

2020

Special Education by Zip Code: Creating Equitable Child Find Policies

Crystal Grant
Duke Law School

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Crystal Grant, *Special Education by Zip Code: Creating Equitable Child Find Policies*, 52 Loy. U. Chi. L. J. 127 ().

Available at: <https://lawcommons.luc.edu/lucj/vol52/iss1/6>

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Special Education by Zip Code: Creating Equitable Child Find Policies

*Crystal Grant**

It is estimated that more than 1.3 million youth in the United States have a disability. One in four American adults have a disability that impacts major life activities. With disability rates this high, our nation must prioritize efforts to ensure that all children with disabilities and in need of special education are identified and receive the support they need in school. Congress, through the Individuals with Disabilities Education Act (IDEA), mandated that all public schools locate, identify and evaluate all students suspected of having a disability. The special education community refers to this affirmative duty as “child find.” Unfortunately, this mandate has not been taken seriously and has left many children without access to an education that will prepare them for higher education, the workforce, and independence after graduation. Both the federal government and state agencies have left local school districts to their own devices in determining how to identify students who may need an evaluation for special education. This results in disparate access to special education for students who live in poor and low-performing school districts, particularly students of color. This Article argues that the child find mandate, as implemented, is ineffective for many school districts. In addition to strengthening guidance directing schools on how to implement the child find mandate, I propose crafting regional solutions that will provide greater access to training, resources, and accountability to aid school districts in more equitable access to special education.

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* Crystal Grant, JD, MSW, directs and teaches in the Duke Children’s Law Clinic, a medical-legal partnership that provides legal services to children and their families. Previous drafts of this article were presented at the AALS Conference on Clinical Legal Education and the NYU Clinical Law Review Writers’ Workshop. I would like to thank Randy Hertz, Erika Wilson, Claire Raj, Nichole Tuchinda, Jonathan Romberg, Christina Brown, and Peggy Nicholson for comments on earlier drafts of this paper. I would also like to thank Arielle Hooks (Duke Law Class of 2021) for excellent research support.

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I. INTRODUCTION

In many school districts, the current “child find”¹ policies and practices leave the most vulnerable children with disabilities, from poor and low-performing school districts,² without the Individuals with Disabilities Education Act’s³ intended protections and supports.⁴ Each public school district should have explicit red flags that trigger their child find duty. These triggers are not consistent between school districts. Part I of this article is an introduction by way of case example to the way child find policies are applied inconsistently to students who live in different school districts or zip codes. Part II further outlines the disparities facing children suspected of having disabilities in poor and low-performing school districts. Part III examines the school funding structures that impact the availability of special education services for students with

1. Child find is the school district’s affirmative duty to enact policies and procedures aimed at locating, identifying and evaluating children who are in need of special education. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a) (2019).

2. Per the U.S. Department of Education, low performing schools are defined as schools in the bottom 10% of performance in the state, or who have significant achievement gaps, based on student academic performance in reading/language arts and mathematics on the assessments required under the ESEA or graduation rates. *Race to the Top District Competition Draft—Definitions*, U.S. DEP’T EDUC., <https://www.ed.gov/race-top/district-competition/definitions> [<https://perma.cc/5FT5-MYFQ>] (last visited Aug. 18, 2020).

3. The Individuals with Disabilities Education Act (IDEA) is a federal law that applies to all schools receiving federal funding. It governs the special education services and provides support to children with disabilities. These individualized services and supports enable students to have access to the general education curriculum and make meaningful progress toward their educational goals. See 20 U.S.C. § 1412(a) (listing the eligibility requirements for schools to receive a federal grant under IDEA).

4. 20 U.S.C. § 1400(d).

disabilities. Since funding and resources differ vastly between school districts, the ability to provide a student with appropriate services can influence referrals for evaluations. Part IV discusses the minimum child find requirements and highlights the autonomy afforded to school districts by the federal and local agencies tasked with implementing the IDEA. Part V of this article explores some of the causes fueling inequity in existing child find frameworks. Part VI proposes regional solutions for strengthening the child find mandate to extend its ability to locate and identify students who need special education regardless of where they live.

Parents, providers, and advocates have long encountered inconsistencies with the implementation of child find. The story of Zachary and Darren provides an example of the varying practices across school districts. Zachary and Darren⁵ are both middle school students who reside in Berrien County, Michigan.⁶ Aside from their race, Zachary is white and Darren is black, the two boys have a lot in common. They both receive mental health treatment from the local Community Mental Health agency in their county. Zachary and Darren have mood and conduct disorders and receive a combination of behavioral therapy and medication to address their symptoms. They share the same therapist. The boys have struggled in school by demonstrating aggressive and disruptive behaviors that interfere with their learning. They come from middle class families and have parents who are committed to their success. Zachary lives in St. Joseph and attends the St. Joseph Public School district, which serves almost entirely white, relatively affluent students.⁷ Darren lives in

5. The names of the students have been changed to protect the identities of the minors and maintain client confidentiality.

6. I previously worked as a special education attorney for Michigan Protection & Advocacy Service, Inc. (MPAS). MPAS is the protection and advocacy agency in Michigan. It is designated by the governor to advocate for the rights of persons with disabilities. *See generally* MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC., <https://drmich.org/> [<https://perma.cc/Z4G4-SGMV>] (last visited Aug. 19, 2020). During my time with MPAS, I represented children with disabilities in both individual and systemic cases across the state. I performed a significant amount of legal work in Berrien County, Michigan. Both Benton Harbor and St. Joseph are located in Berrien County.

7. The median family income in St. Joseph is \$90,450. The mean family income in St. Joseph is \$105,665. In Benton Harbor, the median family income is \$36,270 and the mean is \$44,740. *American Community Survey, 2012–2016 ACS 5-Year Data Profile*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2016/> (select “Nation” for geography type; then click “GET DATA PROFILE LINKS”; then select “Economic Characteristics”; then click “Customize Table” button; then click “Geographies” button; then select (1) “Unified School District” under Geography, (2) “Michigan” under Within (State), (3) “St. Joseph Public Schools, Michigan” and “Benton Harbor Area Schools, Michigan” under Michigan; then click “close”; then scroll down to “Families” under the INCOME AND BENEFITS dropdown) (providing five-year aggregate data on economic characteristics such as income, employment, and occupation in the St. Joseph Public School district and the Benton Harbor Area Schools district) (last visited Aug. 19, 2020).

Benton Harbor, just five minutes away, and attends the Benton Harbor Area Schools, which serve almost entirely black students, and are significantly less affluent with 33.7% of its individual residents below the federal poverty rate.⁸ The two cities are neighbors, earning them the title of the “Twin Cities.”⁹

Their therapist, who has both boys on his caseload, noticed a stark difference in the way the two school districts approached the educational challenges presented. In elementary school, when a teacher noticed Zachary’s disruptive behaviors, she immediately met with his parents and referred him for a special education evaluation to determine whether he qualified for services under the IDEA. Zachary underwent a battery of tests arranged by the school district within a relatively short period of time¹⁰ and received an individualized education program (IEP).¹¹ Per his IEP, Zachary receives school social work services,¹² a behavior

8. *American Community Survey, 2013–2017 ACS 5-Year Data Profile*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2017/> (select “Nation” for geography type; then click “GET DATA PROFILE LINKS”; then select “Economic Characteristics”; then click “Customize Table” button; then click “Geographies” button; then select (1) “Unified School District” under Geography, (2) “Michigan” under Within(State), (3) “Benton Harbor Area Schools, Michigan” under Michigan; then click “close”; then scroll down to “Families” under the INCOME AND BENEFITS dropdown and “All Families, with related children of the householder under 18” under the PERCENTAGE OF FAMILIES AND PEOPLE WHOSE INCOME IN THE PAST 12 MONTHS IS BELOW THE POVERY LEVEL dropdown) (last visited Aug. 19, 2020) (providing five-year aggregate data on economic characteristics such as income, employment, and occupation in the Benton Harbor Area Schools district) (last visited Aug. 19, 2020); *id.* (select “Nation” for geography type; then click “Get Data Profile”; then select “Demographic Characteristics”; then click “Customize Table” button; then click “Geographies” button; then select (1) “Unified School District” under Geography, (2) “Michigan” under Within(State), (3) “St. Joseph Public Schools, Michigan” and “Benton Harbor Area Schools, Michigan” under Michigan; then click “close”; then scroll down to “RACE” dropdown) (last visited Aug. 19, 2020) (providing five-year aggregate data on demographic characteristics such as sex and age, race, Hispanic origin, and housing units in the Benton Harbor Area Schools district) (last visited Aug. 19, 2020).

9. Mercedes Mejia, *Bridging the Gap Between Benton Harbor and St. Joseph*, MICHIGAN RADIO (Nov. 17, 2011), <https://www.michiganradio.org/post/bridging-gap-between-benton-harbor-and-st-joseph> [<https://perma.cc/HH8D-CXLX>].

10. In Michigan, upon receiving a written request for an initial evaluation, a public agency is required to provide a parent with written notice and request consent to evaluation within ten school days. MICH. ADMIN. CODE. r. 340.1721 (2020). If the school and parent agree to evaluate, the initial evaluation must be conducted within 30 school days. MICH. ADMIN. CODE. r. 340.1721b(1) (2020).

11. An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting. It includes “[a] statement of the child’s present levels of academic achievement and functional performance”; “[a] statement of measurable annual goals, including academic and functional goals designed to—(A) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and (B) meet each of the child’s other educational needs that result from the child’s disability” 34 C.F.R. § 300.320(a)(1)-(2) (2019).

12. “Social work services in schools includes –

(i) Preparing a social or developmental history on a child with a disability;

intervention plan, and goals aimed at developing the skills needed to address his behavior. A member of his IEP team suggested that he seek additional services outside of the school system to deal with the emerging pressures of adolescence. The school welcomes Zachary's therapist to attend and contribute to annual IEP meetings and the therapist collaborates with the school social worker who routinely collects data to review the effectiveness of the behavior intervention plan.

The therapist could not help but notice that, in contrast, Darren has made it to the seventh grade without his school district making any referral for additional school services. His parents, unaware of the potential appropriateness of special education, have struggled to find solutions that will keep him in school. They are frequently asked to pick him up from school for behavior that violates the school's code of conduct. In addition to the office referrals for behavior, his attendance records show an excessive number of absences attributed to both formal and informal suspensions. For years, teachers have made concerning comments about Darren's behavior on his report cards. Darren entered the juvenile court system when the police were called to break up an after-school fight that occurred on school property. Darren's probation officer and therapist observed serious mental health issues and made referrals to the school for special education. At first, the Benton Harbor school district refused to evaluate Darren. Following legal intervention on Darren's behalf, the district finally agreed to conduct evaluations which included the Behavior Assessment System for Children (BASC), a tool commonly used to evaluate behavior in children and young adults. Darren scored in the clinically significant range for hyperactivity, aggression, and anxiety.

Despite his scores, the school district felt that Darren's behavior was similar to his peers within the district and he failed to demonstrate a need for specialized instruction and related services, the standard for eligibility under the IDEA. Darren's parents challenged the school district's denial of eligibility by filing a state complaint and prevailing.¹³ The district's decision on eligibility was not supported by data. The district's own

-
- (ii) Group and individual counseling with the child and family;
 - (iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;
 - (iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and
 - (v) Assisting in developing positive behavioral intervention strategies."

34 C.F.R. § 300.34(c)(14) (2019).

13. A state complaint is a mechanism for resolving disputes under the IDEA. Each state education agency must adopt written procedures for resolving any complaint, including a complaint filed by an organization or individual from another state that meets the requirements of the Act. 34 C.F.R. § 300.151 (2019).

evaluation and student observations pointed toward a finding that Darren needed services. After years of struggling with disability-related behavior in school, Darren finally received an IEP toward the end of middle school. His parents regretted not pursuing special education years before. They wished that someone had explained the eligibility process to them long before middle school.

Like Darren's parents, I wondered whether the differences in the two district's pre-evaluation procedures were credited to race, socioeconomic status, the district's finances, or something else.

The school districts in Benton Harbor and St. Joseph implement the child find mandate differently. These variances in implementing federal law play out in many neighboring districts across the United States. By examining this case example in relation to existing child find practices and influencing factors, we can consider solutions that will improve implementation of the child find mandate and provide greater access to special education for all children with disabilities.

II. ZIP CODE DISPARITIES

The IDEA's child find mandate, to the extent that it provides some minimal (though insufficient) requirements, is not implemented consistently in all school districts. Comparing child find across school districts requires an examination of relevant factors that have an impact on school policies and practices. The literature and jurisprudence on school equity reveal that school segregation and school financing play an important role in the disparities faced in neighboring school districts and impact students like Zachary and Darren every day.¹⁴ Despite *Brown v. Board of Education's* proclamation that school segregation was unconstitutional, subsequent court rulings did little to enforce *Brown* by failing to allow desegregation efforts in neighboring school districts.¹⁵ Poor and low-performing school districts have less resources than white

14. See generally JAMES E. RYAN, *FIVE MILES AWAY A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 1 (1st ed. 2010).

15. See *Brown v. Bd. of Educ. of Topeka.*, 347 U.S. 483, 495 (1954) (holding that schools for black children were inherently unequal). *Brown* overruled *Plessy v. Ferguson*, a Supreme Court case that upheld racial segregation and "Jim crow" laws under the separate but equal doctrine. *Id.* (referencing *Plessy v. Ferguson*, 163 U. S. 537, 548 (1896) (stating it was the opinion of the court that "the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment . . .")); see also *id.* at 483 (The "separate but equal" doctrine adopted in *Plessy*, 163 U.S. 537, has no place in the field of public education.).

middle-class districts.¹⁶ These resources include more revenue from local taxes, experienced and motivated teachers, students with access to adequate healthcare, and parents who are equipped with the knowledge and time to advocate for their children. Benton Harbor and St. Joseph, Michigan are examples of two neighboring school districts where racial and economic segregation result in disparate outcomes for children with disabilities.¹⁷ This section examines the differences between the St. Joseph and Benton Harbor communities and similar school districts that share a border.

A. *The Benton Harbor and St. Joseph Example*

Despite separation by a river and a mere five-minute drive, the Twin Cities could not be more different in their demographics and school systems. The two districts share the eighth-most segregating school district border in the United States.¹⁸ The differences in their child find practices must be considered within the overall context of their educational, political, and socioeconomic landscapes. In 2019, Michigan's governor, Gretchen Whitmer, proposed closing Benton Harbor's sole high school to address the district's \$18 million debt and dismal academic performance.¹⁹ The high school's graduation rate was 46.71% in the 2018–19 school year.²⁰ If adopted, the state's plan to close Benton Harbor High School would have transferred approximately 700

16. See generally Chris Duncombe, *Unequal Opportunities: Fewer Resources, Worse Outcomes for Students in Schools with Concentrated Poverty*, COMMONWEALTH INST. (Oct. 26, 2017), <https://www.thecommonwealthinstitute.org/2017/10/26/unequal-opportunities-fewer-resources-worse-outcomes-for-students-in-schools-with-concentrated-poverty/> [https://perma.cc/D3AM-MRVZ]; see also U.S. DEP'T OF EDUC. OFF. FOR C.R., 2013–2014 CIVIL RIGHTS DATA COLLECTION 6–7 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [https://perma.cc/FN2B-WPCR] (providing updates as of 2016 regarding unequal access to resources).

17. In 2018, the Michigan Department of Education has found Benton Harbor's special education program to be out of compliance for <four> years. Cassidy Williams, *State of Michigan Demands Change for Benton Harbor's Special Education Program*, WSBT 22 (Mar. 6, 2018), <https://wsbt.com/news/local/state-of-michigan-demands-change-for-benton-harbors-special-education-program> [https://perma.cc/2HGU-UUUZ].

18. EDBUILD, FAULT LINES, AMERICA'S MOST SEGREGATING SCHOOL DISTRICT BORDERS 12 (2020), <https://edbuild.org/content/fault-lines/full-report.pdf> [https://perma.cc/9JBL-KWYA].

19. Jennifer Chambers, *Whitmer Tells Benton Harbor That High School Must Close to Save District*, DETROIT NEWS (June 5, 2019, 10:38 PM), <https://www.detroitnews.com/story/news/local/michigan/2019/06/05/benton-harbor-high-school-closure/1355720001/> [https://perma.cc/K52M-Z675].

20. The state graduation rate was 81.41% for the 2018-19 school year. *Data Shows Benton Harbor High School Graduation Rate Plummeted in 2019*, 94.9 WSJM (Feb. 28, 2020), <https://www.wsjm.com/2020/02/28/data-shows-benton-harbor-high-school-graduation-rate-plummeted-in-2019/> [https://perma.cc/WV3E-G3BM] (comparing Benton Harbor High School's sharp decline from 75.64% in 2017–18 to the state's overall graduation rate, which has been increasing for the past three year).

high school students to neighboring school districts including St. Joseph.²¹

Child find policies do not exist in a vacuum. In an environment where schools are fighting to stay open and all students are arguably receiving an inferior education, it is difficult for some to prioritize the needs of students suspected of having a disability that requires special education. There are many factors that explain why a school district like St. Joseph is better positioned than Benton Harbor to implement an effective child find system. Race and resources are two of the primary factors. St. Joseph is a small affluent community with few black residents.²² St. Joseph brings in more local taxes than Benton Harbor, a larger city with primarily black residents.²³ The following chart provides a snapshot of the resources available to the two neighboring school districts.

21. Jennifer Chambers, *In Benton Harbor, a School Crisis with Racial Overtones*, DETROIT NEWS (June 10, 2019, 11:33 AM), <https://www.detroitnews.com/story/news/education/2019/06/10/benton-harbor-high-school-turmoil-racial-overtones/1269719001/> [https://perma.cc/D8WY-BQRU].

22. *QuickFacts: St. Joseph City, Michigan; Benton Harbor City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/stjosephcitymichigan,bentonharborcitymichigan/RHI225219> [https://perma.cc/9UUJ-QMW4] (last accessed July 5, 2018) (reporting that only 3.8% of the population of St. Joseph, Michigan was black or African American alone).

23. *Id.* (reporting that 85.6% of the population of Benton Harbor, Michigan was black or African American alone); see also Tolly Taylor, *Operation Education: Stats Show Big Economic Segregation Between Benton Harbor, St. Joseph*, WSBT 22 (Sept. 23, 2019) <https://wsbt.com/news/local/operation-education-two-local-school-districts-have-8th-most-economically-segregated-bo> [https://perma.cc/88QW-JQR4] (discussing how both school districts received almost the same amount of funding in 2017 despite St. Joseph's ability to raise about \$500 more per student through property taxes).

Table 1: St. Joseph vs. Benton Harbor Statistics

	St. Joseph	Benton Harbor
Number of students ²⁴	3,004	1,825
Percentage of students qualifying for free or reduced lunch ²⁵	31%	83%
General revenue per student ²⁶	\$9,700	\$14,740
Money spent per student on basic instructional programs ²⁷	\$5,263	\$4,181
Average teacher salary ²⁸	\$64,896	\$48,280

Despite receiving less general revenue per student, St. Joseph is able to spend more money on basic instructional programs—these are costs related to classroom instruction and exclude capital outlay. Higher spending is typically associated with improved student outcomes.²⁹ School finance reforms aimed at increased funding for underresourced school districts make a positive difference when the money is spent on reduced class sizes, hiring more teachers, and paying competitive salaries resulting in higher quality teachers.³⁰

Unfortunately, Benton Harbor must use some of its per-pupil funding to pay down debt instead of classroom instruction.³¹ The district’s \$18.0 million debt is attributed to overspending and

24. 2018–19 BULLETIN 1014, MICHIGAN PUBLIC SCHOOL DISTRICTS RANKED BY SELECTED FINANCIAL DATA 12 (2020) [hereinafter 2018–2019 BULLETIN], https://mdoe.state.mi.us/SAMSPublic/others/b1014_19Final.pdf [<https://perma.cc/6L4N-ESJP>].

25. *Free and Reduced-Price Lunch. Counts: Fall 2018 District Level Data*, CTR. FOR EDUC. PERFORMANCE & INFO., <https://www.mischooldata.org/Other2/DataFiles/StudentCounts/HistoricalFreeAndReducedLunchCounts.aspx> (select the XLS file under “District: Fall” for the 2018–2019 School Year) (last visited Aug. 19, 2020).

26. 2018–2019 BULLETIN, *supra* note 24, at 11.

27. *Id.*

28. Julie Mack, *Look Up Average 2017–18 Teacher Salary for any Michigan School District*, MLIVE (Apr. 8, 2019), <https://www.mlive.com/news/2019/04/look-up-average-2017-18-teacher-salary-for-any-michigan-school-district.html> [<https://perma.cc/9E83-2EUL>] (scroll down to “Average 2017–18 teacher salaries by school district”; then select “Berrien County”; then input either “St. Joseph Public Schools” or “Benton Harbor Area Schools”; then click “Search”).

29. BRUCE BAKER, *HOW MONEY MATTERS FOR SCHOOLS*, LEARNING POL’Y INST. 1 (2017), https://learningpolicyinstitute.org/sites/default/files/product/how-money-matters-brief.-files/How_Money_Matters_REPORT.pdf [<https://perma.cc/589A-UWQB>].

30. *Id.* at 5.

31. Ron French & Ted Roelofs, *Anguish in Benton Harbor as Years of Mistakes Lead to a School’s Likely Demise*, BRIDGE (June 6, 2019), <https://www.bridgemi.com/talent-education/anguish-benton-harbor-years-mistakes-lead-schools-likely-demise>. [<https://perma.cc/7GY2-5X7U>].

mismanagement.³² Benton Harbor has a larger population that is predominantly black with an average family income of \$35,863 per year. Teachers in Benton Harbor earn significantly less than their counterparts in St. Joseph. First-year teachers in Benton Harbor earn about \$28,000 per year, making it difficult to attract and retain quality and experienced teachers.³³ Studies confirm that families also bring important social resources to their school districts.³⁴ Social resources can be defined as advocacy for curricular changes, influence on personnel or budgetary decisions, fundraising efforts, and access to extracurricular activities that benefit all children.³⁵ Many parents in low-income communities not only lack the financial resources, but the social resources needed to improve outcomes for low-performing schools. Benton Harbor is the perfect example of a low-performing school district in a high-poverty neighborhood.³⁶ Research in the area of educational achievement shows that the lowest performing schools are often concentrated in the poorest neighborhoods and typically serve low-income and nonwhite families.³⁷ These low-performing schools, and high schools in particular, are known as “drop out factories” as their students have little expectation of graduating and being prepared for employment or postsecondary education.³⁸ Both Benton Harbor and St. Joseph receive special education support in the form of evaluations and related services from a regional educational agency, Berrien Regional Education Service Agency.³⁹ Nonetheless, child find referrals begin in the individual school buildings and more specifically, the classroom.

32. Tom Gantert, *Mismanagement, Incompetence Made Benton Harbor Schools A Financial Basket Case*, MICH. CA. CONFIDENTIAL (June 14, 2019), <https://www.michigancapitolconfidential.com/mismanagement-incompetence-made-benton-harbor-schools-a-financial-basket-case> [https://perma.cc/396P-A5B4].

33. French & Roelofs, *supra* note 31.

34. Kendra Bischoff & Ann Owens, *The Segregation of Opportunity: Social and Financial Resources in the Educational Contexts of Lower and Higher-Income Children, 1990–2004*, 56 DEMOGRAPHY 1635, 1638–40 (2019).

35. *Id.* at 1639–40.

36. *Race to the Top District Competition Draft—Definitions*, *supra* note 2.

37. SUSANNA LOEB, CONTINUED SUPPORT FOR IMPROVING THE LOWEST PERFORMING SCHOOLS, in 2 EVIDENCE SPEAKS REPS. (2017), https://www.brookings.edu/wp-content/uploads/2017/02/es_20170209_loeb_evidence_speaks.pdf [https://perma.cc/MV9L-7RRL].

38. LYND SAY M. PINKUS, ALL. FOR EXCELLENT EDUC., ACTION REQUIRED: ADDRESSING THE NATION’S LOWEST PERFORMING HIGH SCHOOLS 1 (2009), <https://all4ed.org/wp-content/uploads/2009/05/ActionRequired.pdf> [https://perma.cc/VKZ2-69HC].

39. *What is a RESA?*, BERRIEN RESA, https://berrienresa.org/about_us/what_is_a_resa [https://perma.cc/6UKY-UZQ2] (last accessed Aug. 3, 2020). https://berrienresa.org/about_us/what_is_a_resa

B. Zip Code Disparities Across the United States

School districts across the United States, even those in neighboring towns, provide starkly different levels of services to their disabled students because of the cultural and socioeconomic makeups of their populations. This article argues that child find triggers and the criteria for evaluation should not vary between school districts. Disability laws provide an objective and measurable standard that can be applied to all children.⁴⁰ For example, the IDEA provides that a child qualifies as having a specific learning disability if the child does not achieve adequately for the child's age or fails to meet state-approved grade-level standards and fails to respond to intervention or exhibits a pattern of strengths and weaknesses in performance.⁴¹ A child who is behind grade-level standards should be referred for an evaluation. Accordingly, state and local governments should play a greater role in distributing resources in way that will achieve more equitable outcomes for students with disabilities—regardless of their zip code. The following chart highlights the ten most-segregated school district borders in the United States.

40. Under the IDEA, to qualify as a student with a disability, the student must: (1) meet the definition of one or more of the categories of disabilities, which include intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and (2) need special education and related services as a result of his disability or disabilities. 34 C.F.R. § 300.8(a)(1) (2019). Each state has policies that outline eligibility in greater detail.

41. 34 C.F.R. § 300.309(a)(1), (2)(ii) (2019).

Table 2: The Ten Most-Segregated School District Borders in the United States⁴²

Rank	State	High Poverty District	Poverty Rate	Number of Students	Median Household Income
		Low Poverty District			
1	NY	Rochester City SD	47%	29,436	\$32,347
		Penfield Central SD	5%	4,581	\$80,926
2	Ohio	Youngstown City SD	47%	5,088	\$26,892
		Canfield Local SD	6%	2,662	\$75,234
3	Ohio	Youngstown City SD	47%	5,088	\$26,892
		Poland Local SD	7%	1,925	\$75,943
4	Miss.	Claiborne County SD	55%	1,487	\$24,601
		Hinds County SD	14%	6,004	\$57,868
5	Mich.	Detroit City SD	45%	45,455	\$27,829
		Grosse Pointe Public Schools	6%	7,931	\$98,063
6	NY	Rochester City SD	47%	29,436	\$32,347
		Brighton Central SD	8%	3,628	\$76,205

42. EDBUILD, *supra* note 18, at 16 (2020); see also Cory Turner, *The 50 Most Segregating School Borders in America*, NPR ED (Aug. 23, 2016, 6:17 AM), <https://www.npr.org/sections/ed/2016/08/23/490513305/the-50-most-segregating-school-borders-in-america> [<https://perma.cc/D3NJ-7GEQ>] (detailing the poverty rates in the top 10 most segregated school districts).

7	NY	Rochester City SD	47%	29,436	\$32,347
		West Irondequoit Central SD	10%	3,597	\$63,626
8	Mich.	Benton Harbor Area Schools	45%	2,254	\$30,108
		St. Joseph Public Schools	8%	3,004	\$66,111
9	Penn.	Clairton City SD	40%	807	\$31,112
		West Jefferson Hills SD	5%	2,880	\$75,694
10	Miss.	Tunica County SD	47%	2,095	\$32,052
		DeSoto County SD	12%	33,537	\$62,595

School segregation, both by race and socioeconomic status, did not happen accidentally. It is the byproduct of racism and government-sanctioned discrimination that has not been adequately remedied in the United States.⁴³ Historically, federal and local government policies reserved affordable and quality housing for white middle-class families.⁴⁴

Efforts to remediate the effects of housing discrimination have been abandoned.⁴⁵ Many court-ordered desegregation plans from the civil

43. See Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 71–72 (2001) (discussing the institutions that perpetuate systemic housing discrimination and maintain the “racist status quo”).

44. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 17–35 (2017). Following *Brown v. Board of Education*, the Housing and Home Finance Agency declined to apply the decision to housing. *Id.* at 85–86. The Eisenhower administration refused to implement policies requiring African Americans and whites to receive public housing of equal quality. *Id.* at 33–34. “Public housing authorities not only continued to choose segregated sites for new developments but made efforts to segregate existing projects where integration might have been tolerated.” *Id.* at 34. Local and federal officials promoted zoning ordinances that encouraged racial segregation. *Id.* at 46–47.

45. The Department of Housing and Urban Development failed to implement effective policies that would affirmatively further fair housing. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM),

rights movement have expired, contributing to the rise of racial and economic segregation in American schools. The implementation of remedial schemes to achieve desegregation moved at a slow pace, and when it did occur, it resulted in undesirable consequences that led to a backlash from wealthier, whiter communities. Many residential communities remain segregated today. Consequently, it has been difficult to integrate the schools in many segregated communities. Courts declined ordering formal integration measures where there was no evidence that a school district deliberately enacted policies supporting segregation.⁴⁶ In 1974, the U.S. Supreme Court voted 5–4 in *Milliken v. Bradley* to overturn an order requiring a desegregation plan that included busing students across school district lines of Detroit, Michigan, and its wealthier, whiter suburbs. Unsurprisingly, the decision in *Milliken* made it difficult to include suburban districts in a desegregation plan. *Milliken* allowed desegregation plans to be avoided and undermined by white families who wanted to avoid integration.⁴⁷ Federal and local housing policies supported this white flight.⁴⁸

Racially segregated school districts continue to exist all over the country. Southern school districts in particular have experienced a reemergence in segregation after making significant strides toward integration.⁴⁹ Two explanations for the new segregation include Supreme Court decisions deemphasizing the obligation of schools to provide students with an integrated education, and localism⁵⁰ (i.e., the ideological commitment to local governance over education).⁵¹ In the context of school funding, localism gives deference to local school officials in their school financing schemes, which may result in gross disparities in per-

<https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/ZB9S-2R6Y>].

46. See generally *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that a federal district court's multi-district, area-wide remedy for a single-district segregation problem was unconstitutional where there was no evidence of the single-district's racially discriminatory acts resulting in a direct and significant interdistrict segregative effect).

47. Sarah J. Reber, *Court-Ordered Desegregation: Successes and Failures Integrating American Schools since Brown versus Board of Education*, 40 J. HUM. RES. 559, 561 (2005).

48. See ROTHSTEIN, *supra* note 44, at 93–99. The Federal Housing Administration (FHA) claimed that including African Americans in white neighborhoods would cause the value of white-owned properties to decline. *Id.* at 93. The evidence showed the opposite. *Id.* at 94. African Americans were willing to pay more than whites for similar housing, so property values increased more than they declined. *Id.* Property values did decline when real estate agents engaged in blockbusting. *Id.* at 95.

49. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 141 (2016).

50. *Id.* at 157.

51. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000).

pupil funding between school districts.⁵² One scholarly analysis suggests that there is strong public opposition toward equality in public school funding even if the proposed reforms do not harm the economic self-interests of taxpayers or affluent school districts.⁵³ The issues of race and poverty in schools are complex and undeniably intertwined.⁵⁴ Education scholar James Ryan also argues that classism is more of a concern than racial segregation in schools.⁵⁵ The classism analysis is deceiving as it emphasizes socioeconomics over race when accounting for differences in neighborhood resources. However, given the historical discrimination in housing which begets wealth and access to educational resources, we cannot divorce race and wealth.

Parents who are unhappy with their traditional neighborhood schools have turned to charter schools as an alternative with the expectation of a higher quality education. Charter schools are known for their innovation in learning and are still required to follow federal laws regarding students with disabilities and other civil rights protections.⁵⁶ Unfortunately, years after the charter school movement has taken off, it appears that they may further segregate students based on race.⁵⁷ Charter schools also tend to be less accommodating to students with disabilities.⁵⁸ There is little oversight and transparency when it comes to funding charter schools.⁵⁹ Private companies are providing a public service and it is often up to the consumer to notice and report violations. Despite their strengths, charter schools are more segregated by race and class than traditional public schools.⁶⁰ There is no evidence that charter schools do a better job finding

52. Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 628 (2011) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40–41 (1973) as an example of a Supreme Court decision to uphold local property tax school funding schemes despite gross disparate effects on funding between school districts).

53. Douglas S. Reed, *Not in My Schoolyard: Localism and Public Opposition to Funding Schools Equally*, 82 SOC. SCI. Q. 34, 38 (2001).

54. See generally Russell J. Skiba et al., *Unproven Links: Can Poverty Explain Ethnic Disproportionality in Special Education?*, 39 J. SPECIAL EDUC. 130, 131 (2005) (explaining that poverty and educational opportunities are linked).

55. See RYAN, *supra* note 14, at 185 (arguing that school choice can help balance the effects of socioeconomic segregation in schools).

56. See generally Jessica Schneider, *What Rights Do Students Have in the Charter School Era?*, 19 CHILD. RTS. LITIG. 1 (2017) (explaining charter schools and school choice generally).

57. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 403–05 (2008).

58. See generally Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 UDC/DCSL L. REV. 145 (2007).

59. See generally Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37 (2012).

60. See generally Leighann Smith Rosenberg & Sanessa Griffiths, *Charter Schools: Innovation for Free or at What Cost?*, 22 TYL 6 (2017).

students with disabilities and serving them.

Despite all of the educational reforms aimed at leveling the playing field, there is no fundamental right to education for every child in this country.⁶¹ Nonetheless, the Supreme Court has recognized that equal access to education must be protected because it is vital to a person's ability to function in our society. In *Plyler v. Doe*, a case addressing the educational rights of undocumented children, the Court opined:

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all [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.⁶²

Even though we have adopted public education for all as an American ideal, government funding priorities have been illusory. In North Carolina, the state Supreme Court ruled that every child has the right to a "sound, basic education" under the state constitution.⁶³ In 1994, five school districts in poor communities joined individual families in a

61. The U.S. Supreme Court has declined to interpret the U.S. Constitution as providing an explicit right to education. Lawsuits attacking the school financing schemes that lead disparities in funding have failed. *See generally* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 3 (1973) (upholding local property tax school funding schemes despite gross disparate effects on per-pupil funding between school districts).

62. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). In *Plyler*, local school districts in Texas initially denied public school enrollment to children who were not legally admitted to the United States. *Id.* at 205. The districts began allowing undocumented students to attend but they were charged tuition. *Id.* at 206, n.2. The Supreme Court ruled that this practice, which was backed by the Texas legislature, violated the Equal Protection Clause, and failed to further a substantial state interest. *Id.* at 224–25, 230. Additionally, holding children responsible for the actions of their parents' actions "does not comport with fundamental conceptions of justice." *Id.* at 220.

63. *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997). The plaintiffs in this case were public school children, their guardians and school boards from poor counties in North Carolina. *Id.* at 252. The plaintiffs alleged that their rights to adequate educational opportunities were being denied by the state's failure to provide adequate resources. *Id.*

[A] "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 255 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) and *Pauley v. Kelly*, 255 S.E.2d 859, 877 (1979) (exemplifying the constitutional requirement to provide efficient schooling systems)).

lawsuit against the state of North Carolina.⁶⁴ They argued their school districts could not afford to provide students with a sound basic education that was equal to that of wealthier districts. The court held that North Carolina's funding system failed to provide adequate resources for the opportunity for a sound basic education. The *Leandro* case magnified the minimum standard of quality for education in the state of North Carolina by defining the elements of a sound basic education—an objective standard that many states still lack.⁶⁵ Unsurprisingly, the *Leandro* ruling has had little impact on education equity without a corresponding ruling that requires equitable funding.⁶⁶ Advocates in North Carolina have learned that the qualitative standard of education affirmative court rulings mean very little when the funding is missing. The absence of adequate funding has very real consequences on the daily functioning of schools.

Across the United States, high-poverty schools continue to be staffed by less qualified and experienced teachers.⁶⁷ These schools also have a higher rate of teacher turnover.⁶⁸ High teacher turnover rates are costly to high poverty districts that are struggling to make ends meet.⁶⁹ They

64. See generally *Leandro*, 488 S.E.2d.

65. The *Leandro* court affirmed that “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” *Id.* at 254; N.C. CONST. art. I, § 15. “The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.” *Leandro*, 488 S.E.2d at 254.

66. See generally *Leandro v. State*, 468 S.E.2d 543 (N.C. Ct. App. 1996). In 2019, an expert report by WestEd was submitted to the presiding judge in *Leandro*. The WestEd report included findings and recommendations regarding education in the state of North Carolina. Some of the recommendations that will enable students to receive a sound, basic education include: revising the state funding model to provide adequate, efficient, and equitable resources; providing a qualified, well-prepared, and diverse teaching staff in every school; revising the student assessment system and school accountability system, and building an effective regional and statewide system of support for the improvement of low-performing and high-poverty schools. WestEd, Learning Policy Institute, & Friday Institute for Educational Innovation at North Carolina State University. *Sound Basic Education for All: An Action Plan for North Carolina*, WESTED (Jan. 31, 2020), <https://www.wested.org/wested-news/sound-basic-education-for-all-an-action-plan-for-north-carolina/#> [<https://perma.cc/63LM-3E86>].

67. SARAH ALMY & CHRISTINA THEOKAS, EDUC. TR., NOT PREPARED FOR CLASS: HIGH POVERTY SCHOOLS CONTINUE TO HAVE FEWER IN FIELD TEACHERS 1–2 (2010), <https://edtrust.org/wp-content/uploads/2013/10/Not-Prepared-for-Class.pdf> [<https://perma.cc/4DXW-3ABD>]. See also 2013–2014 CIVIL RIGHTS DATA COLLECTION, *supra* note 16, at 9 (indicating that black, Latino, and American Indian or Alaska Native students are more likely to attend schools with higher concentrations of inexperienced teachers).

68. DESIREE CARVER-THOMAS & LINDA DARLING-HAMMOND, LEARNING POL’Y INST., TEACHER TURNOVER: WHY IT MATTERS AND WHAT WE CAN DO ABOUT IT 3 (2017), <https://ahed.assembly.ca.gov/sites/ahed.assembly.ca.gov/files/hearings/6.%20Teacher%20Turnover%20BRIEF%20Sep%202017.pdf> [<https://perma.cc/3EAM-5A6J>].

69. See generally *id.* Total turnover rates are highest in the South (16.7%) and lowest in the Northeast (10.3%), where states tend to offer higher pay, support smaller class sizes, and make greater investments in education. *Id.* at 2. Teachers of mathematics, science, special education,

also lower student achievement.⁷⁰ Schools with a higher percentage of students of color have a hard time attracting and retaining quality principals.⁷¹ Litigation has not been a successful strategy in ending the disparities between neighboring school districts across the country. Instead, the disparities in resources continue to exist and segregate American schoolchildren based on race and socioeconomic status.

III. OVERVIEW OF SPECIAL EDUCATION FUNDING

During her campaign for president, Senator Elizabeth Warren, a former special education teacher, called on Congress to provide more funding for states to implement the IDEA.⁷² Poor and low-performing school districts bear the brunt of insufficient of IDEA funding. Like Darren in Benton Harbor, half of America's schoolchildren are enrolled in high-poverty school districts, often bordered by much more affluent neighbors.⁷³ Socioeconomic segregation is rising in America's schools, in part because of the structure of education funding.⁷⁴ By relying on locally raised property taxes to fund public schools, wealthier communities keep their resources away from the neediest schools.⁷⁵ Researchers assert that these practices created a system of school district borders that trap low-income children in high concentrations of poverty, while more privileged peers live in better-resourced communities, often in close proximity.⁷⁶ School income segregation leads children from low- and high-income families to experience disparities in school resources and contexts; these disparities may in turn lead to economic achievement and attainment gaps.⁷⁷ In studies exploring the correlation between special education identification

English language development, and foreign languages are more likely to leave their school or the profession than those in other fields. *Id.* at 3. These are teaching fields that experience shortages in most states across the country. *Id.* Turnover rates are 50% higher for teachers in Title I schools, which serve more low-income students. *Id.* Mathematics and science teacher turnover rates are nearly 70% greater in Title I schools than in non-Title I schools, and turnover rates for alternatively certified teachers are more than 80% higher. *Id.*

70. *Id.* at 1 (explaining that high turnover rates lowers student achievement).

71. Lorna O. Beckett, *Predictors of Urban Principal Turnover*, URB. EDUC. 1, 1 (2018).

72. See Elizabeth Warren, *Protecting the Rights and Equality of People with Disabilities*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/disability-rights-and-equality> [http://perma.cc/2T2J-YREB] (last visited June 14, 2020) (detailing Senator Warren's presidential campaign plans to better serve individuals with disabilities).

73. EDBUILD, DISMISSED: AMERICA'S MOST DIVISIVE SCHOOL DISTRICT BORDERS 6-7 (2019), <https://edbuild.org/content/dismisssed/edbuild-dismisssed-full-report-2019.pdf> [http://perma.cc/F7FA-8PQT].

74. *Id.* at 1-2.

75. *Id.*

76. *Id.*

77. Ann Owens, Sean Reardon, & Christopher Jencks, *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RSCH. J. 1159, 1161 (2016).

and race, school resources and community poverty are independent variables that must be considered.⁷⁸ Federal funding makes up a small percentage of overall elementary and secondary school funding. Instead, state and local funds are the primary sources of school funds.⁷⁹ Tax and funding differences lead to disparities in educational opportunities in property-poor and property-rich school districts.⁸⁰

A study examining the identification and placement of low-income students in special education in three states found that students from low-income families were more likely to be identified for special education than their non-low-income peers.⁸¹ This identification is likely to be appropriate given the fact that children in poverty have greater exposure to experiences associated with disability. Examples are lead exposure, low-birthweight, and malnutrition.⁸² Unfortunately, not all states and school districts accurately account for the fact that some communities will legitimately have much higher rates of special education students due to valid social factors. The National Center for Education Statistics (NCES) estimates that, nationally, between 8.3% and 13.7% of U.S. students have disabilities.⁸³ In 2004, Texas state officials put an 8.5% cap on the number of students that could be identified for special education. As a result of the arbitrary cap, thousands of students with disabilities were denied or pushed out of special education programs.⁸⁴ Teachers and administrators across the state delayed and denied eligibility to students in order to stay below the benchmark in an effort to save the state costs associated with providing special education services.⁸⁵ These practices, though a reality, are in direct contradiction with the intent of the IDEA.⁸⁶

78. See Reed, *supra* note 53 (discussing public opposition towards equality in public school funding).

79. Institute of Education Sciences, Digest of Education Studies 2010 260–61 (2011).

80. See generally SCOTT F. JOHNSON & SARAH E. REDFIELD, EDUCATION LAW: A PROBLEM-BASED APPROACH 1 (LexisNexis eds., 2nd ed. 2012). Property poor school districts do not get a significant amount of additional funding from property taxes. Kristin Blagg et al., *How do School Funding Formulas Work?* URB. INST. (Nov. 29, 2017), <https://apps.urban.org/features/funding-formulas/> [<https://perma.cc/EQX4-Y4FD>].

81. 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/?agreed=1> [<https://perma.cc/P83F-NEE4>].

82. *Id.* at 3.

83. Institute of Education Sciences, Digest of Education Studies 2017 110 (2019).

84. Brian Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children out of Special Education*, HOUS. CHRON. (Sept. 10, 2016), <https://www.houstonchronicle.com/denied/1/> [<https://perma.cc/9XEQ-KC7E>]; Institute of Education Sciences, *supra* note 83, at 114 (explaining trends in public school staff).

85. Rosenthal, *supra* note 84 (reporting the pattern of Texas school teachers and administrators in denying students' access to special education services).

86. *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 130–35 (5th Cir. 2018). The court

The U.S. Department of Education conducted an investigation and determined that the state failed to meet their child find obligations under the IDEA when they failed to identify all students with disabilities who needed special education.⁸⁷

Prior to the IDEA's predecessor, the Education for All Handicapped Children Act of 1975, public schools lacked the resources to address the educational needs of children with disabilities.⁸⁸ The primary purpose of the IDEA is to provide federal funding to the states to assist them in educating students with disabilities.⁸⁹

Approximately seven million children are served under the IDEA.⁹⁰ This is 14% of all public school students.⁹¹ The monies are funneled to

found that Texas's weighted-student model clearly violated the plain meaning of the "maintenance of state financial support" (MFS) clause of the Individuals with Disabilities Education Act (IDEA). The MFS clause prohibits a state from reducing the amount of state financial support made available for special education and related services below the amount for the previous fiscal year. Texas violated the MFS clause when it spent roughly \$33.3 million less for special education and related services in the fiscal year 2012 than it did during the fiscal year 2011. The court said that the funding model "creates a perverse incentive for a state to escape its financial obligations merely by minimizing the special education needs of its students." *Id.* at 135.

87. Aliyya Swaby, *Feds Say Texas Illegally Failed to Educate Students with Disabilities*, TEX. TRIB. (Jan. 11, 2018), https://www.texastribune.org/2018/01/11/federal-special-education-monitoring-report/?utm_source=articleshare&utm_medium=social [https://perma.cc/S4CB-EJ2B] (citing Texas Part B 2017 Monitoring Visit Letter).

88. 20 U.S.C. § 1400(c)(2)(D).

89. The purpose of the Individuals with Disabilities Education Act is:

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

to ensure that the rights of children with disabilities and parents of such children are protected; and

to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1400(d).

90. Institute of Education Statistics, *The Condition of Education 2019* xxxii (2019); Institute of Education Sciences, *Digest of Education Statistics 2016*, tbl. 204.30 (July 2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_204.30.asp [https://perma.cc/D8D8-LJHJ] (outlining data regarding children ages 3 to 21 years old served under IDEA).

91. *The Condition of Education 2019*, *supra* note 90, at xxxii (detailing how in 2017–2018 the number of students ages 3–21 who received special education services under the (IDEA) was 7.0 million).

the states through state formula grants and discretionary grants.⁹² Congress initially intended to cover up to 40% of the excess or “per-pupil” costs associated with students with disabilities who qualified under the Act. This is 40% of the average per-pupil expenditure in the United States multiplied by the number of special education students in the state. The promise was never to cover 40% of the actual cost of educating a student with a disability.⁹³ The cost of educating a student without a disability is lower than the actual costs of providing services for a student with a disability.⁹⁴

Covering the 40% promised by Congress has been referred to as “full funding” of the IDEA.⁹⁵ The IDEA has never been fully funded, and the consequences of that failure are far-reaching. The government is currently funding roughly 18% of the costs—less than 50% of the amount pledged.⁹⁶ It is important to note that the last comprehensive study of special education costs was conducted fifteen years ago and published in 2004.⁹⁷ The states experience varying degrees of the federal shortfall, and the excess costs of special education shift to the state and local school districts.⁹⁸ Federal aid is nominal compared to the state and local contributions toward educational spending. State revenue provides 47% of K–12 funding; local revenue accounts for 45%.⁹⁹ Consequently, local administrations pick up a hefty tab when the federal government cannot or will not adequately fund special education.

Increased funding has a direct impact on student achievement in low-

92. Part B includes provisions related to formula grants that assist states in providing a free appropriate public education in the least restrictive environment for children with disabilities ages three through twenty-one. 20 U.S.C. § 1411(a)(2)(B). Part C includes provisions related to formula grants that assist states in providing early intervention services for infants and toddlers birth through age two and their families. 20 U.S.C. § 1431.

93. Michael Griffith, *The Progress of Education Reform: A Look at Funding for Student with Disabilities*, 16 EDUC. COMM’N OF THE STATES 3 (March 2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf>.

94. *Id.*

95. KYRIE E. DRAGOO, CONG. RSCH. SERV., R44624, THE INDIVIDUAL WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PREMIER, 21–22 (Oct. 1, 2018), <https://crsreports.congress.gov/product/pdf/R/R44624> [<https://perma.cc/75ZB-NWK5>] (Oct. 01, 2018 (R44624 – Version 4)).

96. *NCD Statement on the 40th Anniversary of IDEA*, NAT’L COUNCIL FOR DISABILITY (Nov. 24, 2015), <https://ncd.gov/newsroom/2015/ncd-statement-40th-anniversary-idea>. [<https://perma.cc/78LQ-BM2Q>].

97. Thomas Parrish & Phil Esra, *The Special Education Expenditure Project (SEEP): Synthesis of Findings and Policy Implications*, INFORUM 11 (Apr. 2006), https://nasdse.org/docs/217_d5fd28bb-dd1f-4b11-abb5-cbdd9e7e1583.pdf [<https://perma.cc/5PCL-ZBWB>].

98. *IDEA Funding Gap*, NAT’L EDUC. ASS’N (Apr. 4, 2018), <https://www.nea.org/assets/docs/IDEA-Funding-Gap-FY2017-with-State-Table.pdf>. [<https://perma.cc/F6L2-788Z>].

99. *States Provide Nearly Half of School Funding*, CTR. ON BUDGET AND POL’Y PRIORITIES (June 2016), <https://www.cbpp.org/states-provide-nearly-half-of-school-funding-0> [<https://perma.cc/B5QN-ZRQD>].

income districts.¹⁰⁰ Not surprisingly, municipalities and school districts have become protective of their resources. In most cases, a student living in a poorly resourced district is restricted by geographic boundaries and precluded from enrolling in a school that adequately meets their needs. Desperate parents have faced criminal and civil penalties for enrolling their child in a school district in which neither the parent nor the child resides.¹⁰¹ In an exercise of local control, suburban school districts allow taxpayers to insulate a good education for the children in their communities while excluding others.¹⁰²

The financial stresses on general education funding¹⁰³ are mirrored if not amplified in special education programs. In many school districts, the need for special education is greater than the available resources. This problem is more pronounced in low-income districts where property taxes fail to make up the federal and state gaps in funding. The 8.5% cap on eligibility which resulted in the child find controversy uncovered in Texas is not unique or isolated. Due to the current financial structure of special education, struggling school districts have little incentive to “find” additional students with disabilities when they are already struggling to provide special education services to the students already identified. Once a student is determined to be eligible for special education, the school district is financially responsible for any programs or services that are necessary for the child to receive an appropriate education under the IDEA, regardless of cost.¹⁰⁴ While most states recognize that it is unwise and illegal to declare an 8% cap on the number of students who can be identified for special education, administrators and teachers are keenly aware of the financial deficit that comes with identifying more students than a district can afford to serve. In schools serving primarily students of color, principals feel they need more support to serve students with disabilities.¹⁰⁵ In addition to funding, the

100. Julien Lafortune, Jesse Rothstein, & Diane Whitmore Schanzenbach, *School Finance Reform and the Distribution of Student Achievement*, 5–6 (IRLE, Working Paper No. 100-16, 2016) <https://irle.berkeley.edu/files/2016/School-Finance-Reform-and-the-Distribution-of-Student-Achievement.pdf> [<https://perma.cc/2TMR-SEW8>]. See also Marta Elliott, *School Finance and Opportunities to Learn: Does Money Well Spent Enhance Students' Achievement?*, 71 SOC. OF EDUC. 223, 230–40 (1998) (examining the direct effect of school expenditures on student achievement in math and science).

101. LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 397–98 (2019).

102. *Id.* at 402.

103. See generally ALMY & THEOKAS, *supra* note 67.

104. *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984). Testimony established that the only free and appropriate public education for a 19-year-old student with a serious emotional disturbance was in a long-term treatment facility that cost \$88,000 as opposed to the \$55,000 per school chosen by the district's school board. *Id.*

105. Laura Stelitano, William R. Johnston, & Christopher J. Young, *Principals Could Use More*

lacking supports include district leadership support (i.e., information and guidance from district administrators), materials and tools (i.e., curricula, activities, technology, modified text), staff with specific expertise, and training.¹⁰⁶

In the introductory case example, Darren was ultimately found eligible for special education after legal advocacy was provided by a nonprofit. The special education process, especially when there are disagreements, can be difficult to navigate. Disagreements regarding identification, evaluation, programming, and placement are addressed using the IDEA's procedural safeguards.¹⁰⁷ However, it takes time and often requires specialized knowledge to exercise these important rights.¹⁰⁸ The poorest children seem to be disproportionately impacted by this convoluted and broken system.¹⁰⁹ Recent scholarship analyzes the disproportionate allocation of special education resources by race and class through the lens of cultural capital and stratification.¹¹⁰ In the special education context, cultural capital is defined as a parent's ability to effectively use

Support to Help Students with Disabilities—Especially in Schools Serving Mostly Students of Color, RAND CORP. (2020), https://www.rand.org/pubs/research_reports/RR2575z13.html. [<https://perma.cc/V99U-GJV4>].

106. *Id.*

107. Procedural safeguards are rights afforded to parents of children who have disabilities or are suspected of having disabilities under the IDEA. They include the right to examine records, the right to mediation, the right to an independent educational evaluation, the right to a state complaint, and the right to an administrative due process hearing before an impartial hearing officer. 20 U.S.C. § 1415.

108. *See generally* Samantha C. Pownall, *Education Delayed is Education Denied*, 63 N.Y. L. SCH. L. REV. 95 (2019). This piece highlights the delays and costs associated with obtaining independent educational evaluations under the IDEA and implementing relief ordered by independent hearing officers. *Id.* Even when they are successful in a due process hearing, students with disabilities experience further educational loss when educational agencies attempt to prolong hearings to moot placement issues. *Id.* Even when students receive compensatory services, it comes at great financial, emotional, and educational costs. *Id.*

109. *Id.* *See also* Ben Chapman, *NYC Denies Nearly 9,000 Kids with Disabilities the Services They Need*, N.Y. DAILY NEWS (Sept. 4, 2017), <http://www.nydailynews.com/new-york/education/nyc-denies-9-000-kids-disabilities-services-artice-1.3467241> [<https://perma.cc/6XAR-A838>] (documenting two school districts in New York). In District 9 in the Bronx, 856 students did not receive mandated services, compared to only 67 students in Manhattan's wealthier District 1. *Id.*; *see generally* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How the IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107 (2011).

110. *See generally* LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381 (2018). This article notes that white middle-class children are overrepresented among children receiving special education resources for autism. *Id.* This disability category, as opposed to intellectual disability and emotional disturbance, has been associated with more resources such as aides and therapy. *Id.*; *see also* Jon Hamilton, *Autism "Clusters" Linked to Parents' Education*, NPR (Jan. 6, 2010), <http://www.npr.org/templates/story/story.php?storyID=122256276> [<https://perma.cc/8LD4-CFJE>] (discussing the that a child's access to more resources by social class results in more diagnosis being present).

communication patterns, knowledge, behavioral strategies, and dispositions to successfully navigate the special education process and gain access to the benefits available for children with disabilities.¹¹¹ Stratification describes “the unequal distribution of people across social categories that are characterized by differential access to scarce resources.”¹¹² Using this analysis to account for the disproportionate allocation of special education resources, we can acknowledge how a system where white middle-class parents may have greater access to thorough private evaluations, may advocate for the “right” medical diagnosis, understand how to request special education evaluations, obtain training on the IDEA’s requirements, and have access to expert consultants and legal advocates will result in greater access to services and support for children with disabilities. Children with disabilities who live in more affluent suburban school districts will find that their school administrators and teachers can focus on their needs and not whether the school district can afford to provide services. White parents in affluent suburban districts are more likely to possess the cultural capital and stratification necessary to implement the IDEA and overcome any funding deficits if they exist.

Through regional focus groups and national forums, “parents reported that schools and districts have openly admitted that resources are limited, and therefore the school is unable to provide a comprehensive set of services and supports to the child.”¹¹³

IV. CHILD FIND REQUIREMENTS

This section describes the legal rights afforded to children suspected of having disabilities that require special education. The child find mandate and corresponding activities fall under the IDEA.¹¹⁴ The drafters of the IDEA set out to ensure that the states would not simply avoid the financial burden of serving disabled children with appropriate, individualized services by establishing the child find mandate.¹¹⁵

111. Clark, *supra* note 110, at 385 (discussing how cultural capital is important to successfully navigating the process).

112. DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM I* (Russell Sage Found. 2007).

113. NATIONAL COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA* 35–36 (2018) [hereinafter *BROKEN PROMISES*], https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf [<https://perma.cc/7E6C-59L2>].

114. 34 C.F.R. § 300.111 (2019).

115. 20 U.S.C. § 1412. The Child Find provision requires that states establish and implement policies to identify, locate, and evaluate children with disabilities who are in need of special education. 20 U.S.C. § 1412(a)(3). For the purposes of this article, we refer to the child find under the IDEA. However, section 504 of the Rehabilitation Act also has a child find requirement that closely mirrors the child find mandate and many other provisions of the IDEA.

The landmark cases of *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*¹¹⁶ and *Mills v. Board of Education*¹¹⁷ enjoined states from denying education to children with disabilities without due process. Education is considered “an important property interest by states because without it, a person may not succeed in life. Education is important for helping individuals with disabilities to live independently or semi-independently.”¹¹⁸ In *PARC*, filed on behalf of children with intellectual and developmental disabilities, the state of Pennsylvania was precluded from denying an education to children who had not reached a mental age of five years old by the time they enrolled in the first grade. The court affirmed that placement in a regular school is preferable to placement in a special school class or any other type of program of education and training.¹¹⁹ The court in *Mills* mandated that due process includes procedures relating to the labeling, placement, and exclusionary stages of decision-making for students with disabilities.¹²⁰ *Mills* emphasized the practice of suspending, expelling and excluding children with disabilities from school with the district defending their actions by citing the high costs of educating children with disabilities.¹²¹ In significant part, the special education laws we have today are a legislative response to the decisions in *PARC* and *Mills*.

Parents and other individuals enumerated in the IDEA may refer a child for a special education evaluation if they have the knowledge and assertiveness to ask affirmatively that their child be evaluated.¹²² However, under the IDEA’s child find obligation, schools must proactively initiate a referral for evaluation even if it is not requested by the parents. States have no choice but to establish and implement procedures aimed at finding public school children in need of special education and under the jurisdiction of state education agencies and the

116. *Pa. Ass’n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 279, 293, 302–03 (E.D. Pa. 1972) (noting that pursuant to a consent decree, the state of Pennsylvania and other defendants were enjoined from denying children with disabilities access to a free public education without due process).

117. *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 874–75 (D.D.C. 1972) (holding that the District of Columbia Board of Education violated controlling statutes and denied due process by refusing special education to children who had been labeling as behavior problems, mentally retarded, emotionally disturbed, or hyperactive).

118. LAURA F. ROTHSTEIN & SCOTT F. JOHNSON, *SPECIAL EDUCATION LAW* 14 (5th ed. 2014).

119. *Pa. Ass’n for Retarded Child.*, 343 F. Supp. at 302; 34 C.F.R. § 300.111 (2019); 20 U.S.C. § 1412.

120. *Mills*, 348 F. Supp. at 875, 879.

121. *Id.* at 875.

122. 20 U.S.C. § 1414(a)(1)(B). Though parents may and often do refer their children for special education by requesting that the school district conduct an evaluation, the statute and its implementing regulations place the duty squarely on the state and local school district. *See* 34 C.F.R. § 300.111.

local education agencies within those states. “In addition to this basic obligation, states must also have policies in place to ‘find’ all children with disabilities residing in the state, including children who are homeless, wards of the state, and children in private schools, and highly mobile children such as migrants.”¹²³ Though parents may and often do refer their children for special education by requesting that the school district conduct an evaluation, the statute and its implementing regulations place the duty squarely on the state and local school district.¹²⁴

State authorities and school districts almost certainly will give into the financial pressures brought on by underfunding without clear and explicit guidelines to follow for child find. These practices will be further compounded by the absence of data to assess practices and hold the system accountable.

A. Reasonable Suspicion

Parents tend to rely on school staff, as experts in the field of education, to determine if and when their child should undergo an evaluation for special education. Even when parents recognize that their child is struggling in school, many parents lack the specialized knowledge to connect their child’s educational challenges to the need for an evaluation for special education. Little research has been conducted to determine what parents know and understand about the special education referral process. Courts, in assessing a district’s compliance with its child find obligations, also give credence to school personnel because the controlling criteria require “expertise . . . in the need for special education and familiarity with the child in the school context.”¹²⁵ I argue that schools should have less discretion in determining when students should be evaluated for special education. Instead, we must create clear referral guidelines that should be followed for all students.

The child find obligation is an affirmative duty; however, it is not unqualified. School staff must at least have a reasonable basis to know that a particular student is suspected of having a disability. This suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.”¹²⁶ Consequently, courts have held that a reasonable

123. Yael Cannon et al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 429–30 (2013).

124. *Id.* at 429.

125. Perry A. Zirkel, “Child Find:” *The Lore v. The Law*, 307 W. ED. L.R. 574, 577 (2014).

126. *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d. 1307, 1311 (D. Utah 2002) (citing 20 U.S.C. § 1415(k)(8)(B)(i–iv) (2003)).

suspicion as to whether a child is suspected of having a disability is required to trigger a school district's child find duty. The failure of the district to engage in reasonable efforts to investigate children to determine if a reasonable suspicion of disability exists has rarely, however, been held to be noncompliant. Few child find cases are published and even fewer are decided in favor of the parents.¹²⁷ Reasonable suspicion as it relates to child find lacks a clear definition by legislation, regulation, and the courts. Instead, hearing officers and state educational agencies assess reasonable suspicion (or lack thereof) based on a number of factors, which they determine ultimately by the facts and circumstances in each instance. Courts have held that the child find duty arises when the local educational agency has reason to suspect that (1) the student has a disability, and (2) there is a resulting need for special education.¹²⁸ When there is no specific request or referral for evaluation, it is not clear how much evidence of disability school officials must observe before the duties to evaluate and classify are brought into effect.¹²⁹ This vagueness coupled with the deference afforded to school officials is precisely why two students in neighboring school districts can exhibit the same suspicious behaviors and not receive a uniform response that includes an evaluation for special education.

In regional focus groups and national forums, parents reported that districts have openly admitted that resources are limited and therefore the school is unable to provide a comprehensive set of services and supports to the child.¹³⁰ In one case a parent was told that an evaluation could not be done because the district could not pay for the evaluation(s) and they could not afford another teacher to pull the student out for services.¹³¹

Clay T. v. Walton County School District, a well-known child find case, stands for the general rule that school officials do not violate the child find mandate unless they overlook "clear signs" of disability and offer no rational justification for deciding not to evaluate.¹³² In *Clay T.*, an elementary student performed well in first and second grade. In the third grade, the student failed reading and had low marks in spelling and social studies. The court determined, based on testimony from teachers, that the decrease in the student's marks seemed more clearly linked to his choices, such as not turning in assignments, than to a diagnosis of a

127. See Perry A. Zirkel, *It's The Law: Child Find*, PRINCIPAL 50, 51 (2015), https://www.naesp.org/sites/default/files/Zirkel_SO15.pdf [<https://perma.cc/ZUH2-KQXW>] (concluding that rulings on child find are 2:1 in favor of school districts).

128. *Id.*

129. *Id.*

130. Rosenthal, *supra* note 84.

131. *Id.*

132. *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997).

disability. At the time, a private evaluation had ruled out a learning disability and Attention Deficit Disorder (ADD). The parents withdrew the student from the school district and placed him in a private school. The student was later retested and diagnosed with a “developmental reading disorder.”

The parents argued that the school district only offered an informal screening and did not refer him for an evaluation. The court found that the district’s periodic testing of all students and screening processes were adequate and satisfied the child find mandate. The parents could not show that the teachers were not trained properly and had ignored any clear signs of a learning disability or ADD. The decision implied that the student may have had an emotional disturbance, which is another potential basis for special education eligibility. However, the parents did not argue or request eligibility under this category, and the district did not voluntarily consider it.

It is striking that the court in *Clay T.* did not require the school district to initiate an analysis of whether the student would have qualified for special education based on his emotional disturbance, a circumstance as to which the school district seemingly had more than a reasonable suspicion. Again, the court placed the responsibility on the parent to be aware of the full range of available categories of eligibility, and to specifically request and provide evidence in support of each potential basis on which they seek to have the district evaluate the child. The court did not accept the idea that, at least once parents have requested that the district evaluate their child, the district is responsible not just for evaluating the specific basis for eligibility mentioned by the parents, but also other related bases that the district should reasonably have recognized as providing a reasonable basis for evaluation.¹³³ *Clay T.* demonstrates the lack of “teeth” in the child find mandate. After going through the time and of expense of a hearing, the parents, and the court, failed to consider the student’s eligibility under all suspected categories of disability.¹³⁴ One line in the *Clay T.* decision sums up the essence of child find jurisprudence:

Because a federal district court does not have the expertise or experience in the field of education presumably possessed by professional educators, and does not have the opportunity to observe a student’s classroom behavior over a period of months as his teachers

133. *Id.* at 824.

134. *Id.* Disability refers to a condition that meets the eligibility requirements under the IDEA and not the mere existence of a physical or mental impairment. This analysis appropriately places the burden on the school district but can lead to very circular reasoning. For to know whether a child has a disability as defined by IDEA, a comprehensive evaluation considering all areas of suspected disability is necessary.

do, the Court must grant much deference to the evaluations of Clay's teachers and the school officials.¹³⁵

In administrative hearings brought under the IDEA, the burden of proof is on the party seeking relief, which is typically the parents.¹³⁶ Very little, if anything, has changed in special education case law since *Clay T.* To convince a court that the school district erred in failing to evaluate a student for child find, a parent would need an expert who is able to overcome the deference given to school officials and teachers who are considered experts, armed with personal knowledge such as daily observations of the student and informal assessments.

A few jurisdictions properly hold districts to a high standard in satisfying the child find mandate. A federal court in Hawaii held that the school violated the child find provisions when it failed to evaluate the student despite reasons to suspect a disability.¹³⁷ In *Cari Rae*, the court determined there was a child find violation when the student had extensive absences (159 in one year), numerous behavior/disciplinary problems, and ranked near the bottom of her class (GPA below 1.5).¹³⁸ The judge determined that the school should have ordered an evaluation when, in the words of a teacher, she was “in danger of failing everything . . . at this time we realized there was a real problem.”¹³⁹ Even in *Cari Rae*, the court failed to articulate a bright line rule instructing schools to conduct formal evaluations for special education eligibility when certain objective criteria are observed by teachers and staff.

The legal analysis detailed in many child find cases gives school districts a roadmap for avoiding liability under the mandate. A Third Circuit case that has been frequently cited states, “Child Find does not demand that schools conduct a formal evaluation of every struggling student.”¹⁴⁰ In the Sixth Circuit, another decision provides that the standard in establishing whether a school district has failed to identify a student with a disability under child find is that the school district “overlooked clear signs of disability” and was “negligent in failing to order testing,” or “that there was no rational justification for not deciding to evaluate.”¹⁴¹ In *L.M.*, the judge went on to reason that it was not clear that the student needed special education before a certain date. However, in most cases, it is the process of evaluating a student for special education using the guidelines set forth in the IDEA that provides the

135. *Id.* at 823; MASSEY *supra* note 112.

136. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

137. Dept. of Educ. St. of Haw. v. Cari Rae S., 158 F. Supp. 2d 1190, 1195 (D.C. Haw. 2001).

138. *Id.*

139. *Id.*

140. K. ex rel. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012).

141. Bd. of Educ. of Fayette Cnty. v. L.M., 478 F.3d 307, 313–14 (6th Cir. 2007).

clarity to which the court refers.¹⁴² By using phrases such as “clear signs of disability” and “no relational justification for not deciding to evaluate,” some jurisdictions have created an unreasonably high legal standard making it almost impossible for a parent to successfully bring a child find claim against a school district. In general, courts appear to grant educators a significant amount of leeway, finding child find violations only in relatively extreme circumstances.¹⁴³ Hearing officers generally find that the school district has no responsibility to evaluate if the evidence of a potential learning disability can be plausibly attributed to another cause or is not necessarily atypical for the age group or if it does not appear to be having an effect on educational attainment.¹⁴⁴ This *wait and see* or *fail first* framework results in students who are left to struggle in school until someone puts forth an ironclad case that there is clear and convincing evidence to suspect a disability.

B. Response to Intervention

The response to intervention (RtI) model and the school policies that inappropriately rely on it are an additional barrier to timely child find referrals. RtI is a multi-tiered instructional framework and school wide approach used to “address[] the needs of all students, including struggling learners and students with disabilities.”¹⁴⁵ The phrase “response to intervention” does not appear in the IDEA; however, it is used under the IDEA to determine how a student responds to scientific and research-based interventions.¹⁴⁶

The term multi-tiered systems of support or MTSS is often used

142. *K. ex rel. D.K.*, 696 F.3d at 250 (“The IDEA requires that initial evaluations upon suspicion of a disability (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent . . . [;] (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2)(A)-(C); 34 C.F.R. § 300.304(b)(1)-(3). It further mandates, among other things, that evaluation materials be “used for purposes for which the assessments or measures are valid and reliable” and that children be “assessed in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(A)(iii), (B); 34 C.F.R. § 300.304(c)(1)(iii), (4).”).

143. Zirkel, *supra* note 127, at 51.

144. *See, e.g., K. ex rel. D.K.*, 696 F.3d at 251 (“The School District was not required to jump to the conclusion that D.K.’s misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years.”).

145. Memorandum from Melody Musgrave, Ed.D, Dir. of Off. of Special Educ. Programs to State Dirs. of Special Educ., *A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility Under the Individuals with Disabilities Education Act (IDEA)*, (Jan. 21, 2011) <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf> [<https://perma.cc/5F4A-Z7HU>].

146. 34 C.F.R. § 300.307(a)(2) (2019).

interchangeably with RtI but is broader in scope and defined as a “comprehensive continuum of evidence-based, systemic practices to support a rapid response to students’ needs, with regular observation to facilitate data-based instructional decision-making.”¹⁴⁷ MTSS involves three tiers of support for struggling students with each level providing more support. A comprehensive MTSS program not only uses problem-solving to address academic challenges but all issues that impact learning such as behavior, absences, and poverty-related concerns. While RtI focuses on identifying and addressing the causes of students struggling academically, MTSS potentially reaches the at-risk, disengaged, unmotivated, low-performing, and “consistently unsuccessful students.”¹⁴⁸ The applicable IDEA regulation, which was introduced by Congress in 2004 when the IDEA was reauthorized, was intended to help schools tease out whether a student had a specific learning disability or needed access to quality research based interventions.¹⁴⁹ Experts from varying disciplines believed that special education could be avoided if students were provided with interventions early in their educational experience.¹⁵⁰ Recent federal reports and assessments of the efficacy of RtI and MTSS reveal that they have not been successful.¹⁵¹ Researchers list avoiding diagnostic and functional assessment until it’s too late and not linking assessment to intervention as two of the flaws related to RtI and MTSS.¹⁵² In many states, students who struggle are offered routine Tier I and Tier II supports before school staff are permitted to offer more intensive and targeted support under Tier III.¹⁵³

147. 20 U.S.C. § 7801.

148. Howard M. Knoff, *A Multi-Tiered Service & Support Implementation: Revisiting the Science to Improve Practice*, ILLUMINATE EDUC. 1, 2 (2018), <https://www.illuminateed.com/download/multi-tiered-service-support-implementation-blueprint-schools-districts/> [<https://perma.cc/AJK5-A85E>].

149. See 20 U.S.C. § 1414(b)(6) (providing that states cannot require local schools to consider a severe discrepancy between achievement and intellectual ability in determining whether the child has a specific learning disability); see 34 CFR § 300.307(a)(2) (2020) (providing that the use of scientific, research-based intervention must be allowed in determining whether a child has a specific learning disability).

150. Jose L. Martin, *Legal Implications of Response to Intervention and Special Education Identification*, RTI ACTION NETWORK, <http://www.rtinetwork.org/learn/ld/legal-implications-of-response-to-intervention-and-special-education-identification> [<https://perma.cc/wt9r-5zql>] (last visited Aug. 5, 2020) (explaining that educational thinking had shifted from a “wait-to-fail” model to an intervention model by the time IDEA was reauthorized in 2004).

151. See Institute of Education Sciences, *Evaluation of Response to Intervention Practices for Elementary School Reading 120* (Nov. 2015) (concluding that the results suggested reading interventions for students in first, second, and third grade “may have not been appropriate” because the results were either negative or insignificant).

152. See generally HOWARD M. KNOFF, *A MULTI-TIERED SERVICE AND SUPPORT IMPLEMENTATION GUIDEBOOK FOR SCHOOLS: CLOSING THE ACHIEVEMENT GAP* (2019).

153. HOWARD M. KNOFF, *IMPLEMENTING RESPONSE-TO-INTERVENTION AT THE SCHOOL*,

Under the RtI and MTSS frameworks, some students will continue to struggle for weeks, if not years, without clear signs to indicate that they should be referred for a special education evaluation. The Office of Special Education Programs (OSEP), under the umbrella of the U.S. Department of Education, provides leadership and financial support to assist states and local districts.¹⁵⁴ OSEP has clarified that students should not receive special education as Tier II and Tier III interventions without an evaluation indicating the need for special education and parental consent.¹⁵⁵ Schools struggle with knowing when to refer a student for special education when they have started RtI and MTSS interventions and are in an ongoing process of gathering and analyzing the data. Under MTSS, Tier II interventions typically last longer than six to eight weeks.¹⁵⁶ These interventions occur outside of the time dedicated to core instruction, are typically done in small groups of five to eight students, and focus primarily on providing increased opportunities to practice and learn skills taught in the core classes.¹⁵⁷ Tier II interventions should not last longer than twenty weeks, as students make the most gains within that time period.¹⁵⁸ As RtI and MTSS become more common, courts will be increasingly called on to determine timeliness with school districts rely on interventions prior to a formal evaluation. In a recent child find case, the court found that “the duty to evaluate, at the very least, was triggered 8 weeks after [the child] started Tier 3 services in first grade.”¹⁵⁹ In 2011,

DISTRICT, AND STATE LEVELS: FUNCTIONAL ASSESSMENT, DATA-BASED PROBLEM SOLVING, AND EVIDENCE-BASED ACADEMIC AND BEHAVIORAL INTERVENTIONS 20–23 (2009); KNOFF *supra* note 148, at 6–8.

154. *Welcome to OSEP*, U.S. DEP’T. OF EDUC. (Oct. 30, 2019), <https://www2.ed.gov/about/offices/list/osers/osep/index.html> [perma.cc/XU7Q-DAWP].

155. Letter from Laurie VanderPloeg, Dir., Off. of Special Educ. Programs, to Perry Zirkel, professor, Lehigh Univ. (Jan. 29, 2019), <https://sites.ed.gov/idea/files/osep-letter-to-zirkel-01-29-2019.pdf> [https://perma.cc/MG2F-8J4V].

156. BONNIE M. BEYER & EILEEN S. JOHNSON, *SPECIAL PROGRAMS AND SERVICES IN SCHOOLS* 48 (rev. 2d ed. 2014).

157. Scott K. Baker et al., *Robust Reading Instruction in the Early Grades: Conceptual and Practical Issues in the Integration and Evaluation of Tier 1 and Tier 2 Instructional Supports*, 42 *FOCUS ON EXCEPTIONAL CHILD* 1, 3 (2010); *see also* Edward S. Shapiro, *Tiered Instruction and Intervention in Response-to-Intervention Model*, RTI ACTION NETWORK, <http://www.rtinetwork.org/essential/tieredinstruction/tiered-instruction-and-intervention-rti-model#top> (last visited Sept. 25, 2020) (explaining that depending on the RtI model being used, small groups consist of anywhere from five to eight students).

158. Sharon Vaughn et al., *INTENSIVE INTERVENTIONS FOR STUDENTS STRUGGLING IN READING AND MATHEMATICS: A PRACTICE GUIDE* 23 (2012), <https://files.eric.ed.gov/fulltext/ED531907.pdf> [https://perma.cc/E3AR-GHUW] (summarizing multiple studies that suggest elementary students make the highest gains in reading within the first five months of intervention).

159. *Avaras v. Clarkstown Cent. Sch. Dist.*, No. 15-CV-9679, 2018 WL 4964230, at *10, *15 (S.D.N.Y. Oct. 15, 2018) (ordering private school reimbursement for ten months); *see also* Krawietz

a letter from OSEP to state special education directors made it clear that RtI cannot be used to delay or deny an evaluation for special education under the IDEA.¹⁶⁰ Nonetheless, evaluations are still delayed and denied as many districts are unyielding in their strict identification policies.

C. Data Collection

At first glance, child find seems to be a straightforward requirement. Requiring school districts to offer evaluations to parents who may or may not be aware of their rights under the IDEA, or of the right to request evaluation in particular, seems like a commonsense approach and first step to identifying students with disabilities who require special education. However, advocates and school districts clash when it comes to implementation and accountability. The scant data collected and shared makes it difficult for stakeholders to fully understand and study the effectiveness of child find policies and the mandate itself. The child find requirement is at risk of becoming nothing more than a lofty ideal in the absence of federal guidance describing how it should be implemented. Administrative agencies must collect and analyze relevant child find data to strengthen child find practices.

OSEP monitors the states to ensure their compliance with the IDEA.¹⁶¹ The IDEA requires each state to develop a state performance plan/annual performance report (SPP/APR) that evaluates the state's efforts to implement the requirements and purposes of the IDEA and describes how the state will improve its implementation.¹⁶² These reports include "indicators" that measure child and family outcomes and other indicators that measure compliance with the requirements of the IDEA.¹⁶³ The indicators measure performance in the areas of graduation, drop out, suspension/expulsion, disproportionate representation, and child find to name a few.¹⁶⁴ The IDEA requires states to use the performance

v. Galveston Indep. Sch. Dist., 900 F.3d 673, 675–76 (5th Cir. 2018) (The court found a four-month delay to be inexcusable when a student was failing most of her classes, suspended and placed in an alternative placement for two months. Instead, the district opted to provide a section 504 plan but did not provide a behavior plan which rendered the accommodations insufficient.); *see also* Spring Branch Indep. Sch. Dist. v. W. ex rel. O.W., 938 F.3d 695, 707 (5th Cir. 2019), *aff'd in part*, 961 F.3d 781 (5th Cir. 2020) (where a school district claimed to use response to intervention for ninety-nine days before evaluating the student for special education. The court found that it was clear that general education interventions were not working).

160. Memorandum from Melody Musgrove, *supra* note 145.

161. *Welcome to OSEP*, *supra* note 154 ("OSEP is dedicated to improving results for infants, toddlers, children and youth with disabilities ages birth through 21 by providing leadership and financial support to assist states and local districts.").

162. *State Performance Plans/Annual Performance Reports (SPP/APR)*, U.S. DEP'T. OF EDUC., <https://sites.ed.gov/idea/spp-apr/> [perma.cc/4c2d-p56c].

163. *Id.*

164. 20 U.S.C. § 1412(a)(15).

indicators to assess progress toward their goals in meeting the purposes of the Act.¹⁶⁵

In comparing the child find indicators for St. Joseph and Benton Harbor Area Schools, there is no apparently meaningful discrepancy between the two districts, at least as reported by the State of Michigan. This ostensible parallel of reported compliance is, in fact, effectively meaningless.

Table 3: Child Find Compliance Indicator

	St. Joseph	Benton Harbor
Indicator #11: Child Find Compliance¹⁶⁶	98.36%	97.3%

In Michigan, to satisfy the requirements of child find, a school district is only required to complete an evaluation and IEP within thirty school days of actually receiving parental consent as established by the Michigan Administrative Rules for Special Education.¹⁶⁷ These timelines comply with IDEA’s requirement for timely evaluations.¹⁶⁸ Accordingly, child find “data” only reflects procedural compliance with evaluation timelines for children who have already been placed into the evaluation process, either by the parents or by the district (and whose parents have given consent). Thus, the figure does not actually measure how frequently or how well the district initiates evaluation of children reasonably suspected of having a disability absent a parental request.

Many states use this method of measuring evaluation timelines alone as the determining factor to prove compliance with child find. OSEP and most state education agencies fail to consider the most important obligation under child find—whether local education agencies have made any efforts to comply with pre-referral activities aimed at identifying and locating students who may warrant a referral for an evaluation. A small sample of data based on state indicators confirms that states are defining compliance with child find based on evaluation timelines and not pre-referral activities aimed at finding children who may have a disability.¹⁶⁹

165. *Id.*

166. MICH. SCH. DATA, 2016–2017 SPECIAL EDUCATION PUBLIC REPORT – INDICATOR REPORT #11, CHILD FIND <https://www.mischooldata.org/SpecialEducationEarlyOn3/AnnualPublicReporting/IndicatorReportSelected.aspx> [<https://perma.cc/7VS3-GUFT>] (under “Location” select Benton Harbor, or St. Joseph and under “Indicator” select B11 Child Find).

167. MICH. ADMIN. CODE r. 340.1721b (2020).

168. 34 C.F.R. § 300.301(c)(1) (2019) (requiring that the initial evaluation must be conducted within sixty days after receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe).

169. OSEP considers child find data under Indicator 11. It is defined as the “[p]ercent of

Child find, when implemented comprehensively, “functions as one of the most important elements in the pre-determination stage [of eligibility for special education services].”¹⁷⁰ If a child is educationally disabled but is not referred by the parents and not found by the district, that child will not receive any special education, despite their eligibility and need for those services.¹⁷¹ States are not required to collect and report special education data related to students’ income status. As a result, there is little data examining the identification and placement of low-income students in special education.¹⁷² Anecdotally, white middle-class parents are generally better positioned to navigate the IDEA process and get their children appropriate special education services.¹⁷³

The IDEA requires a comprehensive child find system.¹⁷⁴ Case law has gone a step further to clarify and define a comprehensive child find system as one that must include a definition of the target population; a widespread public awareness campaign; a referral process that fosters the timely identification of children; screening and evaluation of children who may be eligible for services; an accurate eligibility determination; tracking systems to ensure that all children who are referred are screened, evaluated, and receiving services; and an interagency coordination effort

children who were evaluated within 60 days of receiving parental consent for initial evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. *Note:* In North Carolina, the policies governing students with disabilities has an established an alternative timeline (90 days) from receipt of the referral to the placement determination, as indicated in the measurement. The 90-day timeline/receipt of the referral begins before parental consent to evaluate.” U.S. DEPT. OF EDUC. OFF. OF SPECIAL EDUC., STATE PERFORMANCE PLAN REQUIREMENTS, https://nceln.fpg.unc.edu/sites/nceln.fpg.unc.edu/files/events/3-SPPIndicatorsforPreschool_0.pdf [perma.cc/APY3-X9MN].

170. *Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 882 (E.D. Wis. 2007).

171. *Id.*

172. DeJarnatt, *supra* note 81.

173. See Mike Elsen-Rooney, *Two Boys with the Same Disability Tried to Get Help. The Rich Student Got It Quickly. The Poor Student Did Not.*, USA TODAY (Feb. 10, 2020, 12:37 PM), <https://www.usatoday.com/in-depth/news/education/2020/02/09/disability-special-education-dyslexia-doe-nyc-sped-private-placement/4651419002/> [perma.cc/DXE7-V5TZ] (explaining that when New York school districts cannot meet the needs of a student with a disability, the parents may petition the school for placement in a private school setting. These parents are typically white and wealthy). See also OLAYEMI AKINOLA, THE EXPERIENCE OF AFRICAN AMERICAN PARENTS WITH THE SPECIAL EDUCATION SYSTEM: A REVIEW OF LITERATURE (May 2015) (explaining that various factors, including cultural, socioeconomic and linguistic barriers, impact the involvement of African American parents in their children’s special education).

174. 34 C.F.R. §§ 303.321, 303.302 (2019) (This includes a system and timelines for making referrals to lead agencies or early intervention service providers; provides for participation by the primary referral sources; and ensures rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services under Part C of the IDEA that will reduce the need for future services. This definition also includes coordination with all other major efforts to locate and identify children by other state agencies responsible for administering the various education, health, and social service programs relevant to this part, including Indian tribes that receive payments under this part, and other Indian tribes, as appropriate.).

between state and local agencies.¹⁷⁵

In contrast, under current practice, child find begins with evaluating children who have already been “found” and referred for an evaluation. Thus, the child find data available is highly misleading and not indicative of how school districts are implementing child find, in terms of vital, pre-referral activities.¹⁷⁶ Due to the lack of relevant data about pre-referral activities, we know little to nothing about how many jurisdictions define their target population, create public awareness, and refer students who are in need of an evaluation.

In many districts, despite the child find obligation, the onus is effectively placed solely on parents to suspect that their child has a disability and request an evaluation in writing. This assumes that most parents have an awareness of what special education is and know the procedures required to request an evaluation. In our example, Zachary and Darren’s cases, despite the significant behavioral and educational difficulties, none of the parents connected their child’s educational challenges to a need for an educational evaluation or special education until they received a referral from the school, private therapist, or probation officer.

Determining if and when a child warrants referral for an evaluation is of utmost importance as it is the gateway to accommodations and procedural safeguards for children with disabilities.¹⁷⁷ Without a comprehensive evaluation,¹⁷⁸ parents and educators are armed with insufficient data¹⁷⁹ to make educational decisions. In return, students with disabilities are left without the protections available and intended by

175. *Early Identification: How the Child Find Program Works*, SPECIAL EDUC. GUIDE <https://www.specialeducationguide.com/early-intervention/early-identification-how-the-child-find-program-works/> (last visited Aug. 6, 2020) [perma.cc/P7G8-94C4]; see *D.L. v. D.C.*, 730 F. Supp. 2d 84, 96 (D.D.C. 2010).

176. School districts are not required to make wide-reaching announcements regarding the availability of special education to all parents. However, some state policies and procedures may include public awareness requirements. See Letter from Ruth E. Ryder, Acting Dir., Off. of Special Educ. Programs to Lawrence Siegel (Aug. 2, 2018), <https://sites.ed.gov/idea/files/osep-letter-to-siegel-08-02-2018.pdf> [https://perma.cc/7LZJ-PWSU].

177. Procedural safeguards are designed to protect the rights of children with disabilities and their parents. These safeguards include the right to participate in all meetings, to examine all educational records, and to obtain an independent educational evaluation of the child. 20 U.S.C. § 1415(d).

178. The IDEA provides that “[a] State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with [the Act] before the initial provision of special education and related services to a child with a disability. under this subchapter. 20 U.S.C. § 1414(a)(1)(A).

179. The IDEA provides that the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 34 C.F.R. § 300.304(b) (2019).

the IDEA.¹⁸⁰ To clarify the child find mandate, Congress, the Department of Education, and state educational agencies must define the target population, child find pre-referral activities, and provide guidance on how to create an effective public awareness campaign. These actions would limit the broad discretion given to local school districts and provide more consistency in evaluation referrals across school districts. The fact that federal and state agencies have failed to develop more descriptive and consistent referral guidelines in the forty-five years since the Act was passed is telling. We, as a nation, have not truly committed to providing access to special education for all students who need it.

V. INEQUITY IN THE EXISTING CHILD FIND FRAMEWORKS

American taxpayers value the ability to make their own decisions about matters that impact their lives. Any state or federal intrusion on that ability or “right” is met with careful scrutiny to outright opposition. Scholars have defined localism as a preference for decentralized local governance structures.¹⁸¹ Educators often discuss localism in the context of school funding and governance. When it comes to governance, giving school districts too much autonomy, with little guidance and accountability, can undermine the educational goals we are trying to achieve. This unchecked autonomy is the perfect breeding ground for implicit bias in the child find process. This results in inequitable identification rates and other unintended consequences such as the school-to-prison pipeline. The school-to-prison pipeline refers to the policies and practices that push children out of school and into the

180. The procedural safeguards under the IDEA apply to children not yet found if the local educational agency is deemed to have knowledge that a child has a disability.

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B).

181. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000).

criminal justice system.¹⁸² It disproportionately impacts children with disabilities and children of color.¹⁸³

A. *Implicit Bias*

Each public agency has an obligation to ensure that assessments and other evaluation materials used to assess a child under IDEA are selected and administered so as not to be discriminatory on a racial or cultural basis.¹⁸⁴ Districts, however, have no obligation and tend not to gather data about the role that race plays in finding, evaluating, and providing special education to their students. Absent data on child referral trends and specific federal guidance on implementing child find, local school districts are not able to determine if individual decisions are based on bias. School districts facing issues such as segregation and sparse educational resources are left to implement child find subjectively. Students with disabilities are vulnerable and likely to experience implicit bias both individually and systemically.

One definition of implicit bias is “the tendency for our unconscious selves to feel or exhibit a bias toward certain groups of, or characteristics in, people—in part because we’ve been bombarded by negative images and messages What we believe about a person—or a group of people—translates into how we act toward them.”¹⁸⁵ Researchers have documented pervasive implicit associations that link black individuals, especially males, to stereotypes such as aggression, criminality, or danger, even when explicit beliefs contradict these views.¹⁸⁶ Arising outside of conscious awareness, implicit biases do not necessarily align with our explicit beliefs and intentions. The unconscious aspect of bias means that “even individuals who profess egalitarian intentions and try to treat all individuals fairly can still unknowingly act in ways that reflect their implicit, rather than their explicit, biases.”¹⁸⁷ The actions of well-intentioned individuals can result in inequitable outcomes for different

182. NAT’L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 5 (2015), https://ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf [perma.cc/vt15-rsyg].

183. *Id.*

184. 34 C.F.R. § 300.304(c)(1)(i) (2019).

185. Eric J. Cooper, *Confronting Implicit Bias in Sports, on the Streets and in Our Schools*, HUFFPOST (Aug. 23, 2017) https://www.huffingtonpost.com/eric-cooper/confronting-implicit-bias_b_11653312.html. [perma.cc/qf5q-znwz].

186. *See generally* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

187. Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, AM. EDUC. 29, 30 (Winter 2015–2016), https://www.aft.org/sites/default/files/ae_winter2015staats.pdf [https://perma.cc/D4LU-B2M5].

groups.¹⁸⁸

School discipline statistics are laden with the consequences of implicit bias. Black students are suspended and expelled at a rate three times greater than white students.¹⁸⁹ Starting at age ten, black children are perceived as less innocent than nonblack children.¹⁹⁰ Researchers have examined how student race may influence teachers' responses to classroom misbehavior. Results show "that teachers commonly perceive black students to have more negative demeanors, to have a longer history of misbehavior, and to earn lower grades than white students."¹⁹¹ "Teachers' experiences and automatic unconscious associations can shape their interpretation of situations that merit discipline, and can even contribute to discipline disparities based on a student's race."¹⁹² If these unconscious associations impact school discipline, then it is plausible that these same biases influence how educators think about the "red flags" or "triggers" for child find. The Office of Civil Rights (OCR) found that referrals for evaluations for special education may involve "subjective exercise of unguided discretion in which racial biases or stereotypes may be manifested."¹⁹³ One possible example is the way a teacher may attribute symptoms such as trouble turning in homework assignments, requiring extra time to complete work, and having more difficulty than other students in organizing and following instructions. For a white student, a biased teacher may see symptoms of ADHD while the same behaviors in a black student are framed as a lack of motivation and a lack of commitment to education. This subtle type of discrimination, could result in a violation of Title VI of the Civil Rights Act, if investigated by the OCR.¹⁹⁴ Title VI prohibits discrimination based on race, color or national origin in programs or activities that receive federal financial

188. *Id.*

189. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE, ISSUE BRIEF NO. 1 (2014).

190. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529 (2014).

191. Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 618 (2015).

192. See Staats, *supra* note 187, at 30 (describing the effect teachers' implicit biases can have on students).

193. Off. for Civ. Rts., U.S. Dep't of Educ., Dear Colleague Letter: Preventing Racial Discrimination in Special Education 11 (Dec. 12, 2019) [hereinafter Preventing Racial Discrimination], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf> [https://perma.cc/5WRU-JUDF]; Off. for Civ. Rts., U.S. Dep't of Educ., & Civ. Rts. Div., U.S. Dep't of Just., Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 6 (Jan. 8, 2014) [hereinafter Nondiscriminatory Administration], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [https://perma.cc/4TES-FVME].

194. See Preventing Racial Discrimination, *supra* note 193, at 18 (warning that subtle discriminations are subject to Title VI of the Civil Rights Act of 1964).

assistance which includes public education programs.¹⁹⁵

In our introductory case example, Zachary's school viewed his struggles as challenges beyond his control requiring assessment and eventually special education services and support. Conversely, Darren's school district chose to criminalize the same behaviors when Darren exhibited them. The "frog pond effect" is a theory of social comparison that can be applied to the way we view and compare students in the educational setting.¹⁹⁶ In a controlled study, high-performing students at academically inferior schools evaluated themselves more favorably than low-performing students at superior schools, after researchers statistically controlled for ability level.¹⁹⁷ We see the frog pond effect in student self-evaluations because students use local comparison data and lack general comparison data beyond their school district.¹⁹⁸ In essence, student functioning appears to be contextual based on the makeup and subculture of the individual school or district. In the child find context, "a student with a given level of behavior problems is less likely to be referred for special education placement in a school where academic disengagement and problem behavior occur more frequently."¹⁹⁹ I call into question the appropriateness of this variability when there are norm-referenced standards and definitions of disability under the IDEA.

One legitimate question that school staff may find themselves asking is what happens when too many students qualify for special education? In 2019, the superintendent of Flint Public Schools in Flint, Michigan, explained that the number of special education students in the district jumped to 28%.²⁰⁰ The Flint Public Schools, a low-performing school district, found that their financial and academic challenges were exacerbated by the lead crisis²⁰¹ which will impact their students for

195. *Id.* at 24.

196. See generally Mark D. Alicke et al., *Mere Categorization and the Frog-Pond Effect*, 21 PSYCH. SCI. 174 (2010).

197. *Id.* at 174.

198. See generally Ethan Zell & Mark D. Alicke, *Contextual Neglect, Self-Evaluation, and the Frog-Pond Effect*, 97 J. PERSONALITY & SOC. PSYCH. 467 (2009).

199. Jacob Hibel & Paul Morgan, *Who is Placed into Special Education?*, SOCIO. OF EDUC. 312, 315 (2010).

200. Corey Mitchell, *In Flint, Schools Overwhelmed by Special Ed. Needs in Aftermath of Lead Crisis*, EDUC. WK. (Aug. 26, 2019), <https://www.edweek.org/ew/articles/2019/08/28/special-ed-concerns-loom-large-after-flint.html> [<https://perma.cc/5QZP-GVX9>].

201. In April 2014, Flint's drinking water source was changed from Great Lakes' Lake Huron to the Flint River without necessary corrosion control treatment to prevent lead release from pipes and plumbing into the public drinking water. As a result, citizens of Flint were continuously exposed to dangerous levels of lead through the tap water. Lead exposure can damage children's brains and nervous systems, lead to slow growth and development, and result in learning, behavior, hearing, and speech problems. The Flint water supply was reconnected to the Detroit water system on October 16, 2015. A federal emergency was declared in January 2016. The effects of the crisis

years to come.²⁰² The increase in students who qualify for special education left the district overwhelmed with a shortage of qualified teachers and providers trained to address the unique needs of their students.²⁰³ The crisis resulted in a lawsuit that was filed by the Education Law Center and the American Civil Liberties Union (ACLU) of Michigan.²⁰⁴ The class action brought against the Department of Education and the district demanded that the respondent school district identify the academic and behavioral needs of all Flint students and avoid unnecessary suspensions of students with disabilities.²⁰⁵

Condoning the frog pond effect by permitting districts to assess students in comparison to their local peers instead of national or even regional standards fails to account for the fact that there may be actual increased levels of disability in some school districts. The higher identification rates may be attributed to environmental factors such as poverty, lead poisoning, and trauma. Challenging behavior and poor academic outcomes may not stand out as significant in such districts, but that does not in any way justify its being ignored. In cities like Flint, systemic educational changes may help children more than individualized plans.²⁰⁶ A school district taking an adequate approach to its child find obligation, as a legal and ethical matter, would recognize that a reasonable effort to find educationally disabled children in low-performing districts like Darren's requires more affirmative effort than in a district like Zachary's.

are still being experienced by the citizens of Flint. *See generally* Perri Zeitz Ruckart et al., *The Flint Water Crisis: A Coordinated Public Health Emergency Response Management and Recovery Initiative*, 25 J. PUB. HEALTH MGMT. & PRAC. S84 (2019).

202. Dominic Adams, *Some Flint Schools May Be Among State's Lowest-Performing Says Interim Superintendent*, MLIVE (Jan. 30, 2019), https://www.mlive.com/news/flint/2018/03/state_flint_superintendent.html [<https://perma.cc/P3GA-LKZ5>]; *see also* Erica L. Green, *Flint's Children Suffer in Class After Years of Drinking the Lead-Poisoned Water*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html?searchResultPosition=2> [<https://perma.cc/FBZ4-G2KC>] (describing the neurological effect the lead poisoning is having on students years later).

203. *See* Green, *supra* note 202 (describing the burden placed in the schools and teachers); *see generally* Expert Report by William Therrien, Richardson ex rel. D.R. v. Mich. Dep't of Educ. No. 16-13694, 2017 WL 5010773 (E.D. Mich. Nov. 2, 2018) (finding that the Flint Schools are not meeting their obligation to locate, identify and evaluate students with disabilities in the district). Teachers reported capacity issues including too many children who needed to be served, inadequate staff and lack of training. *Id.*

204. Evie Blad, *Lawsuit: Amid Water Crisis, Flint Schools Fail to Meet Needs of Special Ed. Students*, EDUC. WK. BLOG (Oct. 18, 2016, 5:25 PM), https://blogs.edweek.org/edweek/District_Dossier/2016/10/lawsuit_amid_water_crisis_flin.html [<https://perma.cc/8HJ5-NKSQ>].

205. *Id.*

206. Karen Czapanisky, *Preschool and Lead Exposed Kids: The IDEA Just Isn't Good Enough*, TOURO L. REV. (forthcoming 2020) (working paper at 3) (U. Md. Legal Stud. Res. Paper No. 2018-30, 2018).

B. The Myth of Overrepresentation

Some school employees are hesitant to refer students of color for evaluations even when they suspect the student may have a disability. Fueling their apprehension is a concern that students of color, black students in particular, are overrepresented in special education. This results in the legitimate fear that the state will penalize the school district for racial “disproportionality” or “overrepresentation”²⁰⁷ in special education.²⁰⁸ The IDEA requires states to collect and examine data to determine whether significant disproportionality in special education based on race and ethnicity is occurring in the state and the local educational agencies.²⁰⁹ In some cases, a district can find itself out of compliance by identifying just one additional student for special education placing the district above the acceptable threshold.²¹⁰ This kind of a numerical assessment is especially problematic in predominantly minority school districts. As mentioned previously, there are districts that legitimately have higher disability rates due to external factors such as poverty and environmental trauma.²¹¹ Research models that focus on individual factors such as student characteristics and backgrounds, as opposed to aggregate-level data focusing on district-level factors, found that students of color became significantly less likely to be in special education.²¹² Flint, Michigan, is a city known for experiencing a water

207. *Id.* at 9. Overrepresentation is present when a high percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district. Underrepresentation occurs when a low percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district. Preventing Racial Discrimination, *supra* note 193, at 2; Nondiscriminatory Administration, *supra* note 193, at 2.

208. In 2019, Palo Alto Unified School District risked being cited for having a disproportionate number of Latino and African American students in special education for three consecutive years. In 2011, seventeen California school districts were cited for the overrepresentation of Latino and African American students in special education. Elena Kadvan, *State Will Likely Cite Palo Alto Unified for Too Many Students of Color in Special Education*, PALO ALTO WEEKLY (Aug. 28, 2019, 9:03 AM), <https://www.paloaltoonline.com/news/2019/08/28/state-will-likely-cite-palo-alto-unified-for-too-many-students-of-color-in-special-education> [<https://perma.cc/KT98-4VEW>].

209. 20 U.S.C. § 1418(d); 34 C.F.R. § 300.647 (2019).

210. Nora Gordon, *Race, Poverty and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/> [<https://perma.cc/5H3Z-HZXF>].

211. See generally Paul Morgan et al., *Are Black Children Disproportionately Overrepresented in Special Education? A Best-Evidence Synthesis*, 83 EXCEPTIONAL CHILD. 1 (2017) [hereinafter Morgan, *Best Evidence Synthesis*].

212. See generally Paul Morgan et al., *Minorities Are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions*, 44 EDUC. RESEARCHER 1 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4950880/> [<https://perma.cc/TL8H-D7E3>] [hereinafter Morgan, *Longitudinal Evidence*] (arguing that over-identification of students of color as having a disability may be due to external factors such as greater exposure to poverty).

crisis when the municipality switched to a water supply that was contaminated with lead. The lead poisoning resulted in higher number of children with disabilities.²¹³ In Flint, nearly 20% of students qualify for special education, the statewide special education rate is 13.6%.²¹⁴ The Center for Disease Control (CDC) found that minority populations are disproportionately susceptible to lead poisoning, specifically black children that are almost three times as likely to be exposed to lead.²¹⁵

Investigations by the Office of Civil Rights have revealed that students of color may be over-identified as having a disability.²¹⁶ However, scholarship is divided on the issue of overrepresentation.²¹⁷ Recent studies reveal that the over-identification of students of color in special education occurs in specific categories of eligibility, not overall identification rates.²¹⁸ Black students are more likely to be classified as emotionally disturbed while white students with similar behavior may be more likely to be classified as having Attention-Deficit/Hyperactivity

213. Children exposed to lead have lower IQs, lower math and reading levels, increased difficulty with attention, impaired executive functioning, poor visual-motor coordination, impaired social behavior and motor skills, and a greater likelihood of attention-deficit hyperactivity disorder (ADHD). Suzanne Hungerford et al., *Neurotoxins and Language-related Disorders: Implications for Prevention* Poster Presentation.

214. Jennifer Chambers, *Lawsuit Alleges State Failing Flint Special Education Kids*, DETROIT NEWS (Oct. 16, 2018), <https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2018/10/16/lawsuit-alleges-state-failing-flints-special-education-kids/1660550002/> [<https://perma.cc/PGQ9-QJVS>].

215. CTRS. FOR DISEASE CONTROL AND PREV., *CHILDHOOD LEAD POISONING* (2005), <http://www.cdc.gov/ncch/ncet/publications/factsheets/ChildhoodLeadPoisoning.pdf> [<https://perma.cc/VY6A-A5TN>].

216. Over-identification refers to the inappropriate identification of a student who does not actually have a disability and who does not need services as a student with a disability. Under-identification is the failure to appropriately identify a student who has a disability and who does need services as a student with a disability. *Preventing Racial Discrimination*, *supra* note 193, at 2 n.5.; *see also Nondiscriminatory Administration*, *supra* note 193, at 2 n.4 (showing federal regulation prohibits disability discrimination by recipients of Federal funding).

217. Alfredo Artilles et al., *Justifying and Explaining Disproportionality, 1968–2008: A Critique of Underlying Views of Culture*, 76 *EXCEPTIONAL CHILD* 279, 280 (2010); Kristen Harper, *5 Things to Know about Racial and Ethnic Disparities in Special Education*, *CHILD TRENDS* (Jan. 12, 2017), <https://www.childtrends.org/publications/5-things-to-know-about-racial-and-ethnic-disparities-in-special-education> [<https://perma.cc/74Q7-8V6H>]; Kelly Kreskow, *Overrepresentation of Minorities in Special Education*, *EDUC. MASTERS* 1, 3 (2013), https://fisherpub.sjfc.edu/cgi/viewcontent.cgi?article=1258&context=education_ETD_masters [<https://perma.cc/M78R-M229>].

218. Paul L. Morgan et al., *Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools*, 46 *EDUC. RESEARCHER* 305, 317 (2017), <https://spr.confex.com/spr/spr2019/webprogram/Paper28250.html> [<https://perma.cc/C3SL-W6M3>] [hereinafter Morgan, *Replicated Evidence*]; *see also* Morgan, *Longitudinal Evidence*, *supra* note 212, at 4 (explaining that low-performing children who attend disadvantaged schools may be less likely to be identified for special education because the schools' limited resources only go to the lowest-performing students).

Disorder (ADHD).²¹⁹ Children of color have less access to adequate health care which results in decreased opportunities for early identification of disabilities such as autism and ADHD.²²⁰ Since school districts do not conduct medical assessments, early identification of medical conditions, which are shared with the school, aids in the child find process. In some communities, students with disabilities are under-identified for special education.²²¹ Without equitable funding and consistent frameworks to identify children with disabilities for special education, child find disparities will continue to exist between school districts.

VI. REGIONAL SOLUTIONS TO ADDRESS CHILD FIND DISPARITIES

Scholars and researchers have proposed theories of equitable regionalism and federated regionalism as frameworks to address the disparities in public education.²²² To overcome inequity that stems from the lack of resources, I propose that states should enact policies that pool resources and increase the pot of funding available for both child find and subsequent special education costs. In addition to fully funding the IDEA, legislators should consider expanding Medicaid²²³ funding in schools and creating regional programs that can pool money from the IDEA, Medicaid and Title I of the Every Student Succeeds Act (ESSA).²²⁴ States should also gather relevant and consistent data that will support future decisions on child find and equity in special education.

219. Martha J. Coutinho et al., *Gender and Sociodemographic Factors and the Disproportionate Identification of Culturally and Linguistically Diverse Students with Emotional Disturbance*, 27 BEHAV. DISORDERS 109, 121 (2002).

220. Glenn Flores, *Technical Report—Racial and Ethnic Disparities in the Health and Health Care of Children*, 125 PEDIATRICS 979, 982, 986–87 (2010) (reporting that nonwhite children have less access to pediatric care providers, greater adjusted odds of not being referred to a specialist by a health care provider, lower adjusted odds of being diagnosed with ADHD, and increased adjusted odds of receiving a delayed diagnosis of autism).

221. *Preschool Grants for Children with Disabilities*, 81 Fed. Reg. 10,968, 10,977 (Mar. 2, 2016) (to be codified at 34 C.F.R. pt. 300).

222. See generally Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA. L. REV. 1416 (2014) (proposing that states should require or incentivize cooperation between local school districts. One example is adopting enrollment plans that allow students within metropolitan regions to cross school district boundaries to attend school. In general, regionalism proposals recognize the importance of local governments working together in collaboration to address issues on a regional level so that public goods can be disseminated more efficiently and equitably throughout metropolitan regions); see also Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 493–94 (2007) (proposing a regional tax base would promote fairness across the overall regional welfare).

223. Medicaid is a federal-state health insurance program for individuals that meet certain eligibility requirements, as determined by the state and federal regulations. 42 C.F.R. § 1396(b)(2) (2019); 42 C.F.R. §§ 455.400–455.470 (2019).

224. See *Improving Basic Programs Operated by Local Educational Agencies*, U.S. DEP'T OF

A. Improving the Use of Medicaid in Schools

Many providers such as school psychologists, physical therapists, occupational therapists, and speech and language therapists participate in the evaluation process when a student is referred for special education.²²⁵ If a student is found eligible for special education, these providers will be expected to provide ongoing related services to meet the student's educational needs in school.²²⁶ To the extent that school staff avoids making referrals for evaluations because they lack funding, expanding Medicaid in schools and streamlining the reimbursement process could help to alleviate some of the financial concerns. Medicaid is the third largest source of federal funding provided to schools.²²⁷ Tapping into Medicaid funding in the school setting helps to provide students with healthcare they may not be able to access anywhere else.²²⁸

Medicaid services are available for low-income children under the age of twenty-one.²²⁹ Medicaid further seeks to ensure that children receive appropriate services through its Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) requirement.²³⁰ Medicaid coverage is also associated with improved educational outcomes and long-term health and economic gains.²³¹ Similar to the IDEA's child find requirement, under Medicaid, each state must perform outreach to ensure that eligible families are informed about EPSDT and enrolled if they qualify.²³² The Act provides important due process rights including

EDUC., <https://www2.ed.gov/programs/titleiparta/index.html> [<https://perma.cc/KVZ6-D3BJ>] (last modified Oct. 24, 2018) ("Title I, Part A (Title I) of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESEA) provides financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families to help ensure that all children meet challenging state academic standards.").

225. 34 C.F.R. § 300.304 (2019) (listing the evaluation procedures public agency are required to conduct).

226. 20 U.S.C. § 1412(4); 34 C.F.R. § 300.306(c)(2) (2019).

227. STRUCTURAL INEFFICIENCIES IN THE SCHOOL-BASED MEDICAID PROGRAM DISADVANTAGE SMALL AND RURAL SCHOOL DISTRICTS AND STUDENTS, AASA 3 (2019) [hereinafter STRUCTURAL INEFFICIENCIES], https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Resources/AASA_Medicaid_Report_FINAL.pdf [<https://perma.cc/F5KU-5WHZ>].

228. *Id.* at 2.

229. 42 U.S.C. §§ 1396a(a)(43); 1396d(a)(4)(B).

230. Each state is required to provide or arrange for provision of services to screen for medical, behavioral, dental, vision and hearing problems in children. 42 U.S.C. § 1396a(a)(43)(B), (C), 1396(r)(5).

231. *See generally* ALISA CHESTER ET AL., GEORGETOWN UNIV. HEALTH POL'Y INST. CTR. FOR CHILDREN AND FAMILIES, MEDICAID IS A SMART INVESTMENT IN CHILDREN (2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/03/MedicaidSmartInvestment.pdf> [<https://perma.cc/UK5J-MEUI>].

232. 42 U.S.C. § 1396a(a)(43)(A).

notice and the opportunity to appeal.²³³ Medicaid can supplement special education funds to support child find activities and evaluations.²³⁴ Schools may also use Medicaid to pay for related services when students are eligible for both special education and Medicaid.²³⁵ The number of uninsured children in the United States has steadily declined since 2008; however, in 2017, that number increased.²³⁶ Schools are already using Medicaid reimbursement to pay for costs associated with providing related services to students with disabilities.²³⁷ The National Alliance for Medicaid in Education estimates that 1% (between \$4 and \$5 billion annually) of all Medicaid reimbursement goes to local school districts.²³⁸

233. Families also have the right to receive notice and a hearing when coverage for Medicaid services is denied, delayed, reduced or terminated. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220 (2019).

234. State Medicaid programs can provide payment for evaluations if the assessments are to determine health-related needs for the purpose of an IEP and are conducted by a qualified Medicaid provider. Health-related services covered under an IEP are subject to the state requirements on amount, duration, and scope; comparability; medical necessity; and prior authorization. *See generally* MACPAC, MEDICAID IN SCHOOLS ISSUE BRIEF (2018), <https://www.macpac.gov/wp-content/uploads/2018/04/Medicaid-in-Schools.pdf>.

235. 20 U.S.C. § 1412(a)(12)(A); 34 C.F.R. § 300.154 (a), (b), (d) (2019). Parents are not required to apply separately for Medicaid benefits or incur cost sharing charges. 20 U.S.C. § 1440(b)(1). The Medicare Catastrophic Coverage Act of 1988 added section 1903(c) to the Medicaid statute, which allows state Medicaid agencies to pay for services listed in a child's individualized education program (IEP) or individualized family service plan (IFSP) if the child is enrolled in Medicaid. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 13, 102 Stat. 798 (1998) (codified at 42 U.S.C. § 1396b).

236. This report shows that “an estimated 276,000 more children were uninsured in 2017 than in 2016. No state (except for the District of Columbia) experienced a significant decline in the number of uninsured children in 2017.” JOAN ALKER & OLIVIA PHAM, GEORGETOWN UNIV. HEALTH POL'Y INST. CTR. FOR CHILDREN AND FAMILIES, NATION'S PROGRESS ON CHILDREN'S HEALTH COVERAGE REVERSES COURSE 1 (2018), <https://ccf.georgetown.edu/2018/11/21/nations-progress-on-childrens-health-coverage-reverses-course/> [<https://perma.cc/4AB5-77UN>]. “Three-quarters of the children who lost coverage between 2016 and 2017 live in states that have not expanded Medicaid coverage to parents and other low-income adults. The uninsured rates for children increased at almost triple the rate in non-expansion states than in states that have expanded Medicaid.” *Id.* Additionally, the following nine states experienced statistically significant increases in their rate of uninsured children: South Dakota, Utah, Texas, Georgia, South Carolina, Florida, Ohio, Tennessee and Massachusetts. *Id.*

237. *See, e.g.*, Anna Gorman & Carmen Heredia Rodriguez, *How Medicaid Became a Go-To Funder for Schools*, KAISER HEALTH NEWS (Mar. 9, 2018), <https://khn.org/news/how-medicaid-became-a-go-to-funder-for-schools/> [<https://perma.cc/YJW8-LZW5>] (utilizing real life testimonials to illustrate how children across the nation depend on Medicaid for a myriad of services).

238. BROKEN PROMISES, *supra* note 113, at 38; *see also* SASHA PUDELSKI, AASA, SCH. SUPERINTENDENTS ASS'N, CUTTING MEDICAID: A PRESCRIPTION TO HURT THE NEEDIEST KIDS 2 (2017), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Resources/medicaid.pdf [<https://perma.cc/4FN4-GXDT>] (referencing NAT'L ALL. FOR MEDICAID IN EDUC., BIENNIAL STATE SURVEY OF SCHOOL BASED MEDICAID SERVICES (2014), http://www.medicaidforeducation.org/filelibrary-name/webcommittee/2011_NAME_Biennial_Survey/NAME%202013%20Biennial%20Survey%20Final%20Report.pdf [<https://perma.cc/7E8C-DB6R>]).

School-based Medicaid services are available to all states; however, not all states utilize the funding. In Oregon, only 50% of school districts use Medicaid reimbursement for services, while in Michigan, 100% of school districts participate in the program.²³⁹ Prior to 2014, schools were not permitted to bill Medicaid for services that were free to all students.²⁴⁰ In 2014, the U.S. Department of Health and Human Services lifted the restriction known as the “free care rule” and issued a letter allowing states to charge for services delivered to students receiving Medicaid as long as they are covered by the state plan and delivered by a qualified provider and as long as schools have a billing mechanism.²⁴¹ Some school districts that need the additional funding decide to forgo using Medicaid due to the administrative burdens associated with reimbursement. Providers are also impacted by the administrative costs. One national association reported that its therapists spend 25–35% of their time on Medicaid paperwork.²⁴² Some school districts address the administrative hurdles by paying private firms for assistance in processing Medicaid claims, but these fees are not allowable for federal reimbursement.²⁴³ In a survey of participating school districts, 43% of rural and suburban districts described it as extremely difficult or difficult to complete and 37% of urban districts consider the paperwork difficult

239. See STRUCTURAL INEFFICIENCIES, *supra* note 227, at 4 (discussing the significant variation in the percentage of Medicaid-participating school districts between states).

240. Phyllis Jordan, *How Can Schools Leverage Medicaid to Meet the Needs of the Most Vulnerable Students?*, GEORGETOWN UNIV., CCF (Mar. 13, 2018), <https://ccf.georgetown.edu/2018/03/13/how-can-schools-leverage-medicare-to-meet-needs-of-most-vulnerable-students/> [<https://perma.cc/D7YT-7E85>] (explaining that Medicaid services were not eligible for reimbursement unless they were only provided to special education students).

241. Letter from Cindy Mann, CMS director, to State Medicaid Directors, U.S. Dep’t Health & Human Servs. (Dec. 15, 2014) (on file with CMS), <https://www.medicare.gov/federal-policy-guidance/downloads/smd-medicare-payment-for-services-provided-without-charge-free-care.pdf> [<https://perma.cc/W833-TXY2>] (regarding Medicaid payment for services provided without charge (free care)).

242. See BROKEN PROMISES, *supra* note 113, at 38 (discussing the burden of Medicaid paperwork on providers in school districts).

243. CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICAID PAYMENT FOR SCHOOL-BASED ADMINISTRATIVE CLAIMING GUIDE 9 (2003), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidBudgetExpendSystem/Downloads/Schoolhealthsvcs.pdf> [<https://perma.cc/JDG5-RLZC>] (“Interagency agreements may only exist between governmental (i.e., public) entities and cannot extend to private contractors or consultants. If a school district hires a private consultant to manage its administrative claims, the contract between the school district and the private consultant would be considered outside the scope of the interagency agreement.”); see also *Medicaid Payment for School Services*, ASHA, https://www.asha.org/Practice/reimbursement/medicaid/school-based_services/ [<https://perma.cc/5VDH-8LUK>] (last visited Aug. 8, 2020) (stating that the utilization of private firms to process Medicaid claims is not eligible for federal reimbursement).

or extremely difficult to complete.²⁴⁴ Poor and low-performing school districts also struggle to find qualified Medicaid providers to provide school-based services.²⁴⁵

Lack of oversight is another barrier to using Medicaid funding to offset special education costs. The U.S. Government Accountability Office and the Health and Human Services Office of Inspector General have both raised concerns about lack of oversight and improper Medicaid billing for school-based services. Providers and school associations such as the School Superintendents Association have advocated for congress to pass the Improving Medicaid in Schools Act.²⁴⁶ The Act would allow states to develop a uniform method for billing Medicaid based on costs and focusing on coordination of care.²⁴⁷ With a uniform process for all schools to follow, states could provide more oversight and accountability at the state and district level.

B. Regional Service Providers

Students with disabilities are at a disadvantage when their local school districts are not large enough or wealthy enough to create the programming that each suspected or eligible student needs. One way to distribute resources and meet the needs of all students is to develop regional service providers that provide evaluations and special education to students in a geographic region that includes several neighboring counties. A regional solution that pools money from multiple counties and distributes it to students in a larger region would directly address the disparities experiences in neighboring school districts. Once it is established that the resources are available, school staff would be less influenced by the perception that there is no funding to “find” children who are eligible for special education.

This idea is not entirely new as Michigan and Minnesota have intermediate school districts (ISDs).²⁴⁸ ISDs assist with financing and delivering special education services as well as operating alternative and career services.²⁴⁹ While Michigan is made of up of fifty-six ISDs,

244. See STRUCTURAL INEFFICIENCIES, *supra* note 227, at 6 (discussing the burden of Medicaid billing requirements).

245. *Id.* at 6–7 (discussing the lack of qualified Medicaid providers in rural areas and poorer districts).

246. *Id.* at 10 (listing seven things the “Improving Medicaid in Schools Act” would do, including simplifying the billing Medicaid billing process).

247. *Id.* at 11–12 (explaining that the “Improving Medicaid in Schools Act” would allow school districts to focus on providing health-related services).

248. MICH. COMP. LAWS § 380.627 (1996); MINN. STAT. § 136D.01 (1996).

249. Ben DeGrow, *Funding for Intermediate School Districts*, MACKINAC CTR. PUB. POL’Y, (July 19, 2017), <https://www.mackinac.org/23788> [<https://perma.cc/S2DE-AGUY>] (discussing the common responsibilities of ISDs).

Minnesota has just four ISDs serving more than 20,000 students across the state.²⁵⁰ It may not be necessary for states to create statewide ISDs but instead concentrate their efforts on areas where there are large disparities, a lack of resources, or pockets of charter schools. Many charter schools may be financially sound but struggle to provide the staff needed to serve special education students.²⁵¹ Others are struggling to meet the financial costs of special education programs.²⁵²

Charter schools and magnet programs that exist within larger school districts are distinct from smaller charters that function as their own school districts. They are given a lot of autonomy but must still comply with most federal laws, including the IDEA.²⁵³ It is difficult to examine data on students with disabilities in charter schools because the numbers are so small.²⁵⁴ Allowing charter schools to join with other local school districts to coordinate special education services would benefit both the charter schools and the neighboring school districts. Some charters will be reluctant to participate in interdistrict programs as they intentionally avoid evaluating and classifying children as students with disabilities in need of special education.²⁵⁵ These schools often genuinely believe that their innovative approaches to learning benefit all students, including students with special needs, and instructional modifications are naturally built into their methodology.²⁵⁶

250. Michigan Ass'n of Intermediate Sch. Adm'rs, *Michigan Intermediate School Districts*, MAISA, https://www.gomaisa.org/downloads/general/mi-isd_interactivemap_121719.pdf [<https://perma.cc/3NBJ-F7T7>] (listing all fifty-six ISDs in Michigan); SW. METRO INTERMEDIATE DIST. 288, INTERMEDIATE SCHOOL DISTRICTS OF MINNESOTA, http://swmetro.k12.mn.us/UserFiles/Servers/Server_45933/Image/Intermediate%20fact%20sheet%20for%20legislature%201.5.17.pdf [<https://perma.cc/HSR5-CPTC>] (providing information on Minnesota's four ISDs) (last visited Sept. 25, 2020).

251. Lauren Morando Rhim & Margaret J. McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices and Tensions*, 31 CAMBRIDGE J. EDUC. 373, 374 (2001) (discussing charter schools' lack of human and fiscal resources).

252. THOMAS A. FIORE ET AL., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: A NATIONAL STUDY, OFF. OF EDUC. RSCH. & IMPROVEMENT, U.S. DEP'T OF EDUC., 35 (2000), <https://files.eric.ed.gov/fulltext/ED452657.pdf> [<https://perma.cc/M997-LKCM>] (discussing administrator-identified barriers to student success).

253. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 394–95 (2008) (discussing how charter schools are given more autonomy in deciding their programs); see also Walker Richmond, *Charter School Accountability: Rhetoric, Results, and Ramifications*, 12 VA. J. SOC. POL'Y & L. 330, 340 (2004) (comparing charter schools to traditional public schools).

254. Erin Hankins Diaz, *Is It Really a Choice? How Charter Schools Without Choice May Result in Students Without a Free Appropriate Public Education*, 2016 BYU EDUC. & L.J. 25, 48 (2016) (discussing difficulty of collecting data on special education).

255. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 692 (2012) (discussing charter schools' intentional violation of their child find obligations).

256. *Id.* (explaining the good-faith intention behind charter schools' decision to forgo their child find obligations).

One fifteen-state study revealed that charter schools are better equipped to serve students with disabilities when they are linked to a larger special education infrastructure.²⁵⁷ This linkage could be accomplished through contract with a local education agency, an intermediate agency, a cooperative, community based nonprofits, or a comprehensive education service provider.²⁵⁸ A special education model that links services between schools regionally would level the playing field for students with disabilities in low-income school districts and charter schools. It would also distribute federal and state funding for special education more efficiently by consolidating resources, expertise, and services. A regional service provider would assist smaller and poorer districts with guidance, training, data collection, and compliance with the IDEA. When issues regarding finance and service provision are addressed, school staff can confidently refer students for evaluations knowing that if they are found eligible, there is an effective system in place to provide services. Wealthier school districts may push back if a regional framework with increase their costs. However, combining funding under the IDEA, Medicaid, and Title I across multiple school districts would likely decrease the overall costs for individual districts.

VII. CONCLUSION

Racial and socioeconomic equity has been an ongoing issue in U.S. education for some time. Ensuring that students with disabilities are not left behind has added another layer to an already complex system of disparate efforts and outcomes. Special education laws have been in place for forty-five years, yet we are still searching for ways to effectively locate, identify, and evaluate all students who may be in need of specialized instruction. Instead, we are left with a system that primarily relies on the parents who are equipped with the resources, knowledge, and other privileges required to engage in educational advocacy for their children. Our safeguard for students with disabilities should be the school system itself. If we are serious about implementing the IDEA with fidelity, we will consider strategies to reduce zip code disparities and make special education more accessible and equitable for the students that need it. Issuing guidance on child find, collecting relevant data, and

257. Project SEARCH is a qualitative research study of public charter schools implement special education. The fifteen-state policy analysis included many recommendations for improving special education in charter schools. EILEEN M. AHEARN ET AL., NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., PROJECT SEARCH, SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS: FINAL REPORT OF A RESEARCH STUDY 3 (2001), <https://files.eric.ed.gov/fulltext/ED464427.pdf> [<https://perma.cc/8YQR-S5DM>] (describing the study). One recommendation described the need for charters to affiliate with a special education infrastructure. *Id.* at 56.

258. *Id.* at 50 (explaining recommendations based on the study's findings).

addressing bias are steps that our federal and local governments can take to address some of the underlying causes of inequity and avoid institutional discrimination. I join the longstanding call for Congress to fully fund the IDEA, alleviating the financial stresses experienced by poor and low-performing schools. For these schools, the IDEA is nothing more than a privilege for middle-class school districts. It is also time to expand on regional solutions that will combine resources and expertise to better identify and serve students with disabilities, regardless of where they live.