

# Education Savings Accounts: Implications for Students with Disabilities

## Statement by Disability Rights Texas

### November 14, 2022

#### 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.

#### Texas Commission on Special Education Funding Straying From Statutory Charge With Attention on Education Savings Accounts

The Texas Commission on Special Education Funding was created by House Bill 1525 during the regular session of the 87<sup>th</sup> Texas Legislature. The stated purpose of the Commission is for improving how the state financially supports local educational agencies in the delivery of special education services to students with disabilities. Specifically, the charter for the Commission states:

The commission is established to develop and make recommendations regarding methods of **financing special education in public schools**. (Emphasis added.) Tex. Educ. Code § 48.402(a).

Education Savings Accounts do not finance special education in public schools. Therefore, Education Savings Accounts are beyond the charge of the Commission. Any recommendations regarding Education Savings Accounts are not authorized. Further, the state method of financing special education in public schools is in critical need of attention and reform. The state's special education allocation formula in Chapter 48 of the Texas Education Code has not been substantially changed in decades. Local educational agencies are dependent on state funding to satisfy the mandate of delivering a free and appropriate public education (FAPE) to each student with a disability under Individuals with Disabilities Education Act (IDEA). Turning attention to Education Savings Accounts distracts from the core function of the Commission.

#### Lack of Legal Right Protection with Education Savings Accounts

A primary concern with Education Savings Accounts is the lack of legal rights. Religious schools are not subject to 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 Education Savings Account 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 Education Savings Accounts and issued a report. Our statement is in alignment with the report of the National Council on Disabilities.<sup>1</sup>

### Individuals with Disabilities Education Act

The IDEA is the federal mandate for special education 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 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, Education Savings Accounts are funded only with state money. Thus, private schools, including religious schools, are not subject to Section 504. Private schools 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

---

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

- 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:

**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, private religious schools are not subject to the ADA. Private religious schools 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

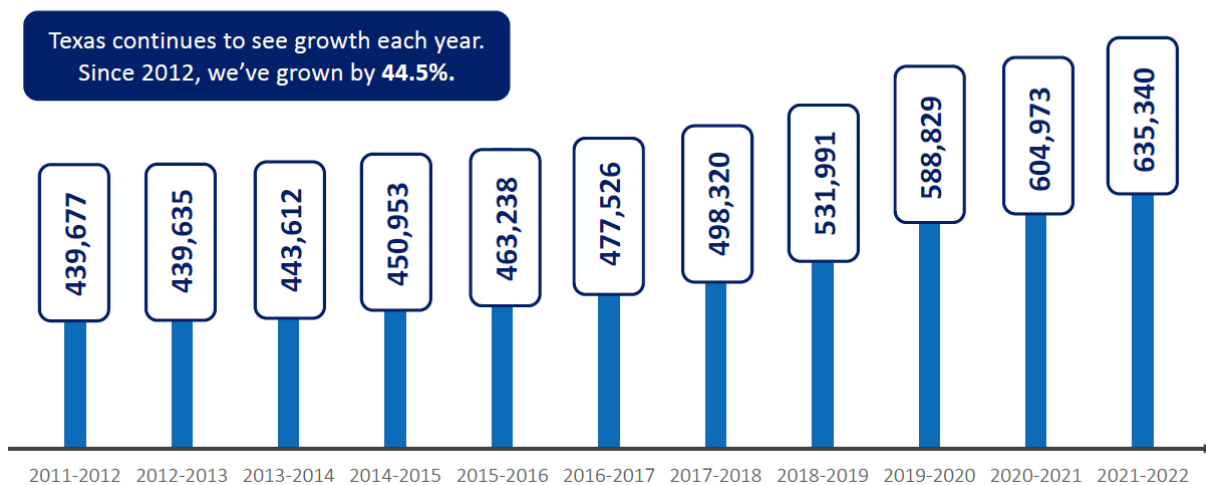
All of the substantive and procedural mandates in the ADA for private schools, except religious schools, are outlined in 28 C.F.R. Part 36.

## Public Special Education Needs Funding Over Education Savings Accounts

A primary concern with Education Savings Accounts 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 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 up from 439,677 in school year 2011-2012. 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.

### 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>

## 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. This statement provides general observations. It does not apply to a specific proposal without an opportunity for examination. We appreciate the opportunity to engage with policymakers moving forward to protect and advance the interest of students with disabilities in Texas.

Point of contact: Steven Aleman, Senior Policy Specialist ([saleman@disabilityrightstx.org](mailto:saleman@disabilityrightstx.org))