A BROKEN PROMISE IN A BROKEN SYSTEM: WHY CONGRESS MUST FULLY FUND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT UNDER A REVISED FUNDING FORMULA

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INTRODUCTION

The time is approximately 6:15 AM. It is a Thursday morning in October; the crisp feel of an autumn dawn lingering in the air. Mary is a middle school Intervention Specialist, also known as a special education teacher, with over thirty-five years of experience.[1] She juts around her classroom preparing for her day, rifling through the piles of assignments ready on her desk. Each assignment has been curated and triple-checked to ensure they comply with her students' Individualized Education Plans ("IEP").[2] Now thinking of IEPs, Mary prints copies of the proposed IEP draft for her scheduled meeting today. The meeting is set to occur during her personal planning period, meaning she will forgo her only free period today, but it was the time that worked best for the parent to attend.

As the clock turns to 7:30 AM, students start to trickle in. She has snacks in her desk just in case someone went hungry last night, and personal care products for students who may not otherwise have access to them. Mary's cellphone buzzes, and she sees a calendar reminder for the staff meeting occurring after school. Looking at her ghastly to-do list, she predicts she will not be heading home until 7:00 PM. The bell rings. With a smile, she prepares herself for the rest of her thirteen-hour workday, only seven of which she will get paid for, and forges ahead.

"That's the job. It's always been the job. You make it work with the tools you have," Mary, who is a close friend and old colleague of mine, shares with me

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1. The interviewee's real name has been changed to Mary. All information about Mary and her experiences are true and accurate depictions of what my interviewee and I discussed. *What is an Intervention Specialist?* COLL. SEARCH TIPS, BLUFFTON UNIV. (Feb. 2022), https://collegesearchtips.bluffton.edu/index.php/2022/02/what-is-an-intervention-specialist/.

2. *What is an Individualized Education Plan?*, ACCESS COMPUTING: A BROADENING PARTICIPATION IN COMPUTING ALL., https://www.washington.edu/accesscomputing/what-individualized-education-plan (last visited June 15, 2024).

over dinner.[3] I was once an Intervention Specialist too, but my career lasted only five years.

"The world of education is like a pendulum; it feels like every so often, educational theories swing back and forth," Mary explains.[4] "But the one consistency over the years has been an ever-increasing set of expectations us special education teachers must reach. I am more than willing, and very capable, to meet those standards, but it feels less and less attainable to do so."[5] When asked what, in a perfect world, would help make those expectations more possible, Mary answered:

> The things education never seems to have enough of: money and time. Money to spend on making classroom spaces more accessible, to hire more educators, and to bring in experts to teach us new procedures we can implement for students. Then the time to help train the new educators and execute the new procedures. I think it speaks volumes that our classrooms look the same they did when Public Law 94-142 was first implemented.[6] How are we supposed to evolve and generate more meaningful educational experiences for students with disabilities when we don't have the time or resources to reach the expectations set for us?[7]

This conversation stuck with me for days. Yes, Mary really rattled off the Public Law number of the Education for All Handicapped Children Act ("EHA"), the country's first federal special education law, by memory.[8] But even more remarkable was her simple, altruistic plea to lawmakers: more money for resources, and more time to diligently implement those resources.

While I do not know how to create more hours in a day, there are two gaping issues in the way the United States federally funds special education. Not only has the federal funding formula been virtually untouched since 1997, but Congress continuously fails to fund the extra costs of special education to even half the amount promised in 1975 when the EHA was first passed.[9] To see an America where our students with disabilities receive the educational experiences they deserve, it is time for Congress to rework the federal funding formula and fund special education to the level it promised it would almost fifty years ago.

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3. Interview with Mary (real name changed), Intervention Specialist, in Toledo, Ohio (Sept. 13, 2023).

4. *Id.*

5. *Id.*

6. *See generally* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

7. Interview with Mary, *supra* note 3.

8. *See generally A History of the Individuals with Disabilities Education Act*, IDEA: INDIVIDUALS WITH DISABILITIES EDUC. ACT, https://sites.ed.gov/idea/IDEA-History#1975 (Feb. 16, 2024), [hereinafter IDEA].

9. Tammy Kolbe et al., *Unequal and Increasingly Unfair: How Federal Policy Creates Disparities in Special Education Funding*, 90 EXCEPTIONAL CHILD. 57, 57, 60 (2023); *Understanding Full Funding: What, Exactly, is "Full Funding" of IDEA?*, IDEA MONEY WATCH: BALANCE SHEET (Mar. 12, 2015, 11:09 AM), http://ideamoneywatch.com/balancesheet/?p=726, [hereinafter *Understanding Full Funding*].

Section I of this Comment will provide necessary information about the history and current state of federal special and general education law. From there, the remainder of this Comment will focus on funding issues the American education system is facing, specifically in the special education realm, and possible remedies for those issues.

Before progressing forward, I felt it was crucial to discuss the language used in this Comment. Early court cases and legislation used words that are now outdated and offensive.[10] In fact, this language was used in federal law until 2010 when Rosa's Law was enacted, mandating the revision of such language.[11] With this said, I have limited the use of this language to the greatest extent possible when discussing the history of special education law. Additionally, I recognize the language used in this space is ever evolving and have prioritized staying current on the best terminology to use.[12]

I. BACKGROUND

Prior to the establishment of federal protections, many people with disabilities were relegated to the corners of society.[13] Educational prospects for students with disabilities were bleak or nonexistent.[14] In the 1950s and 1960s, federal legislation began expanding educational opportunities for students with disabilities and establishing training requirements for their educators.[15] After racially segregated public education was found to violate the Fourteenth Amendment's Equal Protection Clause in *Brown v. Board of Education*, disability rights advocates seized the opportunity to challenge educational discrimination towards students with disabilities.[16] The early 1970s brought landmark court decisions holding certain states responsible for educating students with disabilities.[17] The 1972 decision of *Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania*, better known as *PARC*, held the state of Pennsylvania could not deny a "free public program of education and training" to students with disabilities.[18] Also in 1972, *Mills v. Board of Education of the District of Columbia* required the District of Columbia to provide a "free and suitable publicly-

10. *Disability Language and Etiquette*, Nw. ADA CTR. (Apr. 1, 2022), https://nwadacenter.org/sites/adanw/files/files/4-1-2022%20Disability%20Language%20%26%20 Etiquette.pdf.

11. *See generally* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010). Rosa's Law is named after Rosa Marcellino, who has Down syndrome. Rosa and her family advocated to have offensive terminology replaced with people first language in federal health, education, and labor policy. *Rosa's Law Signed into Law by President Obama*, SPECIAL OLYMPICS, https://www.specialolympics.org/stories/news/rosas-law-signed-into-law-by-president-obama (last visited June 15, 2024).

12. *See generally* NW. ADA CTR., *supra* note 10.

13. IDEA, *supra* note 8.

14. *Id.*

15. *Id.*

16. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Nathaniel Ross, *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania (1972)*, ARIZ. STATE UNIV. EMBRYO PROJECT ENCYCLOPEDIA (May 26, 2022), https://embryo.asu.edu/pages/pennsylvania-association-retarded-citizens-parc-v-commonwealth-pennsylvania-1972.

17. IDEA, *supra* note 8.

18. Pa. Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972).

supported education regardless of the degree of the child's mental, physical or emotional disability or impairment," and regardless of availability of resources.[19] A plethora of litigation sparked from these holdings, pushing Congress to enact the EHA in 1975.[20] The EHA guaranteed a free and appropriate public education ("FAPE") to all students with disabilities.[21]

A. Main Tenets of the IDEA

With the 1990 reauthorization of the EHA, the law's name changed to the Individuals with Disabilities Education Act ("IDEA").[22] Providing students with disabilities FAPE was a guiding principle for schools with this reauthorization, and continues to be to this day.[23] Even with the significance of FAPE in special education, the Supreme Court has only ruled on the term's definition twice since the EHA's inception.[24] The Court first defined FAPE in the 1982 case of *Board of Education v. Rowley*.[25] *Rowley*'s holding required states to offer publicly funded "personalized instruction with sufficient support services" that provides educational benefit, complies with IEPs, and meets state educational standards.[26] Thirty-five years later, the Court redefined FAPE in *Endrew F. v. Douglas County School District Re-1*.[27] Under *Endrew F.*, a school provides FAPE when an IEP is "reasonably calculated" for appropriate progress in a student's individual circumstances.[28] The Court declined to define appropriate progress, emphasizing the importance of curating individualized educational experiences for each child receiving special education services.[29]

Perhaps obvious at this juncture, it would be near impossible to step into the world of special education and avoid the term IEP. Both the IDEA and the Code of Federal Regulations ("CFR") offer IEP construction and implementation guidance to states.[30] The IEP is considered the "centerpiece" of a student's special education experience.[31] Thus, it is imperative each document is carefully crafted

19. Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972).

20. *History of Special Education: Important Landmark Cases*, FORTE L. GRP. LLC, https://www.fortelawgroup.com/history-special-education-important-landmark-cases/ (last visited July 14, 2024).

21. IDEA, *supra* note 8.

22. *Id.* ¶ 1; 20 U.S.C. § 1400(a).

23. 20 U.S.C. §§ 1400(d)(1)(A), 1401(9), 1412(a)(1).

24. IDEA, *supra* note 8.

25. Brian Duignan, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, BRITANNICA, https://www.britannica.com/topic/Board-of-Education-of-the-Hendrick-Hudson-Central-School-District-v-Rowley (Sept. 6, 2024).

26. Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982).

27. *Questions and Answers (Q&A) on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, U.S. DEP'T OF EDUC. 4 (Dec. 7, 2017), https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf.

28. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 404 (2017).

29. *Id.* at 403-04.

30. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320 (2007).

31. Honig v. Doe, 484 U.S. 305, 311 (1988).

to each student's needs to ensure progress is made.[32] An important step in IEP creation is the identification and incorporation of necessary related services.[33] Related services can be speech services from a Speech-Language Pathologist, gross motor skill work from an Occupational Therapist, or any other supports the student needs to access to their education.[34] In *Irving Independent School District v. Tatro*, the Court first defined related services by differentiating "school health services" from "medical services," the latter requiring a physician to perform.[35] *Tatro* held schools must provide "school health services" that can be performed by a nurse or qualified layperson in order to adequately provide FAPE.[36] This holding continues to be enforced by the Court.[37]

Another essential component of the IDEA is educating students in their least restrictive environment ("LRE").[38] Per the IDEA, a school district must, to the "maximum extent appropriate," educate all students receiving special education services alongside their general education peers.[39] Even with LRE's importance to special education, the Supreme Court has never defined the term, denying certiorari as recently as 2020 to potentially do so.[40] Therefore, each circuit has articulated its own approach or adopted another circuit's approach to determine if a school meets the IDEA's LRE requirement.[41]

The IDEA also includes procedural safeguards to follow when disputes arise over a school's educational methods.[42] The Supreme Court has ruled on several components of the dispute resolution process.[43] Most recently in *Perez v. Sturgis*

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32. *IEPs Are Important Because Special Education Students Are Important*, ARK. STATE UNIV. (Feb. 22, 2016), https://degree.astate.edu/online-programs/education/master-of-science/sped-k-12-instructional-specialist/ieps-are-important-because-special-education-students-are-important/.

33. 34 C.F.R. § 300.320(a)(4) (2007).

34. 20 U.S.C. § 1401(26); *Specifying Related Services in the IEP*, CTR. FOR PARENT INFO. & RES. (Nov. 2017), https://www.parentcenterhub.org/iep-relatedservices/.

35. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 892 (1984).

36. *Id.*

37. *See* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 74 (1999).

38. 20 U.S.C § 1412(a)(5)(A) (2018).

39. *Id.*

40. *See generally* C.D. *ex rel.* M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621 (1st Cir. 2019), *cert. denied,* 140 S. Ct. 1264 (2020).

41. Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) ("In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate[.]"); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (declining to use the Sixth Circuit *Roncker* approach and created a two-part test to determine LRE); Oberti *ex rel.* Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993) (declining to use the Sixth Circuit *Roncker* approach and instead adopted the Fifth Circuit's two-part *Daniel R.R.* test); Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland *ex rel.* Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994) (adopting a four-part test by using both *Roncker* and *Daniel R.R*).

42. *See generally* 20 U.S.C. § 1415 (2018); 34 C.F.R. § 300.510-516 (2024).

43. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (holding that a school can be ordered to reimburse parents for private education if the school failed to provide FAPE); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009) (extending the *Burlington* holding to situations where the student was not previously receiving special education services in the public

Public Schools, the Court held a plaintiff does not have to exhaust the IDEA's dispute resolution processes before turning to other methods for remedy when the IDEA "cannot supply what [one] seeks."[44] Students and families accessing special education services considered this ruling a victory.[45] These safeguards also emphasize the importance of parent or guardian involvement in both the IEP and dispute resolution process.[46] In fact, parental involvement is considered so critical, some courts have held that neglecting to include an actively engaged parent in the IEP process is, in itself, a denial of FAPE.[47]

B. An Overview of Federal Education Law

Ten years prior to the EHA, the Elementary and Secondary Education Act ("ESEA") became law in 1965.[48] At its core, the ESEA was created to promote equal educational opportunities for impoverished children.[49] The law supported the idea that access to education could significantly alter the course of a child's life.[50] Looking to the social backdrop of the 1960s provides more context into significance of the ESEA. Passed just one year after the historic Civil Rights Act of 1964, the ESEA enhanced desegregation efforts, especially in southern states, by tying its federal funding distribution to compliance with federal desegregation orders.[51] This caused school attendance rates for southern Black students to skyrocket in the following years.[52] Not only did this further the overall mission of the ESEA; it created significant momentum for the government to continue to push the civil rights efforts of this time.[53]

The ESEA has undergone several changes throughout its lifetime. Perhaps one of the most significant changes came in 2002 with the enactment of No Child Left Behind ("NCLB").[54] During this time, concerns of American education falling

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school); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300 (2006) (holding that schools are not responsible for paying parent expert fees); Schafer v. Weast, 546 U.S. 49, 62 (2005) (holding that the burden of proof in IEP challenges lies with the party seeking relief).

44. Perez v. Sturgis Pub. Sch., 598 U.S. 142, 150 (2023); *see also* Fry v. Napoleon Cmty. Sch., 580 U.S. 154, 168 (2017) (holding that IDEA's exhaustion rule "hinges on whether a lawsuit seeks relief for the denial of… FAPE.").

45. Naaz Modan & Kara Arundel, *Supreme Court Rules Against District in Perez v. Sturgis Public School Special Ed Case*, K-12 DIVE (Mar. 21, 2023), https://www.k12dive.com/news/Supreme-Court-Perez-Sturgis-special-education/645589/.

46. *See* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) (describing the portions of the IDEA which specify the need for parental involvement).

47. Doug C. v. Haw. Dep't of Educ., 720 F.3d 1038, 1047 (9th Cir. 2013).

48. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., https://www.ed.gov/essa?src=rn (last visited Aug. 20, 2024).

49. David A. Gamson et al., *The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations*, RUSSELL SAGE FOUND. J. SOC. SCIS., Dec. 2015, at 1, 3.

50. *Id.*

51. *Id.* at 1, 11.

52. *Id.* at 11.

53. *Id.* at 11-12.

54. *Every Student Succeeds Act (ESSA)*, *supra* note 48.

behind international counterparts were prevalent.[55] NCLB implemented state testing standards, performance benchmarks, and additional teacher credential requirements to address and remediate those concerns.[56] In short, NCLB required states to "adopt challenging academic and student achievement standards," apply these standards to every school and student in the state, and demonstrate how schools achieved adequate yearly progress ("AYP") through standardized tests.[57] Schools that failed to meet their AYP would be penalized through a series of state actions, which became more severe every year the AYP was not met.[58]

In the special education realm, NCLB made promises for students with disabilities to progress "in step" alongside their general education peers.[59] The NCLB also included students with disabilities in standardized testing procedures.[60] This means the NCLB employed the same testing standards to all students regardless of disability.[61] While many applauded increased academic performance standards for students in special education, others worried about how NCLB might conflict with IDEA's emphasis on individualized educational approaches.[62] The juxtaposition of FAPE, coupled with the NCLB goal of "in step" education, left schools and educators torn over what to prioritize.[63] Additionally, the consistent, substantial threat of failing to meet AYP added enormous pressure on educators navigating the conflicting principles of NCLB and IDEA.[64] Even more cruel was the U.S. Department of Education order requiring use of state and school district funding to comply with NCLB when federal funding fell short; an action so poorly received, it sparked litigation.[65]

In the end, NCLB's strict requirements created the need for a more flexible plan for states.[66] The Every Student Succeeds Act ("ESSA"), signed into law in

55. *No Child Left Behind Act of 2001*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/no_child_left_behind_act_of_2001 (July 2024).

56. *Id.*

57. Erin G. Frazor, Comment, *No Child Left Behind in Need of a New Idea: A Flexible Approach to Alternate Assessment Requirements*, 36 GOLDEN GATE U. L. REV. 157, 162 (2006).

58. *President George W. Bush Signs No Child Left Behind Act into Law*, HISTORY (Sept. 5, 2019), https://www.history.com/this-day-in-history/george-bush-signs-no-child-left-behind-act-into-law.

59. Regina R. Umpstead, *Special Education Assessment Policy Under the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 7 RUTGERS J. L. & PUB. POL'Y 145, 146 (2009).

60. *Id.* at 147.

61. Frazor, *supra* note 57, at 162.

62. Umpstead, *supra* note 59, at 146-47.

63. *Id.* at 146.

64. Frazor, *supra* note 57, at 182-83.

65. Michael Simpson, *Ruling in No Child Left Behind Act Case Major Victory for Students, Parents*, JURIST (Jan. 15, 2008, 6:21 PM), https://www.jurist.org/commentary/2008/01/appeals-court-ruling-in-no-child-left/; *see generally* Sch. Dist. of Pontiac v. Spellings, 512 F.3d 252 (6th Cir. 2008), *rev'd en banc*, 584 F.3d 253 (6th Cir. 2009), *cert. denied*, 560 U.S. 952 (2010).

66. *Every Student Succeeds Act (ESSA)*, *supra* note 48.

2015, aimed to provide that flexibility.[67] It was designed to move past NCLB's "one-size-fits-all approach" while still implementing provisions to hold states accountable for providing quality education.[68] A notable change with the ESSA was the shift of power in education regulation from the federal government to the states. The federal oversight seen under NCLB was transferred back to the states, giving states power to make educational decisions for their students.[69] The ESSA did preserve one controversial provision of NCLB: testing requirements by grade level and subject area.[70]

For students with severe cognitive disabilities, the ESSA continued to permit alternate academic achievement standards designed to align with state standards and prepare students for postsecondary education.[71] States can utilize alternate assessment formats based on these standards to meet state testing requirements for students with severe cognitive disabilities.[72] All assessments under the ESSA must be created using the principles of universal design for learning ("UDL").[73]

The ESSA's approach to alternate assessment highlights a substantial change between NLCB and the ESSA. While NCLB placed a cap on proficient alternate assessment scores used in state grade calculations, the ESSA places a cap on the *overall participation* in the alternate assessment at 1% of all tested students by subject.[74] This inevitably caused a portion of students with disabilities who historically took the alternate assessment to instead take the general state assessment with access to applicable accommodations.[75]

There is a waiver process for states forecasted to be over the 1% participation cap. This is a multistep process requiring states to create a plan to lower their future participation percentages.[76] To help facilitate this decrease, some states created decision making frameworks for IEP teams to utilize when making alternate

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67. *See generally* 20 U.S.C. § 6301; *Every Student Succeeds Act (ESSA)*, OHIO DEPT. OF EDUC. & WORKFORCE, https://education.ohio.gov/Topics/Every-Student-Succeeds-Act-ESSA (July 15, 2024, 2:36 PM).

68. Carmel Martin & Scott Sargrad, *Leaving Behind No Child Left Behind: The Every Student Succeeds Act Is an Undeniable Improvement over the Old Education Law*, U.S. NEWS (Dec. 3, 2015, 5:00 PM), https://www.usnews.com/opinion/knowledge-bank/2015/12/03/every-student-succeeds-act-is-better-than-no-child-left-behind.

69. Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 TOURO L. REV. 11, 11-12 (2019).

70. *Every Student Succeeds Act (ESSA) Summary*, OHIO DEP'T OF EDUC. 1 (Jan. 2016), https://education.ohio.gov/getattachment/Topics/Every-Student-Succeeds-Act-ESSA/Every-Student-Succeeds-Act-ESSA-Summary.pdf.aspx.

71. NAT'L COUNCIL ON DISABILITY, IDEA SERIES: EVERY STUDENT SUCCEEDS ACT AND STUDENTS WITH DISABILITIES 19 (2018).

72. *Id.* at 20.

73. *Id.*; Amanda Morin, *What is Universal Design for Learning?*, UNDERSTOOD, https://www.understood.org/en/articles/universal-design-for-learning-what-it-is-and-how-it-works (last visited Oct. 16, 2023) ("The goal of UDL is to use a variety of teaching methods to remove any barriers to learning. It's about building in flexibility that can be adjusted for every person's strengths and needs.").

74. NAT'L COUNCIL ON DISABILITY, *supra* note 71, at 20.

75. *See id.*

76. *Id.* at 20-21.

assessment decisions.[77] These frameworks typically require an analysis of several areas of student performance, including daily living skills.[78] For example, Ohio's decision making framework requires the IEP team to distinguish between a student needing significant support versus general support to complete hygiene tasks such as eating, dressing, or toileting needs.[79] If a student needs general support rather than significant support with these tasks, they are disqualified from taking the alternate assessment.[80] This could prevent students with severe cognitive disabilities from accessing the alternate assessment simply because they need support, rather than *significant* support, with using the restroom.[81] Even so, advocates for the 1% cap appreciate the heightened expectations the cap brings, as well as its attempt to prevent overidentifying students for the alternate assessment.[82]

The ESSA also authorizes states to create an "alternate diploma" for students otherwise unable to meet traditional diploma requirements.[83] This permits state-created avenues for students with severe cognitive disabilities to successfully graduate from secondary education programming.[84] These alternate diplomas must be issued to students while they are eligible for IDEA services.[85] Additionally, alternate diploma and alternate assessment eligibility seem to go hand-in-hand: because both are available only to students with the most severe cognitive disabilities, a student's state assessment format dictates their alternate diploma eligibility.[86] This means conversations surrounding alternate assessment are not only pertinent to a student's state assessment experiences, but also to the type of curriculum they access, and diploma they are eligible to receive.[87]

Providing training and information to schools and educators is necessary for successful implementation of ESSA provisions.[88] IEP teams must be equipped with the necessary tools to make accurate decisions on alternate assessment qualification and alternate diploma access.[89] District administrators and educators must be prepared to navigate conversations with families and students about the assessment and diploma options available to them.[90] As done in the NCLB era,

77. *See generally Ohio's Alternate Assessment Participation Decision-Making Tool*, OHIO DEP'T OF EDUC. 5 (Oct. 2020), https://education.ohio.gov/getattachment/Topics/Testing/Ohios-Alternate-Assessment-for-Students-with-Sign/AASCDDecisionmakingTool_Final_Accessible-pdf-aspx.pdf.aspx?lang=en-US.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. NAT'L COUNCIL ON DISABILITY, *supra* note 71, at 20-21.

83. *Id.* at 24.

84. *Id.* at 25.

85. *Id.* IDEA services are typically offered through age twenty-one, but states have the ability to extend this age limit.

86. *See id.* at 22 (discussing how options for assessments relate to a student's access to the general education curriculum and traditional diploma).

87. *See id.*

88. *Id.*

89. *Id.*

90. *Id.*

educators must continue to address conflicts between the ESSA and IDEA. The IDEA requires states to create academic achievement plans for students with disabilities.[91] Because each state must also submit ESSA implementation plans, concerns over states diligently crafting and executing IDEA mandated plans within their ESSA schemes have arisen.[92]

C. Roadmap

It is clear both the IDEA and ESSA create high expectations for educating students with disabilities, as the legislation should. These pieces of legislation pose a multitude of expectations that schools and educators must meet to adequately educate students with disabilities. They must provide FAPE in the student's LRE, compose and utilize IEPs, reimagine approaches to alternate assessment and diploma eligibility, continue to learn and implement best practices like UDL; the list of responsibilities could truly go on and on. Schools and educators want to accomplish these tasks. They want to provide students with disabilities the high-quality education Congress has promised them through the IDEA and ESSA. But as Mary pointed out, the vast amount of the strain felt while performing these tasks derives from improper funding. How are schools expected to train educators on the best teaching practices, have proper staffing, create physically accessible classrooms, or provide the best intervention strategies without proper funding? To be a nation that lives up to the educational promises made to our students with disabilities, it is time for Congress to address the federal funding issues permeating special education.

Section II will explore both general and IDEA-specific federal funding schemes. It will discuss the funding promise Congress made in 1975 when the EHA was first enacted, and how it is due time for Congress to fulfill this promise by fully funding the IDEA. Section III will examine the current IDEA funding formula and how this formula has perpetuated the funding crisis. It will then analyze the impacts of the current formula and provide recommendations for a revised formula. This Comment will then conclude how a fully funded IDEA under a reworked formula may be what schools need to reach and surpass legislative expectations. A fully funded IDEA under a revised formula will allow schools to create positive educational outcomes for students with disabilities; outcomes these students have not only been promised, but outcomes they thoroughly deserve.

II. OVERALL AND IDEA-SPECIFIC FEDERAL SCHOOL FUNDING SCHEMES

A. Overall Federal School Funding

In *San Antonio Independent School District v. Rodriguez,* the Supreme Court held education is not a "fundamental right or liberty" afforded under the Constitution.[93] The Court therefore used rational basis review to uphold the

91. Adler-Greene, *supra* note 69, at 19.
92. *Id.* at 18-19.
93. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

constitutionality of Texas's school funding scheme, which created large disparities in funding of the least and most affluent public schools.[94] In its opinion, the Court emphasized the importance of federalism and how petitioners "urged [the Court] to abrogate systems of financing public education presently in existence in virtually every State."[95] This reflects the current education structure in America: the vast majority of responsibility for running and funding education lies with state and local governments.[96] Some state courts and legislatures have utilized this power to deem education a fundamental right.[97] Other state courts found dire issues in its state's education funding methods, but its legislators have taken little or no action to remedy the issue.[98]

Schools continue to rely on local property taxes as the primary source of funding.[99] Schools also receive state funding, but this source of revenue is not always dependable as it tends to fluctuate with the economy.[100] For instance, after the Great Recession, nearly $600 billion in revenue was lost, and high-poverty districts on average lost twice as much state funding as low-poverty districts.[101]

Federal funding is designed to help combat inequitable distribution of funds, listing state school funding equity as a specific component of the federal funding scheme.[102] States do receive some federal funding, but the total amount is typically less than 10% of the state's total funding amount.[103] This low funding percentage is especially unfortunate for lower income schools as federal funding is "explicitly designed" to target the need felt by these schools.[104]

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94. *Id.* at 12-14, 40, 54-55.

95. *Id.* at 44.

96. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (May 23, 2024).

97. Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); *The Right to Education: Governing Law & Relevant Authority*, ACLU, https://www.hrwstf.org/wordpress/wp-content/uploads/2012/09/Education-Governing-Law.pdf (last visited June 15, 2024) ("Article IX, Section 1 of the California Constitution recognizes that "[a] general diffusion of knowledge and intelligence [is]… essential to the preservation of the rights and liberties of the people[.]"); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989) (holding education as a fundamental right in the state of Kentucky).

98. DeRolph v. State (*Derolph I*), 677 N.E.2d 733, 747 (Ohio 1997) (holding Ohio's elementary and secondary public school financing scheme to violate the Ohio Constitution). The Ohio Supreme Court has found Ohio's school financing system unconstitutional two more times in DeRolph v. State (*Derolph II*), 728 N.E.2d 993, 1020 (Ohio 2000) and DeRolph v. State (*Derolph IV*), 780 N.E.2d 529, 532 (Ohio 2002). Despite these rulings, inadequate funding continues to be a persistent problem more than two decades after *DeRolph I*. *See* Dan Heintz, *Today Marks 26th Year of Lawmakers Being 'Willfully Negligent' of Ohio Kids*, COLUMBUS DISPATCH (Mar. 24, 2023, 5:33 AM), https://www.dispatch.com/story/opinion/columns/guest/2023/03/24/what-has-happened-since-ohios-supreme-court-declared-school-funding-unconstitutional-school-vouchers/70042749007/.

99. David Gartner, *The Federal Role in School Funding Equity*, 109 VA. L. REV. ONLINE 35, 35 (2023).

100. *Id.*

101. *Id.* at 40.

102. *Id.* at 35, 37.

103. *Id.* at 35.

104. *Id.*

B. Federal Funding Under the IDEA

The IDEA contains four parts. Part A outlines the IDEA's general provisions, and funding is apportioned through Parts B, C and D of the legislation.[105] Part B governs school-aged children and is allocated the largest portion of funding, receiving 95% of the IDEA's total funding in fiscal year 2019.[106] More specifically, Section 611 of Part B, which covers students ages three to twenty-one receiving special education or related services, is distributed approximately 92% of total IDEA funding.[107]

At the time of the EHA's enactment, educating students with disabilities was estimated to cost about twice as much as educating a general education peer as calculated by the national average per-pupil expenditure ("APPE").[108] When the EHA was still in committee, the main disagreement between the House of Representatives and Senate centered on how the EHA would be federally funded.[109] The committee eventually agreed to a formula where the federal government would fund 40% of the APPE by fiscal year 1982, remaining at 40% for every year after.[110] This funding level, 40% of the APPE, is known as the "full funding" amount for the IDEA.[111] Therefore, for the IDEA to be fully funded as intended by the legislature, the federal government would fund 40% of the national APPE to Section 611 of Part B of the IDEA, adjusted to reflect child population and poverty rates.[112]

This 40% figure has never been reached.[113] In fact, the federal funding share has never amounted to even *half* of that, forcing states and school districts to account for funding that was never intended to be their responsibility.[114] The difference between intended versus actual funding levels are shocking. In 2020 alone, the federal government's underfunding of the IDEA costs states and districts twenty-four billion dollars.[115] While indications of a better funded IDEA are on the horizon, there is still no actual plan for Congress to fulfill its promise to fully fund the IDEA.[116]

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105. KYRIE E. DRAGOO, CONG. RSCH. SERV., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 1 (2019), https://crsreports.congress.gov/product/pdf/R/R44624.

106. *Id.* at 1, 4.

107. *Id.* at 2, 4.

108. *Id.* at 21.

109. *Id.* at 9.

110. *Id.*

111. *Id.* at 21.

112. *Understanding Full Funding*, *supra* note 9.

113. DRAGOO, *supra* note 105, at 9, 21.

114. *IDEA Funding Gap*, NAT'L EDUC. ASS'N (Jan. 26, 2021), https://www.nea.org/sites/default/files/2021-01/IDEA%20Funding%20Gap%20by%20State%20FY%202020.pdf. The only year the APPE percentage rose above 20% was in 2009, but this was because this percentage included funds made available under the American Recovery and Reinvestment Act (P.L. 111–15). *See Federal Appropriations for IDEA Part B, Section 611 (Children Ages 3–21),* IDEA MONEY WATCH, http://www.ideamoneywatch.com/docs/611AppropsHistory1987-2021.pdf (last visited June 15, 2024).

115. *IDEA Funding Gap*, *supra* note 114.

116. Tammy Kolbe et al., *More Money Is Not Enough: The Case for Reconsidering Federal Special Education Funding Formulas*, BROOKINGS INST. (Oct. 3, 2022), https://www.brookings.edu/

This broken promise seems even more appalling when considering the increasing costs of servicing students in special education.[117] Students with disabilities overall are more expensive to educate than their general education peers, and different disability identifications result in different expenditure costs.[118] For instance, on average, it costs more to educate a student identified with Autism than a student identified with a Specific Learning Disability.[119] Between 1999 and 2014, the number of students identified with Autism increased by 8%, while the students identified with a Specific Learning Disability decreased.[120] The noticeable shifts in identification categories may play into the rising costs of special education.[121] The broken federal funding promise, coupled with an everchanging special education landscape, creates a clear need for special education funding to be revised and revamped.

C. The Call for a Fully Funded IDEA

While there are prevalent issues with federal education funding in general, the lack of IDEA funding is detrimental to the educational outcomes of students with disabilities. States and districts own their responsibility to adhere to education legislation standards, regardless of federal funding levels.[122] Even so, it has become obvious that the lack of funding provided to schools directly affects the educational experiences of students with disabilities.[123] It is evident that for schools to have the necessary resources to educate students with disabilities and comply with legislative expectations, Congress must fulfill its promise to fully fund the IDEA.

The call for a fully funded IDEA is not a new call. In fact, a bill to fully fund the IDEA was introduced to Congress as early as 2000.[124] This year was also the first and only time an IDEA full funding bill made any real progress in Congress. In May of 2000, House Bill 4055 passed in the House of Representatives.[125] The

articles/more-money-is-not-enough-the-case-for-reconsidering-federal-special-education-funding-formulas/.

117. NAT'L COUNCIL ON DISABILITY, IDEA SERIES: BROKEN PROMISES: THE UNDERFUNDING OF IDEA 35 (2018), [hereinafter BROKEN PROMISES].

118. *Id.* at 33.

119. *Id.* at 33-34; *What is a Specific Learning Disability?*, CHURCHILL CTR. & SCH., https://www.churchillstl.org/learning-disability-resources/specific-learning-disabilities/ (last visited July 4, 2024) ("A specific learning disability is a disorder that interferes with a student's ability to listen think, speak, write, spell, or do mathematical calculations. Students with a specific learning disability may struggle with reading, writing, or math.").

120. BROKEN PROMISES, *supra* note 117, at 33-34.

121. *Id.* at 34.

122. *Id.* at 35.

123. *Id.*

124. IDEA Full Funding Act, S. 2341, 106th Cong. (2000); IDEA Full Funding Act, H.R. 3545, 106th Cong. (2000); IDEA Full Funding Act, H.R. 4055, 106th Cong. (2000).

125. *H.R.4055 – IDEA Full Funding Act of 2000*, CONGRESS.GOV, https://www.congress.gov/bill/106th-congress/house-bill/4055/all-actions (last visited July 24, 2024).

bill was then sent to the Senate, where it unfortunately met its demise.[126] A bill in either the House, Senate, or both has been introduced every year since 2000, never making it past the introduction phase.[127] As recently as July of 2023, the IDEA Full Funding Act was reintroduced in both the House of Representatives and the Senate, urging for Congress to finally take ownership of its commitment to fund 40% of the APPE.[128]

There is a reason the cry for full funding has been consistent throughout the past twenty years. A fully funded IDEA is vital for schools to have the necessary tools to produce high quality educational outcomes for students with disabilities that meet legislative standards. When schools lack the funding needed to reach these standards, they must inevitably make financial decisions affecting the education of all students, but especially students with disabilities.[129] These decisions could lead to buildings being understaffed, creating an increased caseload for Intervention Specialists, perpetuating burnout, and causing further staffing shortages.[130] These decisions could prevent building improvements, preventing students with disabilities from accessing their true LRE.[131] These decisions could even be the sole reason a school is incapable of providing FAPE, leaving students without the education they are legally required to receive.[132]

Outside of these educational implications, a fully funded IDEA would benefit American society as a whole.[133] When special education programs are well funded, all students benefit, even students who do not directly utilize special education services.[134] Even more remarkable is an estimated *multitrillion* dollar gross domestic product increase if all students achieve basic mastery on progress standards.[135] Increased funding also creates higher academic achievement and graduation rates.[136] These in turn lead to net societal financial savings from lower crime, incarceration, and welfare rates, and higher employment and earnings rates.[137] This uniquely impacts students from lower socioeconomic backgrounds

126. *S.2341 – IDEA Full Funding Act of 2000,* CONGRESS.GOV, https://www.congress.gov/bill/106th-congress/senate-bill/2341/all-actions (last visited July 4, 2024).

127. *IDEA Full Funding Act*, CONGRESS.GOV, https://www.congress.gov/search?q=%7B%22source%22%3A%22all%22%2C%22search%22%3A%22%5C%22IDEA+full+funding+act%5C%22%22%2C%22congress%22%3A%22all%22%7D (last visited July 4, 2024) (showing search results for searching under All Congresses for the IDEA Full Funding Act).

128. IDEA Full Funding Act, S. 2217, 118th Cong. (2023); IDEA Full Funding Act, H.R. 4519, 118th Cong. (2023).

129. Linda M. Gorczynski, *Full Funding of the IDEA Critical for Our Children*, SPECIAL NEEDS ALL., https://www.specialneedsalliance.org/blog/full-funding-of-the-idea-critical-for-our-children/ (last visited July 31, 2024).

130. *Id.*

131. *Id.*

132. *Id.*

133. Margy Hillman, *IDEA Law: Special Education Funding*, LET'S GO LEARN (Oct. 29, 2022), https://www.letsgolearn.com/special-education/idea-law-special-education-funding/.

134. *Id.*

135. *Id.* This article cites The Borgen Project's findings of a potential GDP increase of $32 trillion, or 14.6%, if all students reach basic mastery of national assessment standards.

136. *Id.*

137. *Id.*

who see even greater increases in graduation rates and projected personal and family income.[138] Additionally, increased funding leads to increased mental health services; services which are often necessary for students with disabilities.[139] It is evident that investing in special education is an investment into America's future, providing an even larger societal incentive for special education funding levels to increase.

Overall, for schools to fulfill their legislative obligations, Congress must too fulfill its obligations and fully fund the IDEA. Not only is it what is best for students with disabilities, it is what is best for the nation. However, this is just one half of what is necessary to create comprehensive special education funding reform; the other half, reconfiguring the IDEA's funding formula, is just as crucial to ensuring proper educational outcomes for students with disabilities.

III. ANALYZING THE IDEA FUNDING FORMULA

When the EHA was first authorized, the funding formula incentivized states to identify and service students with disabilities.[140] To do this, Congress constructed the original funding formula to directly connect Part B funding to the number of students with disabilities served in each state.[141] This meant the more students a state identified and serviced, the more federal funding that state received.[142]

A. The Current IDEA Funding Formula and Its Implications

While the original funding scheme proved to be successful, the disproportionate number of minority students identified for special education services by the mid-1990s stirred concerns of overidentification.[143] Congress addressed this concern through its 1997 IDEA reauthorization.[144] The reauthorization guaranteed each state a federal funding minimum equal to the amount of federal funding the state received in fiscal year 1999 (hereinafter referred to as FY and the year being discussed).[145] After this base amount was reached, any excess funding would be distributed based on the individual state's share of the national population of children and the national population of children living in poverty.[146] Eighty-five percent of the excess funding would be allocated based on the state's total population of children, and the remaining 15% would be based on the state's population of children living in poverty.[147] Again, these

138. *Id.*
139. *Id.*
140. DRAGOO, *supra* note 105, at 10.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Kolbe et al., *supra* note 9, at 57, 60.
146. *Id.* at 59-60.
147. *Id.* at 59.

distributions would only be made from the amount of federal funding exceeding the FY1999 base amount.[148] There are also provisions guiding a state's maximum and minimum Part B funding amounts based on calculations of the prior year's allocations and "different assumptions about a state's share of annual IDEA Part B appropriations."[149]

Even with the 2004 reauthorization of the IDEA, this formula went largely untouched and remains the formula used to this day.[150] Put differently, this means the current IDEA funding formula rests on the FY1999 base amount.[151] Any amount exceeding that base amount is distributed based on the state's population of children, which receives 85% of the exceeding amount, and the state's population of children in poverty, which receives 15% of the exceeding amount.[152] This funding total will then be adjusted in accordance with the minimum and maximum calculations as necessary.[153] Any additional funds exceeding a state's maximum funding cap will go unused.[154]

This is the formula American schools and educators must survive under; a formula where a state is only guaranteed the federal funding of a twenty-five-year-old data point, and any amount exceeding that is apportioned without specific consideration to students with identified disabilities. To add insult to injury, if this amount somehow exceeds the state's calculated maximum, that amount will not be allocated to them.

When looking at the formula in such light, it is not surprising the current set up has caused wide funding disparities among states.[155] In FY2023, when looking at the yearly average of state IDEA grant amounts per student receiving special education services, there was a $1,805 difference per student receiving special education between the states receiving the most and least funding.[156] This gap between the highest and lowest funded states continues to grow, and has been calculated to have increased 769% in twenty years.[157]

States with larger populations of children and larger populations of children in poverty feel this difference significantly, even though these metrics are specifically contemplated in the current funding formula.[158] States with the largest population of children received 20% fewer dollars per student and 10% fewer

148. *Id.* at 60.

149. Tammy Kolbe et al., *More Money Is Not Enough: (Re)Considering Policy Proposals to Increase Federal Funding for Special Education*, 129 AM. J. EDUC. 79, 83 (2022).

150. Kolbe et al., *supra* note 9, at 60. The 2004 reauthorization changed the Part B full funding level to "40% of APPE multiplied by the number of children with disabilities served and adjusted for each states' annual changes in child population and poverty rate." DRAGOO, *supra* note 105, at 22.

151. Kolbe et al., *supra* note 9, at 60.

152. *Id.*

153. Kolbe et al., *supra* note 149, at 83.

154. *Id.*

155. *See generally id.*

156. Kolbe et al., *supra* note 116. Figure 1 shows Wyoming receiving $3,537 per student and Nevada receiving $1,732 per student in 2023.

157. Kolbe et al., *supra* note 149, at 89.

158. *Id.* at 90.

dollars per student in special education on average in FY2020.[159] Also in FY2020, states with the largest population of children in poverty received 19% fewer dollars per student and 6% fewer dollars per student in special education on average.[160] These disparities appear when analyzing other groups as well, such as race and ethnicity.[161] School districts also feel these differences: high population districts received fewer dollars per student on average than districts with smaller populations.[162]

When putting specific numbers to the matter, the IDEA funding dilemma becomes starker. Take New York state, for example. In 2022, their childhood poverty rate was calculated between 18% and approximately 21%, among the higher percentages in the nation.[163] In the 2021 to 2022 school year, the percentage of public school students identified for IDEA services was also among the highest, at 20% of the total public school population.[164] Even with these high poverty and special education populations, they received 1,184 *less* IDEA dollars per student receiving special education than the highest funded state of Wyoming in FY2021.[165] Mississippi, the state with the highest childhood poverty level at 26.4% and a notable special education population at 15%, was allotted $807 *less* per student receiving special education than Wyoming in FY2021.[166] Turning the focusing on Wyoming, the state received the largest IDEA grant in the nation in FY2021: $3,215 per student receiving special education services.[167] While Wyoming does have a special education population of 17%, it is among the states with the lowest levels of childhood poverty with a rate of 11% to approximately 15%.[168]

This formula was meant to target states affected by childhood poverty, and yet Mississippi receives hundreds of dollars less per student than Wyoming. Also, considering this is the IDEA funding formula, it should provide states with adequate funding to educate their special education population. And yet again, New York has both a higher special education and childhood poverty population than Wyoming and receives almost $1,200 less per student. Clearly, the funding formula is not performing its job as intended. These statistics evidence why recalculating the funding formula cannot be overlooked in the fight for a fully funded IDEA.

159. *Id.*

160. *Id.*

161. *Id.* at 90-91.

162. *Id.* at 83.

163. Craig Benson, *U.S. Poverty Rate Varies by Age Group*, U.S. CENSUS BUREAU (Dec. 4, 2023), https://www.census.gov/library/stories/2023/12/poverty-rate-varies-by-age-groups.html.

164. *Students With Disabilities*, NAT'L CTR. EDUC. STAT. 2 (May 2023) https://nces.ed.gov/programs/coe/pdf/2023/cgg_508.pdf.

165. Kolbe et al., *supra* note 116.

166. *Id.*; Benson, *supra* note 163; *Students with Disabilities*, *supra* note 164, at 2.

167. Kolbe et al., *supra* note 116.

168. *Students With Disabilities*, *supra* note 164, at 2; Benson, *supra* note 163.

B. Recommendations for a Revised IDEA Funding Formula

Fully funding the IDEA under the current funding formula would exacerbate the discussed disparities.[169] This should not be taken as a reason to avoid full funding, but a call to rework the formula for equitable federal funding distribution. This step of reanalyzing the federal funding formula is imperative to providing schools with the funds they need to provide the best educational experiences for students with disabilities.[170]

1. Recalculate the Base Funding Amount

To start, Congress must recalculate the base funding amount. When the current funding formula was created with the IDEA's 1997 reauthorization, the base formula's purpose was to avoid a reduction of a state's total IDEA allocation due to the formula change.[171] This purpose was seemingly achieved as states have always been guaranteed a funding amount at least equal to the FY1999 amount.[172] Even so, it is no secret that costs have increased since then.[173] Today's average prices are about 1.82 times higher than in the year 2000.[174] Even if all else was on par as it was then, this increase in average prices alone shows that the FY1999 base amount does not go as far as it was intended to with the 1997 reauthorization.

But all else is not on par. The costs to educate students has consistently risen for approximately the past decade.[175] As mentioned prior, the costs to educate students identified for special education has risen as well, especially when considering how identification categories have changed since 1997.[176] These factors create a completely different world schools must navigate compared to when the current formula was enacted. It is obvious districts are no longer serving a special education population that looks like it did in the late nineties.[177] And yet, the only guaranteed federal funding districts can access is rooted entirely on a figure calculated in the late nineties. Congress must readjust the base funding amount to accurately reflect the current state of special education districts and educators are working under.

Another suggestion regarding the formula's base amount is for Congress to regularly recalculate this figure. Between the ever-changing statistics surrounding inflation, buying power, and special education identification, the need to readjust

169. Kolbe et al., *supra* note 149, at 93.

170. *See generally* Kolbe et al., *supra* note 116.

171. Kolbe et al., *supra* note 9, at 60.

172. *Id.*

173. Ian Webster, *$1 in 2000 Is Worth $1.82 Today*, CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/2000?amount=1 (last visited July 31, 2024). This number is subject to change as time progresses.

174. *Id.*

175. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE, https://educationdata.org/public-education-spending-statistics (Sept. 8, 2023). See figure titled "Nationwide Public K-12 Spending Per Pupil Per Year."

176. BROKEN PROMISES, *supra* note 117, at 33-35.

177. *Id.* at 33-34.

the base formula will perpetuate itself if Congress does not attentively manage it.[178] To remedy this, Congress should ensure recalculation after a predetermined amount of time. For example, resetting the base funding amount every five years would allow for the figure to reflect the current state of the American economic and educational landscape. This, in turn, would create a base funding amount truly useful to the districts and educators servicing students with disabilities in that very economic and educational landscape.

2. Re-Examine the Population Categories Used in the Funding Formula

The 1997 IDEA reauthorization changed the focus of the funding formula from a state's special education population to a formula targeting the total population of children and total population of children living in poverty.[179] Due to concerns of special education overidentification to secure more funding under the previous formula, Congress utilized these categories as a "proxy" for the special education population.[180] However, in light of the growing inconsistency of IDEA funding per student receiving special education services between states, utilizing these categorizations may not be serving its intended purpose.[181]

While a disproportionate amount of low-income students are identified for special education, the funding formula's focus on these students inevitably counts out students with disabilities who do not hail from poverty.[182] For reference, New Hampshire has one of the highest special education populations with 18% of their public school population receiving special education services.[183] New Hampshire, however, has the lowest childhood poverty rate in the nation, at just under 7%.[184] But because the current formula does not contemplate for special education populations, New Hampshire missed out on almost $1,000 per student receiving special education services in FY2021.[185] In a state where nearly one fifth of public school students receive special education services, adequate funding is necessary to ensuring the best education for students with disabilities. New Hampshire is not alone. States such as Minnesota, Pennsylvania, and Maine are all among the states with higher special education populations but lower childhood poverty levels who lost out on substantial amounts of funding.[186] Additionally, and unfortunately, there are other categorizations of overidentification present in special education

178. *See* Webster, *supra* note 173; BROKEN PROMISES, *supra* note 117, at 33-34.

179. Kolbe et al., *supra* note 149, at 82.

180. *Id.*

181. Kolbe et al., *supra* note 9, at 72.

182. Laura A. Schifter et al., *Students from Low-Income Families and Special Education*, CENTURY FOUND. (Jan. 17, 2019), https://tcf.org/content/report/students-low-income-families-special-education/.

183. NAT'L CTR. EDUC. STAT., *supra* note 164.

184. Benson, *supra* note 163.

185. Kolbe et al., *supra* note 116.

186. NAT'L CTR. EDUC. STAT., *supra* note 164, at 2; Benson, *supra* note 163; Kolbe et al., *supra* note 116.

such as race and students who are English Language Learners ("ELL").[187] The current formula's sole focus on children in poverty may count out these students, too.

To alleviate this, Congress should reincorporate state-specific special education populations into the funding formula. Incorporating this population in the formula would provide states with a funding figure curated for their special education population. Additionally, given the shift in disability identification categories and rates, including this information in the formula could also help provide a more accurate funding figure.[188] For example, because it costs more to educate a student identified under Other Health Impairment ("OHI") versus a student with a speech disability, including identification categories and rates would allow a state with more OHI students to receive the funding necessary to adequately support them.[189] Considering that the IDEA's existence is unequivocally for special education, an IDEA formula that expressly incorporates a state's special education population is integral to producing an accurate funding figure to support this population.

If there are still prevalent overidentification concerns like as in the mid-1990s, Congress should expand the scope of categorizations considered in the formula. Incorporating more identities within the formula would hopefully generate more accurate funding amounts compared to focusing on poverty alone. Theoretically, special education populations could also be incorporated into this formula scheme. This would provide an avenue for considering a state's special education population without being the sole categorization funding relies on. As discussed above, this formula could also take identification categories and rates into consideration to create a more representative funding figure. Regardless, having actual representation of the special education population in the formula is an essential component to producing accurate IDEA funding figures.

Finally, breaking out of the 85% and 15% distribution amounts may help stabilize state funding. The current formula has only 15% of funding allocated for poverty; a metric intended to account for differences in need between states.[190] Redistributing funding percentages and accounting for additional differences in need among states may produce a more individualized, need-based funding figure for states.

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187. Hannah R. Kramer, Note, *Expanding the IDEA to Mitigate Disproportionality of English Language Learners in Special Education*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 257, 259-60 (2022).

188. BROKEN PROMISES, *supra* note 117, at 33-34.

189. *Id.* Per the IDEA, "Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment" that is due to a health condition and "adversely affects a child's educational performance." *Comprehensive Overview of Other Health Impairments*, NAT'L ASS'N SPECIAL EDUC. TCHRS., https://www.naset.org/professional-resources/exceptional-students-and-disability-information/other-health-impairments/comprehensive-overview-of-other-health-impairments (last visited July 5, 2024).

190. Kolbe et al., *supra* note 9, at 72-73.

3. Distribute Federal Allocations Directly to LEAs

One final suggestion is for the federal government to funnel aid directly to local education agencies ("LEAs") and remove state education agencies ("SEAs") from the funding distribution process.[191] LEAs are entities within states that exist "for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties…."[192] A SEA is typically the state board of education, but could be another "agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools[.]"[193] Currently, the IDEA is funded through a "two-part allocation strategy" where the federal government allocates funds to each state, and then the state allocates portions of those funds to districts.[194] Comparatively, Title I funding under the ESSA is distributed from the federal government to LEAs.[195] From there, LEAs distribute their Title I funds to schools with the highest population of children from low-income households.[196] If IDEA funding adopts this model, funds would be distributed from the federal government to LEAs, and then from the LEA to each applicable district. Under the IDEA's current two-tiered system, theoretically, two essentially identical school districts in two different states could receive different funding amounts.[197] A scheme that allocates funds directly from the federal government to LEAs could alleviate some of the disparity seen under the current approach.[198] Because LEAs are *local* education agencies, they are more connected to surrounding districts than SEAs would likely be. This closer connection means that they are more likely to have an accurate depiction of special education needs throughout their area. LEAs could use their area expertise to disperse federal funds in a more equitable, need-based way, producing a more accurate funding amount for districts.

C. Overall, a New Formula Is a Necessary Part of the Solution

Without a new IDEA funding formula, a fully funded IDEA will only perpetuate the funding disparities currently created by the existing formula.[199] Therefore, reworking the current formula to alleviate these disparities is a crucial step in addressing the problems with the IDEA's funding scheme.[200]

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191. Kolbe et al., *supra* note 149, at 100.
192. 34 C.F.R. § 303.23(a) (2018).
193. 34 C.F.R. § 303.36 (2018).
194. Kolbe et al., *supra* note 149, at 100.
195. *Id.*
196. *Improving Basic Programs Operated by Local Educational Agencies (ESEA Title I, Part A)*, OFF. ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/title-i-part-a-program/ (Nov. 5, 2020).
197. Kolbe et al., *supra* note 149, at 100.
198. *Id.*
199. Kolbe et al., *supra* note 116.
200. *Id.*

By readjusting the base amount, schools would be guaranteed a funding figure that more accurately represents the current state of the American economy and student population. Also, by refocusing the funding formula on special education populations, the formula could produce a funding figure more representative of a state's special education need. If Congress wishes to avoid this, as it did in 1997, expanding the identities considered within the formula could provide a more holistic figure to represent a state's school-aged population. Along with this, reanalyzing the percentages used to distribute the funding amount could help stabilize the formula. As a final suggestion, switching to a distribution method where the federal government allocates state funding directly to LEAs, rather than through SEAs, could help provide schools with more equitable funding amounts.

The IDEA's funding formula is fundamental to the equitable distribution of IDEA funds between states. Should Congress finally answer the call to fully fund the IDEA, it also must reexamine the funding formula to provide states with funds that represent their special education need.

CONCLUSION

American education legislation has emphasized the need to focus on and improve learning outcomes for students with disabilities. The IDEA exists to set expectations states must meet to deliver quality education to students with disabilities. Alongside this, the ESSA continues to prioritize setting high educational standards for students with disabilities. These expectations and commitments *should* exist. The country *should* emphasize the importance of providing students with disabilities an engaging, valuable education. But when legislators make these commitments to students with disabilities without providing states sufficient funding, they leave districts and educators unable to deliver this education as intended. This is why Congress must fully fund the IDEA under a revised formula.

Congress made its promise to fully fund the IDEA nearly fifty years ago. It promised states, districts, and educators the necessary funding to accomplish the tasks set out before them. More importantly, the IDEA communicates that the education of students with disabilities is important and valued in this country. Congress continuously falling short of its funding promise decade after decade does not reflect the principles set forth in the IDEA. When alongside the ESSA, the impact of lack of funding is amplified.

As this point is of the most importance, it is worth reiterating: a fully funded IDEA distributed under the current funding formula is not the answer. Congress must also revise the funding formula to produce a funding figure reflecting state financial need for their special education population. This new formula must work to alleviate the disparities existing under the current formula. For full funding to truly help states produce quality educational outcomes for students with disabilities, funding amounts must be distributed through a new formula.

As I conclude, I think of Mary. I think of an intelligent, compassionate educator who has spent her entire career working to ensure she gave her students the best educational experiences possible. She did this over early mornings, sleepless nights, and to the loss of her own personal finances. She did this because

she made a promise not only to herself, but to all the students who walked through her classroom door, that she would do everything in her power to educate them. Mary is not alone. Countless other educators spend their careers fighting, day in and day out, for students with disabilities. It is time for Congress to do the same. There are an abundance of policy reasons why this should occur, as just discussed. But at the end of the day, the real reason is this: students with disabilities are worthy of fulfilling educational experiences. To provide schools and educators with the resources to do this, Congress must fully fund the IDEA under a reworked formula.