

Autism Therapy Mandates: An Idea to Mitigate the School Costs of IDEA

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For reasons that are not clear, the diagnosis of autism among children is on the rise. As of last measure, the Centers for Disease Control (CDC) found a prevalence of 1.7% in eleven sampled communities it was tracking, up from a 1.5% estimate in 2016.¹ And the CDC found that early intervention was lacking: “Fewer than half of the children identified in the Autism and Developmental Disabilities Monitoring Network received their first autism diagnosis by the time they were 4 years old.”²

The prevalence rate is up significantly from what was identified in 2008 (1 in 88 children) and 2000 (1 in 150 children).³ Boys are five times more likely than girls to be diagnosed with autism.⁴

So is this an epidemic? Not necessarily. It could be that parents have become more aware of the signs, and that “[g]reater awareness of autism is also likely to boost CDC estimates by increasing the chances that autism traits, such as lack of eye contact, show up in school and medical record[.]”⁵

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¹ *Autism prevalence slightly higher in CDC’s ADDM Network*, CDC (Apr. 26, 2018) [hereinafter “CDC”], <https://www.cdc.gov/media/releases/2018/p0426-autism-prevalence.html>.

² *Id.* Another study reported in 2018 found a prevalence of 2.5%, however “[t]he fact that the new study relies on parental reporting -- which is not validated by health and education records, as in the CDC report -- may be a limitation despite the broad scope of the research, the authors say.” Michael Nedelman, *Autism prevalence now 1 in 40 US kids, study estimates*, CNN (Nov. 26, 2018), <https://www.cnn.com/2018/11/26/health/autism-prevalence-study/index.html>.

³ Jessica Wright, *The Real Reasons Autism Rates Are Up in the U.S.*, SCI. AM. (Mar. 3, 2017), <https://www.scientificamerican.com/article/the-real-reasons-autism-rates-are-up-in-the-u-s/>.

⁴ *See id.* The reasons for this disparity are debatable and unknown. *See* Nicholette Zeliadt, *Autism’s sex ratio, explained*, Spectrum (June 13, 2018), <https://www.spectrumnews.org/news/autisms-sex-ratio-explained> (“One potentially important factor is diagnostic bias: Several studies suggest that girls receive autism diagnoses later in life than boys, indicating that the condition is harder to spot in girls.”) (emphasis added).

⁵ *See* Wright, *supra* note 3. At the risk of incurring the wrath of the anti-vaccination community, the author does not believe, and medical science does not support, the theory that vaccinations have increased the incidence of autism. *See, e.g.,* Ariana Eunjung Cha, *The origins of Donald Trump’s autism/vaccine theory and how it was completely debunked eons ago*, WASH. POST (Sept. 17, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/09/17/the-origins-of-donald-trumps-autismvaccine-theory-and-how-it-was-completely-debunked-eons-ago> (quoting the then-future president) (“We had so many instances, people that work for me, just the other day, 2 years old, a

If, in fact, “the rate grew only because of better diagnosis, that would mean that autism spectrum disorder isn’t becoming more common among American children. Doctors are just better at spotting it.”⁶

What is clear is that early intervention makes a difference. A University of Virginia program found “families wait an average of three years between noticing signs of autism and receiving the diagnosis, resulting in critical delays in obtaining intervention and support.”⁷ As an article on the program noted, “There are many reasons why autism diagnoses may be delayed. Few health care providers have expertise in diagnosing autism, leading to long waitlists at autism centers. Many families are not able to travel to access health care outside their own communities, due to financial, geographic or other barriers.” The burden upon families can be terrible, and parents of children with autism often work overtime to stay abreast of the latest treatment research.⁸

For many children on the autism spectrum, schools will be their most likely source of intervention. But the costs are enormous. As a study by a group of professors found, “There is a large economic burden associated with caring for a child with ASD, a substantial portion of which is borne by the educational system, principally the cost of special education services in public schools.”⁹

beautiful child, went to have the vaccine and came back and a week later got a tremendous fever, got very, very sick, now is autistic.”)

⁶ Nsikan Akpan & Hannah Grabenstein, *The autism rate is on the rise, CDC says. Here’s what that actually means*, PBS (Apr. 27, 2018), <https://www.pbs.org/newshour/health/the-autism-rate-is-on-the-rise-cdc-says-heres-what-that-actually-means>.

⁷ Audrey Breen, *Earlier Autism Diagnosis Means Better Outcomes for Rural Children*, UVA TODAY (Aug. 20, 2018), <https://news.virginia.edu/content/earlier-autism-diagnosis-means-better-outcomes-rural-children>.

⁸ See, e.g., Ruth Padawer, *The Kids Who Beat Autism*, N.Y. TIMES: MAG. (July 31, 2014), <https://www.nytimes.com/2014/08/03/magazine/the-kids-who-beat-autism.html> (“In desperation, the Macluskies pulled Mark from school. They took out a \$100,000 second mortgage so Cynthia could quit her job in human resources to work full time with Mark, even though she was the primary breadwinner.”); Sharon King, *10 ways to help the parent of a child with autism*, THE GUARDIAN (Nov. 18, 2017), <https://www.theguardian.com/lifeandstyle/2017/nov/18/10-ways-to-help-the-parent-of-a-child-with-autism> (“Broken sleep is often a huge issue for children with autism. Their parents’ physical, mental and emotional health can suffer from many sleepless nights.”); Caroline Bologna, *What Parents Of Kids With Autism Wish You Knew*, HUFFPOST (Apr. 3, 2018), https://www.huffpost.com/entry/parents-autism-wish-you-knew_n_5ac26cfce4b04646b64516fd.

⁹ Tara A. Lavelle, et al., *Economic Burden of Childhood Autism Spectrum Disorder*, PEDIATRICS (Feb. 4, 2014), <http://pediatrics.aappublications.org/content/pediatrics/early/2014/02/04/peds.2013-0763.full.pdf>.

Although early intervention services, from birth through age 2, are provided in states under Part C of the Individuals with Disabilities Education Act (IDEA),¹⁰ two professors note these services are at risk:

Multiple coordinators reported that their states are reconsidering their participation in Part C early-intervention programs. The main reason: anxiety over the high cost of these services and their ability to cover expenses. Most worrisome for children with autism, two states indicated that the “increased costs of serving children with complex needs” might cause their state to discontinue these early-intervention services.¹¹

IDEA may be no safer in the schools. Its funding risk flows from the top-down, given the laissez-faire attitude of the U.S. Department of Education under the Trump Administration and Education Secretary Betsy DeVos.

The purpose of IDEA is clear under law:

Congress finds that there is an urgent and substantial need—

- (1) to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child’s first 3 years of life;
- (2) to reduce the educational costs to our society, including our Nation’s schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age;
- (3) to maximize the potential for individuals with disabilities to live independently in society;
- (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and

¹⁰ Act of Oct. 30, 1990, Pub. L. No. 101-476, 104 Stat. 1103 (amending the Education of the Handicapped Act).

¹¹ Batya Elbaum & Steven Rosenberg, Opinion, *Faulty use of data threatens early intervention for autism*, Spectrum (July 31, 2018), <https://www.spectrumnews.org/opinion/viewpoint/faulty-use-data-threatens-early-intervention-autism>.

(5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care.¹²

Under Secretary DeVos, rules beneficial to these children, particularly children of color, have been delayed, under the pretext of President Trump’s “Regulatory Reform Agenda.”¹³ The final rule effectuating this delay made it clear that commentary ran overwhelmingly against it.¹⁴ Commenters, for example, “argued that the status quo had high, long-term social and economic costs to children with disabilities and to society.”¹⁵ Others stated that

delaying the compliance date and allowing the status quo to continue for (at least) two more years is, variously, morally wrong, the wrong message to send to children with disabilities and their families, inconsistent with the purpose of IDEA to reduce disproportionality, inconsistent with congressional intent, and a failure to champion the rights of children with disabilities.¹⁶

Yet supporters of the Department of Education’s position on the delayed regulation argued it could lead to “racial quotas,”¹⁷ an argument DeVos was sympathetic to: “The Secretary is reluctant to implement a methodology that may result in encouraging quotas[.]”¹⁸

¹² 20 U.S.C. § 1431(a) (2018).

¹³ Office of Special Educ. & Rehab. Serv., U.S. Dept. of Educ., *Regulation postponed two years to ensure effective implementation*, IDEA (July 3, 2018), <https://sites.ed.gov/idea/regulation-postponed-two-years-to-ensure-effective-implementation/>.

¹⁴ See Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 31,306 (July 3, 2018) (to be codified at 34 C.F.R. pt. 300).

¹⁵ *Id.*

¹⁶ *Id.* at 31,307.

¹⁷ On racial disparities in special education, “The rule required districts to do a deep analysis of the root causes, but explicitly prohibited the use of quotas.” Erica L. Green, *DeVos Delays Rule on Racial Disparities in Special Education*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/us/politics/devos-obama-special-education-racial-disparities.html>.

¹⁸ Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. at 31,306. DeVos is taking this position notwithstanding the plain language in IDEA that meeting the needs of “particularly minority . . . children” is an objective. 20 U.S.C. § 1431(a)(5) (2018). DeVos was not reluctant, however, to consider allowing federal grant money to be used to purchasing firearms for teachers. See Laura Meckler & Moriah Balingit, *Betsy DeVos considers allowing schools to use federal funds to buy guns*, WASH. POST (Aug. 23, 2018), <https://www.washingtonpost.com/news/grade-point/wp/2018/08/23/betsy-devos-considers-allowing->

This ideological straw horse argument conflicts with the fact that the CDC had reported in 2018 that “autism is still more likely to be identified in white children than in black or Hispanic children.”¹⁹

It was clear during her Senate confirmation hearing in 2017 that DeVos had no understanding of what IDEA was, as the *Washington Post* reported:

DeVos said that states should have the right to decide whether to enforce IDEA, but when Sen. Maggie Hassan (D-N.H.) later told her that IDEA is a federal civil rights law and asked DeVos if she stood by her statement that it was up to the states to follow it, DeVos responded, “Federal law must be followed where federal dollars are in play.” Hassan then asked, “So were you unaware when I just asked you about the IDEA that it was a federal law?” DeVos responded, “I may have confused it.” *DeVos did not protest when Hassan said she was upset the nominee didn’t understand the law and urged her to learn about it.*²⁰

In 2017, DeVos rescinded “72 policy documents that outline the rights of students with disabilities.”²¹ In giving her first speech on special education as Education secretary, “DeVos said in the speech that she has ‘reestablished equal treatment of IDEA cases in the Office for Civil Rights, ensuring they are prioritized as much as any other complaints.’”²² Yet, as a reporter noted, “the Office for Civil Rights doesn’t handle IDEA cases.”²³

According to an analysis by the National Education Association, the Trump Administration’s budget request for federal fiscal year

schools-to-use-federal-funds-to-buy-guns/.

¹⁹ CDC, *supra* note 1.

²⁰ See Valerie Strauss, *Six astonishing things Betsy DeVos said — and refused to say — at her confirmation hearing*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/18/six-astonishing-things-betsy-devos-said-and-refused-to-say-at-her-confirmation-hearing> (emphasis added).

²¹ Moriah Balingit, *DeVos rescinds 72 guidance documents outlining rights for disabled students*, WASH. POST (Oct. 21, 2017), <https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students> (“The special education guidance documents rescinded this month clarified the rights of disabled students in a number of areas, including making clear how schools could spend federal money set aside for special education.”).

²² Valerie Strauss, *The deep irony in Betsy DeVos’s first speech on special education*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/18/the-deep-irony-in-betsy-devos-first-speech-on-special-education/?utm_term=.a2e3ad59d3ca.

²³ *Id.*

2019 “**maintains** funding for IDEA programs compared to FY 2017; however, because the number of students needing special services is expected to increase, the **federal share** of the excess cost of these services is expected to drop to **13.8 percent, the lowest level since 2000.**”²⁴

It is not as if states need any encouragement to fail to do right by students with special needs, even in a progressive state like Washington, as a *Seattle Times* editorial noted:

The Legislature has neglected to ensure special education is amply funded. After surveying every school district in the state, Superintendent of Public Instruction Chris Reykdal told lawmakers that state funding for special education falls about \$160 million short each school year. The Legislature responded by adding a fraction of that amount — \$26.9 million — to the budget.²⁵

In conservative Texas, the 2018 school year opened, as *Bloomberg* reported, under a federal mandate for violating IDEA that is “intended to make up for a de facto cap put in place by the Texas Education Agency in 2004” and “may amount to the biggest single expansion of special education services ever.”²⁶ Bloomberg noted: “The U.S. Department of Education’s latest annual review found that 29 states and the District of Columbia fell short of meeting their special education obligations in the 2016-17 school year. But what happened in Texas falls into an entirely different category.”²⁷ If the Texas

²⁴Special Education: Trump/DeVos Budget Request, FY 2019, NAT’L EDUC. ASS’N (emphasis in original). https://www.nea.org/assets/docs/Trump_DeVos-FY19-Budget-Request-for-Special-Education-with-State-Tables.pdf (last visited Aug. 29, 2018).

²⁵ Editorial, *Beyond McCleary: 6 items remaining on education to-do list*, SEATTLE TIMES (Apr. 13, 2018, 12:24 PM), <https://www.seattletimes.com/opinion/editorials/beyond-mccleary-6-items-remaining-on-education-to-do-list>. This may lead to school districts hiding, or understating, problems. See Taylor Mirfendereski & Susannah Frame, *Washington school district violates special education laws for a decade*, KING5 NEWS (Aug. 6, 2018), <https://www.king5.com/article/news/local/investigations/washington-school-district-violates-special-education-laws-for-a-decade/281-574478178> (“Despite Anthony’s severe autism, the mother and her soon-to-be high school senior have no trouble understanding each other. But the Mabton School District Anthony attends denied him the specialized educational services he needs to learn to communicate with anyone else.”).

²⁶ John O’Neill, *Texas Saved Billions Cutting Special Education. Now the Bill Comes Due*, BLOOMBERG (Aug. 21, 2018), <https://www.bloomberg.com/news/articles/2018-08-21/texas-saved-billions-cutting-special-education-now-the-bill-comes-due>.

²⁷ *Id.*

Legislature fails to provide funding, however, school districts will strain to make up the difference.²⁸

The costs to schools of autism can be high, as one article about California special education notes: “More severe disabilities that districts are seeing more frequently, like autism, often require additional one-on-one aids, occupational therapists and other specialized positions.”²⁹ In 2017, refuting a ruling by then-U.S. Court of Appeals Judge Neil Gorsuch, the U.S. Supreme Court unanimously ruled that IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”³⁰ A Colorado school district had argued all the way to the U.S. Supreme Court that it did not have to serve the acute needs of a student with autism.³¹

In the area of autism, the cost burden upon schools for serving unmet need would be significantly mitigated were states to enact, and enforce, strong insurance mandates for autism therapy, as well as provide coverage to children on Medicaid and dependents of public employees.

²⁸ See *id.* (One parent was quoted worrying “that the situation ‘sets up children with disabilities for blowback from the general education community if schools feel like they have to cut other programs.’”).

²⁹ *Maya Srikrishnan, Special Education Costs Are Rising, But Money From State and Feds Isn’t*, VOICE OF SAN DIEGO (Feb. 1, 2018), <https://www.voiceofsandiego.org/topics/education/skyrocketing-special-ed-costs-join-pensions-district-budget-busters>; see also Harold Pierce, *The price of special education: As autism rates surge among children, so does the cost to educate them*, BAKERSFIELD CALIFORNIAN (June 24, 2017), https://www.bakersfield.com/news/the-price-of-special-education-as-autism-rates-surge-among/article_ed30bad2-2de9-5fa3-a47b-dd2ebb8425ce.html (“An unexplained increase in autistic and emotionally disturbed students is driving up special education enrollments — a huge problem for school districts that aren’t getting any additional state and federal funds to cover the ballooning costs.”).

³⁰ Richard Pérez-Peña, *Supreme Court Rejects Education Minimum Applied by Gorsuch*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/us/politics/gorsuch-education.html> (quoting opinion by Chief Justice John Roberts); see also *Andrew F. v. Douglas Cty. School Dist.*, 137 S. Ct. 988, 999 (2017) (“A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.”). The impact is yet to be measured. One writer noted, “Advocates and parents say the case dramatically expands the rights of special-education students in the United States, creates a nationwide standard for special education, and empowers parents as they advocate for their children in schools.” Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, THE ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662>. She acknowledged that “[h]ow this decision will play out on the school level, given the rising costs of special education and diminishing support from the federal government, is anyone’s guess.”

³¹ See John Aguilar, *Douglas County Schools must pay the private education costs of student who has autism*, judge rules, DENVER POST (Feb. 12, 2018), <https://www.denverpost.com/2018/02/12/douglas-county-schools-private-education-costs/> (“A federal judge on Monday ruled that the Douglas County School District did not provide an adequate education to a student who has autism and must reimburse his family for the cost of sending him to a private school for students with disabilities.”).

IDEA states that it is federal policy “to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and *private insurance coverage*)” (emphasis added).³² This exhortation was somewhat gratuitous, as, ever since the McCarran-Ferguson Act of 1945, “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.”³³

Yet, however begrudgingly in many instances, most states are enforcing insurance and/or Medicaid mandates for treating autism spectrum disorder.³⁴ In the state of Washington it took class-action litigation, because the insurance commissioner would not enforce the state’s mental health parity act and require insurers to provide neurodevelopmental therapy (NDT).³⁵ As the unanimous Washington Supreme Court noted:

Regence BlueShield asks us to attach significance to the fact that the Washington State Office of the insurance Commissioner (OIC) has never disapproved Regence BlueShield’s NDT exclusion. We decline to do so. Assuming that this constitutes an agency interpretation, we afford the agency interpretation deference only if the interpretation is not contrary to the plain language of the statute. . . . Regence BlueShield’s exclusion was contrary to the plain language of the mental health parity act, and OIC’s action (or inaction) is irrelevant.³⁶

³² 20 U.S.C. § 1431(b)(2) (2018).

³³ 15 U.S.C. § 1012 (b) (2018).

³⁴ See generally *State Insurance Mandates for Autism Spectrum Disorder*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <https://www.asha.org/Advocacy/state/states-specific-autism-mandates> (last visited Aug. 27, 2018).

³⁵ See *O.S.T. vs. BlueShield*, 335 P.3d 416 (Wash. 2014).

³⁶ *Id.* at 421 (citations omitted). Washington was the only state where a longstanding law requiring autism therapy was not enforced for years. In a pointed editorial, the *Seattle Times* stated: “The court’s ruling, however, raises the question: Why do exclusions continue, nearly a decade after the Legislature passed mental-health parity? In court filings, Regence pointed to Insurance Commissioner Mike Kreidler’s office, noting it allowed the neurodevelopmental therapy exclusion. The court tossed that aside, but the argument puts a spotlight on Kreidler’s record. He has been slow to stand up for the tens of thousands of families struggling to get necessary care for loved ones with mental illness. Astoundingly, his office has not taken a single enforcement action on the law, and a proposed rule to strengthen enforcement has languished in his office for two years.” Editorial, *Ending exclusions under state’s mental-health parity law*, SEATTLE TIMES (Oct. 14, 2014), <https://www.seattletimes.com/opinion/editorial-ending-exclusions-under-statersquos-mental-health-parity-law>; see also Eleanor Hamburger &

These insurance protections can be limited, as one can imagine if even a state like Washington would balk at covering kids with autism therapy needs.³⁷

In Kansas, for example, although autism therapy for children of state employees is covered up to age 19,³⁸ for private insurance a mandate for covering autism therapy only applies to insurance for employers of 101 employees or more, and only covers care for children under age 12.³⁹

In Alabama, “A health benefit plan shall cover the screening, diagnosis, and treatment of Autism Spectrum Disorder for an insured 18 years of age or under in policies and contracts issued or delivered in the State of Alabama to employers with at least 51 employees for at least 50 percent of its working days during the preceding calendar year.”⁴⁰

Florida law, under what is called the “Steven A. Geller Autism Coverage Act,” requires “[t]reatment of autism spectrum disorder and Down syndrome through speech therapy, occupational therapy, physical therapy, and applied behavior analysis.”⁴¹ However, coverage “shall be limited to \$36,000 annually and may not exceed \$200,000 in total lifetime benefits.”⁴² Such monetary limitations are not uncommon.⁴³ It is not clear what the empirical

Sean Corry, *Enforce state's mental-health parity law*, SEATTLE TIMES (Aug. 19, 2014), <https://www.seattletimes.com/opinion/guest-enforce-statersquos-mental-health-parity-law> (“Kreidler needs to end insurance discrimination. Without adequate enforcement by his office, private attorneys have filled the void, winning on an insurer-by-insurer, exclusion-by-exclusion basis. Such litigation is time-consuming and piecemeal.”).

³⁷Too often in falls upon parents, not policymakers, to achieve a just result. In Minnesota:

A Somali immigrant mother's relentless campaign to expand care for poor children with autism has achieved a major triumph, as Minnesota becomes one of the first states in the nation to subsidize a broad range of intensive therapies for the developmental disorder.

The federal government has approved Minnesota's request to pay for expensive one-on-one therapies designed to improve language and social skills in children and young adults with autism. As a result, hundreds of low-income families on Medical Assistance, Minnesota's health plan for 1 million poor and disabled Minnesotans, will benefit from treatment that previously been available only to wealthier people.

Chris Serres, *Mom's push to help poor kids with autism brings new federal benefits*, STAR TRIB. (Apr. 1, 2015), <http://www.startribune.com/mom-s-push-to-help-poor-kids-with-autism-brings-new-federal-benefits/298349191/>.

³⁸ KAN. STAT. ANN. § 75-6524 (2018) (“[T]he state employees health care commission shall provide for the coverage of services for the diagnosis and treatment of autism spectrum disorder in any covered individual whose age is less than 19 years.”)

³⁹ KAN. STAT. ANN. § 40-2,194 (2018).

⁴⁰ ALA. CODE § 27-54A-2(a)(10)(b)(1) (2018).

⁴¹ FLA. STAT. § 627.6686(3)(b) (2016).

⁴² FLA. STAT. § 627.6686(4)(b).

⁴³ In Montana, coverage for treatment of autism spectrum disorders may be limited to “\$0,000 a year for a child 8 years of age or younger” or “\$20,000 a year for a child 9 years of age through 18 years of age.” See MONT. CODE ANN. § 33-22-515(4)(a) (2018). In Louisiana, “Coverage under this Section

basis is for such caps; one article noted, “According to a 2006 study by health economist Michael Ganz, the direct costs to raise a child with autism to age 22 are more than \$500,000 — and that’s in 2003 dollars.”⁴⁴ Applied behavioral analysis (ABA) “involves as much as 40 hours a week of one-on-one therapy.”⁴⁵

The example of Virginia shows the challenges of overcoming insurance company opposition. From “January 1, 2012, until January 1, 2016” the mandate only covered therapy for those “age two years through age six years”; it was only after that period that the mandate was broadened to cover those “from age two years through age 10 years[.]”⁴⁶ That coverage is “subject to an annual maximum benefit of \$35,000,” unless the insurer opts to spend more.⁴⁷

Legislation enacting coverage up to the initial age threshold “failed for 11 straight years until House Speaker William J. Howell (R-Stafford) backed it — even though conservatives considered the measure an unacceptable mandate that would drive up insurance costs.”⁴⁸ The *Washington Post*

shall be subject to a maximum benefit of thirty-six thousand dollars per year and a lifetime maximum benefit of one hundred forty-four thousand dollars.” LA. STAT. ANN. § 22:1050(D)(1) (2018). Illinois similarly limited benefits to \$36,000 a year, but required that, “After December 30, 2009, the Director of the Division of Insurance shall, on an annual basis, adjust the maximum benefit for inflation using the Medical Care Component of the United States Department of Labor Consumer Price Index for All Urban Consumers.” 215 ILL. COMP. STAT. § 5/356z.14(b) (2018). That same upward adjustment to a \$36,000 limit began in Iowa in 2014, see IOWA CODE § 514C.28(3) (2018), and in New Mexico and Pennsylvania in 2011. See N.M. STAT. ANN. § 59A-23-7.9(B)(2) (2018); 40 PA. CONS. STAT. § 764h(b) (2018). In South Carolina, “Coverage for behavioral therapy is subject to a fifty thousand dollar maximum benefit per year. Beginning one year after the effective date of this act [2008], this maximum benefit shall be adjusted annually on January first of each calendar year to reflect any change from the previous year in the current Consumer Price Index, All Urban Consumers, as published by the United States Department of Labor’s Bureau of Labor Statistics.” S.C. CODE ANN. 38-71-280(5)(E) (2018). In Wisconsin, the limit was set as “at least \$50,000 for intensive-level services per insured per year, with a minimum of 30 to 35 hours of care per week for a minimum duration of 4 years, and at least \$25,000 for nonintensive-level services per insured per year, except that these minimum coverage monetary amounts shall be adjusted annually, beginning in 2011, to reflect changes in the consumer price index for all urban consumers, U.S. city average, for the medical care group, as determined by the U.S. department of labor.” WIS. STAT. § 632.895(12m)(c)(1) (2018). Arkansas has a fixed \$50,000 annual limit for its applied behavioral analysis therapy mandate. See ARK. CODE ANN. § 23-99-418(14)(c)(1) (2018). In Oklahoma, “Coverage for applied behavior analysis shall be subject to a maximum benefit of twenty-five (25) hours per week and no more than Twenty-five Thousand Dollars (\$25,000.00) per year. Beginning January 1, 2018, the Oklahoma Insurance Commissioner shall, on an annual basis, adjust the maximum benefit for inflation by using the Medical Care Component of the United States Department of Labor Consumer Price Index for All Urban Consumers (CPI-U).” OKLA. STAT. tit. 36, § 6060.21(E) (2018).

⁴⁴ Maureen Hoch, *Autism Diagnoses Bring Slew of Costs for Families*, PBS (Apr. 13, 2011), https://www.pbs.org/newshour/health/health-jan-june11-autismcosts_04-13.

⁴⁵ Elizabeth Davita-Raeburn, *Is the Most Common Therapy for Autism Cruel?*, THE ATLANTIC (Aug. 11, 2016), <https://www.theatlantic.com/health/archive/2016/08/aba-autism-controversy/495272>. Some “advocates, many of them childhood recipients of ABA, say that the therapy is harmful.” Hoch, *supra* note 43.

⁴⁶ VA. Code Ann. § 38.2-3418.17(A) (2018).

⁴⁷ VA. Code Ann. § 38.2-3418.17(K).

⁴⁸ Anita Kumar, *VA. families of autistic children still waiting for coverage*, WASH. POST (Jan. 22, 2012), https://www.washingtonpost.com/local/dc-politics/va-families-of-autistic-children-still-waiting-for-coverage/2012/01/18/gIQArQHWJQ_story.html?utm_term=.8f9581571697.

reported that

a coalition of conservative groups, including the Virginia Federation of Tea Party Patriots and Americans for Prosperity, lobbied against the bill and targeted Howell via recorded phone calls statewide. The Independent Insurance Agents of Virginia, Virginia Chamber of Commerce, National Federation of Independent Business and Virginia Association of Health Plans also were opposed, citing the expense of another mandate.

Even after the initial law's 2011 passage, it was not enforced until some language was fixed, a delay that activists blamed upon the conservative governor and attorney general, who they contended had, in contrast, "worked quickly . . . to implement far-reaching regulations for abortion clinics and could have done the same for the autism bill."⁴⁹ In 2015 the successful effort to broaden the law required "what one delegate described as a 'gut wrenching' vote on the issue."⁵⁰ The *Richmond Daily Press* reported that "[t]he bill initially did away with the age cap altogether, but it was reined in during the committee process."⁵¹ The bill's prime sponsor dismissed cost concerns expressed by those voting against the measure, and "said the revamped version of the measure would increase policy costs per-covered-member policy costs 40 cents a month."⁵² This time insurers gave up the fight upon recognizing the inevitability of the bill's passage.⁵³

As is true of many insurance mandates, the costs of socializing autism therapy may be exaggerated. In Utah, an actuarial study in 2012, on behalf of the advocacy group Autism Speaks, found that premiums would increase by no more than .74% upon enactment of a

⁴⁹ *Id.*

⁵⁰ Travis Fain, *Health care law called out as House takes "gut wrenching" autism vote*, RICHMOND DAILY PRESS (Feb. 10, 2015), <https://www.dailypress.com/news/politics/dp-nws-ga-autism-insurance-20150210-story.html>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Jacob Geiger, *Senate panel backs extension of autism insurance mandate*, RICHMOND TIMES (Feb. 23, 2015), https://www.richmond.com/business/national-international/senate-panel-backs-extension-of-autism-insurance-mandate/article_afa88bab-e512-5662-9797-03740bbc28c7.html ("Doug Gray, executive director of the Virginia Association of Health Plans, did not speak against the bill Monday. Gray had spoken at a previous committee hearing against the measure but said he did not speak Monday because it was clear the measure would pass."). They had more success in 2017, when the prime sponsor of the earlier laws introduced a bill to remove the age caps on therapy; the bill was killed in the Virginia House. See H.B. 1995, 2017 Gen. Assemb. (Va. 2017).

mandate.⁵⁴ As one writer noted in 2016, “In Missouri, where the coverage for treatment was capped at \$40,000 a year until age 19, the state found that, in 2015, the mandate cost 30 cents per member per month. That’s at the lower end of the expected cost, said John Huff, director of the Missouri Department of Insurance.”⁵⁵ Even where a mandate exists, a problem can be accessing providers with one’s insurance, or, if one is on Medicaid, finding coverage at all given the typical parsimony of Medicaid payment.⁵⁶ Still, it carries the promise of early intervention.

Such early intervention holds the promise of saving money down the road. University of Pennsylvania medical researchers, for example, found that “costs associated with the Early Start Denver Model (ESDM), one evidence-based treatment for young children with autism, were fully offset after only two years following intervention due to reductions in children's use of other services[.]”⁵⁷

In conclusion, at a time of tremendous profitability for health insurers,⁵⁸ and funding risk for our K-12 system,⁵⁹ autism therapy mandates are an idea that just might help bolster and save IDEA.

⁵⁴ See Oliver Wyman, Actuarial Consulting Group, Inc., Actuarial Cost Estimate Utah HB 69 (Feb. 8, 2012), http://advocacy.autismspeaks.org/atf/cf/%7B2A179B73-96E2-44C3-8816-1B1C0BE5334B%7D/UT_Wyman.2012.pdf.

⁵⁵ Jen Fifield, *Coverage for Autism Treatment Varies by State*, PEW: STATELINE (Feb. 19, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/02/19/coverage-for-autism-treatment-varies-by-state>.

⁵⁶ See *id.* That is if one can even get on Medicaid. Katie Parsons, *The costs of autism strap many families*, ORLANDO SENTINEL (July 3, 2018), <https://www.orlandosentinel.com/get-healthy-orlando/os-families-cost-of-autism-20180702-story.html> (“Lorienda Crawford’s son with ASD was on the Florida Medicaid Waiver wait list for 17 years before recently receiving word that the cost of some of his services would now see some relief. He is 22 years old but will live with his mother, or another adult, his entire life, Crawford said.”).

⁵⁷ Press Release, U. of Penn. Sch. of Med., High Quality Early Intervention for Children with Autism Quickly Results in Costs Savings (Aug. 7, 2017), <https://www.sciencedaily.com/releases/2017/08/170808074253.htm>.

⁵⁸ See, e.g., Kimberly Chin & Anna Wilde Mathews, *UnitedHealth Raises Profit Outlook*, WALL STREET J. (JULY 17, 2018), <https://www.wsj.com/articles/unitedhealth-raises-profit-outlook-1531826450> (“OVERALL, REVENUE ROSE 12% TO \$56.1 BILLION”); Dennis Fitzgerald, *Aetna projects Trump tax overhaul will add \$800M to profit*, FOX BUS. (JAN. 30, 2018), <https://www.foxbusiness.com/markets/aetna-projects-trump-tax-overhaul-will-add-800m-to-profit>; David Nicklaus, *Centene CEO's pay rises to \$25.3 million*, ST. LOUIS POST-DISPATCH (MAR. 20, 2018), https://www.stltoday.com/business/columns/david-nicklaus/centene-ceo-s-pay-rises-to-million/article_408e28ce-fdc4-5c38-a726-054a7b63ed60.html. On the Medicaid side, the incentive for states in bearing the cost is that it could reduce school costs and the federal government will match their investment.

⁵⁹ Twelve states have recently faced lawsuits over K-12 funding adequacy. See Courtney Sanders, *Many States Facing Suits Over K-12 Funding*, Ctr. For Budget & Pol’y Priorities (Apr. 26, 2018), <https://www.cbpp.org/blog/many-states-facing-suits-over-k-12-funding>. This despite the “economic miracle” President Trump has boasted of. See Ezra Klein, *The truth about the Trump economy*, VOX (Aug. 24, 2018), <https://www.vox.com/policy-and-politics/2018/8/24/17759940/donald-trump-economy-jobs-growth-obama>. We are never more than an economic downturn away from things being much worse. As Ezra Klein notes, “A recession would be devastating, as wage increases haven’t come

near to making up for the pain caused by the last recession, and” – given an enormous federal deficit created by tax cuts – “Republicans have taken fiscal firepower that could’ve been held in reserve for a future downturn and spent it on tax cuts and military boosts amid an expansion.” *Id.* Not only is that an ill-harbinger for K-12 education, but it is especially worrisome for “discretionary” programs in states like those that serve people with disabilities.

