



Education Savings Accounts: Implications for Students with Disabilities

Statement by Disability Rights Texas

May 15, 2023

Introduction

[Disability Rights Texas](#) is the protection and advocacy agency for people with disabilities in Texas. Our mission is to advocate, protect, and advance the legal, human, and service rights of people with disabilities, ensuring their full and equal participation in society.

Lack of Legal Right Protection with Education Savings Accounts

A primary concern with Education Savings Accounts (ESAs) is the lack of legal rights. Religious schools are not subject to the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA). Private schools that are not religious are not subject to IDEA and Section 504.

The loss of legal rights once a student with a disability leaves a public school for a private school because of an ESA is a significant concern. This concern is articulated by the federal advisory board for persons with disabilities. The National Council on Disabilities examined school vouchers and ESAs and issued a report. Our statement is in alignment with the report of the National Council on Disabilities.¹

An ESA program will lead to the loss of rights for students with disabilities. Private schools are not subject to the robust legal protections and complaint mechanisms available in the public special education system.

Individuals with Disabilities Education Act

The IDEA is the federal mandate for special education and a free appropriate public education (FAPE) in public schools. The U.S. Department of Education provides IDEA grants to states. In turn, states distribute IDEA grants to local educational agencies. States do not send IDEA grants

¹ National Council on Disabilities, *Choice & Vouchers – Implications for Students with Disabilities* (2018).

to private schools, including religious schools. Thus, private schools are not subject to IDEA. Private schools have no obligation to adhere to IDEA provisions such as:

- Engage in Child Find
- Conduct Initial Evaluations
- Conduct Reevaluations
- Write individualized education programs (IEPs)
- Hold IEP Team meetings
- Place students in the least restrictive environment
- Provide written responses to parental requests surrounding the identification, evaluation, and placement of students with disabilities, or the provision of FAPE to students with disabilities
- Provide access to student records
- Provide procedural safeguards, including impartial administrative hearings

All of the substantive and procedural mandates in IDEA are outlined in 34 C.F.R. Part 300.

[Section 504 of the Rehabilitation Act](#)

Section 504 is the federal mandate on recipients of federal financial assistance. It prohibits them from discriminating on the basis of disability in their programs and activities. Public schools are subject to Section 504 as federal aid, in many forms, flows to local educational agencies. Education Savings Accounts are a creation of a state. Presumably, ESAs are funded only with state money. Private schools not getting any federal aid have no obligation to adhere to Section 504 provisions such as:

- Have accessible facilities
- Provide benefits on a nondiscriminatory basis
- Allow participation on a nondiscriminatory basis
- Post public notices of nondiscrimination on basis of disability
- Designate a Section 504 coordinator
- Adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504
- Engage in a self-evaluation of its policies and practices, with the assistance of interested persons, including persons with disabilities or organizations representing persons with disabilities
- Ensure each facility or part of a facility constructed shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by persons with disabilities
- Provide non-academic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation

All of the substantive and procedural mandates in Section 504 are outlined in 34 C.F.R. Part 104.

Americans with Disabilities Act

The ADA is the federal law that prohibits discrimination on the basis of disability. The mandates of the ADA, however, are divided between governmental entities and non-governmental entities. Further, the standards for non-governmental entities depends on the nature of the entity in regard to religious status. This is important for private schools as not all private schools are subject to the ADA. The ADA has a specific carve out for religious private schools. Specifically, the federal regulations for the ADA state:

The contrast is stark with regard to the legal framework for students with disabilities in private schools versus public schools. Even under the ADA, a school owned or controlled by a religious organization can bar an application for admission by a student with a disability, blatantly saying we don't take kids with disabilities.

This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to **any religious entity** or public entity. (Emphasis added.) 28 C.F.R. § 36.102(e).

Thus, schools owned or controlled by a religious organization are not subject to the ADA. Schools owned or controlled by a religious organization have no obligation to adhere to ADA provisions such as:

- Allow access by service animals
- Provide effective communication
- Refrain from retaliation and discrimination against any individual because that individual opposed an act or practice made unlawful by the ADA, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA
- Provide auxiliary aids and services to individuals with disabilities

All of the substantive and procedural mandates in the ADA for private schools, except religious schools, are outlined in 28 C.F.R. Part 36.

Public Special Education Needs Funding Over Education Savings Accounts

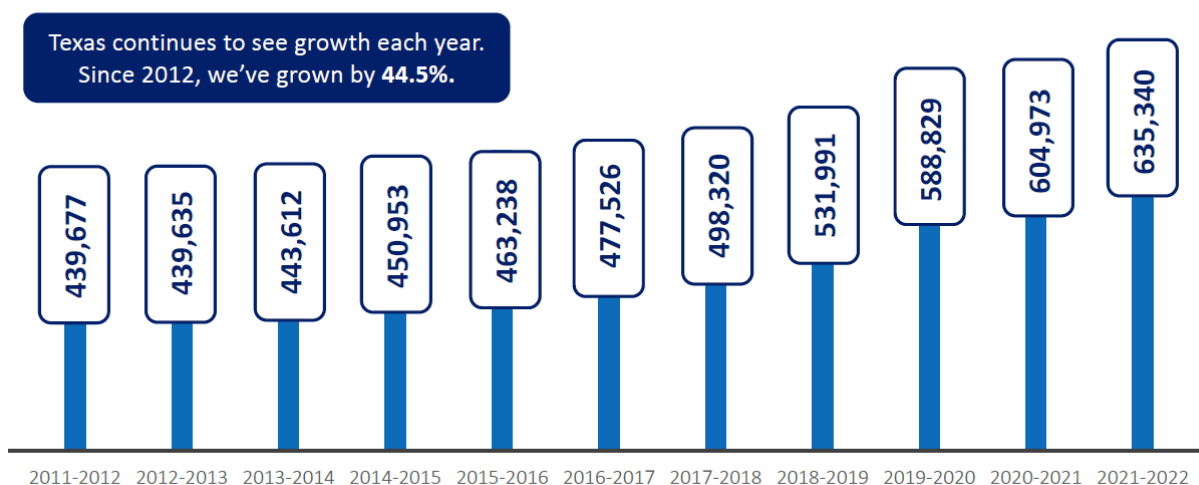
A primary concern with ESAs is that they divert limited state resources away from local educational agencies that need more funding, not less, to cope with the growth of the special education population in Texas. Fewer dollars for public special education puts into jeopardy the right to FAPE by each student with a disability in Texas public schools.

The State of Texas is underfunding school districts and charter schools for special education costs by \$2.3 billion. An ESA program that siphons off the special education weighted allotment for a student who signs up for an ESA account undermines the financial integrity of the public special education system.

The chart below shows the explosion in the special education population in Texas over the past decade. The most recent census count is that public schools are serving 635,340 students with disabilities (2021-2022 school year). This is almost 196,000 more students with disabilities since the 2011-2012 school year (439,677 special education population). This is driving up the expenditures for special education in Texas. More resources than ever are needed by Texas schools. Education Savings Accounts funded by state money would seemingly hurt the investment in special education that Texas needs today.

While the special education population is exploding in Texas, state spending on special education is not keeping up.² In fact, the state is shifting the financial burden of special education onto local educational agencies, i.e., school districts and charter schools, now in the amount of \$2.3 billion a year. In other words, the **annual shortfall in state spending on special education has grown to \$2.3 billion**. The Texas Education Agency (TEA) reports that local educational agencies spent \$6.3 billion on students with disabilities, using general funds, in the 2020-2021 school year.³ Yet, TEA only allocated \$4 billion in state aid to local educational agencies for special education in the 2020-2021 school year.⁴

Special Education Identification has Significantly Increased



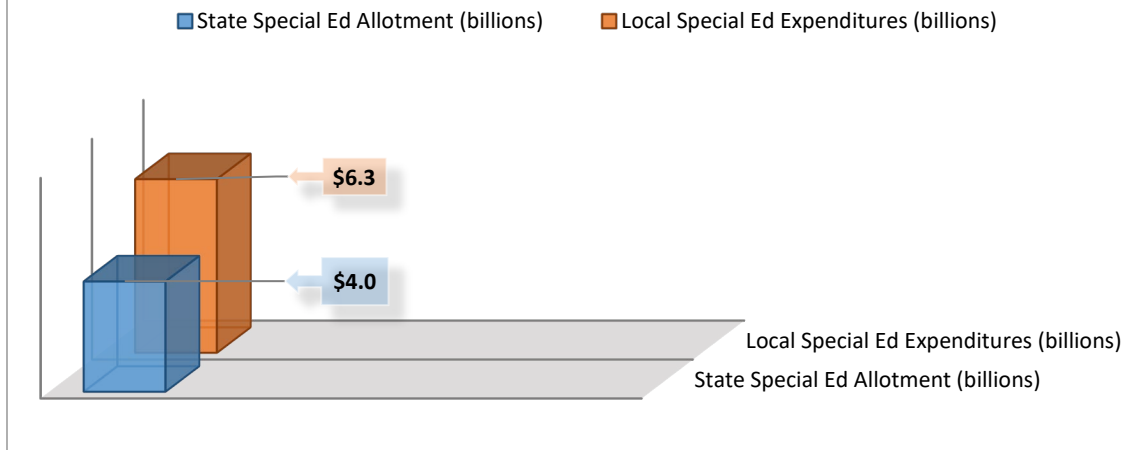
SOURCE: U.S. Department of Education, National Center for Education Statistics. (2016). Digest of Education Statistics, 2015 (NCES 2016-014), Chapter 2, and <http://nces.ed.gov/fastfacts/display.asp?id=64>

² Texas Education Agency, *Special Education Trends*, <https://tea.texas.gov/sites/default/files/sped-funding-weights-2021-2022.pdf> (last visited March 21, 2023).

³ Texas Education Agency, *PEIMS District Financial Actual Reports (2020-2021 Report)*.

⁴ Texas Education Agency, *Statewide Summary of Finances (2020-2021 Report)*.

TEXAS SPECIAL EDUCATION STATE FUNDING SHORTFALL SY 2020-2021



Conclusion

There are a number of concerns about Education Savings Accounts specifically for students with disabilities. Any benefit for an individual student must be weighed by the impact on the state system and all students with disabilities. On balance, ESAs would likely be a detriment to the special education system in Texas. [Disability Rights Texas](#) appreciate the opportunity to engage with policymakers moving forward to protect and advance the interest of all students with disabilities in Texas.

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