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A Texas Two-Step in the Right Direction—Looking Beyond Recent Legislation to Improve the Provision of Special Education Services in Texas

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A TEXAS TWO-STEP IN THE RIGHT DIRECTION—LOOKING BEYOND RECENT LEGISLATION TO IMPROVE THE PROVISION OF SPECIAL EDUCATION SERVICES IN TEXAS

Taylor Michals*

ABSTRACT

This article analyzes the current state of the special education system in Texas following the 85th Legislative Session, focusing on the practical and legal implications of the limitation imposed by the Texas Education Agency in 2004 before analyzing Senate Bill 160, which requires Texas to remove the limitation on special education services, and its future impact on special education in Texas. Additionally, this article addresses Senate Bill 927, which outlined a plan to ensure that students who were previously denied services receive an adequate evaluation, why the legislation failed, and potential remedies for students who have been negatively impacted by the limitation over the years. Following this discussion, policy recommendations on how to further improve the current state of special education in Texas are proposed.

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I. INTRODUCTION

“Disability only becomes a tragedy when society fails to provide the things we need to lead our lives” – Judith Heumann¹

IN 2004, the Texas Education Agency (TEA), the government agency responsible for public education in Texas, implemented an arbitrary benchmark, limiting the percentage of students in a school district who should receive special education services.² At the time the TEA executed the benchmark, approximately 12% of the Texas public school system population received special education services, compared to the national average of 13% of students.³ However, TEA’s new monitoring system illogically capped special education enrollment at a mere 8.5% of students per school district.⁴ As a result, the Texas public school system denied federally-mandated, essential services to an estimated 225,000 students for over a decade.⁵

Beginning in September 2016, the *Houston Chronicle* published a multi-part exposé, titled “Denied,” that revealed the benchmark’s ad-

1. See Joseph P. Shapiro, *A New “Common Identity” for the Disabled*, WASH. POST (Mar. 29, 1988), https://www.washingtonpost.com/archive/lifestyle/wellness/1988/03/29/a-new-common-identity-for-the-disabled/1560359a-2b64-48d2-b9a1-b701d198a452/?utm_term=.750ee9baf8be [<http://perma.cc/9VGW-8SKF>].

2. Rachel Gandy, *TEA’s Cap on Special Education Enrollment Hurts Students and Families*, DISABILITY RIGHTS TEXAS, https://www.disabilityrightstx.org/files/DRTx_SPED_cap_overview.pdf (last visited Feb. 1, 2018); *About TEA*, TEXAS EDUCATION AGENCY, https://tea.texas.gov/About_TEA/ (last visited Feb. 1, 2018).

3. Brian M. Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children Out of Special Education*, HOUSTON CHRONICLE (Sept. 10, 2016), <http://www.houstonchronicle.com/denied/1/> [<http://perma.cc/86WM-54SP>].

4. Gandy, *supra* note 2.

5. Rosenthal, *supra* note 3.

verse impact on students with disabilities⁶ throughout the state.⁷ Given that the TEA grossly lacked transparency regarding the benchmark and no such measure has previously existed in the nation, policymakers, educators, parents, and advocates across the state immediately expressed grave concern over the measure.⁸ As a result of detailed journalism by the *Houston Chronicle* and relentless advocacy by Disability Rights Texas—a non-profit legal firm that represents individuals with disabilities in Texas—the United States Department of Education (DOE) issued a letter requiring the TEA to remove any sort of imposed limitation on the number of students who can receive services within a district.⁹ More recently, the DOE filed a report placing blame on the TEA for denying students access to a “free and appropriate public education” (FAPE) through the benchmark, instructing the state to overhaul its special education system.¹⁰

To ensure that the TEA does not continue intentionally harming the well-being of students with disabilities, the Texas Legislature attempted to implement positive special education reform during the 85th Legislative Session, seeking to improve the current state of the state’s special education system through a series of targeted bills.¹¹ In response to “Denied,” the Texas Legislature passed Senate Bill 160, which officially bans all state agencies from implementing any measure that effectively limits the percentage of students receiving special education services.¹² Certainly, the passage of this bill is a significant step towards ensuring these students’ protected right to FAPE throughout the state. However, the Senate failed to pass Senate Bill 927, which would have required school districts to identify and evaluate those students who were initially denied evaluations due to the benchmark.¹³ The exclusion of this bill leaves a significant portion of the estimated 225,000 students impacted by the limitation with little support moving forward.¹⁴

6. According to the Individuals with Disabilities Education Act (IDEA), a “child with a disability” is anyone with: “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other healthy impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.” Bernadette Knoblauch & Barbara Sorenson, *IDEA’s Definition of Disabilities*, ERIC DIGESTS (Apr. 1998), <https://www.ericdigests.org/1999-4/ideas.htm> [<http://perma.cc/KZ9J-F5JD>].

7. *Denied*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/denied/> [<http://perma.cc/3T92-UPU4>] (last visited Feb. 1, 2018).

8. *See id.*; Gandy, *supra* note 2.

9. Rosenthal, *supra* note 3; Gandy, *supra* note 2.

10. Letter from U.S. Dep’t of Educ., Office of Special Educ. and Rehabilitative Servs., to the Honorable Mike Morath, Commissioner, Tex. Educ. Agency 3–4 (Jan. 11, 2018), <https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-letter.pdf> [<http://perma.cc/M627-X8RH>].

11. *See* Gandy, *supra* note 2.

12. TEX. EDUC. CODE ANN. § 29.0011.

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

14. Rosenthal, *supra* note 3.

This article analyzes the current state of the special education system in Texas, including recent legislation outlawing the benchmark on special education services. This article argues that, even in the wake of recent legislation that will improve the current state of special education, the state's current public education system still requires a significant overhaul to create any lasting change for students with disabilities within Texas. Policymakers, educators, advocates, and parents must join together to propose and implement measures that will attempt to rectify the harm caused by the previous benchmark, therefore ensuring that current and future students are provided adequate support and access to FAPE. Moreover, this article proposes that Texas's special education system will only see substantial, long-lasting transformation once the dated stigma regarding special education and students with disabilities throughout the state ends.

Part II of this article begins with a brief synopsis of the history of special education law within the United States and an analysis of the balance between federal and state law in this area before focusing more specifically on the history of special education in Texas, focusing on the 2004 TEA benchmark and its impact on the special education system.¹⁵ Part III of this article highlights major special education bills from the 85th Legislative Session, including Senate Bill 160, which requires Texas to remove the limitation on the provision of special education services, and Senate Bill 927, which, if passed, would have outlined a plan to ensure that students who were previously denied services received an adequate evaluation.¹⁶ Part IV of this article outlines the practical and legal implications of the benchmark, analyzing the future impact of Senate Bill 160 on special education in this state.¹⁷ Moreover, this section proposes education policy measures that the TEA and the Texas Legislature should consider when overhauling the state's special education system, as required by the DOE and requested by Governor Abbot.¹⁸

II. HISTORY OF SPECIAL EDUCATION LAW

A. SPECIAL EDUCATION LAW IN THE UNITED STATES

In *Brown v. Board of Education*,¹⁹ the Supreme Court introduced the notion that all children are constitutionally entitled to equal access to education, laying the groundwork for over sixty years of special education

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part IV; see also Letter from Greg Abbott, Governor of Texas, to the Honorable Mike Morath, Commissioner, Tex. Educ. Agency 1–2 (Jan. 11, 2018), https://gov.texas.gov/uploads/files/press/TEA_LETTER_1_11_18.pdf; Anya Kamenetz, *Department of Education Finds Texas Violated Special Education Law*, NPR (Jan. 11, 2018, 3:10 PM), <https://www.npr.org/sections/ed/2018/01/11/577400134/texas-violates-federal-law-education-department-finds> [<http://perma.cc/SU3V-EYN4>].

19. 347 U.S. 483 (1954).

legislation at both the state and federal level.²⁰ Following this ground-breaking decision, courts across the nation held that state and local education entities must ensure equal access to educational opportunities by meeting the individual needs of every student.²¹ Nevertheless, these courts typically supported local school districts' authority to refuse admission to students with disabilities and to set standards for determining student progress and retention in public schools.²² After frequent legal challenges by parents due to such inconsistency during the early 1970s, many public school systems reconsidered their discriminatory evaluation and placement processes for students with disabilities, thus creating more equitable measures.²³

Guided by victories from prominent legal battles,²⁴ disability rights advocates petitioned Congress to create legislation to allow for improved access to education for students with disabilities, resulting in the passage of the Education for All Handicapped Children Act of 1975 (EAHCA).²⁵ This legislation required states to guarantee FAPE to students with disabilities²⁶ by increasing access to public schools and providing support systems once admitted.²⁷ Additionally, the EAHCA ensured parental involvement in students' "individual education plans" (IEP) and the right to judicial review if compliance with the EAHCA was not met.²⁸ The EAHCA, which today is known as the Individuals with Disabilities Education Act (IDEA),²⁹ significantly expanded rights for students with disabilities. However, given the rapid growth in the special education population upon passage of this legislation, critics argue that the IDEA has created unreasonable expectations, leaving school districts unable to appropriately meet the needs of all students within this population.³⁰

20. RICHARD S. VACCA & WILLIAM C. BOSHER, JR., *LAW & EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS* 377 (Carolina Academic Press, 9th ed. 2017).

21. *See id.*

22. *Id.* at 377–78.

23. *Id.* at 378.

24. *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971) (requiring states to provide students with mental retardation a "free public program of education and training appropriate to his learning capacities"); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that the Equal Protection Clause also requires public schools to educate children with disabilities).

25. *See* Wendy F. Hensel, *Symposium: Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 *HASTINGS L.J.* 1147, 1147–48 (2007). *See generally* Education for All Handicapped Children Act of 1975, Pub. L. No. 942-142, 89 Stat. 773 (1975).

26. "To be considered a 'child with a disability' eligible for special education services, a child must be evaluated by a team set up by a school district. This team determines eligibilities and the education needs of the child." RONNA G. SCHNEIDER, *EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION* 8 (Thomson West 2004).

27. Hensel, *supra* note 25, at 1153.

28. *Id.* at 1155–58.

29. In 1990, the EAHCA was reenacted and retitled as Individuals with Disabilities Education Act (IDEA). The IDEA was reauthorized and amended in 2004 through the Individuals with Disabilities Education Improvement Act (IDEIA), which includes new provisions further guaranteeing students with disabilities the right to free and appropriate public education. VACCA & BOSHER, *supra* note 20, at 383.

30. *See* Hensel, *supra* note 25, at 1148–49.

Due to a lack of detail throughout the EAHCA and its subsequent amendments, there has been much confusion as to what Congress actually intended for this legislation to require, leading to an influx of special education litigation.³¹ While the EAHCA mandated that all children be placed in a setting where they can access FAPE and receive necessary related services, it was unclear what that entailed prior to the Supreme Court's opinion in *Board of Education v. Rowley*.³²

The majority in *Rowley* held that the EAHCA was intended to provide students with a "basic floor of opportunity," reasoning that "if personalized instruction is being provided with sufficient supportive services to provide the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free and appropriate public education' as defined by the [A]ct."³³ Here, the Supreme Court also emphasized that IEPs must be individually tailored to each student's needs, and that a student's level of educational benefit must be particular to that student.³⁴ Thus, today's decisions regarding IDEA are often fact-specific and subjective based on the student's personal situation and individualized educational needs.³⁵

Post-*Rowley*, special education litigation has maintained its presence in the court system, typically involving FAPE and the provision of, and funding for, special education services.³⁶ New legal issues regarding special education, such as inclusion in general education classrooms and requirements under the Americans with Disabilities Act (ADA), began to emerge in the late-1990's and early-2000's.³⁷ For example, in *Endrew F. v. Douglas County School District*,³⁸ the Supreme Court ruled that IEPs must provide more than a de minimis educational benefit to students under the IDEA.³⁹ Rejecting the idea that students with disabilities must receive equal opportunity as other students, the Supreme Court created a

31. VACCA & BOSHER, *supra* note 20, at 385.

32. 458 U.S. 176 (1982); *see* VACCA & BOSHER, *supra* note 20, at 387; Bill Crane, *Ten Supreme Court Special Education Cases You Need to Know*, MASS. ADVOCATES FOR CHILDREN: BILL'S BLOG (Sept. 25, 2014), <https://massadvocates.org/billsview/> [<http://perma.cc/8FNW-W5U6>]; *The Rowley Case: What Does It Mean?*, WHITTED TAKIFF, <http://www.whitedtakiff.com/for-parents/memorandum/rowley-case-mean/> [<http://perma.cc/D3VD-S3AC>] (last visited Feb. 1, 2018).

33. *Rowley*, 458 U.S. at 188–89, 201.

34. *Id.* at 202; Crane, *supra* note 32.

35. Crane, *supra* note 32.

36. VACCA & BOSHER, *supra* note 20, at 390; *see* Rettig v. Kent City Sch. Dist., 720 F.2d 463, 465–66 (6th Cir. 1983) (finding that the EAHCA does not require a state to provide handicapped children with the same potential as other children); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984) (holding that the provision of clean catheterization was a required related service under the EACHA); *Sch. Comm. of Burlington, Mass. v. Dep't of Educ.*, 471 U.S. 359, 372–73 (1985) (establishing the right of parents under EACHA to be reimbursed for private special education expenditures).

37. VACCA & BOSHER, *supra* note 20, at 405–09.

38. 137 S. Ct. 988 (2017).

39. *See* Andrew M.I. Lee, *Endrew F. Case Decided: Supreme Court Rules on How Much Benefit IEPs Must Provide*, UNDERSTOOD (Mar. 22, 2017), <https://www.understood.org/en/community-events/blogs/in-the-news/2017/03/22/endrew-f-case-decided-supreme-court-rules-on-how-much-benefit-ieps-must-provide> [<http://perma.cc/9AAA-LS8S>].

flexible standard, requiring that “an educational program [be] reasonably calculated to enable a child to make progress appropriate in light of the circumstances.”⁴⁰ In the majority opinion—celebrated by disability rights advocates nationwide—Chief Justice Roberts stated that the appropriateness of an IEP differs based on each child’s individual needs, reflecting the same idea set forth in *Rowley* and further emphasizing the need for parental input.⁴¹

B. JURISDICTION

To receive the federal funding necessary to support students with disabilities, states must provide FAPE and proper education services to all students in accordance with IDEA.⁴² While IDEA compels states to provide accessible public education to students with disabilities, it includes few demands as to how states must accomplish this requirement.⁴³ Since the IDEA allows the State Education Agency (SEA) to determine procedural and substantive standards for providing FAPE to students with disabilities and to monitor compliance with IDEA, laws and regulations dealing with the provision of special education services vary among the states.⁴⁴

Generally, courts are cautious of interfering with the public school system’s authority to make decisions regarding the provision of special education services, aiming to “avoid imposing their view of preferable educational methods upon the states.”⁴⁵ Recognizing a general lack of knowledge and experience in education policy, courts likely will only overturn such determinations that are in clear violation of mandated policies or procedures.⁴⁶ For example, if a student with a disability is eligible for an IEP, yet the school district has denied such services, a court has standing to determine whether the school district deprived the student access to FAPE.⁴⁷ When reviewing such cases, courts must first analyze whether the state complied with IDEA’s procedural requirements before determining if an IEP can appropriately provide a student FAPE.⁴⁸

C. SPECIAL EDUCATION LAW IN TEXAS

Despite the fact that Texas’s public education system currently ranks

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

41. *See id.* at 994; Lee, *supra* note 39; Michelle Diamant, *Supreme Court Fape Ruling May Be a Watershed Moment*, DISABILITY SCOOP (Apr. 7, 2017), <https://www.disabilityscoop.com/2017/04/07/supreme-court-fape-watershed/23553/> [http://perma.cc/8MQK-ABEH].

42. SCHNEIDER, *supra* note 26, at 5.

43. *See id.* at 6.

44. *Id.* at 5–6.

45. Bd. of Educ. v. *Rowley*, 458 U.S. 176, 207 (1982); VACCA & BOSHER, *supra* note 20, at 410.

46. VACCA & BOSHER, *supra* note 20, at 410; SCHNEIDER, *supra* note 26, at 85.

47. SCHNEIDER, *supra* note 26, at 18–19.

48. *Id.* at 85.

forty-first nationally,⁴⁹ the state generally maintains a positive reputation in the education community for school accountability.⁵⁰ However, in recent decades, Texas has drastically decreased the amount of funding it provides to the education system, with per-student state funding 16% lower in 2015 than it was in 2008 when adjusted for inflation.⁵¹ This reduction is a direct result of a struggling oil market, increased dependence on local tax revenue, and the 2008 recession.⁵² While the state has seen a significant growth in its population, a large portion of the incoming students are English Language Learners or from low-income families.⁵³ Due to the state's "Robin Hood" financing system, the wealthy school districts are having to redistribute money to support property-poor school districts, making property tax rates in wealthy school districts nearly unaffordable.⁵⁴ However, lawmakers continue to enact tax relief packages throughout the state, leaving school districts in financial disarray.⁵⁵ Consequently, these financial barriers have prevented school districts from being able to provide necessary services to support students with disabilities.⁵⁶

To receive federal funding, Texas is currently required to follow the guidelines outlined in IDEA that instruct the state to offer FAPE to students with disabilities through the provision of special education services.⁵⁷ Schools must offer these services as directed by a student's IEP in the least restrictive environment that is necessary for academic success.⁵⁸ Moreover, Texas must inform the federal government and local education agencies of any state rules, regulations, or policies regarding education that are not mandated by the IDEA.⁵⁹ The Texas Administrative Code includes special education rules and regulations determined by the State Board of Education (SBOE) and the Commissioner of Education (Commissioner), while laws and regulations passed by the Texas Legislature

49. *Education Rankings: Measuring How Well States Are Educating Their Students*, U.S. NEWS, <https://www.usnews.com/news/best-states/rankings/education> (last visited Mar. 1, 2018).

50. JERRY MCBEATH ET AL., EDUCATION REFORM IN THE AMERICAN STATES 172 (2008); *An Overview of the History of Public Education in Texas*, TEXAS EDUCATION AGENCY, https://tea.texas.gov/About_TEA/Welcome_and_Overview/An_Overview_of_the_History_of_Public_Education_in_Texas/ [<http://perma.cc/N7E2-99RH>] (last visited Feb. 1, 2018).

51. Julie Chang, *Study: Texas Lags Behind Most States in School Funding*, AUSTIN AMERICAN-STATESMAN (Nov. 29, 2017, 12:01 AM), <https://www.statesman.com/news/2017/11/29/study-texas-lags-behind-most-states-in-school-funding> [<http://perma.cc/QVF6-Y4L3>].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. MCBEATH ET AL., *supra* note 50, at 172.

57. *Special Education Rules and Regulations*, TEXAS EDUCATION AGENCY, https://tea.texas.gov/Academics/Special_Student_Populations/Special_Education/Programs_and_Services/Special_Education_Rules_and_Regulations/ [<http://perma.cc/2H4G-C5GJ>] (last visited Feb. 1, 2018).

58. *Id.*

59. *Id.*

are published in the Texas Education Code.⁶⁰ The laws outlined in the Texas Administrative Code and Texas Education Code apply to local education agencies that receive state tax funding.⁶¹

The Commissioner is responsible for the Texas Education Agency (TEA), the agency that oversees the state's public education system.⁶² The TEA, which is located in Austin, Texas, "provid[es] leadership, guidance, and resources to help schools meet the education needs of all students" and ensures that all 1,228 public school districts and charters comply with federal and state laws.⁶³ Additionally, the TEA distributes state and federal funding to the school districts, collects data on the state's public school system, and controls statewide assessment and accountability measures.⁶⁴

Under the IDEA, school districts are required to "proactively identify, locate, and evaluate all children with disabilities who are in need of [special education] services."⁶⁵ However, in 2004, the TEA implemented a new assessment and accountability measure, called "Special Education Representation Indicator," to its Performance-Based Monitoring Analysis System (PBMAS).⁶⁶ Unbeknownst to most educators and policy makers, this indicator instructed school districts to limit the provision of special education services to 8.5% of the student population.⁶⁷

This 8.5% benchmark was implemented following a \$1.1 billion reduction in TEA's budget in 2003, which caused the agency to lay off 15% of employees.⁶⁸ Due to this benchmark, the average percentage of students receiving special education services in Texas decreased from 11.7% in 2004 to 8.5% in 2015, denying services to over 225,000 students with disabilities during those years.⁶⁹ Since the federal government funds less than 20% of special education services, students identified as needing special education are twice as costly to the state; it is estimated that the TEA has saved billions of dollars through this benchmark at the expense of count-

60. *Id.*; see Tex. Educ. Code Ann. §§ 29.001–29.027; 19 Tex. Admin. Code Ann. §§ 89.61–89.1197.

61. *Special Education Rules and Regulations*, *supra* note 57.

62. *About TEA*, *supra* note 2.

63. *Welcome and Overview*, TEXAS EDUCATION AGENCY, https://tea.texas.gov/About_TEA/Welcome_and_Overview/ [<http://perma.cc/ST4N-RFXN>] (last visited Feb. 1, 2018).

64. *Id.*

65. Gandy, *supra* note 2.

66. *Id.*

67. Rosenthal, *supra* note 3. Districts received one of the following performance level rankings based on their special education population: Special Analysis ("Fewer than 30 students in special education in the district"); 0 ("The district identification of students to receive special education services is 8.5% or lower."); 1 ("The district identification of students to receive special education services is between 8.6% and 11.0%."); 2 ("The district identification of students to receive special education services is between 11.1% and 16.0%."); or 3 ("The district identification of students to receive special education services is 16.1% or higher"). *Review the Documents*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/denied/documents/#enforcement> [<http://perma.cc/XRN7-95XH>] (last visited Feb. 1, 2018).

68. Rosenthal, *supra* note 3.

69. Gandy, *supra* note 2.

less students' academic success.⁷⁰

School districts that failed to abide by this measure received lower overall evaluation scores, resulting in sanctions from TEA.⁷¹ For example, in 2008, the Laredo Independent School District (Laredo ISD) received notice from the Commissioner that it would receive a series of on-site visits and interventions due to its low score on the PBMAS.⁷² The TEA informed the superintendent of the school district that the district was out of compliance for over-identifying students served in its special education program.⁷³ During this period, several other school districts across the state, including Marlin Independent School District, Morgan Independent School District, and Gatesville Independent School District, received various sanctions and oversight, largely due to the fact that their special education percentages exceeded 8.5% of students.⁷⁴

To avoid sanctions, many school districts simply denied evaluations to students or provided students with accommodations under Section 504 of the Rehabilitation Act, which does not fall under the special education umbrella.⁷⁵ While 1.3% of Texas students had Section 504 plans in 2004, approximately 2.6% of students in Texas have such plans today.⁷⁶ Moreover, TEA encouraged school districts to use "Response to Intervention" (RTI) as a method of preventing students from receiving evaluations.⁷⁷ Rather than providing an evaluation as legally required, the schools would place students with disabilities in intervention programs without notifying parents, leaving parents with little knowledge of their students' progress or need for additional support.⁷⁸ However, the U.S. Department of Education has made it clear that schools cannot require RTI prior to referring a student for a special education evaluation.⁷⁹ Regardless, the state continued to implement such measures at a higher-than average

70. See Rosenthal, *supra* note 3; Shawn Stern, *Denying Students the Services They Need to Succeed*, THE PUBLIC PURPOSE (Apr. 7, 2017), <https://thepublicpurpose.com/2017/04/07/denying-students-the-services-they-need-to-succeed/> [http://perma.cc/XKM2-36FH].

71. Gandy, *supra* note 2.

72. *Review the Documents*, *supra* note 67.

73. Letter from Laura Taylor, Deputy Assoc. Comm'r for Program Monitoring and Intervention, Tex. Educ. Agency, to Veronica Guerra, Superintendent, Laredo Sch. Dist. 1-2 (Feb. 26, 2008), <https://www.documentcloud.org/documents/3146183-Letter-Summarizing-Monitoring-Visit-and-Sanctions.html> [http://perma.cc/C5SM-BVES]. In 2004, the Laredo ISD provided special education services to 13.6% of its student population. In 2007, only 11.0% of students received special education services in the district. However, the TEA felt that the district should not provide services to more than 8.5% of the student population, which was the state average at the time (largely due to the self-imposed cap). See *id.*

74. *Review the Documents*, *supra* note 67. It is important to note that these districts all still had averages lower than the national average. *Id.*

75. Rosenthal, *supra* note 3. Section 504 plans do not actually provide any services to students with disabilities aside from classroom accommodations. Moreover, they do not provide students the option for individualized instruction. Each plan costs a school district, on average, \$2, as compared to the thousands of dollars spent yearly on special education service for a student. *Id.*

76. *Id.* The national average for a Section 504 plan is 1.5%. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

rate, significantly harming students who should have instead received an evaluation. As a result, parents were kept in the dark regarding their student's academic needs.⁸⁰

III. CURRENT STATE OF SPECIAL EDUCATION LAW IN TEXAS

A. "DENIED"—HOW THE *HOUSTON CHRONICLE* EXPOSED THE TEA

In January 2014, Disability Rights Texas, a non-profit legal firm that represents individuals with disabilities throughout the state, discovered that the TEA had imposed the 8.5% benchmark on special education services.⁸¹ After the TEA ignored the organization's attempt to formally express its concerns over the cap, attorneys with Disability Rights Texas began vehemently fighting for students with disabilities to be identified.⁸² After learning of the issue through the efforts of Disability Rights Texas, the *Houston Chronicle* conducted an in-depth investigation into the current state of special education in Texas, focusing attention on the benchmark imposed by the TEA.⁸³ Beginning in September 2016, the *Houston Chronicle* published "Denied," a series of articles written by Brian Rosenthal, which highlighted the findings of their investigation and exposed the country to the existence of the benchmark, as well as its destructive impact on students with disabilities in Texas.⁸⁴ "Denied" focused on the manner in which the TEA used the benchmark to prevent students with all levels of disabilities, particularly students in big cities⁸⁵ and minorities, from receiving services.⁸⁶ Rosenthal's articles featured compelling stories of individual students who were denied services in recent years, highlighting the irreversible harm that the benchmark had on these students and their families.⁸⁷ Moreover, this investigation uncovered TEA's failure to consult with the Texas Legislature of SBOE before enacting this arbitrary benchmark, leaving policymakers, teachers, parents, and advocates in the

80. Rosenthal, *supra* note 3.

81. Dustin Rynders, *Rynders: Fixing Special Ed in Texas Requires Honest Talk*, HOUSTON CHRONICLE (Sept. 20, 2016, 2:58 PM), <http://www.houstonchronicle.com/opinion/outlook/article/Rynders-Fixing-special-ed-in-Texas-requires-9235322.php> [<http://perma.cc/3RRB-Z2RX>]; Brian M. Rosenthal, *Feds Order Texas to End Special Ed Benchmark Unless State Can Prove No Kid Has Been Denied Services*, HOUSTON CHRONICLE (Oct. 3, 2016, 1:00 AM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Feds-order-Texas-to-eliminate-use-of-benchmark-on-9652019.php> [<http://perma.cc/3E74-47P5>].

82. See Rynders, *supra* note 81.

83. Rosenthal, *supra* note 3.

84. *Id.*

85. Houston ISD provided services to 7.4%, while Dallas ISD provided services to 6.9% of students. Of the 100 largest school districts in the United States, all 10 school districts that serve less than 8.5% of students with disabilities are located in Texas. *Id.*

86. *Id.* The benchmark was most consequential to Black students and English Language Learners. Brian M. Rosenthal, *Denied: Texas Schools Shut Non-English Speakers Out of Special Ed*, HOUSTON CHRONICLE (Dec. 10, 2016), <http://www.houstonchronicle.com/denied/4/> [<http://perma.cc/A3Q7-227P>].

87. *Denied*, *supra* note 7.

dark.⁸⁸

After this investigation surfaced, policymakers, educators, advocates, and parents expressed grave concern; officials, such as Superintendents Michael Hinojosa of Dallas Independent School District and Pedro Martinez of San Antonio Independent School District, pledged to further review their district's special education systems.⁸⁹ Continuously denying that it refused services to students with disabilities, the TEA framed the benchmark as a response to a federal request to reduce over-representation of students in special education programs rather than an attempt to cut funding.⁹⁰ While the TEA initially offered to review any issues, the agency only formally responded to one complaint, filed by Disability Rights Texas, stating that they would only address concerns regarding a specific student.⁹¹ Other officials, such as the former director of special education for the Houston Independent School District, claimed that improved instruction and early intervention programs explained the decline in students receiving special education services.⁹² Further, TEA special education director, Eugene Lenz, argued that school districts were only monitored for compliance and were never penalized for failing to comply with the benchmark.⁹³

B. SPECIAL EDUCATION LEGISLATION IN THE AFTERMATH OF "DENIED"

In the aftermath of "Denied," the Texas Legislature focused heavily on special education policy in an unprecedented manner.⁹⁴ Legislators filed four bills in late 2016 that specifically addressed the 8.5% benchmark imposed by TEA, including Senate Bill 160 (Rodriguez-D), Senate Bill 214 (Menendez-D), House Bill 363 (Huberty-R), and House Bill 713 (Wu-D).⁹⁵ All four bills required TEA to remove the indicator by adding Section 29.0011 to Chapter 29, Subchapter A of the Texas Education Code. Senate Bill 160 and House Bill 363 specifically provided that TEA should continue evaluating data on "disproportionality within [special education] programs throughout Texas."⁹⁶ In May 2016, the Legislature unanimously approved Senate Bill 160, which amended the Texas Education Code to

88. *Id.* The TEA has been unable to provide any documentation to the *Houston Chronicle* regarding meetings where they sought input or any research-based evidence justifying the 8.5% benchmark. However, the TEA did publish information on the cap on Page 5,579 of the July 2014 edition of the Texas Register, a relatively unknown state agency journal. Rosenthal, *supra* note 3.

89. Brian M. Rosenthal, *Dallas, San Antonio Superintendents Call for End to State's Special Education Enrollment Target*, HOUSTON CHRONICLE (Sept. 27, 2016, 12:50 AM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Dallas-San-Antonio-superintendents-call-for-end-9316363.php> [<http://perma.cc/CT5J-C7TC>].

90. Rosenthal, *supra* note 81.

91. Rosenthal, *supra* note 3.

92. Rosenthal, *supra* note 89.

93. Rosenthal, *supra* note 81.

94. *See* Gandy, *supra* note 2.

95. *Id.*

96. *Id.*

prevent any agency from using a benchmark to limit how many students a school district or charter school can enroll in special education services.⁹⁷ The Senate passed three other bills designed to improve the current state of special education programs in Texas, including Senate Bill 436 (requiring that the state's special education continuing advisory committee meetings be conducted publicly); Senate Bill 1153 (mandating greater parental notification regarding any educational supports or intervention strategies, especially involving RTI measures); and Senate Bill 748 (encouraging greater support for older students with disabilities in their transitions out of the public school system).⁹⁸ Additionally, the House passed House Bill 1886, which provides screening for dyslexia and other related disorders in kindergarten and first grade.

While special education policy received strong bipartisan support, only a handful of the proposed bills gained passage in the Legislature.⁹⁹ Most notably, Senate Bill 927, which would have provided a "recovery program" to assist students who were denied special education services due to the previous benchmark, failed to leave the Senate Committee in May 2017.¹⁰⁰ This bill would have amended the Texas Education Code to require the TEA to identify each student who was improperly denied an evaluation from 2004 to 2017 and to notify parents that any student currently under the age of 21 was eligible for reevaluation.¹⁰¹ Moreover, the following special education bills also failed to gain enough votes in the House: House Bill 3369 (providing culturally and linguistically appropriate special education evaluations to English language learners); House Bill 21 (including dyslexic students in the Texas special education budget); and House Bill 23 (funding innovative programs through a grant for students with autism).¹⁰²

C. THE UNITED STATES DEPARTMENT OF EDUCATION WEIGHS IN

After hearing concerns from Disability Rights Texas in October 2016, the United States Department of Education (DOE) informed the TEA that it must eliminate the 8.5% benchmark unless it could prove that the benchmark had not prevented a single child from receiving FAPE.¹⁰³ In a letter to the Commissioner, Mike Morath, the Acting Assistant Secretary for Special Education under the DOE, Sue Swenson, wrote that the cap "may be resulting in districts' failure to identify and evaluate all students suspected of having a disability and who need special education and related services and to provide a [FAPE] to those students who should have

97. Senate Bill 160 is now codified into law. See Tex. Educ. Code Ann. § 29.0011.

98. Laura Isensee, *What Texas Lawmakers Did for Special Education and What They Missed*, HOUSTON PUBLIC MEDIA (June 19, 2017, 11:00 AM), <https://www.houstonpublicmedia.org/articles/news/education-news/2017/06/19/205085/what-texas-lawmakers-did-for-special-education-and-what-they-missed/> [http://perma.cc/6TST-5EF5].

99. *Id.*

100. *Id.*

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

102. Isensee, *supra* note 98.

103. Rosenthal, *supra* note 81.

been found eligible.”¹⁰⁴ Upon Swenson’s demand that the TEA provide a written response justifying the benchmark within thirty days, the TEA announced that it would no longer use the 8.5% benchmark as an evaluative measure.¹⁰⁵ However, TEA continued to act defensively, refusing to admit fault for the negative consequences of the benchmark and failing to clarify procedural steps for eliminating the benchmark.¹⁰⁶ As part of its investigation, the DOE conducted a series of “listening sessions” throughout Texas in December 2016, where officials heard impact stories and concerns from countless residents traveling from across the state.¹⁰⁷

In January 2018, the DOE issued findings from its fifteen-month investigation and monitoring, reporting that the TEA violated several IDEA requirements, including (1) identifying and evaluating students with disabilities; (2) providing FAPE to all students; and (3) monitoring school districts to ensure compliance with such requirements.¹⁰⁸ Regarding the 8.5% benchmark, U.S. Secretary of Education, Betsy DeVos, stated, “Far too many students in Texas had been precluded from receiving supports and services under IDEA. . . . While there is still more work to be done, leaders in the state have assured me they are committed to ensuring all students with disabilities can achieve their full potential.”¹⁰⁹ Although the DOE instructed TEA to remedy the issue, the agency provided the DOE discretion in submitting and implementing a corrective action plan.¹¹⁰

IV. AN ANALYSIS OF SPECIAL EDUCATION POLICY IN TEXAS AND HOW TO MOVE FORWARD

*“To create a world where disability does not matter, educators and policymakers must begin with the recognition that it does.”*¹¹¹

A. OVER-IDENTIFICATION AND THE 8.5% BENCHMARK

The passage of IDEA has led to an influx in the number of students receiving special education services in our nation’s public schools.¹¹² While minority students have always been substantially misidentified in

104. Letter from U.S. Dep’t of Educ., Office of Special Educ. and Rehabilitative Servs., to the Honorable Mike Morath, Commissioner, Tex. Educ. Agency 3–4 (Oct. 3, 2016), <https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/letter-to-mike-morath-10-03-2016.pdf> [<http://perma.cc/Z5GP-B2FF>].

105. *Id.*; see Brian M. Rosenthal, *TEA Suspends Special Education Enrollment Target*, HOUSTON CHRONICLE (Nov. 2, 2016, 8:56 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/TEA-suspends-special-education-cap-10534865.php> [<http://perma.cc/GK8H-LEUU>].

106. Gandy, *supra* note 2.

107. *Id.*

108. Letter from U.S. Dep’t of Educ., *supra* note 10; Kamenetz, *supra* note 18.

109. Letter from U.S. Dep’t of Educ., *supra* note 10.

110. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring (Jan. 11, 2018), <https://www.ed.gov/news/press-releases/us-department-education-issues-findings-texas-individuals-disabilities-education-act-monitoring> [<http://perma.cc/67BG-Z53L>].

111. Hensel, *supra* note 25, at 1197.

112. *See id.* at 1179.

special education, over-identification of all students has been a major concern of education policymakers in recent decades.¹¹³ Allegedly, the TEA arbitrarily limited the amount of students that Texas public schools could evaluate and place in special education programs as a response, drastically reducing the number of students who were provided services in the state over the past decade.¹¹⁴ In addition to violating federal and state education laws, this benchmark will have lasting, detrimental consequences on students with disabilities and their families, the entire Texas public school system, and society as a whole.

By compelling school districts to only identify 8.5% of students with disabilities since 2004, the TEA has forced schools to deny students access to FAPE as required under Section 612(a)(1) of IDEA.¹¹⁵ Moreover, school districts have failed to abide by IDEA's child find provisions, requiring schools to identify, locate, and evaluate students with disabilities.¹¹⁶ School districts have often denied students with disabilities access to the least restrictive environment, as mandated by IDEA, leading to the disregard of individual student needs.¹¹⁷ These violations are significant because states must legally comply with IDEA, the cornerstone of equality in education for students with disabilities in the United States, to receive federal funding for special education services.

Although 59% of Texas educators and parents surveyed in 2016 felt that under-identifying children with special needs was a problem in their school district, the TEA argues that the benchmark was implemented to address the Department of Education's concerns over over-identifying students with disabilities.¹¹⁸ This justification falls flat given that Texas is the only state in the nation to implement such a measure to address over-identification. When the cap was implemented in 2004, 13.8% of students in the United States were in special education programs, but only 11.7% of students in Texas received such services. In 2015, the national average remained 13%.¹¹⁹ Since Texas residents have above-average rates of disability risk factors, the percentage of students in the state qualifying for special education should at least match the national average.¹²⁰ The TEA's reasoning for the cap is even more suspect given that the cap was implemented shortly after \$1.1 billion in cuts to the TEA's budget, caus-

113. See Aliyya Swaby, *Expecting Spike in Special Ed Students, Advocates Push for Better Services*, TEXAS TRIBUNE (Jan. 19, 2017, 12:00 AM), <https://www.texastribune.org/2017/01/19/advocates-pushing-increase-quality-not-just-number/> [http://perma.cc/KN2J-H26G].

114. The TEA continues to use concerns regarding over-identification to justify the benchmark. However, it was most likely a response to significant budget cuts to the TEA's budget in 2003. See Rosenthal, *supra* note 3.

115. Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

116. See *id.*

117. See *id.*

118. See Rosenthal, *supra* note 3.

119. See Gandy, *supra* note 2.

120. See Rosenthal, *supra* note 3.

ing a 15% decrease in staff.¹²¹

Although the TEA blames the rise in special education numbers nationwide on careless over-identification, this growth likely reflects a better understanding of disabilities, an increase in qualifying disabilities, and the ability to appropriately accommodate them in educational setting.¹²² Nevertheless, schools nationwide continue to struggle to accommodate for the increase in students eligible for special education services, and Texas is no exception.¹²³ A lack of proper academic support not only causes students with disabilities to struggle academically and behaviorally, but it also has a negative impact on other students and educators.¹²⁴ The absence of additional support often causes teachers to devote more time to students' individual needs due to disabilities and less time from the general education classroom as a whole. A lack of resources often contributes to low teacher retention rates, and frequent turnover can have a detrimental effect on learning environments.¹²⁵ Fortunately, these issues can be addressed through several policy implementations mentioned below, such as increased funding and additional teacher support.

Moreover, a student's academic performance should not be the only factor considered in determining the need for a special education placement.¹²⁶ For example, a student who performs well academically, but still receives special education services, should not be considered "over-identified." This is evidenced by Joseph Espinoza, a seventeen-year-old who received appropriate services for years due to conditions such as Asperger Syndrome, Post-Traumatic Stress Disorder, Bipolar Disorder and Schizophrenia. However, the school district removed his special education classification based on academic performance. In his first year without the classification, he began failing classes, developed severe depression, had frequent hallucinations, and spent nearly two weeks in a state psychiatric hospital.¹²⁷ For students like Steven Smith, an eleven-year-old who wished to commit suicide due to his academic challenges, the denial of an evaluation could be a matter of life or death.¹²⁸ Like Espinoza and Smith, countless students have faced irreparable harm at the hands of the Texas public school system in an alleged attempt to prevent over-identifying students. However, it is far better to over-identify students than to be responsible for the intense suffering of our state's children.

121. *See id.*

122. *See* Hensel, *supra* note 25, at 1149, 1179–80.

123. *See id.* at 1202; Valerie Strauss, *What Texas Did to Its Special-Education Students*, WASH. POST (Sept. 18, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/09/18/what-texas-did-to-its-special-education-students/?utm_term=.3255454e79f4 [<http://perma.cc/8VNL-4RJW>].

124. *See* Hensel, *supra* note 25, at 1189.

125. *See* Brian M. Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, HOUSTON CHRONICLE (Oct. 22, 2016), <http://www.houstonchronicle.com/denied/2/> [<http://perma.cc/BST4-9TXN>].

126. *See* Hensel, *supra* note 25, at 1171–72.

127. *See* Rosenthal, *supra* note 125.

128. *See id.*

Nevertheless, evidence proves that minorities and children living in poverty are frequently over-identified in special education programs and placed outside of the general education classroom at an alarming rate.¹²⁹ Notably, IDEA instructs that students be placed in their least restrictive environment because of the detrimental effect of removing students from a classroom where learning can effectively occur and placing them in an unproductive learning environment. Prior to the benchmark, 14% of Black students in Texas were in special education placements, while 12% of students in Texas were overall; in 2013-2014, only 11% of Black were in special education placements, but the state's overall total for students in special education placements dropped to a mere 8.6%.¹³⁰ Conversely, English Language Learners are considerably under-diagnosed, although federal law mandates that schools provide services to these students as well.¹³¹ Prior to the benchmark, roughly 11% of English Language Learners received special education services; however, by 2013-2014, this number had decreased to 7.5%.¹³²

Although the benchmark decreased the number of students identified overall, this data demonstrates that it did not address the actual issues involving over-identification in public schools. Research shows that both Black students and English Language Learners are more prone to disabilities based on higher rates of conditions such as premature birth, fetal alcohol syndrome, malnutrition, and exposure to toxins.¹³³ Therefore, the concern regarding overrepresentation of minorities is misplaced, and the underrepresentation of English Language Learners is unjustified. Rather than attempting to apply an overall limitation on students of all backgrounds across the state, the TEA could better address these identification issues by providing less-subjective guidelines for student evaluations and better training for teachers and evaluators to “minimize the effects of prejudice on the eligibility determination.”¹³⁴ Additionally, the legislature should reconsider House Bill 3369¹³⁵ and implement evaluations specifically created for English Language Learners to ensure a fair and appropriate evaluation and identification process.

129. See Hensel, *supra* 25, at 1198. This is especially true in large Texas cities like Houston, where black students are less likely to receive special education services than students of any race in almost any other big city in the United States. See Brian M. Rosenthal, *HISD's Focus on "Over-Identification" of Black Students Backfires*, HOUSTON CHRONICLE (Dec. 27, 2016, 8:52 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/HISD-s-focus-on-over-identification-of-10821607.php> [<http://perma.cc/V7GG-XWNZ>].

130. See *Steal Our Data*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/de-nied/data/> [<http://perma.cc/4G7C-YRTG>] (last visited Feb. 1, 2018).

131. See Rosenthal, *supra* note 86.

132. See *Steal Our Data*, *supra* note 130. In Victoria ISD, the percentage of English Language Learners in special education dropped to 4% during the benchmark in order to lower the district's total rate to 8.9%. Rosenthal, *supra* note 86.

133. See Rosenthal, *supra* note 86; Rosenthal, *supra* note 129.

134. Hensel, *supra* note 25, at 1199.

135. H.B. 3369, 85th Leg., Reg. Sess. (Tex. 2017).

The state should not be applauded for the TEA's claim that the decrease in the number of identified students is due to improved curriculum and instruction, rather than the benchmark. A frequently-cited enhancement is the implementation of RTI in schools. However, Texas school districts have illegally forced this method on teachers before students can be referred for an evaluation, often causing students to fall through the cracks in the process.¹³⁶ Likewise, school districts have drastically increased the provision of Section 504 plans to students who would qualify for special education if provided an evaluation as legally mandated. In 2004, only 1.3% of Texas students had such plans, compared to 2.6% of students today; the national average is 1.5% of students.¹³⁷

These methods are problematic because they do not require parental input or have the same federal and state accountability measures as special education. "Denied" highlights the negative impact of utilizing such measures instead of providing evaluations, focusing on students like Lilly Barrera, a sixth-grader with a learning disability who fell three grade levels behind in her reading ability while placed in RTI, which led to severe depression. It also features students like Roanin Walker, a young child illegally denied an evaluation based on his high IQ who suffered intense meltdowns, frequent suspensions, and decreased academic performance without proper support.¹³⁸ Moreover, the decline in the percentage of students receiving services may be impacted by students like Jade Fuller, whose family had to move out of the state to receive appropriate services in light of the benchmark.¹³⁹ Finally, the additional 14,000 students who received special education services in 2016-2017 once the benchmark was lifted proves a direct correlation between the benchmark and the denial of services, thus providing hope for a positive trend in special education.¹⁴⁰

B. HOW TEXAS SHOULD MOVE FORWARD IN LIGHT OF DENIED AND RECENT LEGISLATION

Even if the TEA did not intend to intentionally discriminate against students with disabilities, it is undeniable that this benchmark had a disparate impact on students and families across Texas. Agencies and officials throughout the state are currently in dispute over TEA's intentions with the benchmark and who should be held accountable for the suffering

136. See Rosenthal, *supra* note 3.

137. See *id.*

138. See *id.*

139. See Susan Carroll & Brian M. Rosenthal, *Denied: Unable to Get Special Ed in Texas, One Family Moved*, HOUSTON CHRONICLE (Dec. 24, 2016), <http://www.houstonchronicle.com/denied/5/> [<http://perma.cc/2BBW-62GT>].

140. See Alejandra Matos, *Enrollment of Students in Special Education Surges in Texas*, HOUSTON CHRONICLE (Nov. 10, 2017, 10:36 AM), <http://www.chron.com/news/politics/texas/article/Enrollment-of-students-in-special-ed-programs-12346161.php> [<http://perma.cc/2BBW-62GT>].

it caused to countless students with disabilities and their families.¹⁴¹ Regardless of who ultimately bears the responsibility, policymakers, educators, advocates, and parents must begin to work jointly to ease the harm caused by the benchmark and to restore the reputation of the special education system in Texas.

1. Fixing Issues Resulting from the Benchmark

Fortunately, the TEA has vowed to remove the benchmark from its evaluation system. The Texas Legislature passed Senate Bill 160, now codified in the Texas Education Code, to ensure that state agencies never again enforce such an arbitrary measure.¹⁴² This provision will be instrumental in restoring education equality for students with disabilities in Texas. The state must continue to implement positive policy changes like this to successfully provide FAPE, as required under the IDEA, to all students regardless of disability. The Texas Legislature's recent interest in improving the state's special education is reassuring.¹⁴³ Additionally, the surprising report¹⁴⁴ released by the Department of Education in January 2018, holding the TEA responsible for the arbitrary benchmark and its impact on students, provides encouragement to special education advocates and families of children with disabilities nationwide.

Despite this progress, Texas must still make significant improvements to restore its credibility as one of the nation's most powerful education systems. To fully resolve the challenges currently impacting the state's special education system, Legislators must continue to pursue several proposed bills that ultimately failed to gain enough support during the 85th Legislative Session. Senate Bill 927, which would have required schools to identify and offer to evaluate students who were previously denied the opportunity, was left pending in committee.¹⁴⁵ Without such

141. See Eva-Marie Ayala, *State, Not Schools, Denied Kids Special Ed Services, Texas Administrator Says*, HOUSTON CHRONICLE (Jan. 16, 2018), <https://www.dallasnews.com/news/education/2018/01/16/kids-denied-special-ed-services-states-derelection-duty-not-schools-texas-administrators-say> [<http://perma.cc/Ry6G-SCP2>].

142. See Tex. Educ. Code Ann § 29.0011.

143. In the 85th Legislative Session, senators and representatives filed fifty-one bills relating to special education. This is nearly twice as many as were filed in the previous session. See Brian M. Rosenthal, *Abbott: "Texas Will Fix" its Embattled Special Education System*, HOUSTON CHRONICLE (Apr. 3, 2017, 2:41 PM), <http://www.chron.com/news/politics/texas/article/Abbott-Texas-will-fix-its-embattled-special-11046397.php> [<http://perma.cc/3X9U-TSCA>].

144. During her Senate confirmation hearing, DeVos emphasized her belief that states should be responsible for decisions regarding the rights of students in special education programs and seemed to lack an understanding of the IDEA and its federal application to the states' public education systems. Thus, many advocates questioned whether the DOE under the current administration would address the issues in Texas. See Laura McKenna, *Is The Bar Too Low for Special Education?*, THE ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/education/archive/2017/01/is-the-bar-too-low-for-special-education/514241/> [<http://perma.cc/NKW5-Z8MG>].

145. S.B. 927, 85th Leg., Reg. Sess. (Tex. 2017). House Bill 3437 proposed similar measures but was evidently struck down in retaliation by conservative Republicans. See Andrea Zelinski, *Major Strides Made on Special Ed in Session, But Much Work Remains Ahead*, HOUSTON CHRONICLE (May 22, 2017, 8:31 PM), <http://www.houstonchronicle.com/>

legislation, thousands of students with disabilities remain unevaluated and underserved in the Texas public school system. The guilt surrounding the denial of services due to the benchmark even led some special education teachers to quit their jobs.¹⁴⁶ To provide any sort of remedy for TEA's controversial measure, a policy must be implemented to guarantee a proper evaluation to any student who can prove a denial of an evaluation or services since 2004.

While Senate Bill 927 would have ensured that school districts properly evaluate a portion of the students with disabilities who were previously denied access to FAPE, it would not provide a remedy to those students who already graduated or otherwise exited the public school system. Due to the benchmark, students across the state who were denied special education services struggled to graduate, spent time in mental facilities, and even dropped out of school.¹⁴⁷ The state will never be able to implement measures that can provide students like Alston Jeffus—who was given a Section 504 plan to address ADHD instead of an evaluation and was indefinitely suspended after an attempted suicide despite a bipolar diagnosis—an opportunity to fully heal from the harm suffered.¹⁴⁸

Although the DOE report ordered Texas to identify students who were denied services and to fix the problem, it did not specify how the state should do so.¹⁴⁹ While it cannot reverse the irreparable harm caused by denying students access to FAPE, the state must, at the very least, attempt to identify these students that are or currently could be in the Texas public school system and provide them with a proper evaluation. It is never too late to begin providing support, and the state will likely see significant improvements in school performance and retention rates upon doing so.

Moreover, countless families either moved to other states where their children could receive necessary, federally-mandated services or paid exorbitant sums of money to send their children to private schools with greater individualized educational opportunities.¹⁵⁰ Under federal law, Texas is required to provide special education services to those students in private schools; however, students with disabilities in private schools rarely received such services.¹⁵¹ It is unrealistic to expect the state to reimburse these parents for moving expenses or years of private school tui-

news/houston-texas/houston/article/Major-strides-made-on-special-ed-in-session-but-11163113.php [http://perma.cc/XY67-K6ZQ].

146. See Rosenthal, *supra* note 125.

147. See Brian M. Rosenthal, *Denied: Mentally Ill Lose Out as Special Ed Declines*, HOUSTON CHRONICLE (Nov. 9, 2016), <http://www.houstonchronicle.com/denied/3/?t=b0dad284f4> [http://perma.cc/DM43-7HHR].

148. *Id.*

149. See Letter from U.S. Dep't of Educ., *supra* note 10.

150. See Rosenthal, *supra* note 125.

151. See Brian M. Rosenthal, *In Texas, Even Blind Children Can't Always Get Special Education*, HOUSTON CHRONICLE (Dec. 30, 2016, 11:27 AM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/In-Texas-even-blind-and-deaf-children-can-t-10822708.php>.

tion based on funding allocations and budget shortfalls. However, school districts must begin abiding by federal law, allowing students with disabilities in private schools the ability to receive special education services through the public school system as mandated.

2. *Improving the System for Students Who Are Identified*

Furthermore, it is imperative that the state implement measures to provide better services to those students who already have been, or soon will be, evaluated and identified. The number of students qualifying for special education services in the state is likely to increase significantly over the next decade with the removal of the benchmark.¹⁵² This influx will raise the demand for special education teachers; yet, it is more challenging than ever to fill these positions with qualified individuals due to lack of training, limited resources, and mounting paperwork.¹⁵³ Therefore, school districts must focus on retaining special education teachers and reallocate budget funding to allow schools to hire additional highly-qualified teachers and paraprofessionals to provide sufficient support.¹⁵⁴ More importantly, the state must ensure that school districts are properly guiding teachers on how to effectively work with special needs populations.¹⁵⁵

In addition to improving the quality of teaching, school districts must focus on measures that promote student success and satisfaction. First, schools should critically analyze whether the support and services provided in IEPs are actually promoting academic and behavioral achievements and determine proper classroom settings accordingly.¹⁵⁶ This analysis should focus solely on the individual needs of the students, rather than considering funding, performance on state testing, or school evaluation measures. Second, given the large population of English Language Learners in Texas and the evidence of underrepresentation, school districts should assess those programs and their correlation with special education to guarantee a proper evaluation to all students with disabilities, regardless of language barriers.

Next, school districts must change the RTI system according to the law to ensure that students are not inappropriately placed in RTI to postpone or deny an evaluation. Finally, parents must be allowed greater involvement in the evaluation process. If students are placed in RTI or provided

152. See Swaby, *supra* note 113.

153. See Winnie O'Leary, *Five Trending Issues in Special Education*, EDMENTUM (May 4, 2016), <http://blog.edmentum.com/five-trending-issues-special-education> [<http://perma.cc/44RA-FZ7J>].

154. See Strauss, *supra* note 123.

155. At a DOE listening session, an eight-year-old child with Asperger's and ADHD admitted to being verbally and physically assaulted, including a choking incident, by under-qualified staff at this public school. Lisa Falkenberg, *Special Ed Stories Are Heartbreaking, and Inaction is Unforgivable*, HOUSTON CHRONICLE (Dec. 13, 2016, 6:21 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Special-ed-stories-are-heart-breaking-and-10794518.php> [<http://perma.cc/KEZ4-6823>].

156. See David DeMatthews, *The State's Special Education Program Needs a Reboot*, TRIBTALK (Dec. 21, 2017), <https://www.tribtalk.org/2017/12/21/the-states-special-education-programs-need-a-reboot/> [<http://perma.cc/G4QU-M6BL>].

with other strategies to alleviate concerns, it is important that schools appropriately communicate this decision to parents, as proposed in Senate Bill 1153 and House Bill 3599.¹⁵⁷ This will provide parents with notice that their child might have a disability and inform them of their rights to an evaluation if requested. School districts should also provide translators for parents to guarantee that all parents properly recognize their child's educational rights and understand how their child is performing academically.¹⁵⁸

Statewide, the TEA should work to improve the public special education system by identifying high-performing school districts and individual schools with successful special education programs and imitating their methods throughout the state.¹⁵⁹ Moreover, it should continue to monitor special education percentages in the state, but only to recognize potential issues and trends in special education identification, and provide support to those schools who require additional support or intervention.¹⁶⁰ Since the TEA holds immense power in shaping the state's education system, it should consult with the legislature and provide data regarding different special education measures to help encourage legislation that will address current needs. As the agency responsible for monitoring compliance with certain federal and state guidelines, the TEA should be actively observing campuses and seeking feedback from students, parents, educators, and advocates rather than simply observing data.¹⁶¹ Had the TEA done so in 2004, nearly 225,000 additional students would likely have received the services they needed to succeed academically and emotionally, and policymakers would not currently be tasked with overhauling an education system that recklessly caused irreparable harm to countless students.

3. *Funding*

Funding is the root of most problems facing the education system today. Schools across the nation are underfunded, leading to a lack of resources and support for both students and teachers. Consequently, students are falling through the cracks and teachers are leaving the profession in droves; Texas is no exception. It is apparent that the benchmark was largely in response to drastic cuts to the TEA's budget, and was likely a measure to cut funding disguised as a method of addressing over-identification issues. However, in an attempt to lower special education identification, Massachusetts changed its funding model to fund lower than the percentage of children in special education at the time.¹⁶² As a result, special education numbers remained stagnant while funding decreased. The TEA should recognize that, based on this evidence, schools

157. See S.B.1153, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 3599, 85th Leg., Reg. Sess. (Tex. 2017).

158. See Swaby, *supra* note 113.

159. See DeMatthews, *supra* note 156.

160. See *id.*

161. See *Welcome and Overview*, *supra* note 63.

162. See Hensel, *supra* note 25, at 1186.

are not likely over-diagnosing children just to receive state and federal funding.

Texas must provide adequate funding to support special education programs across the state. While it is optimistic that the legislature displayed an increased interest in special education during the 85th Legislative Session, there were no proposed measures to increase funding. Conversely, the legislature actually voted against restoring funding for speech, physical, and occupational therapy sessions, leaving schools to use their existing budgets to cover the mandated services.¹⁶³ Although unlikely to ever pass, the state should give serious consideration to the idea of implementing a state income tax. Texas could also raise property taxes, which the state currently uses to fund education, although state officials and lawmakers constantly aim to reduce such taxes.¹⁶⁴ Since both of those recommendations are improbable, the state must review its current budget and find areas in which it can re-allocate funding to special education programs. Moreover, as a key player in federal policy decisions, Texas should petition the federal government to increase the federal funding that has been drastically reduced in recent years to improve special education programs. Although states were originally promised to 40% of special education funding from the federal government after the passage of IDEA, the federal government currently only pays states approximately 16% of funding.¹⁶⁵ To provide the states with appropriate funding for special education programs, the federal government should cap itemized deductions and critically review tax provisions that only benefit the elite.¹⁶⁶ In return, society as a whole will benefit.

Texas should also look to other states with successful special education programs for guidance and imitate positive measures. For example, after expert research and public opinion forums, Pennsylvania estimated that 16% of all students need special education services and began providing funding to each school district based on this percentage.¹⁶⁷ This flat-rate funding method, also called a census-based system, encourages neither over-identification or under-identification.¹⁶⁸ Currently, Texas uses a multiple-weights funding system with different funding levels based on a student's educational placement.¹⁶⁹ However, this measure might encourage school districts to over-identify students and place them in a more restrictive environment with unnecessary support to receive additional funding. In comparison, Maryland utilizes a research-based funding

163. See Kristin Tassin, *How Gov. Abbot's Voucher Plan Hurts Disabled Kids*, HOUSTON CHRONICLE (July 17, 2017), <http://www.houstonchronicle.com/local/gray-matters/article/How-Gov-Abbott-s-voucher-plan-hurts-11293560.php> [<http://perma.cc/Y2ZR-D8XY>].

164. See Falkenberg, *supra* note 155.

165. See McKenna, *supra* note 144.

166. See Stern, *supra* note 70.

167. See Carroll & Rosenthal, *supra* note 139.

168. See *id.*

169. See Maria Millard & Stephanie Aragon, *State Funding for Students with Disabilities*, EDUCATION COMMISSION OF THE STATES (June 2015), <http://www.ecs.org/clearinghouse/01/19/47/11947.pdf> [<http://perma.cc/S7WN-ZEVS>].

method and conducts an adequacy cost study to objectively determine the necessary amount required to provide students with access to FAPE “plus weights for students with disabilities.”¹⁷⁰ The Texas Legislature should consider implementing this funding strategy to ensure that school districts receive appropriate funding to provide acceptable support to students regardless of disability without the risk of encouraging or discouraging special education placements based on funding.

In recent years, Governor Greg Abbot and the Texas Legislature have looked to programs in other states to encourage the use of private school choice vouchers and scholarships to address public school funding concerns. Proponents of such measures believe that this will provide access to programs with more individualized educations, citing the academic growth of students in Arizona after passing a private choice tax credit and Empowerment Scholarship Accounts in recent years.¹⁷¹ In July 2017, the Texas Senate tentatively approved a school-finance bill that allows tax credit scholarships for students with disabilities to attend private schools, but it was left pending in committee in the Texas House of Representatives.¹⁷²

In addition to constitutional issues, school vouchers divert money from public schools to private schools rather than providing these schools with the financial support necessary to fund special education programs. Similarly, scholarship programs are deservedly controversial and are likely to harm students with disabilities. First, such scholarships will likely only benefit wealthy families who can afford to pay any tuition that exceeds the \$10,000 cap on the scholarships.¹⁷³ Next, it is unlikely that private schools, many of which have strict admissions requirements, will be willing to accept or to appropriately accommodate for students with significant disabilities. Finally, federal laws safeguarding the educational rights of students with disabilities do not apply to private schools, leaving these students legally unprotected.

State policymakers must also consider this issue from a cost-benefit perspective. The provision of special education services is costly and absorbs funding from general education. Additionally, school districts, who are often rewarded financially based on academic performance, receive little financial benefit from special education programs.¹⁷⁴ Providing these services to students comes at an expense, but it is far more detri-

170. *See id.*

171. *See* Matthew Ladner, *Texas Implemented a Special Ed Cap, AZ Implemented an ESA for Special Education Children. Guess What Happened Next.*, JAY P. GREENE'S BLOG (May 15, 2017), <https://jaypgreene.com/2017/05/15/texas-implemented-a-special-cap-az-implemented-an-esa-for-special-education-children-guess-what-happened-next/> [<http://perma.cc/R375-9DUQ>].

172. *See* Robert T. Garrett, *Texas Senate Tentatively OKs Private-School Vouchers for Disabled Students*, DALLAS MORNING NEWS (July 24, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/24/texas-senate-tentatively-oks-private-school-vouchers-disabled-students> [<http://perma.cc/X7ED-QELK>].

173. *See id.*

174. *See* McKenna, *supra* note 144.

mental to society as a whole to fail in equipping these students “with the tools and services they need to learn.”¹⁷⁵ Individuals with disabilities are far more likely to be imprisoned, especially when the special education system fails them.¹⁷⁶ When students are not evaluated and properly identified under the special education label, they can legally be suspended and expelled based on manifestations of their disabilities. Particularly for students with disabilities, suspensions are an “entry point” into the school-to-prison pipeline.¹⁷⁷ Further, these students do not learn proper coping mechanisms to address learning and behavioral needs, leading to occupational challenges as adults that often result in a need for federal assistance programs.¹⁷⁸ It is best that the legislature address these issues while these children are impressionable students rather than having these individuals irreparably suffer, leaving society to bear the cost for the state’s educational failures.

4. *Removing the Stigma Around Special Education*

While policy recommendations are important, Texas’s special education system will likely not improve until the stigma is removed around students with disabilities and special education. Special education should be considered “a gateway to more effective instruction and strong intervention” instead of “a dead-end for children deemed dispensable.”¹⁷⁹ Special education is too often viewed as a sort of babysitting program to help pass students through the system with minimal requirements. Many officials and legislators do not believe that special education services can provide students with disabilities an opportunity for academic success and beneficial life skills. Former Assistant Superintendent and Director of Special Education for Houston ISD, Sowmya Kumar, reflected this flawed attitude when she stated, “If the disability label was going to produce better results for kids, then we would have all kids line up . . . [s]pecial education does not deliver better outcomes for kids.”¹⁸⁰ IDEA was implemented to ensure that students receive proper services in spite of such scrutiny, and it is inconceivable that individuals in power continue to hold this belief decades later.

Unfortunately, this negative viewpoint surrounding special education is not uniquely held by officials and legislators. Due to a lack of funding and outdated practice of holding students with disabilities to a lesser standard

175. See Falkenberg, *supra* note 155.

176. See Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, THE HECHINGER REPORT (Oct. 26, 2014), <http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/> [<http://perma.cc/NW6H-MSSM>].

177. See *id.*

178. See Falkenberg, *supra* note 155.

179. See Hensel, *supra* note 25, at 1201.

180. See Shelby Webb, *HISD Special Ed Director Resigns After Reports of Service Denials*, HOUSTON CHRONICLE (Mar. 23, 2017, 11:38 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/HISD-special-ed-director-resigns-after-reports-of-11024341.php> [<http://perma.cc/PBG8-V938>].

than their peers, students with disabilities of all types are often pulled out of the general education classroom and placed into a special education classroom, disregarding federally-mandated requirements that students be placed in the least restrictive environment. Thus, it is common for general education teachers to pass all responsibility for students with disabilities to special education teachers, treating such students as secondary to those without disabilities within the general education setting. However, this problem can easily be alleviated by providing better training to both general and special education teachers, encouraging greater collaboration amongst teachers, and increasing support so that these students can be included in the general education system as much as possible.

Moreover, part of the stigmatization surrounding special education stems from the manner in which school districts are rewarded. School districts often view students with disabilities as a roadblock to federal funding, which is typically directly tied to a district's performance on state testing.¹⁸¹ The culture around testing must change for students with disabilities to be viewed as an asset to an academic setting. High-stakes testing assessments, which are often challenging for students with disabilities, put significant pressure on both educators and students to perform well, repeatedly causing these students to feel inadequate when compared to their higher-performing peers. However, this mindset regarding the testing capabilities of students with disabilities fails to consider the fact that these students will remain in the school district regardless of placement in special education, and that special education services will only help improve testing performance. Additionally, accommodations can alleviate many testing-related problems for students.

Even some disability rights advocates criticize the idea of students with disabilities being identified as "special education" due to the stigmatization, arguing that most students with disabilities can be appropriately served through interventions without the label.¹⁸² This belief is problematic because school districts will not receive adequate federal funding to provide these services without students being identified, leaving teachers overburdened and students ignored. Rather than shielding students with disabilities from ridicule, society as a whole must change its attitude regarding these individuals and begin to view special education as an additional resource for positive support and reinforcement. This can be done through increased awareness and sensitivity training for policymakers, teachers, and parents. Moreover, schools must exercise zero-tolerance policies with regard to bullying and harassment of these students and implement diversity measures to promote a more tolerant and favorable learning community. Unfortunately, because the stigmatization often starts at home, it is also vital that parents and guardians communicate

181. See Aliyya Swaby, *Texas Denied Thousands of Students Special Ed Services. Does the Policy Go Back to George W. Bush's Presidency?*, TEXAS TRIBUNE (Feb. 1, 2018, 12:00 AM), <https://www.texastribune.org/2018/02/01/federal-assessment-cap-texas/> [http://perma.cc/PZ6X-2PPM].

182. See Hensel, *supra* note 25, at 1193.

with their children about learning and behavioral challenges, encouraging empathy and understanding of other students' differences.

V. CONCLUSION

The TEA placed a benchmark on students with disabilities that had an irreversible, negative impact on countless students across Texas. As a result, many of these students may be deprived of a proper remedy, as it is difficult to put the price on a fair and appropriate public education. However, thanks to the *Houston Chronicle* and Disability Rights Texas, local and federal government agencies now recognize the need to completely overhaul this state's special education system.¹⁸³

While policymakers must implement constructive measures to improve the current state of the special education system in Texas, to reach long-term success, the transformation must be accompanied by a better understanding of these students and their needs, as well as how the system can serve as a life-changing reinforcement rather than a debilitating label. Moving forward, policymakers must begin to work closely with educators, advocates, and parents to best address the needs of students with disabilities in Texas by setting an example for the rest of the nation. Discussing the issue with the *Houston Chronicle*, one principal said it best:

It has to be about the kids. . . . It's not about what the state wants. You give kids what they need. And you don't back off from that. This is the rest of their lives. You are laying this foundation for who they're going to be for the rest of their lives.¹⁸⁴

It is imperative that these policymakers remember to put the needs of these children at the forefront of special education policy, and society as a whole will improve.

183. In January 2018, Governor Greg Abbott instructed the TEA to immediately create a corrective action plan to improve the current state of special education. See Letter from Greg Abbott, *supra* note 18.

184. See Carroll & Rosenthal, *supra* note 139.