

**To: New Hampshire Legislative Commission to Study School Funding**

**Re: Special Education Issues**

**Date: September 9, 2020**

**By: Gerald M. Zelin, attorney at Drummond Woodsum, Portsmouth, N.H.**

**1. Special education costs are a significant portion of a school district’s budget.**

The federal Individuals with Disabilities Education Act (IDEA) requires that participating states offer a “free appropriate public education” (FAPE) to all children with disabilities who require special education.<sup>1</sup> A FAPE consists of special education and related services reasonably calculated to enable the student to make meaningful educational progress.<sup>2</sup>

Approximately 15 percent of all school age children in New Hampshire qualify for special education under the IDEA.

The average annual per pupil cost to educate an IDEA-eligible child is approximately twice what it costs to educate a nondisabled child.<sup>3</sup> This includes the costs of providing a disabled child with both special education and regular education.<sup>4</sup>

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<sup>1</sup> 20 U.S.C. § 1412(a)(1)(A).

<sup>2</sup> 20 U.S.C. § 1401(9) as interpreted by *C.D. v Natick Public School District*, 924 F.3d 621, 629 (1st Cir. 2019), cert. denied, 140 S.Ct. 1264 (2020).

<sup>3</sup> *E.g.*, American Association of School Administrators, IDEA Funding Coalition, “IDEA Funding: Time for Congress to Live Up to the Commitment” (March 2006), note 2 (“Based on a 2002 study by the Special Education Expenditure Project, Chambers, Parrish, et al, educating a special education student costs an average of 1.9 times as much as a regular education student”); Chambers, Perez, Socias, Shkolnik, and Esra, “Educating Students with Disabilities: Comparing Methods for Explaining Expenditure Variation,” American Association for Research, *Special Education Expenditure Project, Report 7* (May 2004), p. 5 (“In 1999-2000, schools in the U.S. were spending an average of \$6,556 to educate a student without disabilities. At the same time, schools were spending an average of \$12,639 on each student eligible for special education.”); President’s Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* (2002), p. 31 (when enacting the IDEA, Congress “believed the cost of special education was approximately twice the cost of regular education,” and “[t]he U.S. Department of Education now estimates that as a nation, we are spending about 90 percent (1.9 times) more on the average eligible student for special education than we do on the average general education student with no special needs”); Chambers, Parrish, Lieberman, and Wolman, “What Are We Spending on Special Education in the U.S.?” *Center for Special Education Finance Brief*, Brief No. 8 (February 1998), p. 2 (“The most recent national study of special education expenditures . . . suggests that expenditures on the average student with disabilities is about 2.28 times the average expenditure on a regular education student”); Chaikind, Danielson, and Brauen, “What Do We Know About the Costs of Special Education? A Selected Review,” *The Journal of Special Education*, Vol. 26, No. 4, p. 344 (1993) (surveying the literature and concluding that the per pupil cost for educating students with disabilities is approximately 2.3 times the cost of educating nondisabled students).

<sup>4</sup> One study concludes that, for the average IDEA-eligible student, 2/3 of the costs are for special education and 1/3 of the costs are for regular education. American Institutes for Research, Special Education Expenditure Project, *What are We Spending on Special Education Services in the United States, 1999-2000?*, p. 3.

The average annual per pupil cost per nondisabled child is now approximately \$15,000 in New Hampshire.<sup>5</sup>

Thus, the average annual per pupil cost per cost for a special education child is approximately \$30,000. However, that is just the average. Some IDEA-eligible children attend specialized residential schools that charge over \$200,000 annually.

Special education is a large portion of every school district's budget. For example, if a school district has 100 students, 15 of whom qualify for special education, the total school budget will be approximately \$1,500,000 (100 students x \$15,000). Of that total amount, on average, \$450,000 (15 students x \$30,000) will be spent on IDEA-eligible students; approximately 2/3 of that \$450,000 will be spent on special education.<sup>6</sup>

## **2. Funding special education.**

New Hampshire school districts receive some federal and state financial assistance to help defray the cost of special education and related services, but the amount of assistance is small relative to the cost of providing a FAPE.

School districts receive from the federal government approximately \$1,500 annually per IDEA-eligible student. This is far less than what Congress promised in 1975 when it enacted the IDEA and induced states to participate.

Under New Hampshire's educational adequacy statute, the State pays the school district in which a student resides \$3,561.27 annually regardless of whether the student qualifies for special education. RSA 198:40-a, II(a). However, if the student receives special education, the State pays the school district an additional \$1,915.86 annually as "differentiated aid." RSA 198:40-a, II(d).

If a school district places an IDEA-eligible child in an out-of-district program (e.g., a specialized private school), the school district fronts all costs. The State is then expected to reimburse the school district for 80 percent of the child's costs in excess of 3.5 times the state average annual per pupil cost. RSA 186-C:18, III.<sup>7</sup> (3.5 times the state average annual per pupil cost is approximately \$52,500.) However, the State often reimburses school districts less than the 80 percent this statute promises, because the legislature frequently fails to appropriate sufficient funds.

If a juvenile court places an IDEA-eligible child in a residential facility that provides

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<sup>5</sup> The exact amount is \$16,346.45 for students preschool through grade 12, as reported by the N.H. Dept. of Education on December 18, 2019 for the 2018-19 school year.

<sup>6</sup> See note 4 above.

<sup>7</sup> If the student's total annual cost exceeds 10 times the state average annual per pupil cost, the State is supposed to pay all the costs that exceed this threshold. RSA 186-C:18, III(c).

schooling, the responsible school district pays tuition up to 3 times the state average annual per pupil cost and the State pays the balance. RSA 186-C:19-b.

If DCYF places an IDEA-eligible child in a foster home, group, residential school, or similar facility, the “receiving district” (where that facility is located) may be responsible for providing special education pursuant to RSA 186-C:13, I, and 193:28, II, but the “sending district” (where the student formerly resided or where the student’s parents currently reside) may have to reimburse the receiving district for special education costs. RSA 193:27 and 29.

If parents enroll an IDEA-eligible child in a charter school, the school district in which the student resides is responsible for providing and funding a FAPE. RSA 194-B:11, III. All state adequacy funds (including differentiated aid) tied to that pupil go to the charter school, with the following exception. The differentiated aid arising from the student’s eligibility for special education, \$1,915.86 annually, goes to the school district. RSA 194-B:11, I(b)(1)(A).

Lastly, if an IDEA-eligible student qualifies for Medicaid, the school district may be entitled to partial reimbursement for certain costs under the Medicaid-to-Schools Program. Money a school district receives under that program comes from federal, not state, funds.

### **3. Issues for the Commission to consider when reviewing the cost of special education and funding for those costs.**

a. Are IDEA-eligible students evenly distributed throughout the state, or does a disproportionate percentage reside in property-poor school districts?

b. Are the most severely disabled IDEA-eligible students, who cost the most to educate, evenly distributed throughout the state, or does a disproportionate percentage reside in property-poor school districts?

c. The state legislature has chronically failed to appropriate sufficient funds in order for the State to pay its full 80 percent share of excess costs under RSA 186-C:18.

d. The State has failed to provide and fund adequate social services for children and their families, especially with regard to children with developmental disabilities or mental illnesses. In the absence of social services, school districts are pressured to provide equivalent services under the IDEA, even when not necessary for the student to receive a FAPE. In the most extreme cases, school districts are pressured to fund expensive residential placements that are not *educationally* necessary.

e. RSA 171-A directs the New Hampshire Department of Health and Human Services (NH DHHS) and its area agencies to provide “habilitation” to developmentally disabled clients. The statute contains no age limits. “Habilitation” includes “programs of formal, structured education and treatment.” RSA 171-A:2, IX (2019 Supp.). According to federal law, when a state agency’s duties under a social service program overlap with a school district’s

duties under the IDEA, the state agency's financial responsibilities "must precede the financial responsibility of the LEA." 34 C.F.R. § 300.154(a)(1). Turning that principle upside down, RSA 186-C:7-a, III(e)(2) and NH DHHS's Interagency Agreement with the State Department of Education shift costs to school districts by relieving area agencies of the duty to provide or fund any services listed in a student's IEP.

f. There is a shortage of appropriate specialized day programs within commuting distance of severely disabled students' homes. This forces school districts to place children in expensive residential schools located out-of-state.

g. Is the current state statute governing special education at charter schools reasonable? Under federal law, the New Hampshire Department of Education is fiscally and programmatically responsible for IDEA-eligible children attending charter schools of the sort that exist in New Hampshire.<sup>8</sup> RSA 194-B:11, III downshifts responsibility to school districts.

h. Do RSA 193:27 and 29 impose a disproportionate burden on school districts in which nomadic families tend to land? Are those the districts least able to afford such costs? In Maine, the State Department of Education funds special education for children in foster care. Shifting fiscal responsibility to the New Hampshire Department of Education would also eliminate administrative costs and legal fees arising from disputes over which school district is the "sending district."

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<sup>8</sup> New Hampshire charter schools are independent of school districts, but do not qualify as "local educational agencies" (LEA's) under the IDEA. Federal law consequently imposes responsibility on the State Department of Education to provide and fund special education at New Hampshire charter schools, unless state law delegates responsibility to some other entity. 34 C.F.R. § 300.209(d).