

THERE IS NO SUCH THING AS A FREE APPROPRIATE PUBLIC EDUCATION

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In January 2015, Arizona Governor Doug Ducey implemented the Classrooms First Initiative with the aims “to modernize school finance code, ensuring adequate funding is made available for teachers and classroom instruction.”¹ Recognizing that comprehensive finance reform had not occurred for “generations,” a council convened to “build a long-term strategy” and “multi-year policy initiatives and implementation plans” to reform Arizona’s school finance code.² After two years of meetings and research, the council issued a list of recommendations for reform, among which Recommendation Twelve specified “[c]onduct an actuarial cost study on special education and identify ways to address adequacy of funding based on study results.”³ However, the group did not develop an actual funding formula in order to enact the explicit recommendations.⁴ Recommendation Twelve has not been enacted, nor have any others. This means that schools are left to cover an essentially underfunded mandate to the tune of \$381 million each year.⁵

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1. *Classrooms First Initiative Council*, OFF. EDUC., <https://education.azgovernor.gov/edu/classrooms-first-initiative> [<https://perma.cc/ZU8P-NY84>] (last visited May 6, 2019).

2. *Id.*; *Classrooms First Initiative Council*, OFF. EDUC., <https://education.azgovernor.gov/edu/classrooms-first-initiative-council> [<https://perma.cc/43Z5-MCMX>] (last visited May 6, 2019).

3. CLASSROOMS FIRST INITIATIVE COUNCIL, FINAL REPORT 6 (2016) [hereinafter FINAL REPORT], https://education.azgovernor.gov/sites/default/files/classrooms_first_initiative_council_final_report_0.pdf [<https://perma.cc/A2VC-FMPD>].

4. Alia Beard Rau, *Ducey’s ‘Classrooms First’ Council Folds Without a Funding Plan*, ARIZ. REPUBLIC (Dec. 14, 2016), <http://www.azcentral.com/story/news/politics/arizona-education/2016/12/14/duceys-classrooms-first-folds-without-funding-plan-school-funding-arizona/95267812/> [<https://perma.cc/B8DC-TJEB>].

5. Alia Beard Rau, *Arizona Shorting Schools Millions for Special Education*, ARIZ. REPUBLIC (Sept. 19, 2015), <https://www.azcentral.com/story/news/arizona/politics/education/2015/09/19/arizona-shorting-schools-millions-special-education/72429064/> [<https://perma.cc/9FA4-9SY6>].

Because public district and charter schools are federally required to appropriately educate students with disabilities, these funding shortfalls require schools to scramble and shuffle funds, usually at the expense of students who do not require special education.⁶ This Comment will argue that Arizona's current funding weights for special education leave schools in a legal double bind. The funding weights are inadequately calculated to enable public schools to fulfill their federal requirement of providing access to a free appropriate public education ("FAPE") to students with disabilities while simultaneously fulfilling their state requirement of providing a "general and uniform" education to all students under the Arizona Constitution.

Part I will explain the requirements that the Individuals with Disabilities Education Act ("IDEA") places on public schools, analyze leading federal case law in educating students with disabilities, and examine Arizona's constitutional provisions and state case law that establish a fundamental right to education. Part II will explain how school special education programs are funded at the federal and state levels and examine the strengths and weaknesses of weighted funding mechanisms for special education. Part III will analyze how the current state funding mechanism may be in violation of federal and state requirements and provide recommendations to cure the deficiencies.

I. BACKGROUND

A. *What's the Big IDEA?*

The IDEA was first passed by Congress in 1975 and was known then as the Education for All Handicapped Children Act ("EHA").⁷ Congress passed the law to address the fact that one million children with disabilities were entirely excluded from the public school system, that more than half of the children with disabilities who were served still did not receive appropriate educational services, and that undiagnosed children were

6. *See id.*

7. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). The name change occurred in 1990. OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 4 (2000), <https://www2.ed.gov/policy/speced/leg/idea/history.pdf> [<https://perma.cc/5MM2-T29C>].

limited access to a successful education.⁸ The IDEA provides federal funds to states that assist them in providing all children with disabilities a FAPE.⁹

Providing a FAPE to all children with disabilities is the hallmark principle of the IDEA. It is the first stated purpose of the IDEA that the intent of the legislation is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”¹⁰ There is not an explicit definition of what a FAPE looks like because each student’s needs are unique. However, necessary attributes of a FAPE include providing the student with an Individualized Education Program (“IEP”)¹¹ that is formed with parental involvement, providing for the Least Restrictive Environment (“LRE”)¹² calculated to educate the child, and following all Procedural Safeguards.¹³

The IEP represents specially designed instruction and is the way in which “[t]he ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a student with disabilities.¹⁴ An IEP is a written statement developed by the “IEP Team”¹⁵ about the student with disabilities (i.e. parents, teachers, representatives of the local educational agency (e.g. the district), and others) and must be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”¹⁶ The IEP must address the student’s present levels of academic achievement and functional performance, stipulate annual measurable goals in line with their achievement, and describe the student’s progress toward meeting those goals among other things.¹⁷

To redress the common occurrence of students with disabilities being removed from classrooms and left to sit “idly . . . awaiting the time when

8. See Pub. L. No. 94-142, § 3, 89 Stat. 773, 774 (1975) (codified as amended at 20 U.S.C. § 1401 (2018)).

9. See Office of Special Educ. Programs, *Special Education--Grants to States*, U.S. DEP’T EDUC. (May 5, 2016), <https://www2.ed.gov/programs/osepgrts/index.html> [<https://perma.cc/29SR-JCEL>].

10. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2018).

11. 20 U.S.C. § 1414(d)(1)(A) (2018).

12. 20 U.S.C. § 1412(a)(5)(A) (2018).

13. See 20 U.S.C. § 1415 (2018). For examples of procedural safeguards, see *infra* text accompanying notes 26–33.

14. Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982).

15. 20 U.S.C. § 1414(d)(1)(B).

16. *Rowley*, 458 U.S. at 204.

17. See 20 U.S.C. § 1414(d)(1)(A).

they were old enough to ‘drop out,’”¹⁸ Congress specified that “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.”¹⁹ This concept of the LRE means that children with disabilities need to stay with their peers to the greatest extent possible and that services need to be provided to them in the classroom with their peers or with some supplement.²⁰ “[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”²¹

Some students are able to be “mainstreamed,” meaning that they are able to receive accommodations and services in the regular classroom.²² These accommodations may range from extra time on assessments, to preferential seating, to providing a note taker.²³ Those with more severe disabilities may be in a regular classroom with their peers for the majority of the day, but then taken to a “resource room” for direct instruction in an academic or behavioral concept that they need in support of progress in the general curriculum per their IEP.²⁴ The basic concept of LRE means that students with disabilities stay with their peers whenever reasonably feasible.²⁵

Although there are not explicit substantive educational requirements to determine if a student has access to a FAPE, there are notable procedural requirements.²⁶ The procedural safeguards include a significant number of

18. *Rowley*, 458 U.S. at 179 (quoting H.R. REP. NO. 94-332, at 2 (1975)).

19. 20 U.S.C. § 1412(a)(5)(A) (2018).

20. *See id.*

21. *Id.*

22. Murray Levine, Jeffrey W. Hummel & Richard T. Salzer, *Mainstreaming Requires Something More: The Person-Environment Fit*, 2 CLINICAL PSYCHOL. REV. 1, 3 (1982).

23. *See, e.g.*, Erich Strom, *The Difference Between Accommodations and Modifications*, UNDERSTOOD, <https://www.understood.org/en/learning-attention-issues/treatments-approaches/educational-strategies/the-difference-between-accommodations-and-modifications> [https://perma.cc/5SQN-53BA] (last visited Mar. 14, 2019).

24. *See* Laura O’Laughlin & Jane Clark Lindle, *Principals as Political Agents in the Implementation of IDEA’s Least Restrictive Environment Mandate*, 29 EDUC. POL’Y 140, 154–55 (2014).

25. *See Does the LRE (Least Restrictive Environment) Mean the General Education Classroom?*, ARIZ. DEP’T EDUC.: SPECIAL EDUC. DISP. RESOL., (June 23, 2016), <http://www.azed.gov/disputeresolution/2016/06/23/myth6/> [https://perma.cc/XG4X-UAPD].

26. *See generally* U.S. DEP’T OF EDUC., IDEA 2004 MODEL FORMS: GUIDANCE ON REQUIRED CONTENT OF FORMS UNDER PART B OF THE IDEA (2009), https://sites.ed.gov/idea/files/modelform_Procedural_Safeguards_June_2009.pdf [https://perma.cc/VD96-5SKQ] (containing “model procedural safeguards notice,” a version of which is annually given to the parents of children with disabilities).

rules regarding communications between the student's parents and the school.²⁷ These include schools providing written notices to parents before the initiation of any identification, evaluation or provision of educational services²⁸ and also that all language on forms is understandable to the general public and in the parent's native language.²⁹ Many rules specify the extent of parental participation including involvement in all IEP meetings and rights to independent educational evaluations.³⁰ The procedural safeguards also include numerous methods of resolving disagreements between the parents and school from due process complaints,³¹ to mediation,³² to state-level complaints.³³

The IDEA has few substantive requirements and provides little practical guidance to schools because it is an individualized statute focused on the unique needs of the child.³⁴ This means that the courts have been left with the responsibility of interpreting the legislative intent of what terms such as FAPE or LRE mean in the context of providing services to students with disabilities.³⁵

B. Making Sense of Alphabet Soup: The Court's Interpretation of FAPE

Board of Education v. Rowley is the seminal special education case which determined that a FAPE requires states to provide sufficient services such that students with disabilities receive "some educational benefit."³⁶ Amy Rowley was a deaf first-grader whose school provided her with a hearing aid, specialized instruction, and speech therapy.³⁷ Her parents insisted that her school provide a qualified sign-language interpreter in the classroom in lieu of some of the assistance listed in her IEP.³⁸ The school administrators determined that an interpreter was not necessary because

27. 20 U.S.C. § 1415 (2018).

28. See § 1415 (b)(3)–(c).

29. See § 1415 (b)(4)–(d).

30. See § 1415 (b)(1).

31. See § 1415 (b)(7)(A), (c)(2).

32. See § 1415 (b)(5), (e).

33. See § 1415 (b)(6).

34. See Theresa M. Willard, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1169 (1998).

35. See *id.* at 1170.

36. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

37. See *id.* at 184.

38. See *id.*

Amy was progressing academically and socially.³⁹ The Rowleys sued under a claim that Amy was denied a FAPE because despite her progress, there was a disparity between her achievement and her potential, and the school was denying her the same opportunity to achieve her full potential that it offered to other students.⁴⁰

The Supreme Court looked to the statutory history and determined that the legislative intent was “primarily to make public education available to handicapped children.”⁴¹ However, this primary goal is not tied to any “substantive standard prescribing the level of education to be accorded” students with disabilities which is imposed upon the States.⁴² The Court concluded that the legislative “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.”⁴³ This meant that the IDEA was to serve as a “basic floor of opportunity”⁴⁴ and “generates no additional requirement that the services so provided be sufficient to maximize each child’s potential ‘commensurate with the opportunity provided other children.’”⁴⁵ The Court rooted this interpretation in a policy rationale reasoning that the “requirement that States provide ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”⁴⁶

Although the Court found “general and somewhat imprecise” substantive requirements in the Act, it recognized the importance of the “elaborate and highly specific” procedural safeguards required in the development and implementation of an IEP.⁴⁷ The “emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”⁴⁸ In this way, the Court chartered a middle path, recognizing that although there are not specific substantive requirements imposed upon States, the Act guarantees a

39. *See id.* at 184–85.

40. *See id.* at 185–86.

41. *Id.* at 191–92.

42. *Id.* at 189.

43. *Id.* at 192.

44. *Id.* at 200.

45. *Id.* at 198 (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

46. *Id.* (quoting Brief for Respondents at 35).

47. *Id.* at 205.

48. *Id.* at 206.

substantively adequate program of education to all eligible children.”⁴⁹ Therefore, under the standards set out in *Rowley*, “a child has received a FAPE, if the child’s IEP sets out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’”⁵⁰

Rowley set the standard for providing a FAPE to all students with disabilities for decades, until 2017 when the Supreme Court determined that the “IDEA demands more” in its decision *Endrew F. ex rel. Joseph F. v. Douglas County School District*.⁵¹ Endrew was diagnosed with autism at age two and qualified as a student with a disability.⁵² He was entitled to the benefits of the IDEA, including a FAPE.⁵³ By his fourth-grade year, his parents were dissatisfied with his progress because his yearly-drafted IEP carried over many of the same goals and objectives.⁵⁴ They claimed this carry-over was an indication that Endrew was not making adequate yearly progress and, therefore, moved him to a private school for fifth grade that specializes in educating children with autism.⁵⁵ Endrew’s behavior and academics improved significantly at the specialized school and his parents sought tuition reimbursement⁵⁶ from the public school, claiming that they had been denied a FAPE.⁵⁷

The Supreme Court acknowledged that the *Rowley* standard controlled, but questioned how “reasonably calculated” an IEP needed to be in order for a school to meet its substantive obligation under the IDEA.⁵⁸ The Court recognized that there are not substantive requirements under the IDEA, but maintained that an “IEP must aim to enable the child to make progress.”⁵⁹ The Court declined to elaborate on what appropriate progress was, but explained that despite the lack of a formula, “a student offered an educational program providing ‘merely more than *de minimis*’ progress

49. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 995 (2017).

50. *Id.* at 995–96 (quoting *Rowley*, 458 U.S. at 207).

51. *Id.* at 1001.

52. *Id.* at 996.

53. *Id.*

54. *Id.*

55. *Id.*

56. This is a common remedy if a school is unable to provide access to a FAPE itself. The financial obligations for the private placement are the responsibility of the public school district because of the “free” in FAPE. See Allan G. Osborne & Megan L. Rehberg, *Know the Law: Reimbursement Under the IDEA*, SCH. BUS. AFF. 18 (Oct. 2009), <https://files.eric.ed.gov/fulltext/EJ919362.pdf> [<https://perma.cc/796E-ZKPH>].

57. See *Endrew F.*, 137 S. Ct. at 997. To qualify for tuition reimbursement, “they were required to show that the school district had not provided Endrew a FAPE in a timely manner prior to his enrollment at the private school.” *Id.*; see 20 U.S.C. § 1412(a)(10)(C)(ii) (2018).

58. *Endrew F.*, 137 S. Ct. at 999.

59. *Id.*

from year to year can hardly be said to have been offered an education at all.”⁶⁰ Since this is a very recent Supreme Court decision, the specifics of how this ruling will affect special education remain unclear. Some believe that it is a monumental case and will significantly impact IEP standards; others think that there will be no effect on the *Rowley* standard.⁶¹

Although the effects of *Endrew F.* remain to be seen, both the *Rowley* and *Endrew F.* standards clearly establish that schools must guarantee a FAPE to each student with a disability. Yet, neither case addresses the potentially significant cost requirements placed on schools as a result of these standards. However, the Supreme Court has expressly held that public schools are responsible for expensive services required⁶² by students with severe disabilities and that the cost of service is irrelevant in the IDEA analysis.⁶³

In *Cedar Rapids*, a student was ventilator dependent and required one-on-one nursing assistance due to an auto accident.⁶⁴ The parents initially paid for his care out of settlement proceeds, but then requested that the school cover the costs of the health care services.⁶⁵ The school did not believe it was legally obligated to cover the student’s nursing services and denied the request.⁶⁶ The Court determined that the school was required to provide a nurse despite the cost because it fell under the IDEA’s “related services” that are “required to assist a child with a disability to benefit from special education.”⁶⁷ The Court firmly rejected the school district’s proposed multifactor test that included cost as a consideration as to whether the school was legally obligated to provide the service.⁶⁸ The essential holding of *Cedar Rapids* is that a school is required to provide a FAPE to students with disabilities regardless of how much funding a school receives

60. *Id.* at 1001 (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015)).

61. Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> [<https://perma.cc/J3NP-J3LJ>].

62. Required means statutorily required by the IDEA. *See generally* Leslie A. Collins & Perry A. Zirkel, *To What Extent, if Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11, 11 (1992).

63. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77–79 (1999).

64. *See id.* at 69.

65. *See id.* at 70.

66. *See id.*

67. *Id.* at 73 (quoting the language of 20 U.S.C.A. § 1401(a)(17) (1998) (current version at 20 U.S.C.A. § 1401(26)(A) (2018))).

68. *See id.* at 75–76.

or how much providing a service would adversely impact general population students.⁶⁹

Some have found the mandatory funding requirement particularly troublesome because there has not been a recent study as to the real costs of educating students with disabilities.⁷⁰ The most recent national study⁷¹ was in 2000 and found that “average expenditures for a general education student was \$6,556 compared to \$12,474 for students with disabilities—a difference of \$5,918 (90.3%).”⁷² The most recent Arizona study was in 2007 and found a special education funding gap of \$97.52 million in Arizona schools.⁷³

C. Foundations of a Fundamental State Right

The Arizona Constitution specifies that the “legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system.”⁷⁴ This general and uniform requirement suggests statewide minimum educational standards.⁷⁵ The Arizona Supreme Court has found that this clause, in concert with others, establishes a fundamental right to education for every person between the ages of six and

69. *See id.* at 77–78. Some appellate court cases have language that appears to be to the contrary. *See, e.g., Barnett ex rel. Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991) (“‘[A]ppropriate’ does not mean the best possible education that a school could provide if given access to unlimited funds.”); *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (“Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.”); *Age v. Bullitt Cty. Pub. Sch.*, 673 F.2d 141, 145 (6th Cir. 1982) (“[W]e cannot say that the State has failed to reconcile satisfactorily [the student’s] need for a free, appropriate public education with the need for the State to allocate scarce funds among as many handicapped children as possible.”). However, even though it seems that cost may be used as a factor, what distinguishes these cases is that the public school was providing adequate services and access to a FAPE to the students with disabilities, just not the services that the parents necessarily wanted. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 192, 198 (1982).

70. *See* Michael Griffith, *A Look at Funding for Students with Disabilities*, ECS PROGRESS EDUC. REFORM 1, 3 (Mar. 4, 2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf> [<https://perma.cc/X7U8-DAGH>].

71. The study was the federally funded Special Education Expenditure Project (SEEP). *Id.*

72. *Id.*

73. AUDIT UNIT, ARIZ. DEP’T OF EDUC., SPECIAL EDUCATION COST STUDY i (2007), <https://cms.azed.gov/home/GetDocumentFile?id=56159ce8aadebe10bc574344> [<https://perma.cc/8SRZ-5P3Z>]. The funding gap is the difference in cost between what the state funds and what schools spend on special education services. *Id.*

74. ARIZ. CONST. art. XI, § 1.

75. JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE* 247 (1993).

twenty-one⁷⁶ and that the state has an obligation to “assure[] to every child a basic education.”⁷⁷

In *Shofstall*, the Arizona Supreme Court determined that a “school financing system which has a rational and reasonable basis and which meets the educational mandate of our constitution should, unless otherwise discriminatory or capricious, be upheld.”⁷⁸ Consequently, the court rejected the taxpayer plaintiffs’ claim that disparities in school funding that resulted from differences in tax burdens violated the constitutional provisions.⁷⁹ Although the court did not consider the uniformity requirement,⁸⁰ it was not persuaded that the educational expenditures were in themselves inadequate.⁸¹ Later courts have interpreted the general and uniform clause as creating a “constitutional obligation to fund a public school system that is adequate.”⁸²

In *Roosevelt I*, the Arizona Supreme Court held that a school finance scheme that was “a combination of heavy reliance on local property taxation, arbitrary school district boundaries, and only partial attempts at equalization” violated the general and uniform requirement.⁸³ The court was careful to note that it was not the disparity in funding itself that was unconstitutional, but that “[t]he critical issue is whether those disparities are the result of the financing scheme the state chooses.”⁸⁴ Even in the early

76. *Id.* at 247–48. The U.S. Supreme Court has determined that the U.S. Constitution does not establish education as a fundamental right. *Compare* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding education is not a fundamental federal right), *with* *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (holding education is a fundamental state right).

77. *Shofstall*, 515 P.2d at 592.

78. *Id.* at 592–93. Although Arizona Chief Justice Hays found that education was a fundamental right under the state constitution, he applied the rational basis test instead of strict scrutiny, the more rigorous standard of judicial review usually imposed by courts when fundamental rights are implicated. This has led to confusion among later courts. *See, e.g.,* *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop (Roosevelt I)*, 877 P.2d 806, 811 (Ariz. 1994) (“We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply.”).

79. *See Shofstall*, 515 P.2d at 593.

80. *See* LESHY, *supra* note 75, at 248.

81. *Shofstall*, 515 P.2d at 592. “[W]e have no indication that the present levels of educational expenditures . . . provide an education that falls short.” *Id.* (quoting *Rodriguez*, 411 U.S. at 36–37).

82. *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997); *Craven v. Huppenthal*, 338 P.3d 324, 326 (Ariz. Ct. App. 2014) (maintaining that Arizona case law has interpreted the “general and uniform” clause to mean “adequate”).

83. *Roosevelt I*, 877 P.2d at 815.

84. *Id.*

1990s, the Arizona Supreme Court was critical of financing schemes, commenting that “[t]he per-pupil amount appears to be unrelated to any minimum amount necessary for a basic education.”⁸⁵

Adequacy arguments are considered a part of the “third wave” of school finance litigation and have had success across multiple states, including Arizona.⁸⁶ State courts, including Arizona’s, have interpreted “state constitutions to require states to provide a substantive education that does not fall below a minimally adequate level.”⁸⁷ Plaintiffs who have focused on equitable expenditures as a measure of adequacy have not enjoyed the same success⁸⁸ as those who have focused on the general adequacy of the funding mechanism.⁸⁹ The general and uniform clause has been at the center of multiple battles over perceived inequities in school funding in Arizona, but none of the lawsuits has focused on the discrepancies in funding special education.⁹⁰

II. CRYING, WEIGHTING, HOPING

A. Looking at the Specs in Special: Arizona’s Special Education Funding

Arizona, like all states that follow the requirements of the IDEA, may receive basic entitlement funds from the federal government to alleviate the

85. *Id.* at 810. The court also dourly noted, “[t]he financing scheme is particularly complex. If lack of clarity alone were sufficient to strike these statutes down, this case would be less difficult.” *Id.* at 809–10.

86. Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1623 (2013) (“Courts in Kentucky, Montana, Texas, Arizona, Massachusetts, New Jersey, and Tennessee, among others, have found that their states’ school finance systems violated the education clauses of their respective state constitutions.”).

87. *Id.* at 1621.

88. *See id.* at 1621 n.44; *see, e.g.*, *Craven v. Huppenthal*, 338 P.3d 324, 326–27 (Ariz. Ct. App. 2014) (holding that funding disparities between charter schools and district schools did not violate the general and uniform requirement because the affected children were receiving adequate educations).

89. *See, e.g., Roosevelt I*, 877 P.2d at 819 (Feldman, J., concurring) (“The [general and uniform] clause was intended to guarantee not the unattainable result—equal education—but an equal *opportunity* for each child to obtain the *basic, minimum education* that the state would prescribe for public school students.”).

90. *See, e.g., id.* at 815 (property tax discrepancies); *Craven*, 338 P.3d at 326–27 (funding disparities between charter schools and district schools); Alia Beard Rau, *Arizona Schools to Sue State over Funding—Again*, ARIZ. REPUBLIC (Apr. 28, 2017), <https://www.azcentral.com/story/news/politics/arizona-education/2017/04/28/arizona-schools-sue-state-over-funding-again-education/306900001/> [<https://perma.cc/AB8W-3RNW>] (capital funding disparities).

costs associated with educating students with disabilities.⁹¹ The number of children or youths served under the IDEA was approximately 13% of total public-school enrollment in 2014–2015.⁹² Arizona’s students with disabilities represented 12% of the state’s public-school enrollment in the same period.⁹³ To be eligible for federal funding, states must provide access to a FAPE to all children with disabilities between the ages of three through twenty-one (with some exceptions).⁹⁴ Most of the funds are passed directly on to the Local Education Agencies to provide services.⁹⁵

The maximum amount of grant a state may receive is “40 percent of the average per-pupil expenditure in public elementary schools and secondary schools in the United States” adjusted by a state’s special education population.⁹⁶ This means that the maximum amount states receive is not 40% of the cost of educating children with disabilities, but rather 40% of the cost of educating a typical student—a much lower amount.⁹⁷ Despite the lower burden, the IDEA is typically not fully funded. “For [Fiscal Year] 2014, IDEA federal funding covered 16 percent of the estimated excess cost of educating children with disabilities, less than in FY 2008 when federal funding covered 17 percent of the cost and well below FY 2009 when additional funding through the American Recovery and Reinvestment Act⁹⁸ covered 33 percent of the cost.”⁹⁹ These federal funds generally only account for 9% of the total dollars spent on special education services.¹⁰⁰

91. See 20 U.S.C. § 1412(a)(1)(A) (2018); Office of Special Educ. Programs, *supra* note 9.

92. NAT’L CTR. FOR EDUC. STATISTICS, *Children and Youth with Disabilities, in THE CONDITION OF EDUCATION 2018*, at 74, 74 (2018), <https://nces.ed.gov/pubs2018/2018144.pdf> [<https://perma.cc/H95F-SESP>].

93. U.S. Dep’t of Educ., *Percent Children with Disabilities: 2014–15*, ED DATA EXPRESS (Nov. 18, 2016), <http://web.archive.org/web/20181125054838/https://eddataexpress.ed.gov/data-element-explorer.cfm/tab/data/deid/5955/>.

94. Office of Special Educ. Programs, *supra* note 9.

95. See *id.*

96. Individuals with Disabilities Education Act, 20 U.S.C. § 1411(a)(2)(B)(ii)–(iii) (2018).

97. Griffith, *supra* note 70, at 3.

98. The Obama-era economic stimulus package. See *The American Recovery and Reinvestment Act of 2009: Education Jobs and Reform*, U.S. DEP’T EDUC. (Feb. 18, 2009), <https://www2.ed.gov/policy/gen/leg/recovery/factsheet/overview.html> [<https://perma.cc/H97Z-4L2Q>].

99. “Full Funding” Debate, NEW AM.: EDUC. POL’Y, <https://www.newamerica.org/education-policy/topics/school-funding-and-resources/students-disabilities/federal-funding/full-funding-debate/> [<https://perma.cc/6SHM-AVDU>] (last visited May 6, 2019).

100. CLARE MCCANN, NEW AM. EDUC. POLICY PROGRAM, FEDERAL FUNDING FOR STUDENTS WITH DISABILITIES: THE EVOLUTION OF FEDERAL SPECIAL EDUCATION FINANCE IN

The bulk of the costs of providing services to students with disabilities falls to state and local funds.¹⁰¹

Arizona follows a “Foundation Program” scheme to fund public education through which it assigns a base level of funding per student guaranteed to each school dependent on enrollment.¹⁰² Therefore, each student, regardless of disability or if they are enrolled in a district or charter school is granted the same “Base Level Amount.”¹⁰³ Arizona’s state budget set this base level of funding at \$3,683.27 per student for fiscal year 2017–2018.¹⁰⁴

In Arizona and twenty other states, districts receive additional funds beyond the base level amount to alleviate cost pressures inherent in adequately providing services to students with disabilities.¹⁰⁵ These funds are supplemented by the aforementioned federal funds provided under the IDEA.¹⁰⁶ In Arizona, districts receive their additional funding according to a table of statutory weights.¹⁰⁷ School districts with at least 1,000 students receive funding in two categories: Group A and Group B.¹⁰⁸

THE UNITED STATES 12, <https://na-production.s3.amazonaws.com/documents/federal-funding-for-students-with-disabilities.pdf> [<https://perma.cc/4XNZ-GEN7>].

101. *See id.*

102. Deborah A. Verstegen, *Public Education Finance Systems in the United States and Funding Policies for Populations with Special Educational Needs*, EDUC. POL’Y ANALYSIS ARCHIVES, July 30, 2011, at 1, 4–5, 8, <https://epaa.asu.edu/ojs/article/view/769> [<https://perma.cc/42Y2-FEFY>].

103. YOUSEF AWWAD, STATE OF ARIZ. DEP’T OF EDUC., FUNDING OF DISTRICTS VERSUS CHARTERS (2010), <https://ade.az.gov/schoolfinance/faqs/Funding/Funding%20of%20Districts%20vs%20Charters.pdf> [<https://perma.cc/F99B-KTYN>].

104. ARIZ. REV. STAT. ANN. § 15-901(B)(2)(h) (2019). Arizona school financing is complex, and additional funding is provided beyond the base level amount for costs like transportation and teacher experience. *See* ARIZ. ST. S., ISSUE BRIEF: ARIZONA’S SCHOOL FINANCE SYSTEM 2–4 (2016), https://s3.amazonaws.com/funded.edbuild.org/public/citations/8_arizonasschoolfinancesystem.pdf [<https://perma.cc/MFD9-HPEW>]. School districts also receive District Additional Assistance (“DAA”), which is a statutorily set amount of funding that schools receive for each student for capital needs. ARIZ. REV. STAT. ANN. § 15-961 (2019). However, the DAA formula has not been fully funded since 2009 and is currently the subject of a lawsuit. Rau, *supra* note 90. Arizona’s 2016 average total per pupil spending was \$9,136 and the 2014 national average total per pupil spending was \$12,496. ARIZ. AUDITOR GEN., ARIZONA SCHOOL DISTRICT SPENDING: FISCAL YEAR 2016, at 3 (2017), https://www.azauditor.gov/sites/default/files/17-204_Highlights_0.pdf [<https://perma.cc/HGQ6-37U9>].

105. *See* Verstegen, *supra* note 102, at 11.

106. *See generally* 20 U.S.C. § 1412(a) (2018).

107. *See* ARIZ. REV. STAT. ANN. § 15-943(2) (2019).

108. *Id.*

Group A is supposed to fund students with more mild (and hence less costly) disabilities like dyslexia.¹⁰⁹ It is assumed that each of these students is spread evenly around the state and, consequently, each district receives the same amount per enrolled student regardless of how many students with those disabilities attend the school.¹¹⁰ The current statutory “support level” weights are 1.158 for kindergarten through eighth grade students and at 1.268 for ninth through twelfth grades.¹¹¹ Therefore, a sufficiently large school district would receive \$4,265.23 for each elementary-aged student, which accounts for the base level amount of \$3,683.27 and the Group A funding of \$581.96 per student.

Group B involves specific funding weights; each student diagnosed with a disability is classified into one of fourteen weighted categories¹¹² and then the base level amount is multiplied by the assigned weight.¹¹³ This equals the additional funding the school receives to provide services for the student. For example, if a student in Arizona qualifies for hearing

109. See Rau, *supra* note 5. To complicate matters, Group A monies also fund other programs like gifted and career exploration which are unrelated to educating students with disabilities and the federal mandates of the IDEA. *Special Education Simplified—SPED Series, Part II, CTR. FOR STUDENT ACHIEVEMENT* (Dec. 1, 2015), <http://centerforstudentachievement.org/special-education-simplified-sped-series-part-ii/> [https://perma.cc/3W6Q-V9VK].

110. See Rau, *supra* note 5.

111. § 15-943(2)(a).

112. These categories are generally based on the “qualifying disabilities” of the federal IDEA. See *Exceptional Student Services: Disability Categories*, ARIZ. DEP’T EDUC.: EXCEPTIONAL STUDENT SERVS., <http://www.azed.gov/specialeducation/disability-categories/> [https://perma.cc/5RH3-GAA6] (last visited Feb. 28, 2019).

113. § 15-943(2)(b). For Group B, the fourteen funding categories and corresponding support level weights are as follows: “HI” programs for pupils with hearing impairment, 4.771; “K-3” kindergarten programs and grades one through three, 0.060; “K-3 reading” reading programs for pupils in kindergarten programs and grades one through three, 0.040; “ELL” English language learners, 0.115; “MD-R, A-R and SID-R” resource programs for pupils with multiple disabilities, autism and severe intellectual disability, 6.024; “MD-SC, A-SC and SID-SC” self-contained programs for pupils with multiple disabilities, autism and severe intellectual disability, 5.833; “MD-SSI” program for pupils with multiple disabilities with severe sensory impairment, 7.947; “OI-R” resource program for pupils with orthopedic impairments, 3.158; “OI-SC” self-contained program for pupils with orthopedic impairments, 6.773; “P-SD” programs for children who meet the definition of preschool severe delay, 3.595; “DD, ED, MIID, SLD, SLI and OHI” developmental delays, emotional disabilities, mild intellectual disabilities, a specific learning disability, a speech/language impairment, and other health impairments, 0.003; “ED-P” emotional disabilities who are enrolled in private special education programs, 4.822; “MOID” programs for pupils with moderate intellectual disability, 4.421; “VI” programs for pupils with visual impairments, 4.806. *Id.* (category abbreviations and weights); ARIZ. REV. STAT. ANN. § 15-901(B) (2019) (definitions of abbreviations).

impairment, their multiplier is 4.771.¹¹⁴ Including the base level amount (1.0), the student is entitled to 5.771 times the base level of funding. The weights range from 0.003 for disabilities such as developmental delay or specific learning disabilities to 7.947 for a student with multiple disabilities with severe sensory impairment.¹¹⁵ Given these weights and the current base level amount for the 2017–2018 school year, a school receives an additional \$10.91 for educating a student placed in the lowest weighted Group B category, whereas a school receives an additional \$28,892.43 for a student in the highest weighted Group B category.

These weights are what Governor Ducey’s 2015 Classrooms First Initiative Council wanted reassessed as specified in Recommendation Twelve.¹¹⁶ Because the current weights are based on a cost study from 1980,¹¹⁷ the council recommended that “the state should conduct an updated cost study . . . to identify the true costs of special education.”¹¹⁸ Particularly problematic to Group A funding is that the current financing scheme presumes that students with disabilities are spread relatively uniformly between schools, as was the case in the 1980s when the statutes were composed.¹¹⁹ However, the student with disabilities population has become significantly more concentrated at particular schools as a result of open enrollment and charter schools.¹²⁰ Therefore, “[t]he net effect of the uneven distribution and the unmet costs of special education services is that [general education funding] is often used to address the mandatory costs of special education.”¹²¹ It is estimated that Arizona districts are spending \$1.50 for every \$1.00 they receive for special education.¹²² Analysts have

114. *Id.*

115. *Id.*

116. FINAL REPORT, *supra* note 3, at 6.

117. The weights may not be based on anything more than what current funding was at the time. *See* *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop (Roosevelt I)*, 877 P.2d 806, 810 n.2 (Ariz. 1994) (“[W]e cannot find anything in the statutory scheme that addresses the actual cost of providing a basic education. Instead, the foundation amount for education appears to be derived from each district’s 1979–1980 budget.”).

118. FINAL REPORT, *supra* note 3, at 21.

119. *Id.*

120. *Id.* There may also be concern that charter schools (which did not exist in 1980) are generally ineligible for Group A funding because they tend to fall under the required 1,000 student minimum. *See 25 Years of Public Charter Schools*, ARIZ. CHARTER SCH. ASS’N, <https://azcharters.org/about-charter-schools/> [<https://perma.cc/57WF-PAPN>] (last visited Feb. 28, 2019) (noting that 185,900 students attended 556 Arizona charter schools in the 2016–17 school year, which averages to 335 students per school). This is an area which needs further study.

121. FINAL REPORT, *supra* note 3, at 21.

122. Rau, *supra* note 5.

calculated that this funding disparity effectively results in Arizona underfunding schools by \$381 million a year.¹²³

B. Weighed in the Balance and Found Wanting

One of the primary strengths of a weighting system is that the amount of funding to cover students with disabilities is tied to the base level amount of support. This means that the amount of funding automatically increases, and legislative intervention is not required.¹²⁴ Furthermore, in theory, a weighting system provides a close link between the funds a school needs to provide access to a FAPE and the amount of state funds the school receives to do so.¹²⁵ However, a problem in a uniform weighting system is that the funds for all students in the category are set by their disability and not by the actual costs of their program or their individual needs.¹²⁶ Some high-incident disabilities like speech and language impairment¹²⁷ have high costs, but the additional funding is negligible.¹²⁸

There are also instances where the cost skews in the other direction. Generally, the weights are imprecise and not tailored to the actual cost of teaching unique students.¹²⁹ Not all the same disabilities manifest themselves in the same way, but the schools will all receive the same level

123. *Id.*

124. See Verstegen, *supra* note 102, at 12.

125. See Julie Berry Cullen, *The Impact of Fiscal Incentives on Student Disability Rates*, 87 J. PUB. ECON. 1557, 1561 (2003).

126. See *id.* There is perhaps something ironic in uniform, general funds that must produce and achieve calculated *individualized* education plans that meet the unique needs of students.

127. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 92, at 74 (showing that 20% of students served under the IDEA qualified under Speech and Language Impairment).

128. *Speech Therapy Cost*, COSTHELPER HEALTH, <http://health.costhelper.com/speech-therapist.html#extres9> [<http://perma.cc/MJ3T-B56N>] (last visited May 23, 2019) (estimating that speech therapy costs range from \$100 to \$250 per hour; however, schools are likely to see a discounted rate from this); see also *Arizona Teacher Requirements for Audiologists and Speech-Language Pathologists*, AM. SPEECH-LANGUAGE-HEARING ASS'N, <http://www.asha.org/advocacy/state/info/AZ/AZteachrequire/> [<http://perma.cc/B3PG-YC3U>] (last visited May 23, 2019) (noting that Speech-Language Pathologists require a master's degree and other certificates and clinical hours; it can be inferred that pathologists will charge more as a result of the need for extensive training). See generally ARIZ. DEP'T OF EDUC., *SPEECH-LANGUAGE SERVICES IN ARIZONA'S SCHOOLS: GUIDELINES FOR BEST PRACTICE* (2019), <https://cms.azed.gov/home/GetDocumentFile?id=5829c468aadebe159cb26332> [<http://perma.cc/S4HE-R6TF>] (176-page document outlining best practices in speech-language services).

129. AUDIT UNIT, *supra* note 73, at 13, 17 (explaining that Group A funding fell short of estimated costs because the formula is based on overall enrollment and not specific students and explaining that the specific disability categories in Group B were either over or under funded).

of funding for them.¹³⁰ This concept is recognized in *Rowley* that “[i]t is clear that the benefits obtainable by children at one end of the spectrum of disabilities will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”¹³¹ A student with autism may receive around \$22,000, but not need a one-on-one aid that other students with autism would require.¹³² For instance, one Arizona charter school that exclusively serves students with autism effectively received an additional \$1,727 per student than it needed, because the school received more funding for special education than it spent.¹³³ Although this is an extreme case, it illustrates the fact that schools can receive more funding for particular students than what the school needs to provide an individualized education.

Children are potentially under- and over-diagnosed with disabilities depending on the generosity and adequacy of funding weights.¹³⁴ In Texas, research of the changes in disability rates from the 1991–1992 to the 1996–1997 school years indicated a significant elasticity¹³⁵ of student disability rates with respect to changes in funding weights as a proxy for fiscal incentives.¹³⁶ Statistically significant correlation existed between state financial incentives and the number of students classified as disabled.¹³⁷ The findings suggest that a “10% increase in the supplemental revenue

130. See, e.g., Daniel J. Reschly, *Identification and Assessment of Students with Disabilities*, FUTURE CHILD., Spring 1996, at 40, 44–45 (noting that disabilities exist on a continuum and that there are not necessarily clear demarcations between students who have or do not have disabilities, “[y]et, special education eligibility is a dichotomous decision: the student either is or is not eligible for services”).

131. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

132. See, e.g., Deanna L. Sharpe & Dana L. Baker, *The Financial Side of Autism: Private and Public Costs*, in A COMPREHENSIVE BOOK ON AUTISM SPECTRUM DISORDERS 275, 276–81 (Mohammad-Reza Mohammadi ed., 2011) (explaining that “[a]utism is complex” and providing a wide range of costs associated with autism dependent on whether the child is high functioning or low functioning).

133. Alia Beard Rau, *Arizona Special-Ed Funding Benefits Schools with Fewest Special-Ed Students*, ARIZ. REPUBLIC (Oct. 5, 2017), <https://www.azcentral.com/story/news/politics/arizona-education/2017/10/05/arizona-special-ed-funding-benefits-schools-fewest-special-ed-students/649712001/> [http://perma.cc/2U5A-KXLJ].

134. See, e.g., Cullen, *supra* note 125, at 1561; Michael Conlin & Meg Jalilevand, *Systemic Inequalities in Special Education Financing*, 41 J. EDUC. FIN. 83, 84 (2015); Kanya Mahitivanichcha & Thomas Parrish, *The Implications of Fiscal Incentives on Identification Rates and Placement in Special Education: Formulas for Influencing Best Practice*, 31 J. EDUC. FIN. 1, 2 (2005).

135. The measurement of how responsive one variable is to another; a term generally used in the field of Economics.

136. Cullen, *supra* note 125, at 1559.

137. *Id.*

generated by a disabled student leads to approximately a 2% increase in the fraction of students classified as disabled.¹³⁸ Furthermore, the elasticity was larger for “soft” and less well-defined disabilities.¹³⁹ This may indicate that there are incentives to misclassify or over-classify students in order to receive the additional funding.¹⁴⁰ Indeed, one of the creators of the current Arizona funding weight mechanism said that the rationale behind the system was to deter districts from over-diagnosing students with disabilities in order to receive more funding.¹⁴¹

III. ANALYSIS AND PARALYSIS

Both anticipated and unintended consequences exist because of Arizona’s adherence to a weighting system of funding the education of students with disabilities. There is an inevitable reduction in funding for students without disabilities. School districts do their best to provide for a FAPE, but the costs of meeting any individual student’s needs in pursuit of providing access to a FAPE are not necessarily proportionate to the funding mechanism. Consequently, schools generally spend more on students with disabilities than they receive because the weights are not reflective of the real costs of educating the students. Because this gap averages \$1.50 spent for every \$1.00 received, these schools must take from the base level funding they receive for typical students to make up for the gap.

Federal mandates, fines, and lengthy due process claims loom large over a failure to offer a FAPE to students with disabilities; therefore, schools are forced into this decision in one direction. Ultimately, in a best-case scenario, students with disabilities would be offered a FAPE under the current funding system, yet it would come at the expense of the rest of the

138. *Id.*

139. *Id.* “Softer” disabilities means those like learning disabilities and speech impairment as opposed to physical disabilities such as autism, hearing impairment, traumatic brain injury, etc. *Id.* at 1560.

140. *Id.* at 1561. *But see* FRAN O’REILLY, CTR. FOR SPECIAL EDUC. FIN., POLICY PAPER NO. 7, STATE SPECIAL EDUCATION FUNDING FORMULAS AND THE USE OF SEPARATE PLACEMENTS FOR STUDENTS WITH DISABILITIES: EXPLORING LINKAGES 20 (1995), <https://files.eric.ed.gov/fulltext/ED391271.pdf> [<http://perma.cc/RZW6-R6MR>] (finding that the data “does not uniformly support [the] notion” that “special education finance formulas that fund school districts based on where students receive services can encourage the placement of students into high reimbursement options”).

141. Katie Campbell, *Schools Cover Tab for Lawmakers’ Failure to Fund Special Education*, ARIZ. CAPITOL TIMES (Oct. 6, 2017), <https://azcapitoltimes.com/news/2017/10/06/arizona-public-schools-cover-special-education-funding-gap/> [<http://perma.cc/TQU6-BE9D>].

student population.¹⁴² This means that schools are forced to fund special education with money that comes from the funding of students without disabilities,¹⁴³ which is problematic because students with disabilities are entitled to a FAPE, but all children are presumably entitled to a free and appropriate education. The basic point of federally mandating a FAPE was to guarantee that students with disabilities received the same access to education as those without a disability.¹⁴⁴ Furthermore, in Arizona, all children are explicitly entitled to an adequate public education because of our highest court's interpretation of the "general and uniform" clause of the Arizona Constitution.

Consequently, Arizona is caught in what is essentially a double bind with regards to school financing. Either school funding is adequate and fulfills the state constitutional mandate, but this would mean that the federal IDEA mandates are unfulfilled. Or, as is happening now, due to federal cases like *Cedar Rapids*, the IDEA mandates are fulfilled, but this leaves an inadequate amount of general education funding to fulfill the mandates of the "general and uniform" clause of Arizona's Constitution, particularly because the disparities in funding "are the result of the financing scheme the state chooses."¹⁴⁵

A. Recommendations

The easiest, and admittedly naïve, solution to the funding gap problem is simply to state that Arizona ought to provide more school funding for all

142. *Special Education Funding Matters to All Students—SPED Series, Part I*, CTR. FOR STUDENT ACHIEVEMENT (Nov. 4, 2015), <http://centerforstudentachievement.org/special-education-funding-matters-to-all-students-sped-series-part-i/> [<http://perma.cc/3LWD-3QN5>]. Chuck Essigs, who helped create the current Arizona funding formula in the 1980s, said, "You take it out of somebody else's program" in response to the concept that special education is mandated, but not financed. Campbell, *supra* note 141. One way this impact on typical students may manifest itself is through Arizona's low teacher pay and increasing class sizes. ARIZ. AUDITOR GEN., *supra* note 104, at 2.

143. See Rau, *supra* note 133 (quoting the research director of the Arizona School Boards Association who said "[T]he story that's most compelling is what the districts and charter schools have to do to make up that gap. Who is paying the price? . . . It's the (traditional) students who have the last claim on the dollar.>").

144. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773, 774 (1975) (codified as amended at 20 U.S.C.A. § 1400 (2018)) (noting under "statement of findings and purpose" that students with disabilities did "not receive appropriate educational services which would enable them to have full equality of opportunity" as their typical peers).

145. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop (Roosevelt I)*, 877 P.2d 806, 815 (Ariz. 1994).

students. However, more creative solutions are necessary given the reluctance of the state to provide more education funding.¹⁴⁶ Although these recommendations focus on redistribution and tailoring, an increase in funding is an inevitability; there is no other way to make up for the gap between the \$1.50 that schools spend on their students with disabilities for each \$1.00 that they receive. One maxim to keep in mind in considering the recommendations is that “there are no incentive-free financing systems.”¹⁴⁷ Nevertheless, these recommendations are designed to best solve the current special education financing problems while mitigating any potential perverse incentives.

Recommendation 1: *Distribute Group A funding more equitably, taking into account changes in the populations of student with disabilities due to the advent of charter schools and open enrollment.*

Group A funding presumes that students with low cost, but high incidence disabilities like dyslexia are evenly distributed among schools. However, the real percentage of Group A students at district or charter schools ranges from 0.3% to 32%.¹⁴⁸ Regardless of whether a school has a higher incidence of students with disabilities and, thus, bear the increased costs associated with educating these students, it receives the same amount of Group A funding per student as a school with a low incidence of students with disabilities.¹⁴⁹

Recalculating these weights and distributing them in a more equitable fashion will help to close the special education financing gap and make sure that funding tied to student attributes goes to the students it was intended for. This recommendation is subject to a principal/agent problem because of the existence of asymmetric information about the number of students who require low cost interventions.¹⁵⁰ Each school district would know the specifics of its student population that the state can only generally verify. A

146. See *Arizona Ranks 49th in Education Funding—How Did We Get Here?*, CTR. FOR STUDENT ACHIEVEMENT (Feb. 1, 2017), <http://centerforstudentachievement.org/arizona-ranks-49th-in-education-funding-how-did-we-get-here/> [<https://perma.cc/H6MA-FPSM>] (noting that Arizona currently ranks near the bottom in school funding, but that Arizona funded schools slightly above the national average in the 1980s).

147. Thomas B. Parrish, *Fiscal Issues Related to the Inclusion of Students with Disabilities*, in ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTING INCLUSIVE EDUCATION 167, 169 (1995), <https://files.eric.ed.gov/fulltext/ED413730.pdf> [<https://perma.cc/PCU9-Y4TY>].

148. See Rau, *supra* note 133.

149. See *id.*

150. See Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989).

common method of mitigating the principal/agent problem is to increase monitoring, but this leads to increased administrative costs. With this comes the reality that schools may focus on compliance to the detriment of providing resources for students with disabilities.¹⁵¹

Recommendation 2: *Conduct an updated cost study to identify the true costs of special education.*

Given that school districts on average pay 50% more than what they receive for special education services, the current funding weights are clearly not tailored to provide the funds for the individualized education that students with disabilities are entitled to. However, more individualization cuts both ways: schools should also not receive more funding than they require for students just because they happen to be placed in a category with a greater weight. This recommendation mirrors the essential aspect of Recommendation Twelve of Governor Ducey's *Classrooms First Initiative*: Arizona must conduct a cost study to determine what the true costs of special education are.¹⁵²

To avoid a state constitutional challenge as to the adequacy of the special education weights, the legislature must approve of a cost study. At the very least, conducting the cost study could be a part of a remedy for a school finance lawsuit. This has the advantage of avoiding initial justiciability and separation of powers concerns since the courts would not need to determine what is adequate, but merely decide that the current scheme is inadequate since schools are not spending the money they receive for each student's needs on the intended student.¹⁵³ Therefore, the scheme could be considered

151. This was a finding that emerged from a 1990s study on the classroom and post-school experiences of students with disabilities. See SHARON VAUGHN ET AL., *DEEPER LEARNING FOR STUDENTS WITH DISABILITIES 2* (2015), <https://files.eric.ed.gov/fulltext/ED560790.pdf> [<https://perma.cc/34F3-569W>] (noting that the IDEA “might have erred by placing too much emphasis on monitoring schools’ procedural compliance (e.g., documenting that students and parents were able to participate in the IEP conference) and doing too little to ensure that students were actually learning, passing their classes, and reaching other desired goals”).

152. See FINAL REPORT, *supra* note 3, at 6; see, e.g., APA CONSULTING, FINAL REPORT OF THE STUDY OF ADEQUACY OF FUNDING FOR EDUCATION IN MARYLAND 4–5 (2016), <http://www.marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyReportFinal112016.pdf> [<https://perma.cc/Z4AM-HR5X>] (estimating the cost of providing an adequate education in Maryland using three approaches for estimating adequacy: evidence-based, professional judgment, and successful schools/school district).

153. See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 714–15 (2010) (articulating potential separation of powers concerns because the judiciary does not want to impinge on the role of the legislature in determining adequacy); Buszin, *supra*

inadequate by the legislature's own measuring stick if the amount provided is eaten away by other mandates.¹⁵⁴

Recommendation 3: *Create incentives for early identification and intervention.*

Arizona has stringent curricular standards and understands the importance of early intervention,¹⁵⁵ but this has not manifested itself in financial incentives to schools. Rather, the current special education funding method encourages what is essentially a “wait-to-fail” model; school districts do not receive additional funding until a student is already classified as needing special education. However, some disabilities which may not fully manifest themselves until later in a child's life are potentially identifiable and mitigated with early preventative intervention.¹⁵⁶ There is currently a minimal federal incentive for this as the 2004 reauthorization of IDEA allowed for districts to spend up to 15% of special education funds to develop and implement early intervening services (“EIS”).¹⁵⁷ These services

note 86, at 1624–25 (“Judicial reluctance to overturn school finance systems stems from two justiciability considerations. First, courts are concerned with their institutional role in deciding school finance cases. Second, courts are concerned with their institutional capacity to decide education finance challenges.”).

154. A potential counter to this is that the amount provided per student is well above adequate and that any mandate that reduces the amount actually spent on any particular child does not drop the funding below the level of adequate. However, given that Arizona ranks forty-ninth in school funding, it seems difficult to believe that funding levels are significantly above adequate. *See Arizona Ranks 49th in Education Funding—How Did We Get Here?*, *supra* note 146; *see also* Buszin, *supra* note 86, at 1624 (noting that “courts have been less likely to strike down a school finance scheme in states with higher per pupil expenditures”; presumably the inverse is true too).

155. *See, e.g.*, ARIZ. REV. STAT. § 15-704 (2019) (outlining reading proficiency standards); ARIZ. DEP'T EDUC., AZ RESPONSE TO INTERVENTION (RTI): LITERACY 6–7 (2009), <http://www.azpromisingpractices.com/LiteracyforRTI.pdf> [<https://perma.cc/5DRH-VLJV>] (specifying the need for “tiered levels of instruction and interventions . . . based upon the varying needs of students”).

156. *See* Stephanie Al Otaiba et al., “*Waiting to Fail*” *Redux: Understanding Inadequate Response to Intervention*, 37 LEARNING DISABILITY Q. 129, 129 (2014) (“[T]he mean age at which students were identified as having a reading disability, and were therefore eligible for intensive intervention (special education) was 10 years (or about third to fourth grade), despite converging evidence indicating that prevention was easier and more effective than remediation.”); Edmund JS Sonuga-Barke et al., *Early Detection and Intervention for Attention-Deficit/Hyperactivity Disorder*, 11 EXPERT REV. NEUROTHERAPEUTICS 557, 557 (2011) (“Early detection and intervention may prevent or ameliorate the development of [ADHD] and reduce its long-term impact.”).

157. Anna M. Munson, *Federal Funding to Support Response to Intervention*, RTI ACTION NETWORK, <http://www.rtinetwork.org/getstarted/develop/federal-funding-to-support-rti>

are to be used by districts to provide interventions for students prior to a formal special education referral to avoid inappropriate classifications. However, these funds are truly minimal as they may only be up to 15% of federal funds which only represent approximately 9% of total funding themselves.¹⁵⁸

Since there is no incentive for early identification and intervention, Arizona should create one in the financing scheme. This could involve additional funding that is distributed with Group A funding (once that distribution is revised as discussed in *Recommendation 1*) since those schools are the ones serving the highest-need populations. Regardless, the funds should be earmarked explicitly for EIS with the idea that additional funding for preventive measures in the present will lower the number of costly intensive interventions in the future. This recommendation should not be construed as a way for schools to shirk their responsibilities in either identifying students with disabilities or in providing access to a FAPE per *Rowley* or *Endrew F.* Rather, this is a way in which children are identified and helped from an earlier age such that they can have best chance for success.¹⁵⁹

IV. CONCLUSION

In January 2015, Governor Ducey recognized that school finance reform has not occurred in generations and sought to “build a long-term strategy” and “multi-year policy initiatives and implementation plans” to reform Arizona’s school finance code.¹⁶⁰ Yet, Arizona school districts and charters are still caught in a funding bind, particularly with regards to special education. They must meet the federal mandate of providing access to a FAPE to students with disabilities on the one hand and provide an adequate education to all students on the other. The Arizona Legislature must act to

[<https://perma.cc/UFS2-RQKM>] (last visited May 6, 2019); Sarah D. Sparks, *Districts Must Walk a Fine Line to Fund RTI Programs*, EDUC. WEEK (Feb. 28, 2011), <https://www.edweek.org/ew/articles/2011/03/02/22rti-bureaucracy.h30.html> [<https://perma.cc/3E94-7S72>].

158. This means that approximately 1% of current funds could be used on EIS. *See supra* text accompanying notes 96–101.

159. *See* Jose L. Martin, *Legal Implications of Response to Intervention and Special Education Identification*, RTI ACTION NETWORK, <http://www.rtinetwork.org/learn/ld/legal-implications-of-response-to-intervention-and-special-education-identification> [<https://perma.cc/E5UR-SSXZ>] (last visited May 6, 2019) (outlining the relationship between the mandates of the IDEA and state intervention programs).

160. *Classrooms First Initiative Council, supra* note 2.

comply with Arizona's constitutional provisions on education and reevaluate the special education funding weights of Arizona Revised Statutes section 15-943.