

# ONCE UPON A FAPE: CONTRASTING THE FABLED HOPE OF IDEA WITH PRESENT-DAY PANDEMIC REALITIES

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*Unfinished learning stems from the reality that students were not provided the opportunity to complete their requisite learning, particularly in the K-12 grade levels, and specifically during the initial stages of the pandemic. Most students simply learned less, some thrived in a virtual environment, and some may have disengaged from school completely, even regressing in the knowledge or skills they previously acquired. Students are now at greater risk of finishing varying levels of schooling without the requisite skills, behaviors, and mindsets to succeed. These potential outcomes are of even more profound concern for students with disabilities. The early data of the post-Covid-19 impact on K-12 and post-secondary learning presents several themes, including, a ripple effect that will likely impact student learning for decades; the disproportionate impact of Covid-19 on pre-existing achievement gaps; the broader impact of Covid-19 on mental health; and the need for innovative ways to respond.*

*The impact of unfinished learning on students with unique needs is most concerning. For many students, their individualized special education programs, the basis for their access and equity at school, were not implemented, or implemented sporadically, for over a year in some cases. Being denied adequate support and services for any*

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*extended period can have a profound impact on students' progress in school. In the aftermath of the pandemic, students and their schools are now struggling to recoup the learning lost. So far, however, such attempts have themselves been sporadic and miniscule. What students and their families are left with is a right to the idea of a Free and Appropriate Public Education, however, this remains a reality that is far removed in this post-school closure phase. This notion of a Free and Appropriate Public Education promulgated in the early 1980s, this mandate for quality education for all children, regardless of need, is now more make-believe than ever before. The law guaranteeing such an ideal is now outdated and ignorant of the new reality. And while fairy tales warn us of the harm to children when adults do not meaningfully respond, just like in the stories, with attention and creativity, there can be a happy ending.*

\* \* \*

*On the way into the forest Hansel crumbled his [bread] in his pocket, and often stood still and threw a morsel on the ground. "Hansel, why do you stop and look round?" said the father, "go on." "I am looking back at my little pigeon which is sitting on the roof, and wants to say goodbye to me," answered Hansel. "Fool!" said the woman, "that is not your little pigeon, that is the morning sun that is shining on the chimney." Hansel, however little by little, threw all the crumbs on the path. The woman led the children still deeper into the forest, where they had never in their lives been before. Then a great fire was again made, and the mother said: "Just sit there, you children, and when you are tired you may sleep a little; we are going into the forest to cut wood, and in the evening when we are done, we will come and fetch you away."<sup>1</sup>*

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1. JACOB GRIMM & WILHELM GRIMM, GRIMMS' FAIRY TALES (Edgar Taylor and Marian Edwardes trans., Project Gutenberg 2021) (1812) (ebook).

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### INTRODUCTION: ONCE UPON A TIME . . .

Much like Hansel and Gretel in the widely known fairytale, children around the world have experienced trauma, loss, and profound impact to their physical, social, and emotional well-being due to the pandemic. Also, like Hansel and Gretel, students with unique needs<sup>2</sup> have lacked the guidance, support, and prioritization by the adults who are meant to protect them. For some students, this failure to support by those adults charged with their education has been occurring for decades. For many, they were left alone in the woods in March 2020, the start of the Covid-19 pandemic. Forced to isolate from teachers and peers, often without necessary services and support, students with unique needs experienced

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2. "Students with unique needs" will be used interchangeably with "students with disabilities."

some of the most severe learning losses<sup>3</sup> among the overall student population. Unfortunately, the loss is still ongoing, the long-term impact still unknown, and the needed interventions largely inconsistent from state to state. The primary statutory regulation, The Individuals with Disabilities in Education Act (“IDEA”),<sup>4</sup> intended to ensure students’ access to and progress in their education, but has become the primary perpetrator of ongoing, unrecognized need. The Individuals with Disabilities Education Act intended to afford an individualized approach to each student who qualifies and the funding to support such individualization.<sup>5</sup> This promise is now too grand to be realized. And Covid-19 continues to be the disguised witch in this story, just as students with special needs continue to struggle with learning in a system that is no longer workable and far from equitable.

A brief recap: long ago, in 1970, Congress passed the Education of the Handicapped Act (“EHA”), an initial attempt to provide better educational services to students with disabilities.<sup>6</sup> The EHA allowed for state grants towards programs and education for handicapped students up until secondary school level.<sup>7</sup> However, the EHA did not fully protect or provide for these particular students, as it focused more on federal and state funding and less on ensuring equitable access.<sup>8</sup>

A few years later, Congress broadened the scope of the EHA by passing the Education for All Handicapped Children Act of 1975 (“EAHCA”).<sup>9</sup> The EAHCA was implemented to provide federal funding to children with disabilities specifically for the purpose of ensuring educational opportunities.<sup>10</sup> To qualify for federal financial assistance, states must provide a Free and Appropriate Public Education (“FAPE”) to all qualifying children with disabilities.<sup>11</sup>

Finally, in 1990, Congress re-enacted the EAHCA and renamed it the Individuals with Disabilities Education Act (“IDEA”) in an effort to enforce the educational rights of children with disabilities. Guaranteeing that all children who qualify are entitled to equitable education, IDEA

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3. Libby Pier et al., *COVID-19 and the Educational Equity Crisis*, POL’Y ANALYSIS FOR CAL. EDUC. (Jan. 25, 2021), <https://edpolicyinca.org/newsroom/covid-19-and-educational-equity-crisis> [https://perma.cc/L6NK-VMPT].

4. The IDEA is the primary statutory regulation of the provision of special education to students in the United States and was most recently reauthorized in 2004.

5. See *Special Education: Is IDEA Working as Congress Intended?*: Hearing Before the H. Comm. on Gov. Reform, 107th Cong. (2001) (discussion on IDEA funding).

6. Kim Millman, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 463 (2007).

7. *Id.*

8. *Id.*

9. *Id.*

10. Laura Ketterman, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities - An Analysis of J.D. v. Pawlet.*, 32 ST. MARY’S L.J. 913, 921 (2001).

11. 20 U.S.C. § 1412.

offers federal funding to states that will assure students with disabilities the right to a free and appropriate public education.<sup>12</sup>

The IDEA provides several definitions that are of use in any analysis of the Act's provisions. Under the Act:

- “Child with disability” means a child: (i) with intellectual or cognitive impairment, hearing impairments (including deafness), speech and language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, because of their disability, needs special education and related services.<sup>13</sup>
- Any “child with disability” is entitled to a FAPE, defined as: special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the requirements of the State education agency; include an appropriate preschool, elementary, or secondary school education in the State involved; and are provided in conformity with the individualized education program.<sup>14</sup>
- To try and ensure that each child who qualifies receives a FAPE, IDEA also requires development of an Individualized Education Program (“IEP”) that includes, among other things, a statement of the child’s current academic performance, a statement of the child’s academic and functional goals, a statement of the related services to be provided to the child, and an explanation of the extent to which the child will not participate with non-disabled children in the regular classroom.<sup>15</sup>

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12. *Id.*

13. *Id.* § 1401.

14. *Id.*

15. *Id.* § 1414.

- Any FAPE must be provided in the least restrictive environment (“LRE”).<sup>16</sup> Ideally, the LRE would allow students with disabilities to be integrated within the regular education classroom with appropriate educational services to meet the child’s needs within that setting.<sup>17</sup>

It was thus intended that the IDEA, much like its like-minded sister-statutes Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, aim to reverse a long history of exclusion, institutionalization, and discrimination.<sup>18</sup> Looking specifically at education, prior to all of these statutes, children were often denied education and institutionalized. Conditions could be shockingly inhumane, and it was not uncommon for students to be barely fed, improperly supervised, rarely engaged, and tragically abused.<sup>19</sup>

Without doubt, both the EAHCA and the IDEA that followed in amended form in 1990, have led to momentous gains for individuals with disabilities. The legislation “forced open schoolhouse doors” and further promised education for so many students previously barred for no other reason beyond their learning and/or physical differences.<sup>20</sup> But even with the overdue rescue of this legislation, doubt sowed. When IDEA’s predecessor, the EAHCA, was signed into law by President Ford in 1975, the statutory scheme that would bring students with disabilities out of the shadows and into their communities was already expressed as an ideal rather than a reality. With the stroke of his presidential pen, Ford simultaneously stated:

Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains. Everyone can agree with the objective stated in the title of this bill—educating all handicapped children in our Nation. The key question is whether the bill will really accomplish that objective.<sup>21</sup>

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16. See generally *id.* § 1400.

17. *Id.* § 1412.

18. Claire Raj, *Rights to Nowhere: The IDEA’s Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 414–15 (2022).

19. *A History of the Individuals With Disabilities Education Act*, U.S. DEP’T OF EDUC. (Jan. 11, 2023), <https://sites.ed.gov/idea/IDEA-History#Pre-EHA-IDEA> [https://perma.cc/W4ZE-4QCX].

20. Raj, *supra* note 18, at 412.

21. Statement on Signing the Education for All Handicapped Children Act of 1975, 2 PUB. PAPERS 1935 (Dec. 2, 1975); see also Raj, *supra* note 18, at 412 (citing President

President Ford's doubt was quickly realized, and indeed, the aspiration to successfully educate all students with special needs has never been fulfilled. Most states have not even come close. America's public school system has suffered significantly from disinvestment year after year.<sup>22</sup> Students attending schools in lower socio-economic areas spend their days in overcrowded classrooms, run by under-degreed teachers, read outdated textbooks, and lack even basic materials.<sup>23</sup> Students with disabilities face even steeper learning obstacles since, compared to their non-disabled peers, they are more likely to be segregated into lower-achieving classrooms, subjected to punitive discipline measures, or pushed out of school entirely.<sup>24</sup> And students of color with special needs have experienced even further disparities in academic opportunities.<sup>25</sup>

With this already shaky foundation, the ideal of FAPE crumbled in March 2020. The term "unprepared" vastly understates the readiness of school districts across the country when the Covid-19 pandemic began. Much like the old woman in Hansel and Gretel, the threat presented by Covid-19 was initially undervalued. But as Americans became increasingly ill, as hospitals filled, and as the medical community struggled to treat this novel virus, the threat was quickly and profoundly realized. Mass shutdowns throughout the country closed most aspects of life, including schools. Most schools experienced some duration of closure for the 2019–2020 academic year.<sup>26</sup> By spring 2020, forty-eight states, four territories, and the District of Columbia either ordered or recommended school closure through the end of the school year, affecting at least 50.8 million public school students.<sup>27</sup>

Many school districts continued to keep school campuses closed through the start of the 2020–2021 year, continuing to offer some online version of learning.<sup>28</sup> On January 21, 2021, President Biden issued Executive Order 14000, Supporting the Reopening and Continuing

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Gerald R. Ford, Statement on Signing the Education for All Handicapped Children Act of 1975 (Dec. 2, 1975)).

22. Raj, *supra* note 18, at 412–13.

23. *Id.* at 413–14.

24. *Id.* at 414 (citing Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L.L. REV. 407, 447 (2001)).

25. Losen & Welner, *supra* note 24, at 447–48.

26. Holly Peele & Maya Riser-Kosittsky, *Map: Coronavirus and School Closures in 2019-2020*, EDUC. WK. (Oct. 13, 2021), <https://www.edweek.org/leadership/map-coronavirus-and-school-closures-in-2019-2020/2020/03> [<https://perma.cc/Z4PP-VC24>].

27. *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07> [<https://perma.cc/3JBW-9GAW>].

28. See NAT'L CTR. FOR EDUC. STAT., IMPACT OF THE CORONAVIRUS PANDEMIC ON THE ELEMENTARY AND SECONDARY SCHOOL SYSTEM 4 (2021), [https://nces.ed.gov/programs/coe/pdf/2021/tcb\\_508c.pdf](https://nces.ed.gov/programs/coe/pdf/2021/tcb_508c.pdf) [<https://perma.cc/8U5E-U46X>] (indicating that in September 2020 67% of adults with children under eighteen in public or private school reported that classes had moved to distance learning format).

Operation of Schools and Early Childhood Education Providers, “to ensure that students receive[d] a high-quality education during the COVID-19 pandemic, and to support the safe reopening and continued operation of schools. . . .”<sup>29</sup> As part of the order, the President required the U.S. Department of Education Office for Civil Rights (“OCR”) to deliver a report on the disparate impacts of Covid-19 on students.<sup>30</sup> The OCR identified key observations for the K-12 students with disabilities population:

**Observation 4 (K-12):** For many elementary and secondary school students with disabilities, Covid-19 has significantly disrupted the education and related aids and services needed to support their academic progress and prevent regression. And there are signs that those disruptions may exacerbate long standing disability-based disparities in academic achievement.<sup>31</sup>

**Observation 6 (K-12 and postsecondary):** Nearly all students experienced some challenges to their mental health and well-being during the pandemic and many lost access to school-based services and supports, with early research showing disparities based on race, ethnicity, LGBTQ+ identity, and other factors.<sup>32</sup>

Much contributed to this disparate impact, which among most of the country remains ongoing. Themes have emerged in evaluating the challenges of school districts to timely and appropriately respond. First, school districts struggled or outright failed to implement IDEA mandates during the early stages of the pandemic and in ongoing remote learning which has led to significant learning loss in core academic areas.<sup>33</sup> Second, necessary related services were either provided in an ineffective method or not provided at all during the initial pandemic stage.<sup>34</sup> Third, students of color were disproportionately impacted by school districts’ failures to implement IEP services and in-person learning.<sup>35</sup> Fourth, mental health has

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29. OFF. FOR C.R., U.S. DEP’T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS, at iii (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/7QTR-QJWR>].

30. *Id.*

31. *Id.* at iv.

32. *Id.*

33. Evie Blad, *Special Education During the Pandemic*, in *Charts*, EDUC. WK. (Oct. 17, 2022), <https://www.edweek.org/teaching-learning/special-education-during-the-pandemic-in-charts/2022/10> [<https://perma.cc/RWE4-UKTP>].

34. *Id.*

35. Crystal Grant, *COVID-19’s Impact on Students With Disabilities in Under-Resourced School Districts*, 48 FORDHAM URB. L.J. 127, 128 (2020).



been underserved for decades and the pandemic impact has multiplied students' needs dramatically.<sup>36</sup>

This Article is divided into three parts. Part I presents the known impact of school shutdowns in the early months of the pandemic, and subsequent disruption of placement, support, and services after March 2020, as referenced above. Further, this section introduces the main areas of challenge pre-pandemic for needs-based access to appropriate education and assesses the current learning loss for students with disabilities in these areas. Part II further analyzes these challenges as the main failures of the IDEA, analyzing IDEA's core principles of a free and appropriate education in the least restrictive environment and describing how these principles have not been fully realized for so many students. Finally, Part II argues that IDEA's intention has never been realized and, with the severe impact of pandemic learning loss, will move farther and farther away from its intention in current form. Part III calls for a legislative overhaul, specifically in determining the appropriate educational program for students with disabilities both within and without times of crisis. While full funding of IDEA would certainly improve outcomes, holistic reform of special education would lead to more inclusive learning environments and hopefully begin to bridge the vast cavern of learning loss among America's students in need.

### **Case Study: Once Upon a Time There was a Boy Named Simon...**<sup>37</sup>

Throughout this Article, the current fairy tale promises of a FAPE will be told through the lens of a student with unique needs, specifically autism spectrum disorder ("ASD"). Readers will follow a student named Simon on his journey, pre- and post-Covid-19, to obtain an appropriate education. Much like the birds who ate the breadcrumbs that Hansel and Gretel hoped to follow, the obstacles presented on Simon's journey have consumed any access to a meaningful education, leaving Simon and his family lost, fearful, and not knowing which way to turn. Simon's story is not unique; today's students are largely denied the equity and access promised nearly fifty years ago.

Simon is currently nine years old and will soon begin the fourth grade. He was diagnosed with ASD at the age of three. Simon demonstrates both academic and behavioral needs. His interventions are wide-reaching, requiring specialized academic instruction for all core academic subjects. Further, Simon demonstrates needs in the areas of expressive communication, pragmatic language, articulation, sensory regulation, and social/emotional response, and cognitive functioning.

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36. See Pier et al., *supra* note 3.

37. All names and other identifying information have been changed to protect the student's confidentiality. Client permission has been obtained for all disclosure of confidential facts in accordance with California Rule of Professional Conduct 1.6.

Under the IDEA, students with ASD are a specified student population entitled to FAPE. The IDEA defines autism as:

[A] developmental disability significantly affecting verbal and non-verbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.<sup>38</sup>

ASD is a multifaceted disability that impairs different aspects of a child's personality including social interaction, verbal and non-verbal communication, and imagination.<sup>39</sup> It encompasses a wide spectrum of disorders.<sup>40</sup> In 2023, the Centers for Disease Control and Prevention (CDC) reported that one in thirty-six eight-year-old children have been identified as having ASD.<sup>41</sup>

Since Simon started in the public school system at the age of four, he has experienced significant challenges in acquiring a FAPE. Although Simon's past assessments demonstrate average cognitive ability, he has never met grade-level state standards and performs academically at the preschool level. Communication skills, both spoken and written, are impaired as he has both expressive and receptive language impairments. He lacks typical social skills and demonstrates inattention, which impacts his social relationships both inside and outside of the classroom. While Simon does not display typical behaviors of ASD, like lack of eye contact, repetitive movements, or self-injurious behaviors, he does have a significant inability to sustain attention, which can present as defiance, withdrawal, and even hyperactivity.

This presentation of ASD for Simon substantially affects all aspects of his education, behavior, and school-based relationships. His individualized education program cannot simply focus on developing a teaching methodology that instructs on the core subjects such as reading, writing, and math. For Simon to receive an appropriate education, he requires significant behavior intervention services, with much time spent on

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38. 34 C.F.R. § 300.7 (2023).

39. *The Autism Experience: Understanding Autism*, AUTISM SOC'Y, <https://autism.society.org/the-autism-experience/> [<https://perma.cc/A89S-NBCZ>]; see also Rowland P. Barrett, *Is There an Autism Epidemic?*, BROWN U. CHILD & ADOLESCENT BEHAV. LETTER 7, 8 (2004).

40. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50 (5th ed. 2013).

41. Press Release, Ctrs. for Disease Control and Prevention, *Autism Prevalence Higher, According to Data From 11 ADDM Communities* (Mar. 23, 2023), <https://www.cdc.gov/media/releases/2023/p0323-autism.html> [<https://perma.cc/6ZCL-BVPB>].

developing his relationships with peers and teachers, his ability to handle challenges and conflicts, and his capacity to manage the change and transition occurring throughout his day. Fortunately, for Simon, he was made eligible for an IEP as soon as possible under IDEA guidelines. The challenge that has plagued him and his family since that time, and was further exacerbated during the pandemic, is receiving a program that meets the standards of appropriateness under the statute and can lead to meaningful educational progress.

### I. THE IMPACT OF COVID-19: A VILLAIN IN THE WOODS

*Suddenly the door opened, and a woman as old as the hills, who supported herself on crutches, came creeping out. Hansel and Gretel were so terribly frightened that they let fall what they had in their hands. The old woman, however, nodded her head, and said: "Oh, you dear children, who has brought you here? [D]o come in, and stay with me. No harm shall happen to you." She took them both by the hand, and led them into her little house.<sup>42</sup>*

School closures and the subsequent academic uncertainty that transpired from March 2020 through the 2020-2021 school year created learning loss for most children, particularly in the K-12 grade levels.<sup>43</sup> Emerging evidence shows that the pandemic has negatively affected academic growth, widening pre-existing disparities for specific student populations.

McKinsey & Company<sup>44</sup> engaged in a nationwide review of standardized assessment data to capture academic components of pandemic learning loss.<sup>45</sup> Their analysis indicates the impact of the pandemic specifically on K-12 students was significant, with students on average five months behind in mathematics and four months behind in reading.<sup>46</sup> While the impact of these numbers may initially be minimized as manageable, the true impact is much more profound when considering the student as a

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42. GRIMM & GRIMM, *supra* note 1.

43. Emma Dorn et al., *COVID-19 and education: The lingering effects of unfinished learning*, MCKINSEY & Co. (July 27, 2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [<https://perma.cc/3E2H-RSAA>].

44. McKinsey & Company is a consulting firm that serves many different industry sectors, including education. See *Education*, MCKINSEY & Co., <https://www.mckinsey.com/industries/education/how-we-help-clients> [<https://perma.cc/NZ5X-YEUG>].

45. Dorn et. al, *supra* note 43. The following discussion of learning loss for students with disabilities is a short review of a more complex and ongoing problem. For so many students, learning loss occurred before the pandemic and continues today. Intersecting factors of race, gender, sexual identity, and poverty make learning much more impacted, and the current regulations do not adequately address the whole student in any meaningful way.

46. *Id.*

whole. The pandemic grew pre-existing achievement gaps, affecting historically disadvantaged and marginalized students greatest.<sup>47</sup> For example, in math, students in predominantly Black and African American schools experienced on average six months of learning loss or unfinished learning, in comparison to the above referenced five.<sup>48</sup> Students in lower income schools experienced seven months of learning loss.<sup>49</sup> As referenced above, these schools were already struggling with effectively educating their students pre-pandemic.<sup>50</sup> McKinsey & Company warns that “[t]he deep-rooted challenges in our school systems predate the pandemic and have resisted many reform efforts.”<sup>51</sup>

Data from other research organizations is even more problematic. The Center on Reinventing Public Education (“CRPE”) reviewed hundreds of studies and convened panels of education research experts to extract baselines from the presented data.<sup>52</sup> The results presented similar cause for concern. In general, students fell further below grade level for every month they were not attending school in person. Most studies continue to find greater delays in mathematics than in reading.<sup>53</sup> “One report drawn from a large national database estimates that fall 2021 test scores for grades three through eight were 0.27 standard deviations (approximately a year’s learning) lower in reading and 0.14 standard deviations lower in mathematics than in fall 2019. Another report estimates that the proportion of third graders reading on grade level fell to 51% in the middle of the 2020–2021 school year, from 59% in the middle of 2019–2020.”<sup>54</sup>

Looking specifically at students with unique needs, the impact is further complicated. From 2020–2021, 7.3 million children ages three through twenty-one in the United States were serviced under the IDEA in some capacity.<sup>55</sup> Focusing on those students who already qualified for special education under the Act, scholars are starting to better understand the actual impact of learning loss from the end of the 2019–2020 and 2020–2021 school years.<sup>56</sup> The numbers have been difficult to ascertain.

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. CTR. ON REINVENTING PUB. EDUC., STUDENT ACHIEVEMENT GAPS AND THE PANDEMIC: A NEW REVIEW OF EVIDENCE FROM 2021–2022 3 (2022), [https://crpe.org/wp-content/uploads/final\\_Academic-consensus-panel-2022.pdf](https://crpe.org/wp-content/uploads/final_Academic-consensus-panel-2022.pdf) [<https://perma.cc/G3A2-QLU8>].

53. *Id.* at 4.

54. *Id.* at 5.

55. NAT’L CTR. FOR EDUC. STAT., STUDENTS WITH DISABILITIES 1 (2023), [https://nces.ed.gov/programs/coe/pdf/2023/cgg\\_508.pdf](https://nces.ed.gov/programs/coe/pdf/2023/cgg_508.pdf) [<https://perma.cc/3ZBD-UBUT>].

56. Any data presented is only one part of the whole picture due to the underrepresentation of students who require intervention and those who actually qualify under the Act. According to Clair Raj, “The overrepresentation of minorities in certain categories of disability is a decades old problem. For more than thirty years, schools have struggled with the accurate identification of disabilities for students of color.” Claire Raj,

According to reports by the CRPE, the negative outcomes in academics, social-emotional well-being, and graduation, are still largely unclear over three years after the start of the pandemic.<sup>57</sup> Numerous studies on unfinished learning have not dedicated review to the unique losses for students with disabilities. While some research has been conducted at the individual state level, trying to ascertain the national impact remains illusory. However, even with this limited base of research to date, early evidence suggests the following:

- Students with disabilities did not receive the same quantity or quality of specialized therapies they received before the pandemic, due to shortened school days and the challenges of remote instruction;
- Students with disabilities experienced higher rates of absenteeism, incomplete assignments, and course failures compared to their typical peers, and the effect is more significant in mathematics than reading; and
- Districts struggled more to service students with complex communication, social/emotional, and learning disabilities.<sup>58</sup>

It is important to note that not all remote learning experiences were negative for students with disabilities. Currently, the disability community is conflicted about the impact of remote attendance and technology on accessibility. For example, workers with disabilities have long called for reasonable accommodation to include work-from-home options.<sup>59</sup> The pandemic made remote work much more than just a possibility; it made it a

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*The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. L. J. 373, 375 (2016).

57. LAUREN STELITANO ET AL., CTR. ON REINVENTING PUB. EDUC., HOW HAS THE PANDEMIC AFFECTED STUDENTS WITH DISABILITIES? AN UPDATE ON THE EVIDENCE: FALL 2022 2 (2022), [https://crpe.org/wp-content/uploads/Special-Education-Impact-Brief\\_v3.pdf](https://crpe.org/wp-content/uploads/Special-Education-Impact-Brief_v3.pdf) [<https://perma.cc/FF2N-NMBL>].

58. LAUREN MORANDO-RHIM & SUMEYRA EKIN, CTR. ON REINVENTING PUB. EDUC., HOW HAS THE PANDEMIC AFFECTED STUDENTS WITH DISABILITIES? A REVIEW OF THE EVIDENCE TO DATE 6 (2021), [https://crpe.org/wp-content/uploads/final\\_swd\\_report\\_2021.pdf](https://crpe.org/wp-content/uploads/final_swd_report_2021.pdf) [<https://perma.cc/5H9T-9F4G>].

59. E.g., Robert Iafolla, *Covid's Remote Work Experience Is Slowly Changing Disability Law*, BLOOMBERG L. NEWS (July 6, 2023, 4:20 AM), <https://news.bloomberglaw.com/daily-labor-report/covids-remote-work-experience-is-slowly-changing-disability-law> [<https://perma.cc/3LCR-K8DV>] (noting the shift in pro-worker court rulings on remote work disability accommodations).

plausible and productive reality in a number of different professions.<sup>60</sup> Similarly, some students with disabilities, particularly those with learning challenges that require more paced and focused instruction, thrived in online environments that, when constructed with intentionality, fostered attentive, individualized learning experiences.<sup>61</sup> Initial challenges fueled the rapid development of meaningful changes in service planning in some states' school districts.<sup>62</sup>

However, overall, the impact of the pandemic and resulting distance learning has not led to progress and positive outcome.<sup>63</sup> Too many children remain starved from the educational famine produced by the pandemic. It is critical that in trying to move forward, states and districts do not engage in superficial remedies that, much like the tempting candy house in the dark wood, provide only temporary satiation. This section will look specifically at several of the above-mentioned impacts on access to special education supports and services to better understand how implementation of the IDEA has been permanently impacted by the learning loss that transpired beginning in 2020 and how moving forward, IDEA can be better structured to once again provide meaningful access.

**A. School Districts Struggled or Outright Failed to Follow IDEA Mandates During the Early Stages of the Pandemic and in Remote Learning, Leading to Significant Learning Loss in Core Academic Areas.**

The move to online learning after the initial nationwide school closures in March 2020 was seen by many as a common-sense approach to the unprecedented situation presented in the early stages of the pandemic. In states that ordered school closures, it was the only approach and better than the only other considered alternative, shutting down classrooms altogether.<sup>64</sup> Unfortunately, this was not a workable approach for many students with disabilities, particularly those students in lower-income school districts and communities of color.<sup>65</sup> Beyond the impact of being away from in-person learning, many students also did not have access to online learning due to a lack of computers, adequate technology, reliable

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60. *See id.* (“The pandemic changed the thinking of a number of employers, including many permitting work from home two- or three-days per week . . . [w]ith that in the backdrop, using telework as a reasonable accommodation doesn't seem like special treatment.”).

61. MORANDO-RHIM & EKIN, *supra* note 58, at 6.

62. *Id.*

63. *Id.* at 5–6.

64. Grant, *supra* note 35, at 127 (referencing opportunities like individual tutoring, after-school enrichment and summer programming offered in predominantly wealthier, largely white school districts).

65. *Id.* at 128.

internet connectivity, webcams, or a quiet place to focus, all of which became the new “pencil and paper” to establish access.<sup>66</sup>

Disparities in academic achievement for students with unique needs<sup>67</sup> long predate the pandemic.<sup>68</sup> Standardized assessment data from tests like the National Assessment of Educational Progress (“NAEP”), often referred to as the “Nation’s Report Card,” offers stark contrast of performance between students with disabilities and without.<sup>69</sup> Looking at assessment years from 2002–2019, students with disabilities have consistently performed between thirty-five to forty points lower than typical peers in the area of reading.<sup>70</sup> There have consistently been large disparities in the areas of reading and math across all K-12 grade levels, often with this disparity increasing as students advance from grade to grade.<sup>71</sup> While some discrepancy is expected, especially when reviewing the population of students with disabilities as a whole and considering the impact of some disabilities on academic achievement, this level of disparity is still beyond expectation.<sup>72</sup>

Beyond the impact of online learning, the pandemic substantially disrupted the learning environment for all students, but particularly for students with identified disabilities.<sup>73</sup> School districts, themselves, have acknowledged this disruption in support and services promised under students’ IEP plans.<sup>74</sup> Looking at the Government Accountability Office report from fall 2020, the fifteen school districts surveyed encountered “a variety of logistical and instructional factors [that] made it more difficult to

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66. *Id.*

67. “Students with unique needs” interchangeable with “students with disabilities” or “students with identified disabilities”—all indicating those students who had IEPs at the time of the pandemic.

68. OFF. FOR C.R., U.S. DEP’T OF EDUC., *supra* note 29, at 23.

69. *Id.*

70. *Id.*

71. *See, e.g.*, Allison F. Gilmour et al., *Are Students With Disabilities Accessing the Curriculum? A Meta-analysis of the Reading Achievement Gap Between Students With and Without Disabilities*, 85 EXCEPTIONAL CHILD. 329, 341 (2019); *see also* Xin Wei et al., *Math Growth Trajectories of Students With Disabilities: Disability Category, Gender, Racial, and Socioeconomic Status Differences From Ages 7 to 17*, 34 REMEDIAL & SPECIAL EDUC. 154, 154 (2012).

72. *Id.*

73. OFF. FOR C.R., U.S. DEP’T OF EDUC., *supra* note 29, at 1.

74. *See* Dia Jackson & Jill Bowdon, AM. INSTS. FOR RSCH., SPOTLIGHT ON STUDENTS WITH DISABILITIES, at 4–6 (2020) (“Nearly three-quarters (73%) of districts” in a nationally representative survey conducted in summer 2020 “reported that it was more or substantially more difficult to provide appropriate instructional accommodations”); *see also* Laura Stelitano et al., RAND CORP., HOW ARE TEACHERS EDUCATING STUDENTS WITH DISABILITIES DURING THE PANDEMIC?, at 5–6 (2021) (Sixty-six percent of responding teachers in a nationally representative survey conducted in fall 2020 “reported feeling that they were either somewhat less, much less, or not at all able to meet the requirements of their students’ IEPs when teaching remotely, compared with when teaching in person.”).

deliver special education services during distance learning.”<sup>75</sup> Schools within these districts had shortened their school day during distance learning for all students, sometimes to only a few hours each day. Additionally, distance learning consistently limited live communication with teachers, and aide support was minimal during this period.<sup>76</sup> By the start of the 2020–2021 school year, a wide variation of school district approaches to reopening commenced. Using CDC guidelines and local Covid-19 outbreaks, districts opened either in-person, online, or in hybrid format—with students alternating between remote instruction and physical attendance based on community factors.<sup>77</sup> With the inconsistency nationwide, consistent themes emerged.

*1. Necessary related services were either provided in an ineffective method or not provided at all during the initial pandemic stage.*

Of the over seven million students with IEPs in the United States, most have one or more related services indicated on their IEP plan.<sup>78</sup> Related services are defined in the statutory code as developmental, corrective, and other supportive services required to assist a child with a disability to benefit from special education.<sup>79</sup> Examples of these services include, but are not limited to, speech-language pathology and audiology services; interpreting services, psychological services; physical and occupational therapy; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluation purposes.<sup>80</sup>

Covid-19 made access to meaningful delivery of related services incredibly difficult, particularly due to distance learning. For those students who required live, in-person interaction and engagement for a related service like physical therapy or applied behavior analysis (ABA), Covid-19 brought progress to a stand-still.<sup>81</sup> The advocacy group ParentsTogether contacted families of students with disabilities in May 2020, and of the

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75. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-43, DISTANCE LEARNING: CHALLENGES PROVIDING SERVICES TO K-12 ENGLISH LEARNERS AND STUDENTS WITH DISABILITIES DURING COVID-19 14 (2020), <https://www.gao.gov/assets/gao-21-43.pdf> [<https://perma.cc/G6W2-B4MB>].

76. *Id.* at 16.

77. Grant, *supra* note 35, at 138.

78. See NAT'L CTR. FOR EDUC. STAT., *supra* note 55, at 1, 3.

79. 34 C.F.R. § 300.24 (2023).

80. *Id.*

81. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 75, at 16 (reporting that school officials “told [GAO] that delivering related services—such as occupational therapy, physical therapy, or speech therapy—for students with complex needs was particularly difficult in a virtual setting,” and that some officials and researchers “raised concerns about students not receiving services in the same manner as they did prior to distance learning, including occupational and physical therapy that involved hands-on instruction from therapists or required specialized equipment unavailable in students’ homes”).



1,594 parents who participated in the survey, only 20% said their children received the services mandated in their IEP, with 39% reporting not receiving any services at all.<sup>82</sup> While not a representative sample, by the end of summer 2020, a large-scale survey of more than 80,000 students provided further data that students with disabilities were dealing with more mental health challenges and had fewer positive experiences with school than their typical peers.<sup>83</sup> These challenges largely persisted through the 2020–2021 school year.<sup>84</sup>

If it were only so simple a remedy to tack on remedial learning opportunities, such as after-school tutoring, to try and recoup this lost time, certainly argument for additional government funding and district implementation would be warranted.<sup>85</sup> But funding is only part of the answer (and finding funding is still very much an ongoing problem, as will be further discussed below).<sup>86</sup> Beyond academic loss, students were markedly impacted in their development of durable skills as well.<sup>87</sup> Communication skills, social skills, critical thinking, and leadership skills were all stunted on account of students being shuttered at home.<sup>88</sup> Even more basic, “children of the pandemic also are missing a more basic tool kit

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82. *ParentsTogether Survey Reveals Remote Learning is Failing Our Most Vulnerable Students*, PARENTSTOGETHER ACTION (May 27, 2020), <https://parentstogetheraction.org/2020/05/27/parentstogether-survey-reveals-remote-learning-is-failing-our-most-vulnerable-students-2/> [<https://perma.cc/GU27-9BXK>]; see also Hallie Levine, *As School Returns, Kids With Special Needs Are Left Behind*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/parenting/school-reopening-special-needs.html> [<https://perma.cc/DW8R-KADM>] (reporting on this survey); Kris Maher, *In Remote Learning, Children With Disabilities Face Unique Challenges*, WALL ST. J. (Aug. 31, 2020, 5:30 AM), <https://www.wsj.com/articles/in-remote-learning-children-with-disabilities-face-unique-challenges-11598866202> [<https://perma.cc/ED9R-PGF2>] (same); Kirsten Weir, *What Did Distance Learning Accomplish?*, MONITOR ON PSYCH., 55, 56 (2020).

83. OFF. FOR C.R., U.S. DEP'T OF EDUC., *supra* note 29, at 26 (noting that many of the participating school districts shortened the school day during distance learning, sometimes to only a few hours, and this severely impacted live communication with teachers and service providers, along with provision of IEP related services).

84. *Id.*

85. In fact, remedial learning services like tutoring have been attempted by many school districts, including the second largest in the country, Los Angeles Unified School District. Time will certainly tell whether such remediation has any significant impact.

86. See Hannah Natanson et al., *How America failed students with disabilities during the pandemic*, WASH. POST (May 21, 2021, 7:00 AM), <https://www.washingtonpost.com/education/2021/05/20/students-disabilities-virtual-learning-failure/> [<https://perma.cc/XL4V-FS7Y>] (“In fiscal year 2020, [the federal government] provided just over 13 percent of what was promised, giving states \$12.8 billion . . . [b]ut the issues go beyond funding . . .”).

87. See THE HIGH DEMAND FOR DURABLE SKILLS, AM. SUCCEEDS 10 (2021), <https://americasucceeds.org/policy-priorities/durable-skills> [<https://perma.cc/X5QS-T5WT>] (Durable skills refer to “a combination of how you use what you know – skills like critical thinking, communication, collaboration, and creativity – as well as character skills like fortitude, growth mindset, and leadership.”).

88. Mary Kreitz, *The Impact of COVID-19 on High School Students*, CHILD & ADOLESCENT BEHAV. HEALTH, <https://www.childandadolescent.org/the-impact-of-covid-19-on-high-school-students/> [<https://perma.cc/NLE7-J3GN>].

of behaviors, life skills, and strategies, including tying their shoelaces, taking turns on the playground slide, and sitting still in their chairs for hours at a time.”<sup>89</sup> Related services play a critical role in developing these skills and going many months without them has had profound impact.

2. *Mental health has been underserved for decades and the pandemic impact has multiplied students’ needs dramatically.*

Mental health is a key area that has directly impacted the learning gap. Further, mental health needs have been exacerbated by the pandemic. The California Department of Education observed that nearly all students have experienced some challenges to their mental health and well-being during the pandemic.<sup>90</sup> This was impacted further when these students lost access to school-based services and supports. Long before Covid-19, mental health was the leading cause of school-based intervention, with up to one-in-five children ages three to seventeen with a reported mental, social-emotional, developmental, or behavioral disorder.<sup>91</sup> Revisiting related services, interventions to assist students with these mental health-based needs is often insufficient. For example, therapeutic services are sometimes characterized as medical in nature and as such, school districts do not fund or provide them.<sup>92</sup> The grief, social isolation, and anxiety of the unknown that occurred over the early and active stages of the pandemic compounded the need for those already identified and led to emotional regulation deficits for K-12 students in general.

**B. Data from Simon’s State and District Demonstrate How Dire the Situation Still Is, For Him and So Many Students with Special Needs.**

Simon has been part of Los Angeles Unified School District (“LAUSD”) since he started school in kindergarten. Like so many other districts across the country, LAUSD struggled to implement students’ IEPs and provide necessary services at the end of the 2019–2020 and through the 2020–2021 school year. To date, the district is still struggling to assist students in recoupment of services lost.

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89. Hannah Natanson, *Tying Shoes, Opening Bottles: Pandemic Kids Lack Basic Life Skills*, WASH. POST (Apr. 12, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/04/12/pandemic-kids-shoe-tying-social-emotional/> [<https://perma.cc/R3CW-MSVX>].

90. See Pier et al., *supra* note 3.

91. Ruth Perou et al., *Mental Health Surveillance Among Children — United States, 2005–2011*, 62 MORBIDITY AND MORTALITY WKLY. REP. SUPPLEMENTS 1, 1–2 (May 17, 2013).

92. See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890–91 (1984) (determining what does and does not constitute a “medical service,” and therefore exempt from provision as a related service under IDEA).

In January 2021, the U.S. Department of Education, OCR opened an investigation to determine whether during the Covid-19 pandemic LAUSD provided a free appropriate public education to each qualified student with a disability as required by federal law and provided students with disabilities equal access to education.<sup>93</sup> As the responsible agency for the enforcement of Section 504 of the Rehabilitation Act<sup>94</sup> in its similar requirement to provide a FAPE to all eligible students, OCR determined that during the pandemic, LAUSD:

- (1) limited the services provided to students with disabilities based on considerations other than the students' unique educational needs, did not conduct necessary evaluations of students with disabilities prior to making significant changes to their placements, and did not ensure that the placement decisions were made by a group of persons knowledgeable about the students' needs, in violation of state and federal law;
- (2) failed to accurately track services for students with disabilities, whether provided or not during pandemic learning; and
- (3) failed to develop and implement a plan adequate to remedy the instance in which students with disabilities were not provided a FAPE as required during remote learning.<sup>95</sup>

OCR determined by a preponderance of the evidence that the District failed to provide the required services identified in students' IEPs and Section 504 plans during remote learning.<sup>96</sup>

Recent standardized test scores for California's students provide more recent data of the learning loss. This data incorporates students in both general and special education, but as stated above, the impact for students with disabilities has historically been more significant and

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93. Email from Zachary Pelchat, Reg'l Dir., Off. for C.R., U.S. Dep't of Educ., to Alberto M. Carvalho, Superintendent, L.A. Unified Sch. Dist. (April 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09215901-a.pdf> [<https://perma.cc/LY5N-6CGS>].

94. Section 504 of the Rehabilitation Act has a near identical FAPE requirement as the IDEA. *See also* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) ("No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

95. *Id.*

96. *Id.*

combined with the OCR findings, can provide at least circumstantial evidence of the greater academic deficit for students with unique needs. For example, the percentage of California’s students meeting or exceeding English Language Arts (“ELA”) standards has declined for every grade, with the worst decline present in third grade.<sup>97</sup> The impact on ELA development in the primary grades is especially concerning given the importance of early literacy for overall academic development.<sup>98</sup> Similarly, math achievement fell dramatically in all grades, with eighth grade students being most affected.<sup>99</sup>

Not surprisingly, much like the national numbers, California students from historically marginalized groups saw even greater decline according to state testing scores. The performance of Black and Latinx students is particularly concerning—in 2021–2022, only 15.9% of Black students met or exceeded state standards in math and 30.3% met or exceeded them in ELA.<sup>100</sup> For Latinx students, there was a similar decline with the percentage of students meeting math and ELA standards.<sup>101</sup>

Based on the OCR’s findings of Section 504 violations by LAUSD, the district entered into settlement negotiations to try and resolve these violations, with particular focus on compensatory education needs.<sup>102</sup> The district has committed to developing a plan “to appropriately assess and provide compensatory education to students with disabilities” who did not receive a FAPE during the pandemic; designate a plan administrator to implement the plan; and convene IEP teams to determine the extent of gaps in provision of services for individual students among other procedural requirements.<sup>103</sup>

Anecdotally, the roll out of this comprehensive plan has been slow going. For Simon, as one student among the more than 66,000 within LAUSD who receive special education services, he and his parents, as of February 2024, have yet to hear from district or school administrators about

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97. See Heather Hough & Belen Chavez, *California Test Scores Show the Devastating Impact of the Pandemic on Student Learning*, PACE (Nov. 2022), <https://edpolicyinca.org/newsroom/california-test-scores-show-devastating-impact-pandemic-student-learning> [<https://perma.cc/HBF9-RY9E>] (According to the PACE data, comparing 2018–2019 with 2021–2022, the percentage of students who met or exceeded ELA standards declined 6.4 percentage points, with 7th graders declining the least, by 2.2 percentage points).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (ELA Latinx students falling from 40.8% to 36.4% in ELA and from 28.1% to 21.2% in math).

102. City News Serv., *LAUSD to Address Compensatory Education Needs of Students with Disabilities*, NBC L.A. (April 28, 2022, 6:37 PM), <https://www.nbclosangeles.com/news/local/lausd-to-address-compensatory-education-needs-of-students-with-disabilities/2881583/#:~:text=The%20DOE%27s%20Office%20for%20Civil%20Rights%20announced%20an,and%20implement%20plans%20to%20ensure%20they%20are%20provided> [<https://perma.cc/BV64-GMHS>].

103. Email from Zachary Pelchat, *supra* note 93.

compensatory education, and have yet to begin receiving some additional support to try and recoup the significant learning loss he experienced both at the start of the pandemic and throughout the last two school years. Although little known data currently exists presently to indicate the number of students who have received some meaningful redress, and whether that redress is working at recoupment of learning lost, an educated guess would indicate that no significant impact has yet been made. And all the while, students continue to struggle without adequate intervention, still lost in the woods.

## II. THE FAILURES OF IDEA: DESPITE BEST INTENTIONS, SIMON IS LOST

*“Oh, you dear children, who has brought you here? do come in, and stay with me. No harm shall happen to you.” She took them both by the hand, and led them into her little house.<sup>104</sup>*

The impact of Covid-19 is just starting to be understood, and it will be some time before the learning deficit to all children is fully realized. However, the effectiveness of the current special education construct to address such a deficit is negligible. In more likelihood, the deficits in practical implementation of the procedural process to ensure substantive access are too embedded and too great to be workable tools in trying to recoup the severe learning loss that children with unique needs have experienced. Like so much protocol and policy, its biases laid bare by the pandemic, in areas such as housing and healthcare, so too has the IDEA been exposed. What was once an ideal of integration and inclusion, in practicality, has become a burden of process and an ineffective tool to ensure all students with unique needs are provided equal access to their education.

This Section will review those components of IDEA that have been least effective in accomplishing its intention and purpose. Focusing on the “F” and “A” of FAPE, this Section will demonstrate how a free, appropriate, public education is no longer appropriate or free for so many students. Much like the candy house in Hansel and Gretel, the ideal of a FAPE presents such a sweet façade but is artifice in reality.

### A. “Appropriate” is Ever Illusory

While IDEA requires a strong adherence to progress through a FAPE, the individualized nature of the services and educational environments needed for each child vary widely.<sup>105</sup> The statutory

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104. GRIMM & GRIMM, *supra* note 1.

105. Raj, *supra* note 18, at 423.

prioritization of an individualized learning program can be seen as both its greatest promise and its weakest link. On the one hand, tailoring a student's education to their unique needs is necessary, given the vast spectrum of needs and how such needs present themselves differently in every individual child. However, when combined with inadequate funding, socio-economic implications, and then a world-wide pandemic, whether each individual child receives all that IDEA promises is undermined.

In interpreting the purpose and intent of the IDEA, the Supreme Court provided significant guidance to understanding the requirement of a Free and Appropriate Public Education. In the landmark decision of *Board of Education v. Rowley*, the Supreme Court determined that the inquiry into whether a state has provided FAPE to a child with a "statutorily-approved" disability is twofold: (1) has the state complied with the procedures set forth in the Act; and (2) is the individualized educational program developed through the Act's procedures "reasonably calculated to enable the child to receive educational benefits"?<sup>106</sup> If these requirements are met, then the state has complied with the obligations imposed by Congress and the courts can require no more, even in the face of further concern and disagreement over a child's educational program by that child's parents, school officials, and even the child themselves.<sup>107</sup>

The second prong of *Rowley*, whether an IEP is reasonably calculated to produce an educational benefit, creates the basis for discussion and analysis of the IDEA's appropriateness standard.<sup>108</sup> This is in large part due to the Supreme Court's interpretation of what is *not* an "educational benefit" under the IDEA. In comparison to the specific procedural requirements set forth in the IDEA, the substantive requirements of what actually constitutes a meaningful educational benefit under the IDEA are far from clear.<sup>109</sup> In *Rowley*, the Supreme Court even stated that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."<sup>110</sup>

Therefore, the Court determined that while "some" educational benefit was required under the IDEA, the best possible "potential-maximizing" education was not intended by Congress to be provided to children with disabilities. Whether a child's IEP is reasonably calculated to produce "some" educational benefit has been left to the lower courts to decide.<sup>111</sup> Additionally, the Court granted deference to the states and local

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106. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982).

107. *See id.*

108. *See id.*; see also Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 ED. LAW. REP. 1011, 1011–12 (1997).

109. Rachel Ratcliff Womack, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in Our Schools?*, 34 TEX. TECH L. REV. 189, 205 (2002).

110. *Rowley*, 458 U.S. at 192.

111. Womack, *supra* note 109, at 205.

school districts in ultimately determining what a free and appropriate education should consist of for each particular child.<sup>112</sup>

However, the *Rowley* decision set a foundational standard that no state or school district could fall below. At the same time, it allowed for individual determination of “appropriate” for each child with a disability to continue, as mandated by the IDEA.<sup>113</sup> Although the districts are required to provide for some educational benefit for each individual child, what that benefit consists of remains entirely individualized to each child.<sup>114</sup>

### 1. *Andrew F. Enters the Story*

The most recent judicial interpretation of the “appropriate” standard of FAPE came in 2017 with *Andrew F. v. Douglas County School District RE-1*.<sup>115</sup> A circuit court battle of the appropriateness standard waged on for years post-*Rowley*, with subsequent decisions further interpreting just how much specialized education constituted a baseline of opportunity. In writing for the unanimous majority, Chief Justice Roberts acknowledged that the intention in granting certiorari was to bring further clarity to the second *Rowley* prong. He wrote, “[t]hirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a ‘free and appropriate education’ for certain children with disabilities. We declined, however, to endorse any one standard for determining ‘when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.’ That ‘more difficult problem’ is before us today.”<sup>116</sup>

In attempting to answer the “more difficult problem,” the Court presented a new standard of educational benefit, in interpreting the appropriateness of a FAPE. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>117</sup> The new standard is a middle ground in the circuit court division, significantly more than the Tenth Circuit’s “merely more than de minimis” benefit but did not go as far as requiring “meaningful benefit” as was required by the Ninth Circuit.<sup>118</sup>

Another component of the new *Andrew F.* standard is the requirement that the appropriateness of any IEP be considered in light of a

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112. *Rowley*, 458 U.S. at 208–09.

113. 20 U.S.C. § 1414(a)(1)(A).

114. *See id.* § 1414(b).

115. *See generally* *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 390 (2017).

116. *Id.*

117. *Id.* at 399.

118. *Id.* at 397, 403; *N.B. v. Hellgate Elementary. Sch. Dist.*, 541 F.3d 1202, 1213 (9th Cir. 2008).

child's circumstances.<sup>119</sup> Today, a child's circumstances include Covid-19. The pandemic's impact on supports and services reasonably calculated to enable progress in light of a student's disability cannot be underestimated.<sup>120</sup> Initial data and anecdotal evidence tell the educational community that too many students have struggled far beyond any anticipated impact of their unique needs. "The purpose of the IDEA is clearly anchored in the child's relationship to the world the child inhabits 'to ensure that all children with disabilities have available to them a [FAPE]... designed to meet their unique needs and *prepare them for further education, employment, and independent living.* . . .'"<sup>121</sup> Now their world includes a pandemic that killed millions and deprived them of the safety, supports and services needed to access their education. Additional data collection and ongoing assessment must be continued to begin to fully understand the true impact.

## 2. *Simon Searches High and Low for the FAPE*

The CDC's Morbidity and Mortality Weekly Report (MMWR) assessed data from eleven communities in the Autism and Developmental Disabilities Monitoring (ADDM) Network.<sup>122</sup> According to Karem Remley, M.D., director of the CDC's National Center on Birth Defects and Developmental Disabilities, "disruptions due to the pandemic in the timely evaluation of children and delays in connecting children to the services and support they need could have long-lasting effects."<sup>123</sup>

As reflected upon in *T.H. v. Board of Education*, "[c]hildren with [ASD] are a diverse group who often need a highly structured and regimented environment to meet their social and educational goals."<sup>124</sup> Like so many students, Simon requires significant intervention to access his education. His FAPE requires specialized academic instruction in a smaller learning environment on a general education campus, a one-to-one paraprofessional who follows a detailed behavior intervention plan ("BIP") to target specific behaviors of elopement, task avoidance, inattention, and distraction through positive intervention techniques and Applied Behavior Analysis ("ABA") therapy;<sup>125</sup> one hour each week of one-on-one speech

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119. Thomas Mayes, *The Long, Cold Shadow of Before: Special Education During and After Covid-19*, 30 S. CAL. L. REV. & SOC. JUST. 89, 100 (2021) (referencing *Andrew F.*, 137 S. Ct. at 988, 999).

120. *Id.* at 98–99.

121. *Id.* at 100 (emphasis in original).

122. Press Release, *supra* note 41.

123. *Id.*

124. See *T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 839–40 (N.D. Ill. 1999); see also *Womack*, *supra* note 109, at 190.

125. An extensive range of education interventions exist for young children diagnosed with ASD; because it manifests differently in virtually every child, one approach cannot be determined right for all children. However, certain programs have had substantial success during the early stages of a child's development; these programs demonstrate that early and



therapy; thirty minutes each week of one-on-one occupational therapy; and thirty minutes per week of social skills training with the school psychologist. He has annual goals in all academic areas, along with goals in each related service area.

Simon's mother is a fierce advocate for her son but has numerous limitations herself. As an immigrant and monolingual Spanish speaker, she has consistently faced obstacles in her advocacy. Every facet of Simon's education has presented challenges. For example, something as commonplace as transitioning from kindergarten to first grade was met with delay, judgment, and lack of assistance. Even with advocacy, each new year presented a roll-over of past violations and problems, along with a seemingly never-ending development of new challenges.

When schools in LAUSD transitioned to distance learning in March 2020, Simon's learning came to an abrupt halt. First, his family did not have access to any of the requisite technology or equipment necessary to access distance learning. It took over a month to obtain a laptop and internet connectivity in Simon's home. During this month, Simon had no learning or intervention. He and his family looked high and low for a FAPE but none was found- not in March 2020, and not through most of the 2020-2021 school year. In fact, as will be discussed further below, Simon's family continues to search for a FAPE in 2024. Unfortunately, like the guiding bread crumbs in Hansel and Gretel, it is nowhere in sight.

## B. "Free" No Longer Means Free

*He had little to bite and to break, and once when great dearth fell on the land, he could no longer procure even daily bread. Now when he thought over this by night in his bed, and tossed about in his anxiety, he groaned and said to his wife: "What is to become of us? How are we to feed our poor children, when we no longer have anything even for ourselves?"*<sup>126</sup>

### 1. Funding (or Lack Thereof) for Services and Supports under IDEA

Under IDEA, a state is eligible to receive federal funding to be used for special education services, so long as the state complies with statutory

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intensive educational interventions that target the deficits in behavioral, social, and communication skills of many children with autism are most effective. This most predominantly includes Applied Behavior Analysis therapy. *See generally* Samuel L. Odom et. al., *Educational Interventions for Children and Youth with Autism: A 40-Year Perspective*, 51 J. OF AUTISM & DEV. DISORDERS 4354, 4356–59 (2021). For Simon, this determination of need was established by both medical doctors and a private educational evaluation.

126. GRIMM & GRIMM, *supra* note 1.

requirements and submits proper paperwork.<sup>127</sup> The state must submit “a ‘plan that provides assurances to the Secretary that the state has in effect policies and procedures to ensure that the state meets each’ of the twenty-five stipulated conditions.”<sup>128</sup> One of these conditions is the “maintenance of state financial support” (“MFS”) clause wherein it is prohibited for a state to reduce “the amount of state financial support made available for special education and related services below the amount for the preceding fiscal year.”<sup>129</sup> Part B of the IDEA authorizes the Secretary of Education to extend federal grants to assist states in providing special education and related services for children with disabilities.<sup>130</sup> If a state reduces the amount of financial support, the Secretary of Education may withhold federal funding “by the same amount by which the State fails to meet the requirement.”<sup>131</sup> Alternatively, the Secretary may waive the MFS requirement if the Secretary finds, by clear and convincing evidence, that the State provides children with disabilities a Free and Appropriate Public Education.<sup>132</sup>

In theory, this funding scheme is of similar structure to other spending-clause statutes.<sup>133</sup> In implementation, funding of IDEA has consistently fell remarkably short. California provides a relevant example. For the 2018–2019 school year, California public schools received a total of \$97.2 billion.<sup>134</sup> About 90% of these funds came from the state, and only 9% came from the federal government.<sup>135</sup> With such a large amount of state money being spent on education, the allocation of funds for special education is quite complex.<sup>136</sup> The single biggest factor complicating the allocation of tax dollars is the “non-uniformity” originating within the disabilities themselves.<sup>137</sup> Due to the variation of learning and physical disabilities, it is difficult for federal and state governments to apply a uniform financial system.<sup>138</sup> Typically, a child with disabilities will require

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127. *See* 20 U.S.C. § 1412(a).

128. *Id.* § 1412(a).

129. *Id.* § 1412(a)(18)(A).

130. *Id.* § 1400 *et seq.*

131. *Id.* § 1412(19)(B).

132. *Id.* § 1400(19)(C)(ii).

133. Other spending clause statutes include Social Security and Medicaid.

134. CALIF. DEP’T OF EDUC., BUDGET ACT FOR 2018–19: INFORMATION (2022), <https://www.cde.ca.gov/fg/fr/eb/ba2018-19.asp> [<https://perma.cc/7MT6-7TPJ>].

135. *See generally* Julien Lafortune & Joseph Herrera, *Financing California’s Public Schools*, PUB. POL’Y INST. OF CAL., <https://www.ppic.org/publication/financing-californias-public-schools/> [<https://perma.cc/YDN9-NF9Z>].

136. CALIF. DEP’T OF EDUC., SPECIAL EDUC., <https://www.cde.ca.gov/sp/se/sr/taskforce2015-financing.asp> [<https://perma.cc/RUL9-QZV2>].

137. *See* JASON WILLIS ET. AL., WESTED, CALIFORNIA SPECIAL EDUCATION FUNDING SYSTEM STUDY 50 (2020), [https://www.wested.org/wp-content/uploads/2020/10/WestEd\\_SpecialEdFundingReport\\_Final\\_508.pdf](https://www.wested.org/wp-content/uploads/2020/10/WestEd_SpecialEdFundingReport_Final_508.pdf) [<https://perma.cc/765H-BPYN>].

138. MICHAEL GRIFFITH, EDUC. COMM’N OF THE STATES, THE PROGRESS OF EDUCATION REFORM: A LOOK AT FUNDING FOR STUDENTS WITH DISABILITIES 6 (2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf> [<https://perma.cc/5LJD-6FBS>].

multiple unique services, as required under the law.<sup>139</sup> Another factor to be considered is the largely disproportional property tax among the wealthy.<sup>140</sup> Property taxes provide a large proportion of special education funding; as such, the disparity between the wealthy and lower-income communities automatically creates a disproportionate allocation of funds across school districts, further adding to the already-existing disproportionality of access to education between student populations<sup>141</sup>

2. *“Free” is the Candy House Equivalent in IDEA, i.e., Too Good to be True*

Revisiting pre-pandemic achievement gaps, poverty continues to have a profound impact. Parents with means have been supplementing their children’s education for decades with private tutoring, supportive services, and mental health counseling. With school districts mandated to provide the “Chevrolet” and not the “Cadillac” model of special education to all eligible students, parents and education rights holders with means have long acquired additional support to try and maximize their students’ potential.<sup>142</sup> Even parents without the additional thousands of dollars to supplement their children’s education are tapping into insurance to provide services and additional support.<sup>143</sup> And those parents without such additional funding continue to rely on school districts to try and bridge the gap.<sup>144</sup> The inequity continues to grow. Moreover, a key tenant of FAPE is rendered obsolete—“free” no longer means “free.” At least if one wants their child to progress and succeed.

Despite the pre-pandemic practice for some families to supplement a school district’s offer of FAPE, the pandemic ushered in a different problem. Many students went without the necessary special education, accommodations, and related services for many months, and as stated above, experienced significant learning loss on account of this deprivation.<sup>145</sup> Revisiting Simon’s experience, as mentioned above, he went without basic equipment for several months in spring 2020. His parents could not afford tutoring or intensive summer programming, so he went without. Moreover, over the general summer break, most programs and

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139. *Id.* at 5.

140. See SYLVIA ALLEGRETTO ET. AL, ECON. POL’Y INST., PUBLIC EDUCATION FUNDING IN THE U.S. NEEDS AN OVERHAUL (2022), <https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/> [<https://perma.cc/T2UW-PUA5>].

141. *See id.*

142. *See Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455 (6th Cir. 1993).

143. *See Sarah O’Brien, Some Parents Turn to Insurance to Protect the Cost of Their Kids’ Education*, CNBC (May 9, 2019, 11:48 A.M.), <https://www.cnbc.com/2019/05/09/some-parents-use-insurance-to-protect-the-cost-of-their-kids-education.html> [<https://perma.cc/WQ9P-3TJX>].

144. *See id.*; *see also* ALLEGRETTO ET. AL, *supra* note 140.

145. Blad, *supra* note 33.

services pause for the summer months, to be commenced against in the incoming fall semester. However, for Simon, the 2020–2021 school year in LAUSD began online, so Simon continued to go without the supports and related services stated in his IEP. As such, without even the district services in place- services like speech therapy, behavior intervention and occupational therapy- and with parents unable to supplement Simon’s program out-of-pocket, his right to a FAPE was severely undermined.

### III. A PROPOSED OVERHAUL: AND THEY LIVE “APPROPRIATELY” EVER AFTER

*Gretel emptied her pinafore until pearls and precious stones ran about the room, and Hansel threw one handful after another out of his pocket to add to them. Then all anxiety was at an end, and they lived together in perfect happiness.*<sup>146</sup>

The beauty of the IDEA lies in its adaptability. The intentional broadness of the Act’s language allows for IEPs to be developed for each individual child with a disability.<sup>147</sup> However, as argued above, the various components of IDEA no longer serve its intended purpose: to provide all students with unique needs an appropriate, meaningful education. Instead, today, educational access is disparate, and meaningful benefit is complex, depending on the factual situations to which they are applied.<sup>148</sup> Widespread reform is necessary to begin to slow the swell of learning loss. This section will review recommendations and reasoning for this reform, specifically focusing on statutory amendment, compensatory education, and holistic interventions developed at the local school district level and mirror similar post-disaster intervention and relief.

#### A. Statutory Language on Appropriateness and Placement will Allow for More Inclusive Practices

The current legislation has not been amended since 2004;<sup>149</sup> thus, a thorough revision is long overdue. Primarily, a nuanced standard of “appropriateness,” would make significant strides to guide local education agencies and school districts in determining supports and services to students, particularly when students have already been denied IEP mandated supports and services, as was the case for so many students

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146. GRIMM & GRIMM, *supra* note 1.

147. *See* 20 U.S.C. §1414(d).

148. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under The IDEA*, 77 WASH L. REV. 809, 831 (2002).

149. *About IDEA*, U.S. DEP’T. OF EDUC., <https://sites.ed.gov/idea/about-idea/> [<https://perma.cc/35AY-2KAP>].

during the early pandemic stages. Moreover, a definition of inclusion would work to ensure that students' needs are not ignored for the sake of a false equivalence of inclusion. Much like the false imagery of the candy house in the woods, simply placing students with IEPs in general education classrooms without consideration of how their needs require accommodation in that setting provides an illusion far from the reality. Finally, Congressional directives on individualized funds for after-school and summer tutoring for all would help target the remedial learning necessary for post-school closure.

Beyond legislative revision, states can learn from past large-scale disasters about how to meet all students where they are. Practical guidelines, along with funding for the staff and training necessary to accomplish holistic remediation can assist school districts in meeting the needs of all students, as consistently as possible. Ideas include, teaching fewer concepts more deeply; prioritizing mastery and application of core academic subjects and foundational academic skills; prioritizing the mental health of administrators, support staff, teachers, and parents; protecting the arts; and integrating social emotional learning in core subjects.

### 1. *Congressional Reform on What is "Appropriate"*

Because the current standard of "appropriateness" is conditioned as a two-part inquiry under *Rowley*,<sup>150</sup> actually conditioning statutory implementation on the first *Rowley* inquiry—proper implementation of procedure<sup>151</sup>—could mitigate a significant amount of disagreement and dispute resolution, allowing for more effective and early access to appropriate education services.

Currently, when a parent or education rights holder disagrees with a school district's offer of FAPE, due process or some other alternate dispute resolution is triggered under the statute.<sup>152</sup> Often, the primary question that requires resolution, is what the appropriate level of support, services, accommodations, and/or placement is for the individual student.<sup>153</sup> The *Rowley* standard requires an administrative law judge to first look at procedural implementation of the statutory requirements in the overall adjudication of whether a school district's offer of support in an IEP was appropriate.<sup>154</sup> These procedures include, following appropriate assessment timelines,<sup>155</sup> holding IEP meetings at required times under the statute,<sup>156</sup> including the parent or education rights holder as an equal member of the

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150. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982).

151. *Id.* at 206.

152. *See* 20 U.S.C. § 1415.

153. *See id.*

154. *See id.*

155. *See id.* § 1414.

156. *See id.*

IEP team,<sup>157</sup> and implementing all agreed-upon components of the IEP document as soon as possible after consent and signature by the parent or education rights holder.<sup>158</sup>

According to the *Rowley* standard, if an administrative law judge determines that the school district failed to follow procedure in accordance with IDEA, this threshold question allows the adjudicator to substantively call into question the appropriateness of the school district's offer of support and services.<sup>159</sup> If the school district cannot even follow proper procedure, perhaps the ultimate offer of FAPE is also inappropriate—thereby failing to provide a student some educational benefit under *Endrew F.*<sup>160</sup>

School closures beginning in spring 2020 provide a nationwide example of this procedural consideration and the detrimental impact to students from procedural failures, so many students went without their IEP-mandated support and services when schools began to close in March 2020.<sup>161</sup> In a nationally representative survey of school districts in the summer of 2020, 82% reported that it was more difficult to provide “hands-on accommodations” in the remote learning or hybrid programs.<sup>162</sup> In October 2020, a similarly representative survey of 1,500 teachers indicated that working in remote settings made them less confident in their ability to meet the requirements of students' IEPs.<sup>163</sup> And in November 2020, a report to Congress by the federal Government Accountability Office cites the quality and duration of specialized services as an area of particular concern for students with IEPs, with school leaders specifically expressing concerns about the impact of virtual learning for hands-on services such as physical therapy and occupational therapy.<sup>164</sup>

In the standard process of disagreement under IDEA, parents whose children were among those denied adequate services on account of virtual learning would indicate such disagreement with the school district, either through a filing for due process or some other request for alternate dispute resolution.<sup>165</sup> Each disagreement appropriately filed with the school district and/or the administrative court would then proceed through the administrative process, which might include an informal resolution session with school district representatives, a mediation with a state-appointed mediator, and even a hearing before an administrative law judge.<sup>166</sup> At each

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157. *See id.* § 1450.

158. *See id.* § 1414.

159. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

160. *See Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 401–02 (2017).

161. MORANDO-RHIM & EKIN, *supra* note 58, at 4.

162. *Id.* at 9.

163. *Id.*

164. *Id.*

165. 20 U.S.C. § 1415(f).

166. *Id.* § 1415(f)(1)(A).

of these stages of potential resolution, the standard of FAPE would be argued and reviewed. This process inevitably can take many months.

Therefore, in accordance with *Rowley* and *Endrew F.*, for every student, the two-part analysis must occur; meaning, for a student to receive remedy, a parent or parent representative must individually demonstrate that first, proper procedure was not followed and/or second, the student was denied an appropriate education.<sup>167</sup> If a parent or parent representative can demonstrate that proper procedure was not followed, for example, that the student's IEP was not implemented, this provides a lens for the adjudicator to then analyze the appropriateness of the student's IEP and offer of FAPE.

This is a painstakingly slow process and is not parent-friendly, despite congressional intent for it to be so.<sup>168</sup> Understanding complex case interpretations and statutory schemes to effectively argue a denial of FAPE generally requires legal representation or advocacy.<sup>169</sup> Parents who cannot afford to pay for such advocacy, or do not qualify for/cannot find pro bono representation, either attempt the arguments on their own, often without success,<sup>170</sup> or forgo the process altogether. With every second that ticks away, educational regression goes unaddressed.

In an attempt to resolve the overall shortcomings of the current system to meaningfully service students and the accompanying widespread learning regression of disabled students, one consideration is to shift the burden of proof when the first *Rowley* question is answered in the negative. More specifically, on the outset of assessing denial of a FAPE, if the school district has not followed proper procedure in accordance with *Rowley*, and therefore, has not met the standards of the state educational agency in accordance with IDEA,<sup>171</sup> the burden would shift to the school district to prove how, in the face of procedural violation, it still was reasonably calculated to provide some educational benefit to the student.

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167. Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982); see also Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 401–02 (2017).

168. See S. REP. NO. 94-168, at 9 (1975), reprinted in U.S.C.C.A.N. 1425, 1432 (1975) (Congress intended for the dispute resolution process to afford parents the opportunity to disagree with the school district without the need for outside representation or counsel. With procedures that include parents in the IEP process, minimal pleading requirements and protection of parent choice, the IDEA intended to protect the rights of students with disabilities by protecting the rights of parents to enforce equity and school access.).

169. Paul Hefley, *The Complete Guide to Understanding FAPE (Free Appropriate Public Education)*, L. OFF. OF PAUL A. HEFLEY JR. (Dec. 14, 2021), <https://www.sandiego.specialeducationattorney.com/the-complete-guide-to-understanding-fape-free-appropriate-public-education#:~:text=FAPE%20is%20a%20legal%20principle%20that%20provides%20children,special%20needs%20to%20access%20the%20services%20they%20need> [https://perma.cc/5J89-W4UP].

170. William Blackwell & Vivian Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*, 5 SAGE OPEN J. 1, 2 (2015).

171. 20 U.S.C. § 1401(9)(B).

Currently, whichever party brings the complaint and seeks relief carries the burden of persuasion to establish the merits within.<sup>172</sup> Across most states, parents or education rights holders are primarily the complaining party and rarely the prevailing party in due process hearings.<sup>173</sup> As proposed, and as considered in the landmark case of *Schaffer v. Weast*, allowing for this burden-shifting approach when the first *Rowley* consideration establishes that the school district did not follow proper procedure in accordance with IDEA, would encourage districts to invest more in ensuring that what it offers to a student is in fact, implemented.<sup>174</sup> For example, if a district failed to implement some portion of a student's IEP, such as failing to provide a therapy service, the burden would then shift to the district to demonstrate how, in the face of this procedural failure, the student still received a FAPE.

This would have a profound impact for those families who bring complaints against the school district, specifically complaints post-school closure. As established above, many students have experienced severe learning loss for several years.<sup>175</sup> As the system currently exists, in an attempt to remedy some of that loss, parents or education rights holders must bring a complaint against the school district and demonstrate that the district denied a FAPE.<sup>176</sup> Carrying the burden of persuasion, they must prove under *Rowley* and *Andrew F.* that their child was denied access to some educational benefit, and if present, that the school district failed to follow proper procedure in some meaningful way.<sup>177</sup> If the parent fails to prove the latter, the school district satisfies the first prong of *Rowley* and moves into the second consideration regarding appropriateness with a perceived advantage.<sup>178</sup>

Shifting the burden would allow parents to utilize the procedural violation, specifically the failure to implement their child's IEP, as demonstrable proof of the second consideration, that because the district failed to implement the IEP, the district thereby denied the student a FAPE. The burden would then fall to the district to prove otherwise.

A counter-consideration to this approach looks back to spring 2020 and considers the lack of reasonable alternatives for the school districts at that time. Certainly, districts could not remain open under state mandates to

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172. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005).

173. Looking at 2019 California Hearing Decisions as an example, student or parent prevailed only 18% of the time in comparison to the school district or local education agency's 50% of the time. *2019 Hearing Decision Statistics*, ADAMS & ASSOCIATES (Sept. 19, 2020), <https://www.californiaspecialdewlaw.com/wiki/hearing-decision-statistics/2019-hearing-decision-statistics/> [<https://perma.cc/T262-V3GB>].

174. *Id.* at 62.

175. Dorn et al., *supra* note 43.

176. 34 C.F.R. § 300.507 (2006).

177. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.* 580 U.S. 386, 394 (2017).

178. *Rowley*, 458 U.S. at 207.



close. To now reconsider the current legal standards places a fault on the school districts when no other option at the time was available.

First and foremost, the burden of persuasion is not the only standard that should shift. Blaming the school districts for pandemic learning loss and most failed attempts to provide a FAPE is unhelpful and ignores the complexity of considerations pre-pandemic at the time of school closures and up to the present day. Reauthorization of the IDEA should consider adjustment of the current judicial standard both in terms of approach, as argued above, but also in terms of administrative ruling.<sup>179</sup> As Kadian proposes, “[c]ourts and hearing officers should move away from a blaming approach, and instead, find the district *responsible* for restoring the student, even if it is not *liable* for the harm.”<sup>180</sup>

This concept was already adopted by most state departments of education and early cases brought against school districts during the pandemic’s onset. One case, filed in the U.S. District Court of Hawaii, highlighted that students have experienced a denial of FAPE on account of the pandemic, and rather than burden the school district or state with attempting to provide individual remedy to each and every individual claim, looked to “lift the burden of defining an equitable remedy” by joining special education students together in a class action suit for wide-sweeping resolution.<sup>181</sup>

Similarly, the U.S. Department of Education’s Office for Civil Rights issued several findings in April 2022 upon investigation into Los Angeles Unified School District’s (“LAUSD”) provision of FAPE for qualifying students from March 2020 through the 2021–2022 school year.<sup>182</sup> The Department of Education determined that LAUSD limited services to students with disabilities based on considerations other than the student’s individual educational needs,<sup>183</sup> and held that students were entitled to equitable relief under IDEA and Section 504 of the Rehabilitation Act during that time frame.<sup>184</sup> The school districts’ responsibilities to students is static, regardless of intention or liability. Shifting both the approach and language of this responsibility could have a profound effect on the remedies stemming from due process and alternate dispute resolution.

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179. Bailey Kadian, *A Free Appropriate Public Education: Examining What “Appropriate” Means for Students with Disabilities in a Global Pandemic*, 32 HEALTH MATRIX 557, 591 (2022).

180. *Id.*

181. *Id.* at 587 (citing Complaint at 2, *W.G. v. Kishimoto*, No. 20-CV-00154 (D. Haw. Apr. 13, 2020)).

182. OFF. FOR C. R., U.S. DEP’T OF EDUC., Letter to Los Angeles Unified School District’s Superintendent (Apr. 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09215901-a.pdf> [<https://perma.cc/4MUU-URFA>].

183. *Id.*

184. *See id.*

2. *Streamline the Dispute Resolution Process and Access to Compensatory Education, Permanently*

Beyond the legal standard, the process of dispute resolution itself requires Congressional review.<sup>185</sup> Though the intricacies and deficits of special education law cannot be reduced solely to a resource problem, it remains a significant driving force, particularly for post-pandemic closures.<sup>186</sup> School districts act as the gatekeeper to most everything—distribution of resources and designed funds, eligibility, IEP services and support, implementation, and due process resolution and remedies.<sup>187</sup> It has been a longstanding frustration among special education advocates and attorneys that this gatekeeping function puts school administrators in a quintessential conflict of interest.<sup>188</sup> Being tasked to both allocate limited funds and resources as well as consider equitable relief for students who have been denied a FAPE puts these administrators directly between the proverbial rock and hard place. For example, the conflict may encourage an administrator to deny a costly service for a student with an IEP despite the student's need and revert the funds elsewhere.

Such a practice is further encouraged by the current system. Many parents and education rights holders lack the knowledge of the rights that attach for students with IEPs.<sup>189</sup> They are unaware of the dispute resolution process entirely, making it likely that any denial by a school administrator would not result in further dispute. If the parent or education rights holder does have knowledge that they can file a complaint against the district for denial of the service or request alternate dispute resolution,<sup>190</sup> the likelihood of success at a hearing is not high for parents in many states. Where school districts often have access to attorneys to represent their interests at a hearing, parents often have difficulty in finding and affording representation. And finally, as argued above, carrying the burden of persuasion often puts parents at an additional disadvantage.

All of this together reinforces the denial of necessary support and services for students. Even with the best of intentions, the conflict that these administrators carry is itself a concern that should not be dismissed.

There is a way to relieve this concern. Congress should adopt an alternate and expedited resolution process, at a minimum, in unique circumstances where the impact is widespread and many students have been affected.<sup>191</sup> In defined periods of emergency, like the pandemic, the process for granting compensatory education and other equitable relief to students

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185. Kadian, *supra* note 179, at 591.

186. *Id.* at 591–92.

187. *See id.*

188. *See id.*

189. Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 *YALE L.J.* 1802, 1808 (2008).

190. *See supra* Section III.A.1.

191. Kadian, *supra* note 179, at 590–91.

should be removed from the duties of school administrators, separately funded through federal emergency funds, and streamlined to reach as many students as possible in a shorter period of time.<sup>192</sup>

Currently, the system allows for negotiated settlements to be obtained informally between parents and school districts when disagreements exist.<sup>193</sup> These compensatory education awards occur outside of formal due process and do not require adjudication from the administrative court.<sup>194</sup> These settlements can occur through mediation, resolution sessions, or other informal contact between the parties. While staying within this current remedy framework but removing the direct oversight and responsibility from school administrators, the analysis of FAPE issues and award of equitable relief should be delegated to an outside, separate group, tasked with expediting the process of granting compensatory education to qualifying students.<sup>195</sup>

As stated by Troxler, “[c]ompensatory education was created to mend educational and functional deficits a child suffers as a result of being denied a FAPE by providing additional educational services outside of school.”<sup>196</sup> With the widespread impact to students with unique needs post-pandemic closure, states and school districts should not passively wait for parents and education rights holders to individually bring due process complaints. This is not in the best interests of the students. Post-Covid, and at any future moment of widespread education disruption, whether it be from natural disaster, loss of funding or something else, the implementation of an expedited recovery process should be considered. Overseers of this process, as with any other process of recovery would best come from outside of the district, tasked not with allocating limited funds or resources, with solely responsible for reviewing requests for relief and negotiating settlements.<sup>197</sup>

The New Jersey Department of Education (“NJDOE”) has issued similar guidance for compensatory education post-school closure.<sup>198</sup> According to the NJDOE, compensatory education can be appropriate where the student missed services during the pandemic and based on that lack of implementation, the student was denied a FAPE.<sup>199</sup> This presupposition of learning loss intentionally and proactively skips several steps in the recovery process. Moreover, the NJDOE has tasked the IEP team, which includes the student’s parent or education rights holder, the student’s teachers, related service providers, administrator, and student if

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192. *See id.* at 590–94.

193. *Id.* at 592–93.

194. *See id.* at 592–93.

195. *Id.* at 593–94.

196. McKala Troxler, Note, *Evaluating the Impact of the Covid-19 Pandemic on Students with Disabilities*, 20 J.L. & EDUC. 362, 384 (2021).

197. *Id.*

198. *Id.* at 384–85.

199. *Id.* at 385.

appropriate, to decide if compensatory education is appropriate.<sup>200</sup> Requiring the IEP team to make this determination is a step in the right direction but does not go far enough to relieve these decisions of the inherent conflict of interest present among administrators. Nor does it account for the long-term educational needs of the student. Emergency circumstances as widespread as the Covid-19 pandemic are hopefully one-in-a-lifetime. However, emergencies happen at the local and state level much more frequently.<sup>201</sup> Natural disasters like tornadoes, wildfires, flooding, hurricanes and earthquakes are commonplace, and becoming more common on account of the climate crisis.<sup>202</sup> These can lead to long term school displacement for students and interrupt access to IEP services.<sup>203</sup> Congress must therefore account for how states will address learning loss post-emergency, in a way that appreciates the need for expeditious, streamlined support.

#### CONCLUSION

*[A]nd when they were once safely across and had walked for a short time, the forest seemed to be more and more familiar to them, and at length they saw from afar their father's house. Then they began to run, rushed into the parlour, and threw themselves round their father's neck.*<sup>204</sup>

What is the intention of a fairy tale? According to the National Endowment for the Humanities, these tales are about children and families and how they reacted to the difficult conditions under which they lived.<sup>205</sup> What a fitting backdrop for a discussion of IDEA—it too is a tale of children and their families and how the support received under IDEA reacts to the different conditions under which students live.

In the 1970s, riding on the wings of the civil rights movement, so much initial progress was made in ensuring equity and access to the public

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200. *Id.*

201. See, e.g., *Declarations of a Public Health Emergency*, HEALTH & HUM. SERV., ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://aspr.hhs.gov/legal/PHE/Pages/default.aspx> [<https://perma.cc/7C85-VRM5>].

202. Eric McDaniel, *Weather Disasters Have Become 5 Times as Common, Thanks in Part Due to Climate Change*, NPR (Sept. 7, 2021, 2:10 PM), <https://www.npr.org/2021/09/07/1034607602/weather-disasters-have-become-five-times-as-common-thanks-in-part-to-climate-change#:~:text=Climate%20change%20has%20helped%20drive,agency%20the%20World%20Meteorological%20Organization> [<https://perma.cc/8GAJ-7T79>].

203. Kayla Jimenez, *Deadly Disasters are Ravaging School Communities in Growing Numbers. Is There Hope Ahead?*, USA TODAY (Sept. 24, 2023, 5:02 AM), <https://www.usatoday.com/story/news/nation/2023/09/24/natural-manmade-disasters-close-schools/70767671007/> [<https://perma.cc/5996-6WG8>].

204. GRIMM & GRIMM, *supra* note 1.

205. Jack Zipes, *How the Grimm Brothers Saved the Fairy Tale*, HUMANITIES, Mar.–Apr. 2015, at 30.

school system.<sup>206</sup> In the 1990s, during the alarming rise of mass school shootings (and the media's attention to them), obtaining such access for students engaging in problematic behaviors as a manifestation of their disabilities was often in conflict with new federal regulations like the Gun-Free Schools Act of 1994 and the rise of zero-tolerance for certain offenses taking place on school grounds.<sup>207</sup> In 2008–2009, obtaining meaningful services for students under IDEA was largely impacted by the recession and nation-wide layoffs of teachers and school staff.<sup>208</sup> Where a student and their family lives continues to impact access to appropriate supports and services, as does the color of their skin, sexuality, and socio-economic background.<sup>209</sup> And now too, a global pandemic has taken center stage to substantially impact students' access.<sup>210</sup>

Checking back in with Simon, today, he is at a new school in the same school district. Progress is sporadic, and his behavior has become the biggest barrier to accessing his curriculum. He moved schools after a newly-hired teacher inappropriately restrained him and caused injury. This teacher lacked adequate training in behavior intervention, did not have necessary special education credentials, and was hired by the district in the wake of the mass exodus of trained, credentialed teachers post-school closure.

Because of Simon's injury and learning loss, a due process complaint was brought against the school district. Simon received significant compensatory education, a one-to-one behavior aide and additional supportive services like speech therapy, occupational therapy, and behavior intervention. To date, most of these services have not been implemented and Simon continues to make minimal progress. This is, in part, due to the waiting list for his required therapies and lack of staff to provide his services. Further, Simon's parents are not English-speaking, and therapists with dual language capabilities remain a rarity. Moreover, Simon's parents cannot afford to supplement his education and therapies privately. Thus, the reasons behind the delay make receiving necessary services appear almost unattainable.

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206. *A History of the Individuals With Disabilities Education Act*, *supra* note 19.

207. Gun Free Schools Act of 1994, H.R. 6, 103rd Cong. § 14601 (1994); see Mildred Amayun, *A Policy Analysis of the Gun-Free Schools Act of 1994: A Shifting Intolerance* (2022) (Ph.D. dissertation, California State University) (ProQuest).

208. See Loretta Mason-Williams et al., *Rethinking Shortages in Special Education: Making Good on the Promise of an Equal Opportunity for Students With Disabilities*, 43 *TEACHER EDUC. & SPECIAL EDUC.* 45, 47 (2019); Matthew A. Kraft & Joshua F. Bleiberg, *The Inequitable Effects of Teacher Layoffs: What We Know and Can Do*, 17 *EDUC. FIN. & POL'Y* 367, 368 (2022).

209. See Matthew E. Brock & John M. Schaefer, *Location Matters: Geographic Location and Educational Placement of Students With Developmental Disabilities*, 40 *RSCH. & PRAC. FOR PERS. WITH SEVERE DISABILITIES* 154, 154, 162 (2015).

210. MORANDO-RHIM & EKIN, *supra* note 58, at 4.

Though his needs are unique to him, Simon's experience in the public school system, as a student with unique needs, is far from unique. In fact, Simon is representative of many students struggling in today's system of special education. While Covid-19 certainly shone the spotlight on the system's deficiencies, these deficiencies have been glaringly present for a long time. Thus, congressional overhaul of current statutory procedures, proper special education funding, and effective implementation at the ground level are necessary to address students' unique learning needs and lead America's students out of the dark wood.

However, much like Hansel and Gretel did not wait for their parents to rescue them from that dark wood, parents, teachers, and district administrators should not wait for congressional- or state-directives on how to support students who have experienced post-pandemic learning loss or unfinished learning on account of school closures. Likewise, they should not wait for funding of widespread compensatory education schemes, funding for mass hiring of teachers, support staff and related services providers, or funding for more inclusive classroom placements. Special education has always been grossly underfunded,<sup>211</sup> and while a call to properly fund both special and general education is necessary and warranted, this will serve little purpose. Instead, parents, teachers, staff, and administrators should get creative, particularly with regard to provision of remedial education and classroom inclusion. Beyond recoupment of academic skills in reading, writing, and math, supporting the whole student will take the entire education community dedicating energy and already-limited resources to social-emotional learning; providing more opportunities for the arts and preferred class content; restorative justice practices that focus on relationship-building versus punishment; and re-teaching foundational soft skills for future academic success such as time management, note-taking, organization, teamwork, and leadership skills. In these ways, the community can continue what it started—ensuring that all children, regardless of need, have equitable access to education. Perhaps then, FAPE can move beyond a fabled hope and become a told reality for every child in need.

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211. See Elvie Blad, *Why the Feds Still Fall Short on Special Education Funding*, EDUC. WK. (Jan. 10, 2020), <https://www.edweek.org/teaching-learning/why-the-feds-still-fall-short-on-special-education-funding/2020/01> [<https://perma.cc/3AAL-FBNW>]; see also Mark Lieberman, *How Special Education Funding Actually Works*, EDUC. WK. (Apr. 27, 2023), <https://www.edweek.org/teaching-learning/how-special-education-funding-actually-works/2023/04> [<https://perma.cc/X5EW-BR52>] (explaining how federal education funds support special education).