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CONGRESS'S EMPTY PROMISES: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT IN THE MIDST OF EDUCATION CRISIS

*Sarah Jana**

I. INTRODUCTION

Ten-year-old Alexis Ince is one of millions of students forced to learn from home when the COVID-19 pandemic spread across the country.¹ But unlike most ten-year-olds, Alexis has a rare chromosomal abnormality and autism, requiring her to use a device to communicate.² When her public school in Hawaii closed in 2020 and she was forced to stay home, Alexis quickly began to regress.³ Within a few months, she stopped using her communication device, began to crawl instead of walk, and started wetting herself.⁴ Alexis went from being a happy and bubbly child to one her mother described as “flat and empty and not really there.”⁵

Two years later, over 4,000 miles away in Indiana, five-year-old AJ—a student with cerebral palsy—struggled to attend his public school in-person.⁶ AJ attended a school serving students with developmental and emotional disabilities, but his school had struggled to retain special education teachers and paraprofessionals for several years.⁷ Eventually, the staff shortage became so severe that AJ’s mother pulled him from his school to homeschool him, worried the classroom might be a safety hazard.⁸

Alexis and AJ are just two of the millions of children across the country with disabilities.⁹ Decades ago, the federal government declared its

* Notes & Comments Editor, 2023-2024, *University of Cincinnati Law Review*. I would like to thank the students of Hendley Elementary School in Washington, D.C. for inspiring my love for education law. I miss you all and I will always be fighting for you.

1. Anya Kamenetz, *Families of Children with Special Needs Are Suing in Several States. Here's Why*, NPR (July 23, 2020), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why> [<https://perma.cc/3E4W-8YLQ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Dylan Peers McCoy & Lee V. Gaines, *This Special Education School's Classrooms Are So Understaffed Parents Say It's Unsafe*, WFYI INDIANAPOLIS (Sept. 19, 2022), <https://www.wfyi.org/news/articles/parents-and-teachers-worry-indiana-school-for-students-with-disabilities-unsafe> [<https://perma.cc/WUZ3-G3K8>].

7. *Id.*

8. *Id.*

9. The National Center for Education Statistics found that the number of students with disabilities who received special education services in the 2021-2022 school year was 7.3 million—or about 15% of all public-school students. *Preprimary, Elementary, and Secondary Education: Students with Disabilities*,

commitment to educating students like Alexis and AJ when it passed the Individuals with Disabilities Education Act (“IDEA”)—a statute promising to provide a free appropriate public education for all students with disabilities.¹⁰ But since the IDEA’s inception, the federal government has continually fallen short of its promise, leaving individual states and school districts to struggle with educating students with disabilities.¹¹ Then, in 2020, the pandemic upended our nation’s education system, forcing schools to provide special education services through remote learning.¹² And even though most students are now back to learning in-person, a nationwide shortage of special education teachers has left many without support.¹³

Our nation’s special education system is at a tipping point. The COVID-19 pandemic and the current teacher shortage created a perfect storm that has left many states and local districts scrambling to provide quality education services to students with disabilities. This Comment urges the federal government to step in and provide the funds it originally promised to provide through the IDEA, thereby ensuring that states are better able to comply with federal guidelines. Section II discusses the background of the IDEA, including: (1) the creation of the IDEA; (2) the structure of the federal statute; (3) the realities of educating students with disabilities; (4) the effect of the COVID-19 pandemic on our nation’s special education system; and (5) the 2022 teacher shortage and its ramifications for students with disabilities. Section III explains why the federal government must step in now to fully fund the IDEA and what it must do to remedy the damage wrought by the pandemic and teacher shortage, including: (1) temporarily extending the age of eligibility for students who are set to age out of the statute; and (2) mandating that states use some of these federal funds to develop new programs to attract, retain, and train special education teachers.

For generations, our society has recognized the importance of public

NAT’L CTR. FOR EDUC. STATS. (2023), <https://nces.ed.gov/programs/coe/indicator/cgg?tid=4> [<https://perma.cc/VF8T-Z7BQ>].

10. Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), *amended by the Education for All Handicapped Children Act of 1975 (EAHCA)*, Pub. L. No. 94-142, 89 Stat. 773, *and renamed as the Individuals with Disabilities Education Act (IDEA) by the Education of the Handicapped Act Amendments of 1990*, § 901, Pub. L. No. 101-476, 104 Stat. 1142 (codified as amended at 20 U.S.C. § 1400 *et seq.*); Bailey Kadian, *A Free Appropriate Public Education: Examining What “Appropriate” Means for Students with Disabilities in a Global Pandemic*, 32 HEALTH MATRIX 557, 574 (2022).

11. Claire S. Raj, *Rights to Nowhere: The IDEA’S Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 419-20 (2022).

12. Kadian, *supra* note 10, at 558-59.

13. Lee V. Gaines, *Students with Disabilities Have a Right to Qualified Teachers—But There’s a Shortage*, NPR (Apr. 20, 2022), <https://www.npr.org/2022/04/20/1092337446/special-education-teacher-shortage> [<https://perma.cc/9PYW-8LFK>].

education.¹⁴ Public schools prepare students to meaningfully participate and contribute to our nation as adults.¹⁵ As stated by the Supreme Court, education “is the very foundation of good citizenship.”¹⁶ The right to a free appropriate public education has been promised to all students with disabilities and Congress must act now to fulfill that promise. Any delay will result in millions of our most vulnerable children missing out on one of the most important rights provided in our country: the right to an education.

II. BACKGROUND

Until the 1950s, many students in the United States with physical, mental, and emotional disabilities were excluded from attending public schools.¹⁷ Most often, students with disabilities were forced to stay home or were institutionalized.¹⁸ But even if these students were permitted to go to school, they were typically segregated from their non-disabled peers.¹⁹ The road to equal educational opportunities for students with disabilities has been long, and this Section will discuss how the movement developed and culminated in the creation of the IDEA.

A. The Creation of the IDEA

In 1954, the Supreme Court’s decision in *Brown v. Board of Education* began a national push toward equality in education.²⁰ *Brown* declared that “education is perhaps the most important function of state and local

14. Rasheed Malik, *Examining the Powerful Impact of Investments in Early Childhood for Children, Families, and Our Nation’s Economy: Testimony Before the House Budget Committee*, CTR. FOR AM. PROGRESS (Aug. 10, 2022), <https://www.americanprogress.org/article/examining-the-powerful-impact-of-investments-in-early-childhood-for-children-families-and-our-nations-economy/> [https://perma.cc/U887-5ZL8] (“A genuine concern for the healthy development and education of our children is one of our clearest shared values as a society . . .”).

15. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”).

16. *Brown*, 347 U.S. at 493.

17. Doris Adams Hill & Jonte C. Taylor, *History of the Field of Special Education*, in THE PALGRAVE HANDBOOK OF EDUCATIONAL LEADERSHIP AND MANAGEMENT DISCOURSE, 1655, 1658 (Fenwick W. English ed., 2022); see also *State ex rel. Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wisc. 1919) (holding a local school board could exclude a paralyzed child from public school because his physical condition was “depressing and nauseating” to school administrators and distracted other students).

18. Hill & Taylor, *supra* note 17, at 1658.

19. *Id.*

20. *Id.*

governments,” observing, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”²¹ The Court held that students cannot be segregated based on race and declared “[education] is a right which must be made available to all on equal terms.”²²

The movement for disability rights grew out of *Brown* and the civil rights movement of the 1960s.²³ Seeing successes in the demand for racial equality, parents of students with disabilities began to demand equal education for their children.²⁴ Slowly, public schools began to accept more students with disabilities, but still separated them from the general population—often in basements, temporary additional classrooms known as portables, or even boiler rooms.²⁵ Special education programs were more often regarded as “disability daycares” than opportunities of equal education.²⁶

In 1972, perceptions of special education programs began to change.²⁷ Two class action cases challenging the exclusion of students with disabilities were filed in federal district courts: *P.A.R.C. v. Pennsylvania* and *Mills v. Board of Education of the District of Columbia*.²⁸ In *P.A.R.C.*, the Eastern District of Pennsylvania declared that public schools have a federal constitutional obligation to educate students with academic or cognitive disabilities “in a free, public program of education . . . appropriate to the child’s capacity.”²⁹ *Mills* then extended this right to all students “regardless of . . . the child’s mental, physical, or emotional disability.”³⁰ Together, these cases reflected a societal push toward recognizing the rights of people with disabilities and laid the groundwork for national legislation.³¹

In 1975, Congress passed the Education for All Handicapped Children Act (“EAHCA”), the first piece of federal legislation to mandate “free appropriate public education” (“FAPE”) for all students.³² EAHCA

21. 347 U.S. 483, 493 (1954).

22. *Id.*

23. Hill & Taylor, *supra* note 17, at 1658.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Pennsylvania Ass’n for Retarded Child v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

29. 343 F. Supp. at 307.

30. 348 F. Supp. at 878.

31. Hill & Taylor, *supra* note 17, at 1659.

32. Education for All Handicapped Children Act, Pub. L. 94-149, 89 Stat. 773 (1975); Hill & Taylor, *supra* note 17, at 1659-60. EAHCA came just a few years after the passage of Section 504 of the Rehabilitation Act of 1973. Rehabilitation Act of 1973, Pub. L. 93-112, § 504, 87 Stat. 355, 34. Section 504 of the Rehabilitation Act of 1973 was a piece of legislation that prohibited discrimination on the basis

allocated funding to states based on each state's number of students with disabilities.³³ To receive federal funds, schools were required to identify and evaluate students, create tailored educational plans for each of them, and keep them with the general population as much as possible.³⁴ EAHCA also outlined due process rights for parents, including the right to contest the actions of school officials through administrative hearings and judicial review.³⁵

After passage of EAHCA, a flood of litigation sought to determine what FAPE really meant and how far newfound protection for these students should go.³⁶ In 1982, the Supreme Court held in *Board of Education v. Rowley* that the EAHCA did not require states to “maximize the potential” of students with disabilities,³⁷ but instead provide only a “basic floor of opportunity.”³⁸ In other words, schools must provide special education programs with enough services to provide some benefit, but are not required to provide the best education possible for students with disabilities.

In 1990, Congress amended the EAHCA and renamed the legislation to create the IDEA.³⁹ Like the EAHCA, the IDEA guarantees a FAPE to all students with disabilities and requires participating states to provide special education services in public schools.⁴⁰ Amendments to the legislation, however, have changed the federal funding formula⁴¹ and provided clarification on what states must do to specifically provide an

of disability in all federally funded programs. Hill & Taylor, *supra* note 17, at 1659. EAHCA extended protection for students with disabilities by ensuring that they could not be excluded from education at the state level either. *Id.*

33. Clare McCann, *Federal Funding for Students with Disabilities: The Evolution of Federal Special Education Finance in the United States*, NEW AM. EDUC. POL'Y PROGRAM (June 27, 2014), <https://www.newamerica.org/education-policy/policy-papers/federal-funding-for-students-with-disabilities/> [https://perma.cc/22C4-8PYT].

34. *Statement of Gregory J. Ahart, Director of Human Resources Division Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resource on The Education for All Handicapped Children Act of 1975*, 96th Cong. (1980), <https://www.gao.gov/assets/113316.pdf> [https://perma.cc/D4JM-JZ2Q].

35. *Id.*

36. Hill & Taylor, *supra* note 17, at 1659.

37. 458 U.S. 176, 201 (1982).

38. *Id.* at 203-04.

39. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1142 (1990); Megan Roberts, *The Individual with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1048 (2008).

40. 20 U.S.C. § 1400(d)(1)(A).

41. The funding formula was changed to address a growing national concern that states were overidentifying students with disabilities to obtain more federal funding. Because the EAHCA's funding formula was partly based on the number of students with disabilities identified in the state, it provided an incentive for states to push students into special education services, even if they were not necessary for the child. See McCann, *supra* note 33, at 9.

“appropriate” education.⁴² Because the IDEA continues to govern the education of students with disabilities today, the next Part will outline the structure of the federal statute and explain how it works on the ground level.

B. The Structure of the IDEA

The core purpose of the IDEA is to provide students with disabilities “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.”⁴³ This goal is rooted in the understanding that education impacts a child’s long-term success and represents a “national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁴⁴

To achieve these ends, the IDEA creates a funding system that promises the federal government will support states in providing equal and effective educational opportunities.⁴⁵ The following Parts will describe the mechanics of the IDEA and how they are designed to meet that goal.

1. State and Local Educational Agencies

The IDEA creates a hierarchical system for funding special education.⁴⁶ At the top of the hierarchy sits the federal government.⁴⁷ Then come state educational agencies, which receive federal funds and are responsible for the implementation of the IDEA across their state.⁴⁸ State educational agencies typically set the policies that monitor IDEA compliance within their state.⁴⁹

At the bottom of the hierarchy are local educational agencies—typically local school districts, school boards, county offices of education, or boards of charter schools.⁵⁰ These entities set the policies and

42. Hill & Taylor, *supra* note 17, at 1659-60.

43. 20 U.S.C. § 1400(d)(1)(A).

44. 20 U.S.C. § 1400(c)(1).

45. Evie Blad, *Why the Feds Still Fall Short on Special Education Funding*, EDUC. WEEK (Jan. 10, 2020), <https://www.edweek.org/teaching-learning/why-the-feds-still-fall-short-on-special-education-funding/2020/01> [https://perma.cc/L3AS-8V8L].

46. Erin B. Stein, *The Individuals with Disabilities Education Act (IDEA): Judicial Remedies for Systemic Noncompliance*, 2009 WIS. L. REV. 801, 807 (2009).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 808; 20 U.S.C. § 1401(19) (“The term ‘local educational agency’ means a public board

procedures for individual schools and manage funds to ensure that the district can provide a FAPE.⁵¹

2. Federal Funding

The IDEA's hierarchical funding system reflects the fact that public education in the United States is largely handled at the state and local levels.⁵² While the IDEA does not require states to accept federal grants or fund special education,⁵³ it does require any state choosing to accept grants to maintain special education funding at or above its funding from the previous year to keep its full amount of federal funding.⁵⁴ In other words, if a state decreases its spending on special education programs, the federal government will reduce the amount of funds that state is provided in its IDEA grant the following year.⁵⁵ Federal IDEA funding is intended to increase overall education spending on special education programs by providing additional funds for states—not to replace state funding.⁵⁶ As of 2023, all states have accepted federal IDEA funding.⁵⁷

Under the IDEA, the federal government promises to contribute 40% of the average national per-pupil spending (adjusted by population) to states.⁵⁸ Once grants pass from the federal government to states, they are distributed to local educational agencies.⁵⁹ Each state has its own formula for distribution and the formulas have become increasingly sophisticated over time.⁶⁰ Some states choose to use formulas that differentiate funding based on a student's specific disability or required service, while others base formulas on general categories such as “mild, moderate, or severe” disabilities.⁶¹ Due to these formula variations, the amount of funding local

of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools . . .”).

51. Stein, *supra* note 46, at 808.

52. 20 U.S.C. § 1411(a)(1).

53. Michael Griffith, Educ. Comm'n of the States, *A Look at Funding for Students with Disabilities*, 16 THE PROGRESS OF EDUC. REFORM 1 (2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf> [<https://perma.cc/ZKJ8-LQML>].

54. 20 U.S.C. § 1413(d).

55. Griffith, *supra* note 53, at 3.

56. CONG. RSCH. SERV. R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER, 22 (2019).

57. *Id.* at 1 n.4.

58. 20 U.S.C. § 1411(a)(2)(B). Congress's decision to adjust the percentage based on population—rather than just basing it on the overall number of students with disabilities—was an attempt to reduce or eliminate any financial incentive for states to overidentify students requiring special education services. McCann, *supra* note 33, at 9. Thus, funding is based on averages and overall populations of each state, not on the number of students with disabilities actually being served. *Id.*

59. 20 U.S.C. § 1411(f).

60. Griffith, *supra* note 53, at 5.

61. *Id.*

educational agencies receive differs greatly.⁶²

Local educational agencies also have discretion in how to spend IDEA funds.⁶³ Each state is required to spend some funds to monitor compliance with federal guidelines and to establish and maintain mediation processes for disputes.⁶⁴ Beyond those mandates, state and local educational agencies have authority to spend funds on a variety of “authorized activities” such as professional development trainings, technology, behavioral and mental health interventions, personnel shortages, and transitional programs.⁶⁵

3. Age Provisions and Available Services

Federal grants under the IDEA are divided into two types: “Part B grants” and “Part C grants.”⁶⁶ Part B grants assist states in providing a FAPE for children with disabilities from ages three to twenty-one.⁶⁷ As discussed above, Part B grants are typically funneled through state educational agencies, local educational agencies, and eventually to public schools.⁶⁸

Part C grants assist states in providing early intervention services for infants and toddlers—ages birth through two—and their families.⁶⁹ Part C was added to the IDEA in 2004 in recognition that “significant brain development . . . occurs during a child’s first 3 years of life,” and therefore early intervention services are critical in “[minimizing the] potential for developmental delay.”⁷⁰ Part C grants are funneled to a lead agency in the state—usually the state’s department of health, human services, education, or welfare—and that agency identifies “at-risk infants and toddlers” with “substantial developmental delays” to which the state will provide services addressing physical, cognitive, communicative, emotional, and adaptive developments.⁷¹

Part B grants make up the vast majority of IDEA funding.⁷² In its fiscal

62. *Id.*

63. 20 U.S.C. § 1411(e)(2).

64. 20 U.S.C. § 1411(e)(2)(B).

65. 20 U.S.C. § 1411(e)(2)(C)(i)-(xi).

66. U.S. Dep’t of Educ., *State Formula Grants*, IDEA: INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/state-formula-grants/> [https://perma.cc/S7LU-D7FT].

67. *Id.*

68. 20 U.S.C. § 1411.

69. U.S. Dep’t of Educ., *supra* note 66.

70. 20 U.S.C. § 1431(a)(1).

71. 20 U.S.C. § 1432(1)-(4).

72. Council for Exceptional Children, *Position Statement: Funding for the Individuals with Disabilities Act* (Jan. 2022), <https://exceptionalchildren.org/sites/default/files/2022-02/Funding%20for%20Idea%20-%202022.pdf> [https://perma.cc/W59D-EUSU].

year 2019, for example, Congress spent \$12.36 billion to fund Part B grants, but only \$470 million to fund Part C grants.⁷³ Because of the overwhelming weight of Part B funding, this Comment focuses on funding and services provided to children ages three to twenty-one.

4. FAPE and Individualized Education Plans

To be eligible for federal funding, each state educational agency must submit an annual plan that outlines how it will provide a FAPE to all students.⁷⁴ The plan must include details about how children will be evaluated, how services will be provided, and how family members will engage with the education of each child.⁷⁵ A FAPE is not a guarantee that children with disabilities will reach the same educational outcomes as their non-disabled peers;⁷⁶ it only guarantees that children with disabilities will receive an education that “meets the standards of the state educational agency.”⁷⁷

To qualify for special education services under the IDEA, students with disabilities must be evaluated by the state or local educational agency.⁷⁸ Initial evaluations may be requested by either the agency or the parent,⁷⁹ although parental consent to the evaluation is required.⁸⁰ Evaluations typically require analysis of the student’s functional, developmental, cognitive, and academic information from both the school and home environments.⁸¹ The local educational agency may be permitted to reevaluate a child with a disability if the child’s academic performance does not improve after receiving services or at the parent’s request.⁸²

Recognizing that each student’s abilities and goals are unique, the IDEA mandates that students with disabilities be given their own “Individualized Education Program” (“IEP”).⁸³ The IEP must be developed, reviewed, and revised according to IDEA guidelines.⁸⁴ In a sense, an IEP is a vehicle designed to get students to a FAPE.⁸⁵

73. *Id.*

74. 20 U.S.C. § 1412(a).

75. *Id.*

76. Thomas A. Mayes, *The Long, Cold Shadow of Before: Special Education During and After Covid-19*, 30 S. CAL. REV. L. & SOC. JUST. 89, 96 (2021).

77. 20 U.S.C. § 1401(9).

78. 20 U.S.C. § 1414(a).

79. 20 U.S.C. § 1414(a)(1)(B).

80. 20 U.S.C. § 1414(a)(1)(D).

81. 20 U.S.C. § 1414(b)-(c).

82. 20 U.S.C. § 1414(a)(2).

83. 20 U.S.C. § 1401(14).

84. *Id.*

85. Jessica K. Heldman, Margaret A. Dalton, & Robert C. Fellmeth, *COVID-19 and Preventing Harm to Vulnerable Children*, 57 SAN DIEGO L. REV. 865, 884 (2020).

IEPs are created collaboratively by an IEP team, usually composed of the child's parents, general education teachers, special education teachers, a representative of the local educational agency, and other individuals with knowledge of the child's capabilities and needs.⁸⁶ Under the IDEA, IEPs must contain details about the student's present levels of performance, their academic and other goals, and the services that will be provided to get them to those goals.⁸⁷ For students over the age of sixteen, the IEP must also contain post-secondary goals related to training, education, employment, and independent living skills, as well as a description of any transition services necessary to ensure the student can successfully navigate post-secondary employment opportunities and higher education programs.⁸⁸

At its core, an IEP functions as a legal contract between schools, parents, and a student that governs the education of the child.⁸⁹ According to the IDEA, IEPs must be updated at least annually to reflect the child's progress toward their goals—and to set new ones, if necessary.⁹⁰ Revisions to IEPs must reflect the child's progress, or lack thereof, toward these annual goals, and any changes to their special education services.⁹¹ When a local educational agency fails to provide the services outlined in a child's IEP, the child may be entitled to a statutory remedy.⁹²

5. Remedies

The IDEA ensures that remedies are available for students when a school district fails to provide a FAPE.⁹³ Under § 1415 of the IDEA, parents can file a due process complaint against the state or local educational agency when they feel their child is not receiving the special education services outlined in the child's IEP.⁹⁴ Once filed, the complaint is assigned to an impartial hearing officer who accepts arguments and evidence from both sides and determines whether the education provided complied with the IDEA.⁹⁵

If the hearing officer finds that the educational agency failed to comply, the officer has broad discretion to award remedies, including

86. 20 U.S.C. § 1414(d)(1)(B).

87. 20 U.S.C. § 1414(d)(1)(A)(i).

88. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

89. *Perspectives & Resources: Overview of High-Quality IEPs*, IRIS CTR., <https://iris.peabody.vanderbilt.edu/module/iep01/cresource/q1/p01/> [https://perma.cc/CF6A-WJCQ].

90. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

91. 20 U.S.C. § 1414(d)(4).

92. 20 U.S.C. § 1415(b).

93. *Id.*

94. *Id.*

95. 20 U.S.C. § 1415(f).

compensatory education, reimbursement of private school tuition, revisions to the IEP, a change in the child's educational program, injunctive relief, and training or policy changes for the school district.⁹⁶ If the parent or school district disagrees with the hearing officer's decision, they have the right to appeal to a state educational agency.⁹⁷ When administrative options have been exhausted, parents can file a complaint with a civil court.⁹⁸

Compensatory education is perhaps the most common remedy provided when a school district fails to provide a FAPE.⁹⁹ Compensatory education requires a school district to make up for the special education services that it should have supplied in the first place.¹⁰⁰ But importantly, school districts are not required to make up for every hour of school services missed.¹⁰¹ In *Reid ex rel. Reid v. District of Columbia*, for example, a student with documented learning disabilities fell significantly behind his peers in second grade, but was not given an IEP until two years later.¹⁰² Even after the student was given an IEP and special education services, he continued to struggle.¹⁰³ Eventually, one of his parents filed a complaint against the local school district arguing it had failed to give him an IEP when appropriate and should therefore be required to make up for missed services.¹⁰⁴

The *Reid* hearing officer found for the parent and awarded the student 810 hours of compensatory education—“[one] hour for each day of special education not provided.”¹⁰⁵ The D.C. Circuit upheld the award, holding “there is no obligation to provide a day-for-day compensation for time missed,”¹⁰⁶ and that compensatory education should instead seek to provide only “what services [a student] needs to elevate him to the position he would have occupied absent the school district's failures.”¹⁰⁷ Many courts have adopted this “flexible standard” in awarding compensatory education.¹⁰⁸

Critically, the Supreme Court has made it clear that school districts

96. Perry A. Zirkel, *COVID-19 Confusion: Compensatory Services and Compensatory Education*, S. CAL. REV. L. & SOC. JUST. 391, 393 (2021).

97. 20 U.S.C. § 1415(g).

98. 20 U.S.C. § 1415(i)(2).

99. Zirkel, *supra* note 96, at 393.

100. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005).

101. *Id.*

102. *Id.* at 519.

103. *Id.*

104. *Id.* at 520.

105. *Id.*

106. *Id.* at 524 (quoting *Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994)).

107. *Id.* at 527.

108. Zirkel, *supra* note 96, at 393.

must provide compensatory education and other remedies *even if* the district's failure to provide a FAPE was due to a lack of funding, teachers, or general resources.¹⁰⁹ In *School Community of Burlington v. Department of Education*, the Court found that if a student required a specific type of special education program that was not available in his own local school district, school officials must “develop and implement at public expense an IEP placing the child in a private school.”¹¹⁰ The Court made clear that where the local educational agency is unable to provide services itself, it must compensate the parent for placement elsewhere, stating, “The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.”¹¹¹ This precedent has made it clear: state and local educational agencies must compensate students for the failure to provide a FAPE—even when that failure is not necessarily the school district's fault.¹¹²

As *School Community of Burlington* suggests, educating students with disabilities is not always easy.¹¹³ These children can have complex and wide-ranging needs and goals, making it difficult for school districts to

109. See, e.g., *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (finding a school district was required to pay transportation and tuition costs necessary to send a student with specific learning disabilities to a private school because the district itself was unable to provide the structured learning environment necessary for the child to meet his IEP goals).

110. *Id.* at 370. This case occurred before the development of the IDEA and “the Act” referred to by the Court is EAHCA. *What is the Individuals with Disabilities Education Act?*, DISABILITIES, OPPORTUNITIES, INTERNETWORKING & TECH. (May 24, 2022), <https://www.washington.edu/doit/what-individuals-disabilities-education-act> [<https://perma.cc/3AVN-82T6>]. EAHCA was eventually amended and became the IDEA, but both Acts always served the same purpose. U.S. Dep't of Educ., *About IDEA*, IDEA: INDIVIDUALS WITH DISABILITIES ACT, <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose> [<https://perma.cc/ZJF3-RTZA>].

111. *Sch. Comm. of Burlington*, 471 U.S. at 373.

112. *Id.* at 369. See also *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (finding a public school district was required to pay for a nurse to perform daily catheterizations to allow a child with spina bifida to remain in school); *Crawford v. Pittman*, 708 F.2d 1028, 1035 (5th Cir. 1983) (finding a school district's limitation on the duration of special education programs was invalid because “lack of funds . . . may not limit the availability of ‘appropriate’ educational services to handicapped children more severely than it does to normal or nonhandicapped children.”); *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371-72 (2d Cir. 2006) (finding a public school district was required to reimburse the parents of a special education for private school tuition after the school was unable to provide the student with a small class size as outlined in his IEP); *Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996) (finding a public health department was required to reimburse parents for in-home therapy services for a child with autism after the department was unable to find a qualified therapist); *Malkentzos v. DeBuono*, 923 F. Supp 505, 517 (S.D.N.Y. 1996) (finding a public health department was required to reimburse parents for early intervention services after it was unable to provide appropriate services for a toddler diagnosed with autism).

113. Lee Hale, *Behind the Shortage of Special Ed Teachers: Long Hours, Crushing Paperwork*, NPR ED (Nov. 9, 2015), <https://www.npr.org/sections/ed/2015/11/09/436588372/behind-the-shortage-of-special-ed-teachers-long-hours-crushing-paperwork> [<https://perma.cc/YT8V-W57X>] (citing overwhelming paperwork, feelings of isolation, long hours, and students who demand extra attention as some of the unique issues that come with educating students with disabilities).

provide a FAPE for every child.¹¹⁴ The next Part will introduce some of the current realities that inhibit state and local educational agencies from consistently providing FAPEs.

C. The Realities of Educating Students with Disabilities

While the IDEA may paint a rosy picture of a nation in which all students with disabilities are provided with opportunities equal to those of their peers, the reality is much starker. Federal funding shortages and changes in the diagnoses of students with disabilities have left many school districts—particularly those in underserved communities—scrambling to comply with the IDEA.¹¹⁵

1. Shortage of Federal Funding

Although the federal government pledged to provide up to 40% of the costs of educating students with disabilities under the IDEA, actual federal funding has never come close to that number.¹¹⁶ Since the inception of the IDEA, the federal government has provided between 9% and 18%, less than half of what Congress originally promised.¹¹⁷ While lawmakers and organizations have repeatedly called on the federal government to rectify this shortfall, it has yet to do so.¹¹⁸

To make matters worse, the funding formula used in the IDEA may be flawed to begin with because it assumes that the costs of educating students with disabilities are lower than they actually are.¹¹⁹ When the IDEA was created, the drafters assumed that the cost of educating a student with disabilities would be about twice as much as the cost of educating a student without disabilities.¹²⁰ In reality, no one really knows how much it specifically costs to educate these students because spending varies widely depending on the type and severity of a child's disabilities and the services they require.¹²¹ Some scholars estimate that actual costs

114. NAT'L RSCH. COUNCIL, EDUCATING ONE AND ALL: STUDENTS WITH DISABILITIES AND STANDARDS-BASED REFORM 68 (Lorraine M. McDonnell et al. eds., 1997).

115. Michael Griffith, *Is the Federal Government Shortchanging Special Education Students?*, EDUC. COMM'N OF THE STATES EDNOTE BLOG (Sept. 4, 2018), <https://ednote.ecs.org/is-the-federal-government-short-changing-special-education-students/> [<https://perma.cc/V3XE-KDJV>].

116. Crystal Grant, *Covid-19's Impact on Students with Disabilities in Under-Resourced School Districts*, 48 FORDHAM URB. L.J. 127, 129 (2020).

117. NAT'L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF IDEA 21 (2018), https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf [<https://perma.cc/WG2D-QKKX>].

118. *Id.* at 31-32.

119. Blad, *supra* note 45.

120. *Id.*

121. Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the*

are closer to four times as much per pupil as the cost of educating students without disabilities receiving general educations.¹²² In some instances, the cost to educate one student with special education services could be close to \$200,000 per year.¹²³ Furthermore, because most states don't require local educational agencies to report detailed or itemized special education expenditures, it is difficult to know how much more federal funding is truly needed.¹²⁴ Without meaningful assistance from the federal government and a clear picture of how much special education services cost, states are left to foot a very expensive and unpredictable bill.¹²⁵

2. Demographic Changes Among Students With Disabilities

The 7.8 million students who receive special education services in the United States vary greatly, both in the severity of their disabilities and the services they require.¹²⁶ The IDEA covers students whose academics are impacted by at least one of thirteen types of disabilities: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability(ies), "multiple disabilities," orthopedic impairment(s), "other health impairment[s]," "specific learning disability[ies]," speech or language impairment(s), traumatic brain injury(ies), and visual impairment(s).¹²⁷ But within each individual category of disability, there is great variation.¹²⁸ A student experiencing autism who is nonverbal, for example, may require more intensive (and expensive) services than a student experiencing autism who is verbal.

This diversity has a significant impact on special education spending, particularly because the nation's special education population as a whole has changed with time.¹²⁹ In the past twenty years, the total number of students with disabilities has increased by 25%, requiring states to provide services to a larger pool of children than the states originally

Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?, 40 B.C.L. REV. 633, 634-35 (1999).

122. *Id.* See also Mark Lieberman, *Special Education is Getting More Expensive, Forcing Schools to Make Cuts Elsewhere*, EDUC. WEEK (Apr. 20, 2023), <https://www.edweek.org/leadership/special-education-is-getting-more-expensive-forcing-schools-to-make-cuts-elsewhere/2023/04> [<https://perma.cc/9B95-DW2C>] (estimating it can cost districts up to ten times as much to educate some students with specialized needs than students without).

123. Corbett, *supra* note 121, at 634.

124. Griffith, *supra* note 53, at 3.

125. *Id.*

126. NAT'L RSCH. COUNCIL, *supra* note 114, at 68.

127. 34 C.F.R. § 300.8 (2017).

128. NAT'L RSCH. COUNCIL, *supra* note 114, at 68.

129. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 33.

anticipated.¹³⁰ Today, students with disabilities make up about 15% of the total K-12 student population.¹³¹

And it's not just the total number of students with disabilities that has grown. There has been a shift in the makeup of the population as healthcare providers and public health officials have developed a better understanding of various disabilities.¹³² For instance, the percentage of special education students diagnosed with autism rose from just 1% in 1999 to 14% in 2014.¹³³ The percentages of students diagnosed with attention-deficit/hyperactivity disorder and intellectual disabilities are also on the rise.¹³⁴ These changes are financially overwhelming for states because these types of disabilities have a "larger expenditure ratio," meaning it is more expensive for states to provide services for students with those disabilities.¹³⁵

Over the last ten years, federal funding has not risen to meet the expenses required by this new ratio of students with disabilities or the increasing diversity in disability diagnoses. In fact, federal funding under the IDEA actually fell from 15% in 2016 to 13% in 2021¹³⁶—far short of the promised 40%. Without adequate assistance from the federal government, states must grapple to pay the rest of the costs on their own.¹³⁷

3. Disproportionate Impacts on Underserved Communities and Communities of Color

Finally, providing a FAPE to students with disabilities in underserved areas is becoming particularly difficult.¹³⁸ Even without accounting for disabilities, schools in underserved communities have fewer resources

130. *IDEA Full Funding: Why Should Congress Invest in Special Education?*, NAT'L CTR. FOR LEARNING DISABILITIES (2022) [hereinafter *IDEA Full Funding*], <https://ncl.org/news/policy-and-advocacy/idea-full-funding-why-should-congress-invest-in-special-education/> [<https://perma.cc/2XDN-3EHC>].

131. *Preprimary, Elementary, and Secondary Education: Students with Disabilities*, *supra* note 9.

132. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 34.

133. *Id.*

134. *Increase in Developmental Disabilities Among Children in the United States*, CTR. FOR DISEASE CONTROL (May 16, 2022), <https://www.cdc.gov/ncbddd/developmentaldisabilities/features/increase-in-developmental-disabilities.html> [<https://perma.cc/PL5N-JE6H>].

135. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 33.

136. The Advocacy Institute: IDEA Money Watch, *Federal Appropriations for IDEA Part B, Section 611 (Children ages 3–21)*, IDEA MONEY WATCH, <http://www.ideamoneywatch.com/docs/611AppropsHistory1987-2021.pdf> [<https://perma.cc/7NVS-D4JY>].

137. Griffith, *supra* note 53, at 3.

138. Raj, *supra* note 11, at 412.

than schools in wealthier communities.¹³⁹ Under-resourced schools often have less-qualified and less-experienced teachers, less access to high-quality curricula, larger class sizes, and lower levels of school expenditures.¹⁴⁰ These schools also serve greater numbers of students of color than wealthier schools.¹⁴¹

This gap in resources is particularly important because studies show students with disabilities are overrepresented in underserved communities with high levels of poverty.¹⁴² One possible reason for this disparity is that poverty is tied to risks related to delayed physical and cognitive development in children, including low birth weight and exposure to lead.¹⁴³ There is also evidence that students experiencing poverty are more likely to endure adverse childhood experiences, such as economic hardship, witnessing neighborhood violence, or living with someone who has an alcohol or drug problem.¹⁴⁴ Students who experience four or more such adverse child experiences are up to thirty-two times more likely to develop a learning disability than their peers.¹⁴⁵ Practically, this means that a large number of students in need of special education services across the country attend schools that are already under-resourced and underserved.¹⁴⁶

In addition, studies show that special education programs in underserved schools isolate students with disabilities from their non-disabled peers at a rate higher than programs in wealthier schools.¹⁴⁷ Data suggest that students with disabilities from low-income backgrounds are more than twice as likely to be separated from their non-disabled peers than their higher-income peers.¹⁴⁸ When students receiving special education services are segregated from their peers, they face greater stigma and worse educational outcomes.¹⁴⁹

139. *Id.* at 413.

140. *Id.*

141. Laura A. Schifter et al., *Students from Low-Income Families and Special Education*, THE CENTURY FOUND. (Jan. 17, 2019), <https://tcf.org/content/report/students-low-income-families-special-education/> [<https://perma.cc/P47Y-NDLG>].

142. *Id.*

143. NAT'L CTR. FOR LEARNING DISABILITIES, *SIGNIFICANT DISPROPORTIONALITY IN SPECIAL EDUCATION: CURRENT TRENDS AND ACTIONS FOR IMPACT 2* (2020), https://www.nclد.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf [<https://perma.cc/E9HS-2VCQ>].

144. *Id.*

145. *Id.*

146. Raj, *supra* note 11, at 412-13.

147. Schifter et al., *supra* note 141.

148. NAT'L CTR. FOR LEARNING DISABILITIES, *Significant Disproportionality in Special Education: The Role of Income, 2* (2020) https://www.nclد.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Low-Income-Students_FINAL.pdf [<https://perma.cc/9JCQ-4SV5>].

149. Schifter et al., *supra* note 141.

In sum, over the last few decades, education for many students with disabilities has been a far cry from the rosy picture painted by the IDEA—particularly for students from underserved backgrounds. By 2020, the federal government was already failing in its promise to provide a free appropriate public education for all students, unaware that a global crisis would soon upend the country's schools.

D. The COVID-19 Pandemic

In early 2020, the COVID-19 virus began to spread across the United States, forcing most public schools in the nation to move to remote instruction.¹⁵⁰ While this transition was difficult for all students, it had a particularly devastating effect on students with disabilities.¹⁵¹

Many students with disabilities require services that take place out of the classroom in small-group or one-on-one environments, such as occupational services, physical therapy, speech therapy, or occupational services.¹⁵² These services are difficult to provide virtually because they require equipment, specialized training, and a controlled environment.¹⁵³ A survey conducted by advocacy group ParentsTogether in May 2020 found that only 20% of parents surveyed reported that their children were receiving the services outlined in their IEP.¹⁵⁴ Alarming, 39% of parents surveyed reported that their children were not receiving any special education services at all.¹⁵⁵

Additionally, many special education services provide educational assistance to students with disabilities through tactile stimulation and in-person engagement.¹⁵⁶ This type of hands-on learning requires specific training on engaging students with touch and texture—training most parents do not receive and which they rely on special education professionals to provide.¹⁵⁷ This means that, even when students with disabilities had access to remote learning, the type of lessons and services

150. Grant, *supra* note 116, at 127. See also Kevin McElrath, *Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html> [<https://perma.cc/PZ5Y-UHDA>] (citing data showing nearly 93% of households with school-age children in the United States reported using some kind of remote instruction by August 2020).

151. Grant, *supra* note 116, at 128.

152. *Id.* at 131.

153. *Id.* at 132.

154. *Id.* at 137.

155. *Id.*

156. Kadian, *supra* note 10, at 563.

157. *Id.*

they were provided did not always align with their learning needs, making academic growth more difficult.¹⁵⁸

Pandemic learning was particularly hard for students receiving special education services in underserved communities.¹⁵⁹ Remote education requires access to reliable technology—such as computers, sufficient internet service, and functioning audio speakers—that many could not access.¹⁶⁰ In some states, test scores in high poverty school districts fell by twice as much as scores in wealthier school districts between 2019 and 2022.¹⁶¹ And data from 2022 now suggest that students with disabilities performed thirty-two points lower in math and forty points lower in reading than their peers without disabilities.¹⁶² With remote education, gaps in technology became gaps in achievement—widening disparities that had already existed in the best of times.¹⁶³

Now that the pandemic has ebbed and schools have returned to in-person learning, some local educational agencies are struggling to provide compensatory services to help students with disabilities catch up.¹⁶⁴ But these agencies are only obligated to make compensatory education available for students who qualify under the IDEA—creating a dire situation for students who are set to age out of IDEA protection.¹⁶⁵ The IDEA only provides special education services for students until age twenty-one, meaning many students who were in their late teens when the pandemic hit will soon find themselves without assistance.¹⁶⁶ The IDEA's

158. *Id.*

159. OFF. FOR C.R., U.S. DEP'T. OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS iv (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/MP8Z-TNC7>].

160. *Id.* at 1213.

161. *See, e.g.*, Patrick O'Donnell, *Pandemic Widened Ohio Achievement Gaps, Leaving 'Vulnerable' Students Further Behind*, THE 74 (Oct. 6, 2022), <https://www.the74million.org/article/pandemic-widened-ohio-achievement-gaps-leaving-vulnerable-students-further-behind/> [<https://perma.cc/PVG5-D9CT>].

162. Bob Cunningham, *What Schools Should Do About COVID's Chronic Impact on Special Ed Students*, THE 74 (Jan. 29, 2023), <https://www.the74million.org/article/what-schools-should-do-about-covids-chronic-impact-on-special-ed-students/> [<https://perma.cc/64VQ-TEPU>].

163. Megan Kuhfeld et al., *The Pandemic Has Had Devastating Impacts on Learning. What Will It Take to Help Students Catch Up?*, BROOKINGS (March 2022), <https://www.brookings.edu/articles/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/> [<https://perma.cc/68MH-NXV8>] (describing a 20% increase in the test score gap between low-poverty and high-poverty elementary schools in math and a 15% increase in reading).

164. Cory Turner & Rebecca Klein, *After Months of Special Education Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021), <https://www.npr.org/2021/06/16/994587239/after-months-of-special-education-turmoil-families-say-schools-owe-them> [<https://perma.cc/T38Y-CAZN>].

165. Evie Blad, *Older Students Face Time Crunch in Getting Crucial Special Education Services*, EDUC. WEEK (Oct. 14, 2022), <https://www.edweek.org/teaching-learning/older-students-face-time-crunch-in-getting-crucial-special-education-services/2022/10> [<https://perma.cc/M75H-VYV5>].

166. *Id.*

services are crucial for many students in this age group as the services often relate to independent living skills, such as balancing a checkbook, creating a college-course plan, or advocating for themselves in an employment setting.¹⁶⁷ Across the country, thousands of students are aging out of the IDEA without having received the educational experiences they need and were promised.¹⁶⁸

The pandemic exacerbated already-existing difficulties in many schools across the country, pushing our education system to its limits. And although the rate of COVID-19 infections across the country has dropped, schools are still struggling to return to some semblance of normalcy—particularly as it relates to teaching staff.

E. The Teacher Shortage

The pandemic was difficult not only for students, but for teachers as well.¹⁶⁹ Low pay, burnout, and political interventions have all combined to produce a mass exodus of teachers from public schools.¹⁷⁰ While there is no nationwide data source showing how many teacher positions remain unfilled, researchers conservatively estimate that there are more than 36,000 vacancies across the country.¹⁷¹ Federal data suggest that, as of October 2022, close to 45% of public schools had at least one teacher vacancy after the school year began.¹⁷² In 2022, school districts responded to the teacher shortage by increasing class sizes and broadening definitions of “qualified” educators.¹⁷³

167. *Id.*

168. *Id.*

169. Kavitha Cardoza, ‘We Need to Be Nurtured, Too’: Many Teachers Say They’re Reaching a Breaking Point, NPR (Apr. 19, 2021), <https://www.npr.org/2021/04/19/988211478/we-need-to-be-nurtured-too-many-teachers-say-theyre-reaching-a-breaking-point> [https://perma.cc/5EYR-RPTM].

170. Hannah Natanson, ‘Never Seen It This Bad’: America Faces Catastrophic Teacher Shortage, THE WASH. POST (Aug. 4, 2022), <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/> [https://perma.cc/WKK3-CDFV].

171. Tuan D. Nguyen et al., *Is There a National Teacher Shortage? A Systematic Examination of Reports of Teacher Shortages in the United States 1* (Annenberg Brown Univ., EdWorking Paper No. 22-631, 2022), <https://www.edworkingpapers.com/sites/default/files/ai22-631.pdf> [https://perma.cc/TSL9-MVDB].

172. Cory Turner, *What We Do (and Don’t) Know About Teacher Shortages, and What Can Be Done About Them*, NPR (March 22, 2023), <https://www.npr.org/2023/03/22/1160371732/teacher-shortages-mississippi-education-job-fair> [https://perma.cc/5XBX-M2R8].

173. Nguyen, *supra* note 171, at 1; see also Marianna McMurdock, *A ‘National Teacher Shortage’? New Research Reveals Vastly Different Realities Between States & Regions*, THE74 (Aug. 17, 2022), <https://www.the74million.org/article/new-research-thousands-of-full-time-teacher-jobs-open-in-localized-state-shortages/> [https://perma.cc/6KWT-PH37] (finding that about 5% of the teaching force nationwide is currently “underqualified” and teaching without certification or outside of their subject area).

The teacher shortage has profoundly impacted students with disabilities.¹⁷⁴ Even before the inception of the IDEA, there was a shortage of special education teachers.¹⁷⁵ But in 2022, there was a sharp uptick as forty-eight states reported a shortage of special education teachers to the federal government.¹⁷⁶ The shortage is particularly acute in high-poverty schools, where student absenteeism, sparse resources, and a lack of support combine to make an already difficult job even harder.¹⁷⁷

Schools across the country have responded to the general education teaching shortage by filling positions with underqualified or uncertified candidates.¹⁷⁸ But this isn't a viable option for the shortage of special education teachers.¹⁷⁹ The IDEA requires all special education teachers to be certified, noting that special education teachers must "have the content knowledge and skills to serve children with disabilities" and be "appropriately and adequately prepared and trained."¹⁸⁰ This requires state certification in special education and a passing grade on a state licensing exam,¹⁸¹ although schools can sometimes hire teachers who are in the process of obtaining their certification.¹⁸² On October 4, 2022, the U.S. Department of Education's Office of Special Education Programs reiterated this requirement—warning that special education positions may not be filled with unqualified teachers, even if schools are struggling to fill positions.¹⁸³

Additionally, the path to special education certification is generally longer, more difficult, and more expensive than the general education certification process—making the overall pool of available special education teachers smaller to begin with.¹⁸⁴ Moreover, fewer and fewer applicants are entering pipelines to become special education teachers,

174. Gaines, *supra* note 13.

175. Beth Hawkins, *Yes, There's a Shortage of Special Education Teachers. And That's Nothing New.*, THE 74 (Sept. 15, 2022), <https://www.the74million.org/article/yes-theres-a-shortage-of-special-education-teachers-that-s-thats-nothing-new/> [<https://perma.cc/FVZ6-VBY6>].

176. Gaines, *supra* note 13.

177. *Id.*

178. Moriah Balingit, *Wanted: Teachers: No Training Necessary.*, THE WASH. POST (Sept. 13, 2022), <https://www.washingtonpost.com/education/2022/09/13/teacher-requirements-shortage-jobs/> [<https://perma.cc/Y3SL-KNVP>].

179. Gaines, *supra* note 13.

180. 20 U.S.C. § 1412(a)(14).

181. Madeline Will, *States are Desperate for Special Ed. Teachers. But They Can't Cut Corners to Get Them*, EDUC. WEEK (Oct. 25, 2022), <https://www.edweek.org/teaching-learning/states-are-desperate-for-special-ed-teachers-but-they-cant-cut-corners-to-get-them/2022/10> [<https://perma.cc/JYA3-CDGZ>].

182. Gaines, *supra* note 13.

183. Memorandum from Valerie Williams, Off. of Special Educ. Programs, on Pers. Qualification under Part B of the IDEA to State Dirs. of Special Educ. (Oct. 4, 2022) [hereinafter Williams Memorandum], <https://sites.ed.gov/idea/files/OSEP-Memo-22-01-Personnel-Qualifications-under-IDEA-10-04-2022.pdf> [<https://perma.cc/7VBX-9RL5>].

184. Hawkins, *supra* note 175.

suggesting this problem will continue over the next several years and students with disabilities will continue to suffer.¹⁸⁵

It is important to highlight that state and local educational agencies are not relieved of their responsibilities to provide a FAPE under the IDEA when they are logistically or financially unable to provide special education services.¹⁸⁶ Courts have held, for example, that public school districts must pay to send students to a private placement if placement in a public program would be inappropriate.¹⁸⁷ The mandate to provide a free appropriate education and compensatory services remains in place even when schools are in financial crisis.

The convergence of the COVID-19 pandemic and the teacher shortage has left the special education system in chaos. Many students with disabilities were not provided with a FAPE during the pandemic and are legally entitled to compensatory education to make up for time and services lost. But at the same time, many school districts are understaffed and unable to provide the services that many students with disabilities require, particularly when it comes to providing qualified special education teachers. State and local educational agencies are struggling to meet their legal obligations under the IDEA, and with fewer special education teachers entering the job pool, it seems likely that this problem will continue to snowball. In the meantime, students with disabilities continue to miss out on services they desperately need.

III. DISCUSSION

The fact that schools across the country are struggling to provide special education services creates a national issue that should be addressed by the federal government. Congress must step up and provide states with financial assistance to address both the long-term issues in special education programming that pre-existed the pandemic, and the short-term issues that occurred due to school shutdowns and remote

185. Lisette Partelow, *What to Make of Declining Enrollment in Teacher Preparation Programs*, THE CTR. FOR AM. PROGRESS (Dec. 3, 2019), <https://www.americanprogress.org/article/make-declining-enrollment-teacher-preparation-programs/> [https://perma.cc/9GUW-P9H6] (citing a 14% decline in students completing preparation to become special education teachers between 2012-2018).

186. *See, e.g.*, *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 99 (D.D.C. 2002) (“Difficult financial constraints do not relieve the [local educational agency] from its statutory obligations.”) (quoting *Lampkin v. Dist. of Columbia*, 879 F. Supp. 2d (D.D.C. 1995)); *Hines v. Pitt Cty. Bd. of Educ.*, 497 F. Supp. 403, 408 (E.D.N.C. 1980) (holding a school district must provide special education services even when budget concerns make it difficult because the state chose to accept funds from the federal government under the IDEA); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (“The inadequacies of the [local] school system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than the normal child.”).

187. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985).

education. If the federal government doesn't address these issues quickly, students with disabilities will suffer profound and devastating long-term consequences.

A. Congress Must Fully Fund the IDEA

When it passed the IDEA, Congress made a promise to students with disabilities that they would receive access to meaningful and equal educational opportunities.¹⁸⁸ The IDEA was a national recognition of the potential of students with disabilities and a commitment to protecting their right to education.¹⁸⁹ But since the inception of the IDEA, the federal government has broken its promise.¹⁹⁰ Year after year, federal funding for the IDEA has fallen far below the 40% assistance outlined in the statute, leaving state and local educational agencies to bear most of the costs.¹⁹¹ This trend cannot continue.

While the federal government has already issued billions of dollars in American Rescue Plan funds to schools across the country during the pandemic,¹⁹² this is not a long-term solution to the funding issues that already existed before the pandemic. For one, many districts have found the short-term funding difficult to use because it will eventually expire.¹⁹³ It would not be practical to hire a cadre of new teachers, for example, if the school will not have the funds to keep them for longer than a year or two.¹⁹⁴ Instead, many districts chose to use American Rescue Plan funds to address immediate and pressing needs that were either unrelated or tangential to IDEA compliance, such as upgrades to ventilation and

188. Raj, *supra* note 11, at 414.

189. See 20 U.S.C. § 1400(c)(1) (“Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”).

190. NAT’L COUNCIL ON DISABILITY, *supra* note 117, at 9.

191. *Id.*

192. *Elementary and Secondary School Emergency Relief Fund*, DEP’T OF EDUC.: OFF. OF ELEMENTARY EDUC. (Oct. 20, 2022), <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/> [<https://perma.cc/NN6Q-9SKM>]. On March 11, 2021, in response to the COVID-19 pandemic, President Biden signed the American Rescue Plan and provided over \$8 billion to states and local school districts to help keep schools open, assist with mental health programs, and prevent learning loss. *FACT SHEET: How The American Rescue Plan is Keeping America’s Schools Open Safely, Combating Learning Loss, and Addressing Student Mental Health*, WHITE HOUSE (March 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-how-the-american-rescue-plan-is-keeping-americas-schools-open-safely-combating-learning-loss-and-addressing-student-mental-health/> [<https://perma.cc/F4M9-3SPH>].

193. Ben Chapman & Sara Randazzo, *Billions in School Covid-Relief Funds Remain Unspent*, WALL ST. J. (May 18, 2021), <https://www.wsj.com/articles/school-districts-are-struggling-to-spend-emergency-covid-19-funds-11652866201> [<https://perma.cc/3WCN-PK6M>].

194. *Id.*

technology systems, social and emotional supports for students, and short-term contracts with tutoring, nursing, and counseling staff.¹⁹⁵

While American Rescue Plan funds were certainly necessary and helpful in getting students and schools through the pandemic, data suggest that many state and local educational agencies immediately worried what would happen when these federal funds dried up.¹⁹⁶ And because the federal government has persistently and historically left local educational agencies underfunded, many school districts chose not to immediately spend the American Rescue Plan funds they were allotted—hoping to make what money they had last as long as possible.¹⁹⁷ Schools that did spend their American Rescue Plan funds are finding that the money is dwindling and will likely run out in two years.¹⁹⁸

To be sure, some school districts that held on to their American Rescue Plan funds are currently flush with cash. But this won't last long.¹⁹⁹ The federal government must take steps now to ensure that states have the support they need to invest in long-term solutions. Over the last few decades, the number of students qualifying for services under the IDEA has steadily increased, and these students are consistently being diagnosed with more severe—and more expensive—disabilities.²⁰⁰ Special education teachers have fled the profession in droves, leaving many students without a certified teacher to provide them with services.²⁰¹ The costs of educating students with disabilities are rising, while states are struggling to recover from the pandemic, provide compensatory education, and retain teachers. They can't do it alone.

The dismal state of special education services across the country is a national issue and the federal government must fulfill its promise to students with disabilities.²⁰² The federal government must provide funding at the 40% rate outlined in the statute—and it must do so consistently each year.²⁰³ This initiative already has some support in

195. *Id.*

196. Lauren Lumpkin & Sahana Jayaraman, *Schools Got \$122 Billion to Reopen Last Year. Most Has Not Been Used.*, THE WASH. POST (Oct. 24, 2022), <https://www.washingtonpost.com/education/2022/10/24/covid-spending-schools-students-achievement/> [<https://perma.cc/KK9G-3ZT6>].

197. *Id.*

198. Matt Barnum, *As Pandemic Aid Runs Out, America Is Set to Return to a Broken School Funding System*, CHALKBEAT (Aug. 25, 2022), <https://www.chalkbeat.org/2022/8/25/23318969/school-funding-inequality-child-poverty-covid-relief> [<https://perma.cc/8UEA-KE4Q>].

199. *Id.*

200. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 33.

201. Natanson, *supra* note 170.

202. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 9.

203. Sylvia Allegretto et al., *Public Education Funding in the U.S. Needs an Overhaul: How a Larger Federal Role Would Boost Equity and Shield Children from Disinvestment During Downturns*, ECON. POL'Y INST. (July 12, 2022), <https://www.epi.org/publication/public-education-funding-in-the-us->

Congress as multiple representatives and organizations have signaled their support and have taken steps to make full funding a reality.²⁰⁴ States should not be left wondering how much funding the federal government will cover and whether they will be left to foot the bill and cover the rising costs of special education services.

Consistent IDEA funding would provide states with more flexibility in education spending and would benefit all students, not just students with disabilities.²⁰⁵ Rising special education costs have forced states to divert an increasing proportion of their general funds to special education in order to remain in compliance with the IDEA.²⁰⁶ Increasing federal special education funding would help to cover some of those costs, leaving school districts with more funds to pay teachers and lower class sizes.²⁰⁷ Over time, the additional funding would make it easier for schools to recruit and retain qualified teachers and invest in high-quality educational services for both general and special education students.²⁰⁸

To address the short-term and long-term issues created by the pandemic and teacher shortage, Congress should require that states spend some of this increased federal funding on two mandatory initiatives for students with disabilities. First, Congress should temporarily extend the period of eligibility for the IDEA and require that states provide compensatory services to students with disabilities beyond age twenty-one. This is the only way to ensure that students with disabilities across the country who missed out on important services during the pandemic are given the compensatory education services they need and deserve. Second, Congress should require that states use some of their IDEA funds to create and maintain initiatives to attract, train, and retain highly qualified special education teachers. If states do not invest in these initiatives now, schools across the country will continue to lose these important staff members and many students with disabilities will continue to miss out on services for years to come.

Studies show that quality education is correlated with important

needs-an-overhaul/ [https://perma.cc/54QY-9227] (finding a more robust, stable, and consistent federal funding system for public education would have long-term economic benefits and provide schools with flexibility to withstand crises and downturns).

204. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 31 (describing the collaborative efforts of the IDEA Full Funding Coalition and the President's Commission); *see also* S.3213, 117th Cong. (2021) (bill introduced in the Senate by Senator Chris Van Hollen and thirty cosponsors); H.R. 5984, 117th Cong. (2021) (bill introduced in the House of Representatives by Representative Jared Huffman and 138 cosponsors).

205. Blad, *supra* note 45.

206. Kirk Schneidawind, *Fully Funding Special Education Will Help All Students*, MINNPOST (Apr. 20, 2022), <https://www.minnpost.com/community-voices/2022/04/fully-funding-special-education-will-help-all-students/> [https://perma.cc/3HD2-EGPS].

207. *Id.*

208. *IDEA Full Funding*, *supra* note 130.

individual life outcomes, such as better employment, more earnings, greater social-mobility, and improved physical and mental health.²⁰⁹ Benefits of quality education extend to society as well, including increased GDP growth, reduced healthcare costs, lowered social spending by government aid organizations, and improved social cohesion.²¹⁰ One group of economists and public policy scholars even found that “investments in children’s health and education provide the highest marginal return on every public dollar spent.”²¹¹ Put simply: investing in education—especially the education of our most vulnerable students—benefits everyone and is well worth the price. Accordingly, Congress must act now and fully fund the IDEA to provide students with disabilities the quality education it promised. If it doesn’t, it is not just the students who will lose out, but society as a whole.

*B. Congress Must Temporarily Extend the IDEA’s
Age of Eligibility and Require that States Spend
Federal Funds to Provide Compensatory Services for
Students Who Aged Out of the Program*

While the IDEA explicitly states that students are only eligible for special education services—including compensatory education—until age twenty-one,²¹² this period of eligibility can and should be extended. Thousands of older students with disabilities across the country continue to age out of the IDEA,²¹³ and due to the pandemic they missed out on important transitional programs and life-skills training.²¹⁴

Some federal courts have already ruled that extending eligibility beyond age twenty-one could count as a form of compensatory services under the IDEA,²¹⁵ and the U.S. Department of Education has already

209. Cecilia Mezzanotte, *The Social and Economic Rationale of Inclusive Education: An Overview of the Outcomes in Education for Diverse Groups of Students* 14 (Org. for Econ. Coop. & Dev., OECD Educ. Working Paper No. 263, 2022), [https://one.oecd.org/document/EDU/WKP\(2022\)1/en/pdf](https://one.oecd.org/document/EDU/WKP(2022)1/en/pdf) [<https://perma.cc/2C73-DJN4>].

210. *Id.*

211. An Open Letter from Economists and Public Policy Scholars in Support of Long-term Child Care Investments (Sept. 14, 2021), https://americanprogress.org/wp-content/uploads/sites/2/2021/09/Economist_childcareletter_2021_withSignatures.pdf [<https://perma.cc/A9NH-ZUZT>].

212. U.S. Dep’t of Educ., *supra* note 66.

213. Kalyn Belsha, *Thousands of Students with Disabilities Are Set to ‘Age Out’ of School. After a Pandemic Year, They May Get More Time to Prepare for What’s Next*, CHALKBEAT (May 12, 2021), <https://www.chalkbeat.org/2021/5/12/22430702/students-with-disabilities-age-out-extra-time-pandemic> [<https://perma.cc/WEH2-WCYF>].

214. *Id.*

215. *See, e.g.*, Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 660 (7th Cir. 1996) (finding compensatory education should be provided to a student with autism beyond the age of twenty-one where the student had been placed in an inadequate program

made it clear that states can extend the period of eligibility.²¹⁶ But this lackluster support is not enough. The pandemic affected education in every state, and Congress must mandate that each state temporarily extend the period of eligibility for special education services beyond age twenty-one so these students can receive the compensatory education they desperately need.

At the time of this writing, multiple states have already taken action on their own to extend services beyond age twenty-one.²¹⁷ New York, for example, has temporarily extended IDEA services to cover students until age twenty-three or until their services are completed—whichever comes first.²¹⁸ New Jersey extended services through the 2022-2023 school year for any student who received special education services in school years 2020-2021 or 2021-2022.²¹⁹ Pennsylvania allowed students who aged out of the program in the 2020-2021 school year to repeat their most recent grade.²²⁰ Illinois passed two separate bills—one allowing students who turned twenty-two during the pandemic to remain eligible for services until the end of the 2021-2022 school year, and one allowing students who missed a year or more of in-person special education services and then aged out of the IDEA to get an additional year of services.²²¹

While these states' efforts are admirable, the schooling of students with disabilities across the country cannot be provided in a piecemeal manner. Indeed, the IDEA is a federal guarantee that students with disabilities will

for two years); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186, 1192 (1st Cir. 1994) (finding two years of compensatory education should be granted to a student after age twenty-one; the district failed to provide him with a proper IEP for several years); *Lester H. v. Gilhool*, 916 F.2d 865, 86869 (3rd Cir. 1990) (finding over two years of compensatory education should be provided to a student over age twenty-one because his school district failed to place him in a proper program).

216. OFF. OF SPECIAL EDUC. & REHABILITATIVE SERVS., DEP'T OF EDUC., OSEP QA 21-06, RETURN TO SCHOOL ROADMAP: DEVELOPMENT AND IMPLEMENTATION OF INDIVIDUALIZED EDUCATION PROGRAMS (2021), https://sites.ed.gov/idea/idea-files/return-to-school-roadmap-development-and-implementation-of-ieps/#citem_1657-5316 [<https://perma.cc/7Y4U-QYPC>].

217. Belsha, *supra* note 213.

218. Nancy Cutler, 'Aging Out': *Special Education Students Get More Time to Make up Time Lost to Pandemic*, LOHUD (July 7, 2021, 6:18 AM), <https://www.lohud.com/story/news/coronavirus/2021/07/06/older-special-education-students-ny-covid-age-out-23/7871471002/> [<https://perma.cc/GN4P-ZXX8>].

219. *Governor Signs Bill Extending Special Education Benefits for 8,700 Students*, N.J. SCH. BDS. ASS'N (June 22, 2021), <https://www.njsba.org/news-publications/school-board-notes/june-22-2021-vol-xliv-no-49/governor-signs-bill-extending-special-education-benefits-for-8700-students/> [<https://perma.cc/UB4L-MX34>].

220. Neena Hagen, *Wolf Signs Law Extending Some Special Education Services, Allowing All Students to Repeat a Year*, CHALKBEAT PHILA. (July 6, 2021), <https://philadelphia.chalkbeat.org/2021/7/6/22565994/wolf-signs-law-extending-some-special-education-services-allowing-all-students-to-repeat-a-year> [<https://perma.cc/6TAB-ML7L>].

221. Peter Hancock, *Education Services Extended for Special Needs Students in Illinois*, THE STATE J.-REG. (July 29, 2021, 10:37 AM), <https://www.sj-r.com/story/news/politics/government/2021/07/29/illinois-law-extends-education-services-special-needs-students/5413577001/> [<https://perma.cc/DS7K-98BZ>].

receive a FAPE *regardless* of the state in which they reside.²²² Accordingly, Congress should temporarily extend the cut-off age for the IDEA—mandating that all states allow older students who missed out on services during the pandemic to receive those services before they age out.

To be clear, this Comment does not advocate for permanently extending the age of eligibility or for creating a new temporary cut-off age. It simply argues that the pandemic and virtual learning had a devastating impact on students with disabilities and it will take a little extra time for them to catch up. While schools certainly cannot be blamed for virtual learning or a global health crisis, students with disabilities should not be forced to bear the costs. If Congress temporarily extends the cut-off age, most students with disabilities will receive the services they missed in the pandemic within a few short years.

C. Congress Should Require States to Spend Federal Funds on New Initiatives to Attract, Train, and Retain Special Education Teachers

Congress must also ensure that federal funds are used to address the shortage of special education teachers across the country. The U.S. Department of Education has acknowledged that states are struggling to attract and retain teachers—including special education teachers.²²³ This is particularly true of schools in economically disadvantaged communities and schools with a high proportion of students of color.²²⁴ The road to special education certification is typically longer and more costly than that of general education certification.²²⁵ Data suggest that special education teachers burn out at a faster rate than general education teachers, often due to the burden of paperwork and challenges associated with providing education to students who struggle academically, emotionally, or behaviorally.²²⁶ The federal government has made it clear that states cannot fill these positions with just anyone.²²⁷ Special education teachers must be highly qualified and fully trained in providing

222. NAT'L COUNCIL ON DISABILITY, *supra* note 117, at 9.

223. *FACT SHEET: The U.S. Department of Education Announces Partnerships Across States, School Districts, and Colleges of Education to Meet Secretary Cardona's Call to Action to Address Teacher Shortage*, U.S. DEP'T OF EDUC., <https://www.ed.gov/coronavirus/factsheets/teacher-shortage> [<https://perma.cc/FL34-TJZ4>] (“Throughout the pandemic, many districts have faced significant challenges in attracting and retaining teachers . . .”).

224. Turner, *supra* note 172.

225. Hawkins, *supra* note 175.

226. Hale, *supra* note 113.

227. Williams Memorandum, *supra* note 183.

education to students with disabilities.²²⁸

Because of these unique issues, Congress should require that states use some of their federal funds under the IDEA to develop programs that will attract, train, and retain teachers who are dedicated solely to providing special education services.

Notably, some state and local educational agencies have already begun investing in new initiatives for special education teachers. In 2022, one district in Maryland offered teachers who were dual-certified in both general education and special education \$5,000 if they moved from a general education position to special education.²²⁹ In the same year, Hawaii started paying special education teachers \$10,000 more than general education teachers—drawing 300 new special education teachers and reducing its shortage by half since 2020.²³⁰ Some districts are offering to pay college tuition for candidates who seek to be certified in special education in exchange for a commitment to work in their district for five years.²³¹ Grow Your Own programs—programs in which teacher candidates are chosen from the local community—are also becoming increasingly popular, with at least twenty-five states investing in expanding such programming.²³²

The federal government itself has already provided states with a list of ideas that might help to attract and retain teachers, including: (1) using comprehensive preparation programs to increase teacher effectiveness and retention; (2) investing in Grow Your Own teacher apprenticeships to provide pathways for paraprofessionals and substitute teachers to gain teaching certifications; (3) prioritizing recruitment and hiring strategies; (4) improving retention strategies, including offering professional development programs, implementing more flexible scheduling, and building a team of high-quality substitute teachers; and (5) supporting educator and staff well-being through increased communication and educator mentoring.²³³ The U.S. Department of Education also authorized states to use American Rescue Plan funds to invest in these initiatives.²³⁴

But building quality programs and initiatives to attract, train, and retain highly qualified special education teachers will take time. Congress must assure states that the funds necessary to maintain these programs will not vanish in a year or two. It must consistently provide full funding under

228. 20 U.S.C. § 1412(a)(14).

229. Hawkins, *supra* note 175.

230. *Id.*

231. Gaines, *supra* note 13.

232. Turner, *supra* note 172.

233. U.S. DEP'T OF EDUC., ADDRESSING THE TEACHER SHORTAGE WITH AMERICAN RESCUE PLAN FUNDS, <https://www2.ed.gov/documents/coronavirus/teacher-shortage.pdf> [<https://perma.cc/V55Q-4VA4>].

234. *Id.*

the IDEA to ensure states have the resources to invest in special education teachers. Without this support, students with disabilities will continue to lose out on services they were promised.

IV. CONCLUSION

This country's special education system is at a turning point for students with disabilities. The whole system is in crisis and state and local educational agencies clearly need more help. Congress cannot wait to act. Every day, students with disabilities age out of IDEA services and are thrown into the real world unprepared.²³⁵ Every day, special education classrooms sit empty as schools struggle to find qualified teachers.²³⁶ And every day, our students with disabilities fall further behind.²³⁷ If Congress doesn't act now, then for years to come, students with disabilities will be denied the special education services they desperately need and deserve.

235. Belsha, *supra* note 213.

236. Gaines, *supra* note 13.

237. LAUREN STELITANO ET AL., CTR. FOR REINVENTING PUB. EDUC., HOW HAS THE PANDEMIC AFFECTED STUDENTS WITH DISABILITIES? AN UPDATE ON THE EVIDENCE: FALL 2022 4 (2022), https://crpe.org/wp-content/uploads/special-education-impact-brief_v3.pdf [https://perma.cc/UB84-NBPL] (describing an eight-point drop in average mathematics scores and a seven-point drop in reading scores for students with disabilities since 2020).