education crisis may have been the result of funding cuts and the efficacy of its remedial steps will rely on funding. Quite frankly, without the Legislature allocating significantly more funds for education, it will not be possible for every school district to provide every child with the education they deserve under the IDEA.

(3) Leadership matters.

When George Bush was Governor of Texas, the state focused on rights for students with disabilities. However, when Governor Perry took office, his administration cut education funding and instituted a functional cap on the students with disabilities.

(4) Cuts to agencies matter.

Some argue that cutting funds from the TEA is less problematic than cutting funding directly from schools. While they may be right, gutting the oversight division within the TEA prevented it from investigating school districts and ensuring they were complying with the IDEA generally, and the Child Find regulations specifically.

(5) Low-income and minority students are disproportionately affected.

Texas' policy affected students from all demographic groups; however, research shows that wealthy students could fight these policies or afford to send their children to another school.¹⁷⁵ Low-income students and students of color, particularly English Language Learners (ELL), were often unaware of their rights.¹⁷⁶ As such, the gap between ELL students and native speakers receiving special education services was more than 20%.¹⁷⁷

(6) A 504 plan, RtI, and an IEP are not all the same.

While schools pushed children into 504 plans or kept them in RtI for years instead of providing them an IEP, these are not interchangeable. Although RtI and 504 plans can help students, if a student qualifies for an IEP the school must provide one and ensure that all teachers are following it.

175. See Susan Carroll & Brian M. Rosenthal, *Denied: Unable to Get Special Education in Texas, One Family Moved*, HOUS. CHRON. (Dec. 24, 2016), <https://www.houstonchronicle.com/denied/5>.

176. Rosenthal, *supra* note 91.

177. Rosenthal, *supra* note 91.

These lessons are all important; however, the most important lesson is the most basic of all—we must put students first. The most tragic part of Texas' crisis is the deprivation of opportunity for thousands of students. Succeeding in school is not easy, and this path is all the more difficult when a student has a disability whether that be a learning disability, a visual impairment, or an emotional disturbance. I personally remember my own struggle with a stutter. But I was lucky; my parents understood the IDEA; my school had an incredible speech therapist, and our school had teachers skilled in supporting students with disabilities. Unfortunately, not all students are this lucky. But, and this is important, receiving special education services so that a student can succeed, not merely make some *de minimis* improvement, should *not* be a matter of luck. Instead, it should be and is a right. Every school must provide this, and every state must ensure that every student receives this. When Texas enacted its cap, it failed its most important responsibility—providing every child an opportunity to succeed.

In the final analysis, despite the mistakes, Texas still has the chance to write the next chapter on special education in the state. Specifically, if the TEA fulfills its draft plan and both supports students who were denied services and effectively monitors all school districts, if the Texas Legislature apportions more funds for schools, if school district leaders faithfully fulfill their legal obligations under the IDEA, if school principals prioritize serving students with disabilities and working with families, and if individual teachers follow students' IEPs, Texas can succeed. Although these are a lot of "if's," I remain optimistic that Texans can come together and ensure that students like Jim, my old student who has an emotional disturbance, receive the services they need to succeed in school and reach their dreams.