

Improving Public Schools: What Advocates Can Learn From Indian Education Rights

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A unique feature of the United States is that most children who attend public schools do not have a federal right to education. Unlike 174 other countries' constitutions, the United States Constitution does not mention "education."¹ The U.S. Supreme Court has even rejected the idea that education is a fundamental right implicitly protected by the U.S. Constitution.² Congress has also declined to create a federal right to education for all children in the United States by enacting a federal statute.³ As a result, most public-school students cannot turn to the United States Constitution, a federal law, or even a federal court to defend their right to an adequate education. Remarkably, however, a federal right to education does exist for Indian children⁴ in the United States as a result of the distinct history and political relationship between the United States and tribal nations.⁵ In effect, Indian education rights operate under a completely different legal framework than the right to education that is maintained by most public-school students. For instance, the Bureau of Indian Education (BIE) school system in the United States exists under a federal right to education,⁶ while public school systems operate under a state right to education.⁷

While every state constitution in the U.S. provides a right to education,⁸ it has become very clear that a state right to an education is not enough—especially when it comes to ensuring adequate and equitable public schools. For illustration, states have been steadily decreasing public school funding. After the recession in 2008, nearly

1. Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/>.

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

3. DEREK W. BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 15 (2020).

4. I use the term "Indian" in this paper to track statutory language involving Indian education rights. It is a term used in federal law to identify Native individuals who have a distinct political status based on their tribal affiliation. Conversely, I use the term "Native" when I am referring to the broader racial group.

5. *See, e.g., Meyers v. Bd. of Educ. of the San Juan Sch. Dist.*, 905 F. Supp. 1544, 1561-62 (D. Utah, 1995).

6. 25 U.S.C.A. § 2000.

7. BLACK, *supra* note 3 at 15.

8. *Id.*

every state made large cuts to public education.⁹ In fact, states were routinely cutting over \$1,000 per student each year.¹⁰ Despite recovering from the recession in 2012, the majority of states have declined to return their schools to their pre-recession funding levels.¹¹ With these decreases in funding, states have also reduced teachers' rights and benefits.¹² Consequently, between 2009 and 2012, public schools lost 300,000 teaching positions.¹³ Not only did this drive teachers out of the profession, but the national number of people pursuing education degrees fell by 30%.¹⁴ The persisting teacher shortage continues to cause school districts to cancel courses, increase class sizes, assign teaching overloads, and hire substitute teachers to fill full-time positions.¹⁵ And further, states had no choice but to waive certification, overlook college degree requirements, and even let college interns teach full-time.¹⁶

Additionally, research reveals that, "minority and low-income children in the United States receive inferior educational opportunities."¹⁷ In 2018, school districts with the highest rates of poverty in the United States received approximately \$1,000 less funding per student than school districts with the lowest rates of poverty, and this disparity worsens when race is taken into account.¹⁸ School districts in the United States that have the most students of color receive \$1,800 less per student than districts serving the fewest students of color.¹⁹ Altogether, schools in the United States with 75% or more white students receive twenty-three billion dollars more than schools with 75% or more nonwhite students.²⁰ With this lack of funding it is undeniable that low income and minority public school students are

9. *Id.* at 31.

10. *Id.*

11. *Id.*

12. *Id.* at 46.

13. *Id.*

14. *Id.* at 47.

15. *Id.*

16. *Id.*

17. Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, in A FEDERAL RIGHT TO EDUCATION FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 6 (Kimberly Jenkins Robinson ed., 2019).

18. IVY MORGAN & ARY AMERIKANER, FUNDING GAPS AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 4 (2018), <https://files.eric.ed.gov/fulltext/ED587198.pdf>.

19. *Id.*

20. See EDBUILD, \$23 BILLION 2, (2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

disproportionately impacted by the teacher shortage and are receiving inferior resources, course offerings, textbooks, technology, classrooms, and libraries, among other things.²¹

This is especially troublesome because underfunded school districts—where most minority students attend school—are most impacted by insufficient funding from the Individuals with Disabilities Education Act (IDEA).²² Consistently, schools with mostly minority students struggle to identify children with disabilities and provide adequate special education accommodations and services.²³ This only fuels other educational inequities, such as academic and school discipline racial disparities, which have substantial and lasting implications.²⁴ Even in schools where most students are white, minority students are overrepresented in special education.²⁵ Overrepresentation presents a major problem because the misidentification of a disability may be a means to further school segregation as minority children with disabilities are more likely to be removed from the general education classroom and be educated in an inferior and more restrictive separate environment.²⁶ For instance, only 33% of Black children with disabilities spend more than 80% of their day in the more rigorous general education classroom compared to 55% of white children with disabilities.²⁷

Most problematic with inadequate and inequitable public schools, however, is that they persist despite state court challenges. As of 2019,

21. See Robinson, *supra* note 17, at 4-6.

22. Crystal Grant, *Special Education by Zip Code: Creating Equitable Child Find Policies*, 52 LOY. U. CHI. L.J. 127, 144 (2020).

23. See Todd E. Elder et. al., *Segregation and Racial Gaps in Special Education*, 21 EDUC. NEXT (2021), <https://www.educationnext.org/segregation-racial-gaps-special-education-new-evidence-on-debate-over-disproportionality/>.

24. See Institute of Education Sciences, National Indian Education Study 2019 46-47 (2021) (showing academic achievement racial disparities); see also U.S. GOV'T ACCOUNTABILITY OFF., EDUCATION, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES, GAO-18-258, at 73-74 (2018) (showing school discipline racial disparities).

25. Elder et al., *supra* note 23.

26. Claire Raj, *The Misidentification of Children with Disabilities: A harm with no foul*, 48 ARIZ. ST. L.J. 373, 374 (2016).

27. NAT'L CTR FOR LEARNING DISABILITIES, SIGNIFICANT DISPROPORTIONALITY IN SPECIAL EDUCATION: CURRENT TRENDS AND ACTIONS FOR IMPACT 4-5, https://www.nclld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf (last visited July 16, 2022).

litigation involving school finance issues and the state right to education has already occurred in 44 states.²⁸ Between 1973 and 1987, when advocates first turned to state courts to address inequitable public schools, plaintiffs prevailed in only 7 of the 22 lawsuits that challenged inequitable school-funding schemes.²⁹ Beginning in 1989, advocates began achieving much more success by moving away from equity and equality arguments, and focusing on how school finance systems are inadequate.³⁰ Thus, state courts were more receptive to the idea that students require a minimum level of resources.³¹ Starting around 2009, however, state courts have shown reluctance in intervening in educational finance policy.³² Recent lawsuits challenging inadequate public schools have even failed in states with strong constitutional precedent and recognition of education as a fundamental right.³³ This recent resistance is not because of a lack of legal precedent or a lack of evidence of student performance failure and inadequate educational resources, but rather state court concerns of institutional efficacy or whether the judiciary should be able to compel the legislature to provide a sufficient education.³⁴ Another major barrier in state court litigation is that the language of the right to education in state constitutions varies from state to state.³⁵ Differing language gives room for various interpretations among states and, subsequently, leaves the right to education in some states extremely vulnerable and ineffective.³⁶

Unbeknownst to most education advocates, though, is that Indian education rights provide critical lessons on how to improve schools and the right to education. Just as tribal nations—as separate sovereigns that are capable of enacting their own laws—are considered “laboratories of

28. Kristine L. Bowman, *The Inadequate Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 65, 66 (Kimberly Jenkins Robinson ed., 2019).

29. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1903-04 (2017).

30. *Id.* at 1904-05.

31. *See Id.* at 1906.

32. *Id.* at 1907.

33. *Id.* at 1907-08.

34. *See Id.* at 1911-15.

35. Bowman, *supra* note 28.

36. *Id.*

legal innovation,”³⁷ there is massive potential for studying Indian education rights. With its successes and failures, education advocates can look to Indian education rights to better develop a strategy to improve public schools. In fact, education advocates could have much needed guidance in asking vital questions surrounding inadequate and inequitable public schools. For example, how should the states and the federal government share the responsibility of education in the United States? How should a federal right to education be created? How can we better hold inadequate and inequitable schools accountable? What other strategies can we use to improve inadequate and inequitable schools?

Overall, understanding Indian education rights and its distinctive legal framework could help finally overcome inadequate and inequitable public-school systems. Part I of this article will review Indian education law in-depth by summarizing and synthesizing relevant federal law and its historical context. Part II will describe the current state of Indian education, looking to both current research involving Indian education and the *Stephen C. v. Bureau of Indian Education*³⁸ case, in which advocates of Indian education rights accomplished groundbreaking work in improving a BIE school. Part III will then begin to explore what education advocates can learn from Indian education rights in addressing inadequate and inequitable public schools.

I. INDIAN EDUCATION RIGHTS

Despite the United States having an extensive history involving Indian education, there is a severe lack of awareness of the federal right to education for Indian children. This is presumably due to the lack of knowledge surrounding Native American history and Indian law overall. Importantly, the United States has a unique trust relationship with tribal nations from treaty-based obligations, federal law, and

37. Elizabeth Ann Kronk Warner, *Valuable Lessons to Learn From Tribal Innovation*, THE FEDERAL LAWYER 6, 6 (Apr. 2017), <https://www.fedbar.org/wp-content/uploads/2017/04/At-Sidebar-pdf-1.pdf>.

38. See generally *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141, at *1-3 (9th Cir. Mar. 16, 2022).

federal policy.³⁹ Tribes also retain tribal sovereignty, which is the right of tribes—as political entities—to govern their own affairs.⁴⁰ As a result, tribal members or citizens have a distinct political status, which is distinguishable from merely a racial status.⁴¹ Because of this political status, Indian children, which again is defined by the law as Native children with a distinct political status based on a tribal affiliation,⁴² may maintain distinctive rights and protections under the law. Without this critical baseline knowledge, however, the failure to acknowledge the federal right to education for Indian children is inevitable. Not only does this lack of knowledge harm Indian children whose rights are not being protected, but it also prevents many education scholars from being able to provide insight and learn from this perplexing area of history and law. To help address this gap, this section will review Indian education law in-depth by summarizing and synthesizing relevant federal law and its historical context.

The first federal right to education in the United States was created by the 1794 Treaty with the Oneida, Tuscarora, and Stockbridge Tribal Nations.⁴³ Article II of the treaty provided that the United States would erect a grist-mill and a saw-mill for the Oneida, Tuscarora, and Stockbridge Tribal Nations, and Article III provided that “[t]he United States will provide . . . for the expense of employing one or two suitable persons to manage the mills, to keep them in repair, [and] *to instruct some young men of the three nations in the arts of the miller and Sawyer . . .*”⁴⁴ After the 1794 Treaty, at least 120 more treaties between the United States and various tribal nations provided an explicit provision involving Indian education.⁴⁵

Despite these negotiated treaties, however, the federal government’s commitment to Indian education was exploited by extremely racist and harmful assimilation policies. In fact, the U.S. Senate later explained the following:

39. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 891 (2017).

40. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 530 (1832).

41. *See* *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

42. 25 U.S.C.A. § 1903(3)-(4) (defining “Indian” and “Indian child” for purposes of the Indian Child Welfare Act).

43. Fletcher & Singel, *supra* note 39, at 913.

44. Treaty With the Oneida, etc., 1794, Oneida-U.S., arts. II-III, Dec. 2, 1794, 7 Stat. 47 (available at https://avalon.law.yale.edu/18th_century/one1794.asp).

45. Fletcher & Singel, *supra* note 39, at 913.

Beginning with President Washington, the stated policy of the Federal Government was to replace the Indian's culture with our own. This was considered 'advisable' as the cheapest and safest way of subduing the Indians, of providing a safe habitat for the country's white inhabitants, of helping the whites acquire desirable land, and of changing the Indian's economy so that he would be content with less land. *Education was a weapon by which these goals were to be accomplished.*⁴⁶

In agreement, in 1819, Congress expanded its role in Indian education by enacting the Civilization Fund Act.⁴⁷ The Civilization Fund Act authorized the President "in every case where he shall judge improvement in the habits and condition of such Indians practicable" to "employ capable persons of good moral character" to familiarize a tribal nation with the "arts of civilization."⁴⁸ The Bureau of Indian Affairs (BIA) was also created in 1824 within the Department of War mainly to oversee the Civilization Fund.⁴⁹

By 1825, thirty-eight Indian schools were created.⁵⁰ Soon after, the federal government began converting vacant military posts and barracks into Indian schools⁵¹ and appropriating funds for Indian education in Alaska.⁵² By the 1900s—after the federal government began kidnapping Indian children and placing them in Indian boarding

46. S. Rep. No. 91-501, at 142 (1969) (emphasis added).

47. *Congress Creates Fund to "Civilize" Native American People*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/mar/03> (last visited May 4, 2022).

48. *Id.*

49. *Let All That is Indian Within You Die!*, 38 NARF LEGAL REV. no. 2, 1, 3 (2013), <https://narf.org/nill/documents/nlr/nlr38-2.pdf>.

50. Fletcher & Singel, *supra* note 39, at 914; DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 58 (2000).

51. 25 U.S.C.A. § 276.

52. See BRYAN NEWLAND, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 66 (2022).

schools⁵³—over half of all Indian children within the United States (approximately 21,000) attended federally run Indian schools.⁵⁴ Congress also passed the Snyder Act of 1921 to provide further assistance for Indian schools.⁵⁵

At this point, there were four different types of schools available to Indian children: boarding schools,⁵⁶ mission schools, day schools, and, in some areas, public schools.⁵⁷ Unsurprisingly, these federally run, so-called “schools” were extremely harmful to Indian children, especially the boarding schools:

Cut off from their families and culture, the children were punished for speaking their Native languages, banned from conducting traditional or cultural practices, shorn of traditional clothing and identity of their Native cultures, taught that their cultures and traditions were evil and sinful, and that they should be ashamed of being Native American. Placed often far from home, they were frequently neglected or abused physically, sexually, and psychologically.⁵⁸

In fact, the Department of Interior today acknowledges that the United States applied “systematic militarized and identity-alteration methodologies” in Indian boarding schools.⁵⁹ The Department of Interior also confirmed that “Indian boarding school rules were often enforced through punishment, including corporal punishment, such as solitary confinement, ‘flogging, withholding food, . . . whipping[,]’ and ‘slapping, or cuffing.’”⁶⁰ Additionally, while it is still under

53. *See id.* at 36 (“There is ample evidence in Federal records demonstrating that the United States coerced, induced, or compelled Indian children to enter the Federal Indian boarding school system.”); *see also* Fletcher & Singel, *supra* note 39, at 891 (“Federal, state, and religious officials again turned to kidnapping and imprisoning Indian children in oppressive boarding schools, isolating them from their families, nations, and lands.”).

54. Fletcher & Singel, *supra* note 39, at 913; *see also* ADAMS, *supra* note 50.

55. Snyder Act, Pub. L. No. 67-85, 42 Stat. 208 (1921).

56. NEWLAND, *supra* note 52 (Between 1819 and 1969, the federal government operated or supported 408 Indian boarding schools.).

57. Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 837 (2001).

58. *Let All That is Indian Within You Die!*, *supra* note 49, at 2.

59. NEWLAND, *supra* note 52, at 51.

60. *Id.* at 54.

investigation, the Department of Interior now believes that thousands or tens of thousands Indian children have died at federal Indian boarding schools.⁶¹

The 1928 Meriam Report brought national attention to Indian education by concluding it was “grossly inadequate.”⁶² For example, the report explained that the schools lacked properly trained personnel and students were underfed and malnourished.⁶³ Further, the facilities were exceptionally overcrowded and unsanitary, and the students were forced to spend half of their days working in order to keep the schools running.⁶⁴

In response to the 1928 Meriam Report, there was a push to have Indian children attend state public schools.⁶⁵ Accordingly, Congress enacted the Johnson-O’Malley Act of 1934 which authorizes the Secretary of Interior to enter into contracts with the states regarding Indian education.⁶⁶ With these contracts, states receive federal funding in exchange for educating Indian children in public schools.⁶⁷ The Johnson-O’Malley Act also authorizes the Secretary to set minimum standards of service with these federal-state contracts, as long as “such minimum standards of service are not less than the highest maintained by the States or Territories within which said contract or contracts, as herein provided, are to be effective.”⁶⁸ In 1950, Congress enacted the Impact Aid Act to provide basic educational support funds to school districts educating Indian children,⁶⁹ as well as the School Facilities Construction Act to provide funding for constructing more schools in school districts affected by increased Indian enrollment.⁷⁰

61. *Id.* at 93.

62. LEWIS MERIAM ET AL., THE PROBLEM OF INDIAN ADMINISTRATION 11 (1928).

63. *Id.*

64. *Id.* at 13-14.

65. Dussias, *supra* note 57.

66. 25 U.S.C.A. § 5342.

67. *Id.*

68. 25 U.S.C.A. § 5344.

69. Impact Aid Act of 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-46 (Supp. 1990)), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(b), 108 Stat. 3518, 3965.

70. Act of Sept. 23, 1950, ch. 995, 64 Stat. 967 (codified as amended at 20 U.S.C. §§ 631-647 (1988)), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(a), 108 Stat. 3518, 3965.

Nonetheless, the 1969 Kennedy Report, which was titled “Indian Education: A National Tragedy—A National Challenge,” showed that federal action following the 1928 Meriam Report was not enough.⁷¹ The report concluded that in addition to fueling prejudice, intolerance, and discrimination towards Indians, the federal government’s coercive assimilation policies caused destruction and disorganization among Native communities, and led to “[a] dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children.”⁷² In fact, around 16,000 Indian children were not even enrolled in school, and the dropout rate for Indian children was twice as high as the national average.⁷³

In the 1970s, the United States dramatically shifted its federal Indian policy away from overt assimilation tactics, and towards recognition of the federal-tribal trust relationship, which is based on treaty and international law.⁷⁴ As the U.S. Supreme Court explained, when a stronger sovereign assumes authority over a weaker sovereign, the weaker sovereign does not surrender its right to self-government, and the stronger sovereign assumes a duty of protection for the weaker sovereign.⁷⁵ Thus, “the Federal Government has ‘charged itself with moral obligations of the highest responsibility and trust’ towards Indian tribes.”⁷⁶ By acknowledging this relationship again in the 1970s, the federal government began recognizing the right of tribal nations, as political entities, to govern their own affairs, as well as the federal government’s trust responsibility over Indian children.⁷⁷

With this renewed commitment to Indian education, Congress began responding to the continuing inadequacies of Indian education that were revealed by the 1969 Kennedy Report.⁷⁸ The Indian Education Act of 1972 confirmed the federal right to education for Indian children as part of the federal-tribal trust relationship.⁷⁹ It also established the Office of Indian Education and the National Advisory Council on Indian Education and provided a comprehensive approach to meet the needs of

71. See S. Rep. No. 91-501, at 12 (1969).

72. *Id.* at 19-21.

73. *Id.* at 3.

74. Fletcher & Singel, *supra* note 39, at 956-57.

75. Worcester v. Georgia, 31 U.S. 515, 520 (1832).

76. Haaland v. Brackeen, No. 21-376, slip op. at 12 (2023).

77. See Fletcher & Singel, *supra* note 39, at 958.

78. See generally S. Rep. No. 91-501(1969).

79. 25 U.S.C.A. § 2000.

Indian children.⁸⁰ The current version of the Indian Education Act declares that “the Federal Government has the sole responsibility for the operation and financial support of the Bureau of Indian Affairs funded school system,” and “[i]t is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”⁸¹ It also requires that BIE schools are “of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.”⁸² Likewise, the Indian Education Act increased funding towards Indian education and authorized numerous grants to local educational agencies that were designed to improve Indian students’ educational opportunities.⁸³

In addition, Section 504 of the Rehabilitation Act (Section 504) and the Individuals with Disabilities Education Act (IDEA) were passed in 1973⁸⁴ and 1975.⁸⁵ Section 504 and IDEA apply to both public and BIE schools to help protect education rights.⁸⁶ Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁷ Therefore, a child who has a disability under Section 504 has a right to an education that is comparable to the education provided to students without disabilities. Similarly, IDEA was designed “to ensure that all children with disabilities have available to them a free and appropriate public education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” and “to ensure that the rights of children with disabilities and parents of such children are protected.”⁸⁸ While IDEA provides more

80. *Id.*

81. 25 U.S.C.A. § 2000.

82. *Id.*

83. Dussias, *supra* note 57, at 860-61.

84. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

85. 20 U.S.C.A. §§ 1400 et. seq.

86. 29 U.S.C.A. § 794(a); 20 U.S.C.A. §§ 1400 et. seq.

87. 29 U.S.C.A. § 794(a).

88. 20 U.S.C.A. § 1400(d).

comprehensive protections for children with disabilities,⁸⁹ both Section 504 and IDEA provide various requirements and procedural safeguards that help ensure children with disabilities have equal access to an education.

Congress then passed the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975.⁹⁰ The ISDEAA states that “true self-determination in any society of people is dependent upon an educational process which will ensure the development of qualified people to fulfill meaningful leadership roles.”⁹¹ Congress also declared a “major national goal . . . to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.”⁹² In addition to increasing funding, ISDEAA authorized the Secretary to enter into Johnson-O’Malley contracts with tribal organizations so tribes can operate federally funded educational programs instead of the federal or state government.⁹³ The ISDEAA also amended the Johnson-O’Malley Act so the Secretary cannot enter into a contract unless the prospective contractor has submitted an “education plan” that “contains educational objectives which *adequately* address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives.”⁹⁴

Likewise, the 1978 Education Amendments Act required the Secretary of Interior to “facilitate Indian control of Indian affairs in all matters relating to education,” formulate a plan to recruit Indian educators, and develop “minimum academic standards for the basic education of Indian children”⁹⁵ for BIE and tribally controlled schools.⁹⁶ These minimum standards are currently set out in the Code of Federal Regulations.⁹⁷ Additionally, the Indian Education Amendments of 1984

89. See Pat Howey, *Key Differences Between Section 504 and IDEA*, WRIGHTSLAW, <https://www.wrightslaw.com/howey/504.idea.htm> (last modified June 27, 2019).

90. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended 25 U.S.C.A. § 5301 et seq.).

91. 25 U.S.C.A. § 5301(b)(1).

92. 25 U.S.C.A. § 5302(c).

93. 25 U.S.C. § 450f(a)(1).

94. 25 U.S.C.A. § 5345 (emphasis added).

95. Education Amendments Act, Pub. L. No. 95-561, 92 Stat. 2317 (1978).

96. 25 U.S.C.A. § 2011(a).

97. See 25 C.F.R. pt. 36.

were designed to provide more support to the BIA and to address recurring concerns regarding the conditions of BIE schools.⁹⁸ Similarly, the Indian Education Amendments of 1988 worked to improve Indian educational opportunities as well as further tribal control over education.⁹⁹

In 1994, for the first time, the question of Indian education rights were brought to federal courts. In a decision that is considered the “*Brown v. Board of Indian Country*,”¹⁰⁰ the district court in *Meyers v. Board of Education*¹⁰¹ held that Indian children have a federal right to education “irrespective of whether its responsibility for Indian education was based on legal obligation arising out of trust relationship with Indian peoples or moral obligation it had voluntarily assumed” because of federal statutes and regulations that recognize a federal right to education for Indian children. Therefore, an Indian child has a federal right to an education even if their particular tribe does not have a treaty agreement with the federal government that establishes such a right.

Meyers also determined that Indian children have a right to an educational opportunity that is *equal* to all other persons, and “[r]equiring a minor student to leave home for an education does not necessarily provide him or her with an equivalent education.”¹⁰² In *Meyers*, the BIE school at Navajo Mountain only provided education up until eighth grade.¹⁰³ Thus, the court determined that “at a minimum,” the state had a duty to provide an education to Navajo Mountain children in grades nine through twelve pursuant to *Brown v. Board of Education* and Utah’s state constitution which provides a right to education for children within the state.

Additionally, in 1994, the White House released a comprehensive federal Indian education policy statement,¹⁰⁴ which was intended to

98. Education Amendments of 1984, Pub. L. No. 98-511, 98 Stat. 2391.

99. Indian Education Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 363.

100. *See, e.g.*, Lawrence R. Baca, *Meyers v. Board of Education: The Brown v. Board of Indian Country*, 2004 UNIV. ILL. L. REV. 1155, 1155 (2004).

101. *Meyers v. Bd. of Educ. of the San Juan Sch. Dist.*, 905 F. Supp. 1544, 1561 (D. Utah, 1995).

102. *Id.* at 1555.

103. *Id.*

104. *See* NAT’L CONG. OF AM. INDIANS, *Comprehensive Federal Indian Education: Policy Statement. A Proposal from Indian Country to the White House* (1997), <https://files.eric.ed.gov/fulltext/ED408137.pdf>.

provide national Indian education guidelines for federal agencies and help ensure the academic success of Indian students.¹⁰⁵ While this statement was supported by extensive research and over 100 tribes, it was not legally binding.¹⁰⁶ In 1998, however, the Clinton Administration issued Executive Order No. 13096, entitled “American Indian and Alaska Native Education,” which did carry legal force.¹⁰⁷ The Executive Order recognized the federal government’s obligation to provide Indian education, created an interagency task force, and sought to focus federal agencies’ attention on six goals:

(1) improving reading and mathematics; (2) increasing high school completion and postsecondary attendance rates; (3) reducing the influence of long-standing factors that impede educational performance, such as poverty and substance abuse; (4) creating strong, safe, and drug-free school environments; (5) improving science education; and (6) expanding the use of educational technology.¹⁰⁸

During the Clinton Administration, in 2000, Congress agreed to a \$186 million increase in funding to BIA education programs.¹⁰⁹ Shortly after, Congress enacted the Native American Education Improvement Act (NAEI) as a part of the No Child Left Behind Act.¹¹⁰ The NAEI also affirmed the federal government’s obligation to educate Indian children and established an accreditation to help ensure that BIE schools offer equal educational opportunities compared to all other students in the United States.¹¹¹

Current regulations explain that, in agreement with “the United States Constitution, U.S. Supreme Court decisions, treaties, Federal statutes, and Executive Orders,... it is the responsibility and goal of the Federal government to provide comprehensive education programs and

105. Dussias, *supra* note 57, at 873-74.

106. *Id.* at 879.

107. Exec. Order No. 13,096, 63 Fed. Reg. 42,681 (1998).

108. *Id.*

109. Dussias, *supra* note 57, at 888.

110. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

111. *Id.*

services for Indians and Alaska Natives.”¹¹² Specifically, “basic education” is defined as “those components of education emphasizing literacy in language arts, mathematics, natural and physical sciences, history, and related social sciences.”¹¹³ Among other things, these regulations require certain teacher to student ratios with limited exceptions.¹¹⁴ Intraschool programs, such as libraries, instructional labs, physical education, and music, must be provided throughout the entire school-year.¹¹⁵ The regulations also set out curriculum requirements.¹¹⁶ For example, instructional programs for grades one through six must include language arts, math, social studies, science, fine arts, physical education, career awareness, environmental education, safety education, health education, metric education, and computer literacy.¹¹⁷ Along with curriculum regulations, there are very specific regulations involving libraries and textbooks. For elementary students, for instance, there must be at least fifteen books per student.¹¹⁸ Similarly, textbooks must meet course objectives, reflect cultures accurately, and be “current, in good physical condition, and varied in reading levels.”¹¹⁹ Further, the regulations set out numerous standards for “Homeliving Programs,” which refer to Indian boarding schools.¹²⁰

Ultimately, Indian children have a deep-rooted right to education based on both federal and state law. While the state right to education for Indian children is equal to the rights of non-Indian children within each state, the federal right to education for Indian children stems from distinctive federal statutes, regulations, caselaw, and executive orders. Given this strong legal framework, theoretically, Indian children should have access to adequate and equitable school systems. As the next section will discuss, however, this is unfortunately not true.

II. THE CURRENT STATE OF INDIAN EDUCATION

112. 25 C.F.R. § 32.3 (1994).

113. 25 C.F.R. § 36.3 (1994).

114. 25 C.F.R. § 36.11(a) (2005).

115. 25 C.F.R. § 36.20(c) (2005).

116. *Id.*

117. 25 C.F.R. § 36.22 (1994).

118. 25 C.F.R. § 36.40(a)(2)(i)(A) (1994).

119. 25 C.F.R. § 36.41(b) (1994).

120. *See* 25 C.F.R. § 36.70 (2008).

Despite a well-established obligation of the federal government to ensure that Indian children have adequate and equal access to an education, BIE schools—which are tasked with providing quality educational opportunities for Indian children—have historically and are currently failing to fulfill this commitment. Not only is the general education system wholly inadequate, but many students with disabilities are not even able to access the subpar education that is being provided from BIE schools due to the failure to comply with federal disability law.¹²¹ Even Indian children who attend public schools are struggling compared to their non-Native peers.¹²²

Understanding the current state of Indian education is critical for advocates to help identify the flaws behind the current legal framework of Indian education rights. Not only do Indian education rights need to be improved, but its legal framework—including its strengths and weaknesses—should be studied closely as advocates attempt to improve persevering inadequate and inequitable public-school systems. The first part of this section will discuss current research involving Indian education, and the second part of this section will discuss *Stephen C. v. Bureau of Indian Education*,¹²³ which is the first federal civil rights lawsuit that challenges both the general and special education inadequacies at a BIE school.¹²⁴

A. CURRENT RESEARCH REGARDING INDIAN EDUCATION

Today, there are 183 Bureau-funded elementary and secondary schools that serve approximately 46,000 Indian students.¹²⁵ These

121. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-358, INDIAN EDUCATION ACTIONS NEEDED TO ENSURE STUDENTS WITH DISABILITIES RECEIVE SPECIAL EDUCATION SERVICES 1 (2020).

122. See Institute of Education Sciences, NAEP Data Explorer, <https://www.nationsreportcard.gov/ndecore/xplore/NDE> (last visited July 20, 2022).

123. See *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141 (9th Cir. Mar. 16, 2022).

124. See *Key Documents under The Lawsuit*, UNITE FOR NATIVE STUDENTS *STEPHEN C. V. BUREAU OF INDIAN EDUC. – A LAWSUIT TO ADVANCE NATIVE EDUC.*, <http://uniteforativestudents.org/key-documents/> (last visited March 10, 2022).

125. *About Us*, BUREAU OF INDIAN EDUC., <https://www.bie.edu/topic-page/bureau-indian-education> (last visited Sept. 16, 2023).

schools are located on sixty-four reservations in twenty-three states.¹²⁶ BIE schools primarily serve Indian children living on or near reservations, located mainly in rural areas and small towns.¹²⁷ Fifty-five schools are BIE-operated, while 128 are tribally operated through contracts and grants.¹²⁸

Unfortunately, studies of BIE schools are rare and costly to implement for various reasons, including tribal and linguistic diversity, ranging geographic dispersal, and the largely rural nature of tribal schools.¹²⁹ There is also a major lack of data regarding Native children in general due to the exclusion of Native populations from data sets as well as racial misclassifications.¹³⁰ Even when American Indian/Alaska Native data is collected, studies generally fail to disaggregate it.¹³¹ This is especially problematic in the context of Indian education rights because many studies only analyze American Indian/Alaska Native data as a racial group, and fail to provide specific data regarding Native children who meet the legal definition of Indian and, therefore, have a federal right to education. Nonetheless, the few studies that have been produced regarding Indian education are very revealing.

1. BIE ACADEMIC ACHIEVEMENT GAPS

First, there is still a major achievement gap between BIE schools and public schools. In 1995, it was determined that BIE students were “twice as likely as public school students to be retained at least one grade

126. *Id.*

127. U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-934, BIA AND DOD SCHOOLS STUDENT ACHIEVEMENT AND OTHER CHARACTERISTICS OFTEN DIFFER FROM PUBLIC SCHOOLS' 3 (2001) (In 2004, the GAO changed their name from General Accounting Office to Government Accountability Office).

128. *Tribally Controlled Schools*, BUREAU OF INDIAN EDUC., <https://www.bie.edu/topic-page/tribally-controlled-schools> (last visited Feb. 27, 2022).

129. Jonathan M. Lindeen, *BIA Tribal Schools and the No Child Left Behind Act: An Argument for A More Culturally-Sensitive Implementation*, 9 J. GENDER RACE & JUST. 361, 367 (2005).

130. MALIA VILLEGAS ET AL., NAT'L CONG. OF AM. INDIANS, DISAGGREGATING AMERICAN INDIAN & ALASKA NATIVE DATA: A REVIEW OF LITERATURE 5 (2016).

131. *Id.* at 4.

level.”¹³² For the 1999-2000 school year, the U.S. Government Accountability Office (GAO) determined that BIE students scored far below public-school students in states with the largest numbers of BIE schools—North Dakota, South Dakota, and Arizona.¹³³ For example, in South Dakota, the average performance on state assessments for BIE students’ was in the 25th to 28th percentile, while the average performance of public-school students was in the 60th to 67th percentile.¹³⁴ Also, BIE students scored significantly below national average on college admission exams, such as the ACT and SAT.¹³⁵ The average admission exam scores for BIE students were even lower than the average admission exam scores for students from low-income families.¹³⁶ For the 2011-2012 school year, it was also determined that the national average graduation rate was 80%, but the graduation rate for BIE schools was only 53%.¹³⁷ In fact, the graduation rate for BIE schools was lower than any other states’ graduation rate and was even the lowest graduation rate when comparing racial groups in public schools.¹³⁸

More recently, the 2019 National Indian Education Study found that eighth grade students who attend BIE schools consistently scored lower on math and reading than Native students who attend public schools.¹³⁹ This is significant because the National Assessment of Educational Progress (NAEP)—which is the largest nationally representative and continuing assessment of public and private schools in the United States—shows that there is already a major achievement gap for Native students in public schools.¹⁴⁰

2. BIE SCHOOL EXPENDITURES AND FACILITIES

132. Lindeen, *supra* note 129, at 367-68.

133. U.S. GOV’T ACCOUNTABILITY OFF., GAO-01-934, BIA AND DOD SCHOOLS STUDENT ACHIEVEMENT AND OTHER CHARACTERISTICS OFTEN DIFFER FROM PUBLIC SCHOOLS’ 12 (2001).

134. *Id.* at 13.

135. *Id.* at 14.

136. *Id.*

137. Institute of Education Sciences, Public High School Four-Year On-Time Graduation Rates and Event Dropout Rates: School Years 2010-11 and 2011-12, 9-10 (2014).

138. *Id.*

139. Institute of Education Sciences, *supra* note 24.

140. *About NAEP, NAT’L ASSESSMENT OF EDUC. PROGRESS*, <https://nces.ed.gov/nationsreportcard/about/> (last visited March 8, 2022).

GAO studies show serious issues with BIE oversight regarding school expenditures and facilities. Specifically, a 2014 study determined that the BIE does not have sufficient staff with expertise to oversee school expenditures, and that the BIE's processes for oversight do not adequately ensure that funds are spent appropriately.¹⁴¹ For instance, external auditors found \$13.8 million in unallowable spending at twenty-four BIE schools, yet there was minimal follow-up by the BIE regarding misused funds.¹⁴² Another audit found that one BIE school lost approximately \$1.2 million in federal funds because the funds were illegally transferred to an off-shore account.¹⁴³

The devastating physical conditions of BIE schools are also well-recognized. While Senator Barrasso was Chairman of the Senate Committee on Indian Affairs, he explained that “the school conditions many [BIE students] face on a daily basis are deplorable.”¹⁴⁴ Similarly, one House member described that “[t]he details we have learned are shocking: falling ceilings, broken water heaters, electrical hazards, rotten floors, and rodent-infested classrooms. At a school I visited earlier this year, blankets hang over the doors in a desperate attempt to keep out the cold air.”¹⁴⁵ In agreement, a 2016 GAO study concluded that the Department of Interior is not providing BIE schools with support in addressing health and safety concerns and does not even have accurate or complete information regarding the safety and health conditions of BIE school facilities.¹⁴⁶ In fact, even though the BIA's policy requires every BIE school to be inspected for safety and health threats annually, the GAO found that 69 out of 180 BIE schools were not inspected in 2015.¹⁴⁷ Further, fifty-four BIE schools have not been

141. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-121, BUREAU OF INDIAN EDUCATION NEEDS TO IMPROVE OVERSIGHT OF SCHOOL SPENDING 33-34 (2014).

142. *Id.* at 30.

143. *Id.* at 32.

144. *Bureau of Indian Education: Examining Organizational Challenges in Transforming Educational Opportunities for Indian Children: Hearing before the U.S.S. Comm. on Indian Affs.*, 114th Cong. 140-170 (2015) (statement of Sen. John Barrasso).

145. *Examining the Federal Government's Mismanagement of Native American Schools: Hearing before the U.S. H.R. Comm. on Educ. and the Workforce*, 114th Cong. 14 (2015) (statement of Rep. John Kline).

146. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-313, KEY ACTIONS NEEDED TO ENSURE SAFETY AND HEALTH AT INDIAN SCHOOL FACILITIES 12 (2016).

147. *Id.*

inspected in the last four years.¹⁴⁸ The GAO report noted this was especially concerning because many BIE students are housed in the schools' dormitories, living and sleeping on campus throughout the academic year.¹⁴⁹ Also, because of the remote nature of some BIE schools, there could be a serious delay before an emergency response could be provided.¹⁵⁰

Even when BIE schools were inspected, the GAO determined that there is a serious issue with accuracy.¹⁵¹ For example, a BIE school reported that in 2011 the regional safety inspector conducted his inspection from his vehicle and did not inspect the interior of the school's facilities, which included thirty-four buildings.¹⁵² The inspector's report was one page long and determined there were no deficiencies inside any of the buildings.¹⁵³ Since the BIE school officials were concerned with the inspection, they arranged for another inspection with the Department of Health and Human Services.¹⁵⁴ Unlike the Department of Interior's inspection, the Department of Health and Human Services identified multiple serious safety and health problems including electrical shock hazards, emergency lighting and fire alarms that did not work, and fire doors that were difficult to open or close.¹⁵⁵

The GAO also identified incidents where an inspection did occur, but there was a failure in oversight and assistance to ensure that deficiencies were actually repaired.¹⁵⁶ Most concerning was a school that had seven boilers which failed inspections in 2015 due to elevated levels of carbon monoxide and natural gas leaks.¹⁵⁷ Four of these boilers were located in student dormitories, while three were located in classroom buildings.¹⁵⁸ The inspection determined the deficient boilers were "critical hazards that posed an imminent danger to life and health" and, therefore, needed to be addressed within one-day.¹⁵⁹ The inspection

148. *Id.* at 13.

149. *Id.*

150. *Id.*

151. *Id.* at 18.

152. *Id.*

153. *Id.* at 18-19.

154. *Id.* at 19.

155. *Id.* at 22.

156. *Id.*

157. *Id.* at 24.

158. *Id.*

159. *Id.*

also identified a gas leak affecting one of the dormitory boilers, which was required to be addressed within fifteen days.¹⁶⁰ Despite these poisonous gas and explosion hazards, students were not evacuated until approximately six months after the inspection, and the repairs were not complete until approximately eight months after the inspection.¹⁶¹ Ultimately, the GAO noted many factors contributing to the failure to address safety and health deficiencies in BIE schools, including limited staff capacity, difficulties in using the Indian Affairs' facility data system, limited maintenance funding, limited operations funding which causes schools to pull from maintenance funds, and limited assistance from the BIA regarding facility repairs.¹⁶²

3. *BIE SPECIAL EDUCATION SERVICES AND ACCOMMODATIONS*

While there are no studies regarding Section 504 compliance at BIE schools, a GAO study did reveal that BIE schools largely fail to provide services and accommodations to children with disabilities as required by IDEA.¹⁶³ During the 2017-2018 school year, the GAO analyzed 138 students from thirty randomly selected schools who had Individualized Education Plans (IEPs) under IDEA.¹⁶⁴ This study determined that BIE schools did not provide or did not account for almost 40% of the time for special education and services as required by the students' IEPs.¹⁶⁵ It should be noted that the study relied on service logs which are self-reported by school personnel or service contractors.¹⁶⁶ Therefore, the study was limited in that it could not determine the accuracy of the service logs, or whether the services were actually provided. The study was also limited in that it could not evaluate whether the IEPs were written adequately in the first place. As a result of the BIE's continued non-compliance with IDEA, the Department of Education even withheld 20% of the BIE's fiscal year 2019 IDEA Part B funds that were

160. *Id.*

161. *Id.*

162. *Id.* at 25-26.

163. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-358, INDIAN EDUCATION ACTIONS NEEDED TO ENSURE STUDENTS WITH DISABILITIES RECEIVE SPECIAL EDUCATION SERVICES I (2020).

164. *Id.* at 2.

165. *Id.* at 14.

166. *Id.* at 2.

reserved for administration costs.¹⁶⁷ Considering the similar nature of IDEA compliance and Section 504 compliance, it is likely that BIE schools are largely non-compliant with Section 504 requirements as well.¹⁶⁸

4. *BIE RECENT CHALLENGES RESULTING FROM COVID-19*

It should also be considered that the effects of COVID-19 on BIE schools will likely not be fully apparent for some time. At this point, it is clear that Native communities were disproportionately impacted by COVID-19. For instance, a recent study found that 1 out of every 168 Native children experienced orphanhood or death of a caregiver due to the pandemic, compared to 1 of every 310 Black children, and 1 of 753 white children.¹⁶⁹ Moreover, BIE schools were in no way prepared for addressing COVID-19 and distance learning. Indian education was placed on the GAO's "High-Risk List" shortly before the pandemic in 2017, and also appears on the GAO 2021 High-Risk Series report that is titled, "Dedicated Leadership Needed to Address Limited Progress in Most High-Risk Areas."¹⁷⁰ The 2021 GAO report revealed 33% of all BIE staff positions were *still* vacant.¹⁷¹ Further, many of these vacancies involve key leadership positions in offices supporting and overseeing BIE schools.¹⁷²

Unsurprisingly, the GAO has already identified BIE deficiencies in providing distance learning following the COVID-19 school closures in March of 2020.¹⁷³ The GAO concluded that the BIE failed to provide comprehensive guidance to schools on distance learning.¹⁷⁴ The GAO

167. *Id.* at 12.

168. *See, e.g.*, Stephen C. v. Bureau of Indian Educ., No. 21-15097, 2022 WL 808141 (9th Cir. Mar. 16, 2022).

169. Susan D. Hills et al., *COVID-19-Associated Orphanhood and Caregiver Death in the United States*, 148 PEDIATRICS 1, 7 (2021) (available at <https://publications.aap.org/pediatrics/article/148/6/e2021053760/183446/COVID-19-Associated-Orphanhood-and-Caregiver-Death>).

170. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-119 SP, HIGH-RISK SERIES DEDICATED LEADERSHIP NEEDED TO ADDRESS LIMITED PROGRESS IN MOST HIGH-RISK AREAS 108 (2021).

171. *Id.* at 109.

172. *Id.*

173. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-492T, INDIAN EDUCATION SCHOOLS NEED MORE ASSISTANCE TO PROVIDE DISTANCE LEARNING 1 (2016) (statement of Melissa Emrey-Arras).

174. *Id.* at 23.

also determined that the BIE failed to respond timely to BIE schools' technology needs.¹⁷⁵ For illustration, BIE schools have faced longstanding challenges with technology and access to broadband internet.¹⁷⁶ In 2018 the Federal Communications Commission reported that "28% of Americans living on tribal lands did not have access to broadband services, compared to 6% of all Americans."¹⁷⁷ Similarly, 47% of Americans living on rural tribal lands did not have fixed broadband or mobile access, compared to 23% of rural Americans overall.¹⁷⁸

While the BIE used the CARES Act and other funds to improve internet access during the pandemic by distributing wi-fi hotspots to BIE students, most BIE students still did not have a device to access online distance learning.¹⁷⁹ The BIE did not order laptops for students until September of 2020.¹⁸⁰ By December 2020, over 80% of the laptops ordered had still not been distributed to the BIE students, and by March 26, 2021—approximately one year after school buildings began closing for COVID-19—nearly 20% of the laptops were still not distributed to BIE students.¹⁸¹ As a result of these ongoing accessibility problems, it is fair to assume that the achievement gap between BIE schools and public schools is only widening.

Accessibility problems with distance learning are especially concerning for BIE students with disabilities. In response to COVID-19, the U.S. Department of Education started allowing schools to provide special education services to students through distance learning.¹⁸² Therefore, without accessibility to online learning, BIE students with disabilities may not have been receiving any of the services required by their IEP, such as occupational therapy, speech-language services, psychological and counseling services, or audiology services. Even when online learning is accessible for students with

175. *Id.*

176. *Id.* at 6.

177. *Id.* (source cites FEDERAL COMMUNICATIONS COMMISSION, FCC 20-50, 2020 BROADBAND DEPLOYMENT REPORT 34).

178. *Id.*

179. *Id.* at 17.

180. *Id.* at 18.

181. *Id.* at 19-20.

182. Candi Running Bear et al., *Challenges for Rural Native American Students With Disabilities During COVID-19*, 40(2) RURAL SPECIAL EDUC. Q. 60, 63 (2021).

disabilities, the student's unique needs may make it challenging for them to use technology and many services cannot effectively be provided via online learning because they require intense one-on-one interactions between the student and staff member.¹⁸³ There is also concern that schools have been ignoring or struggling to fulfill their "find-and-evaluate" obligations under IDEA during distance learning and, therefore, failing to determine if a child with a disability needs services or accommodations in the first place.¹⁸⁴

5. NATIVE STUDENTS IN PUBLIC SCHOOLS

Ninety percent of Native students attend public schools instead of BIE schools.¹⁸⁵ Unfortunately, the state of Indian education within public schools is also distressing. A 2004 report found that nationally Native students are 117% more likely to drop out of school compared to their white peers.¹⁸⁶ Although, this was just the average. In South Dakota, for example, Native students are 237% more likely to drop out of school than their white peers.¹⁸⁷ According to NAEP, only 59% of eighth grade Native students are reading at or above grade level, compared to 72% of all students and 81% of white students.¹⁸⁸ Likewise, only 52% of eighth grade Native students are at or above grade level in math, compared to 68% of all students and 79% of white students.¹⁸⁹

School discipline disparities are especially concerning in public schools. The U.S. Commission on Civil Rights found that Native students, along with Black students and Latino students, "do not commit more disciplinable offenses than their white peers, but . . . receive

183. Allan G. Osborne & Charles J. Russo, *Providing A FAPE During the Covid-19 Pandemic*, 385 ED. L. REP. 1, 1 (2021).

184. Kevin P. Shields & Jennifer Swanson, *A Transformative Year for Students with Disabilities*, 58 HOUS. LAW. 22, 24 (2021).

185. *Education under Education, Health & Human Services under Policy Issues*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/education-health-human-services/education> (last visited July 20, 2022).

186. NAT'L CAUCUS OF NATIVE AM. STATE LEGS., STRIVING TO ACHIEVE: HELPING NATIVE AMERICAN STUDENTS SUCCEED, 14 (2008) (available at <https://documents.ncsl.org/wwwncsl/LegislativeStaff/Quad-Caucus/strivingtoachieve.pdf>).

187. *Id.*

188. See Institute of Education Sciences, NAEP Data Explorer, <https://www.nationsreportcard.gov/ndecore/xplore/NDE> (last visited July 20, 2022).

189. *Id.*

substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers for like offenses.”¹⁹⁰ Similarly, Native students with disabilities are 3.5 times more likely to receive multiple out-of-school suspensions and three times more likely to be expelled compared to white students with disabilities.¹⁹¹

Additionally, states still struggle to meet special education requirements. According to the 2021 Annual Report to Congress on the Implementation of IDEA, only twenty-two states are in full compliance with IDEA’s Part B requirements based on state data from 2018, which was before distance learning and COVID-19 became an issue.¹⁹² Also alarmingly, Native students are 70% more likely to be identified as having a disability compared to white students.¹⁹³ For comparison, Black children are 40% more likely to be identified with a disability than white students.¹⁹⁴ Although, there is some tension regarding this statistic.¹⁹⁵ Some scholars argue that the overrepresentation is discrimination based on misinterpreting cultural or linguistic differences as learning disabilities.¹⁹⁶ In contrast, other education researchers argue that the overrepresentation is not discrimination, but a result of other factors such as low socioeconomic status or lack of access to early intervention services.¹⁹⁷

190. U.S. COMM’N ON CIVIL RIGHTS, BEYOND SUSPENSIONS EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 10 (2019) (available at <https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf>).

191. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS OF DISABILITIES 73 (2018).

192. See U.S. DEP’T. OF EDUC., 43RD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2021 221 (available at <https://sites.ed.gov/idea/files/43rd-arc-for-idea.pdf>).

193. Kristen Harper, *5 things to know about racial and ethnic disparities in special education*, CHILD TRENDS (Jan. 12, 2017), <https://www.childtrends.org/publications/5-things-to-know-about-racial-and-ethnic-disparities-in-special-education>.

194. *Id.*

195. U.S. COMM’N ON CIVIL RIGHTS, BEYOND SUSPENSIONS EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 100-01 (2019) (available at <https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf>).

196. *Id.*

197. *Id.*

B. *STEPHEN C. V. BUREAU OF INDIAN EDUCATION*

*Stephen C. v. Bureau of Indian Education*¹⁹⁸ was filed in 2017 as the first federal civil rights lawsuit that challenges both the general and special education inadequacies at a BIE school.¹⁹⁹ *Stephen C. v. Bureau of Indian Education* is focused on one school, Havasupai Elementary School, which is funded and operated by the BIE.²⁰⁰ Havasupai Elementary School is located on the Havasupai Reservation in Supai, Arizona, which is eight miles down from the rim of the Grand Canyon.²⁰¹ The Havasupai Tribe initially had land at the bottom and the top of the Grand Canyon; however, in the 1880s the federal government designated only the bottom of the Grand Canyon as the Havasupai Tribe's reservation, and began forcibly removing tribal members whose homes were outside of that designated area.²⁰² Consequently, Havasupai Elementary School is considered "the most isolated and remote school in the lower 48 states,"²⁰³ and has been described as the lowest performing BIE school.²⁰⁴ Estimates show that less than 20% of students at Havasupai Elementary School later graduate from high school.²⁰⁵ During the 2010-2011 school year, it was also determined that 90% of Havasupai Elementary School students were identified as needing special education services.²⁰⁶ Havasupai Elementary School serves students in kindergarten through eighth grade, and is the only available

198. See generally *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141 (9th Cir. Mar. 16, 2022).

199. See *Key Documents under The Lawsuit*, *supra* note 124.

200. Third Amended Complaint for Declaratory and Injunctive Relief at 10, *Stephen C. v. Bureau of Indian Educ.*, 2022 WL 808141 (9th Cir. Mar. 16, 2022) (No. 21-15097).

201. See *Frequently Asked Questions*, UNITE FOR NATIVE STUDENTS *STEPHEN C. V. BUREAU OF INDIAN EDUC. – A LAWSUIT TO ADVANCE NATIVE EDUC.*, <http://unitefornativestudents.org/faqs/> (last visited March 10, 2022).

202. See Brief of Amicus Curiae The Havasupai Tribe, *Stephen C. v. Bureau of Indian Educ.*, 2022 WL 808141 (9th Cir. Mar. 16, 2022) (No. 21-15097).

203. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2018 WL 1871457 at *5 (D. Ariz. Mar. 29, 2018).

204. *Books for a Reservation Elementary School – Havasupai Elementary School (K-8) (Havasupai)*, FRIENDS OF PINE RIDGE RSRV., <https://friendsofpineridgereservation.org/book-drives/books-for-a-reservation-elementary-school-havasupai-elementary-school-k-8/> (last visited Mar. 10, 2022).

205. Third Amended Complaint for Declaratory and Injunctive Relief, *supra* note 200, at 53.

206. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2018 WL 1871457 at *5 (D. Ariz. Mar. 29, 2018).

option for the student Plaintiffs in *Stephen C. v. Bureau of Indian Education* to obtain an education within their community.²⁰⁷

Plaintiffs in *Stephen C. v. Bureau of Indian Education*, which includes twelve Havasupai students and the Native American Disability Law Center, filed suit in order “to correct longstanding educational deprivations that have for years denied Havasupai children meaningful and equitable educational opportunity.”²⁰⁸ The Defendants in *Stephen C. v. Bureau of Indian Education* includes the BIE, the U.S. Department of Interior, and various federal officials.²⁰⁹ Ultimately, Plaintiffs have alleged six causes of action.²¹⁰

Counts I and II involve the Defendants failure to provide an adequate general education as required by the federal right to education for Indian children.²¹¹ In support, Plaintiffs allege that “Defendants have consistently failed to ensure that Havasupai Elementary School is adequately staffed.”²¹² The complaint explains that “[t]eacher vacancies have been covered by adults who lack teaching credentials...by temporary BIE instructors who rotate through the position on two-week details, and by combining multiple grade levels into one classroom.”²¹³ Even the school janitor, the school secretary, and sometimes even older children would help “teach” in response to these vacancies.²¹⁴ At one point, a single teacher was tasked with teaching every student in grades four through eight, causing the teacher to have to travel back and forth between classrooms during the school day.²¹⁵ These staffing shortages repeatedly caused the school to end the school day early, and even shutdown altogether sometimes for weeks at a time.²¹⁶ Even when the school was operating, the lack of supervision fueled unsafe behaviors ranging from bullying to physical and sexual assault.²¹⁷

207. Third Amended Complaint for Declaratory and Injunctive Relief, *supra* note 200, at 2.

208. *Id.*

209. *Id.*

210. *Id.* at 56-68.

211. *Id.* at 56-60.

212. *Id.* at 41.

213. *Id.*

214. *Id.*

215. *Id.* at 42.

216. *Id.* at 42-43.

217. *Id.*

In addition to severe understaffing, Havasupai Elementary School only provided instruction in math, reading, and writing.²¹⁸ Despite extensive curriculum requirements, there was not *any* instruction in social studies, fine arts, science, computer literacy, or career exploration and orientation.²¹⁹ Defendants failed to provide a functioning library, adequate textbooks and instruction materials, at least yearly fieldtrips, or any extracurricular activities.²²⁰ Defendants also did not provide behavioral health services, communicate policies and disciplinary procedures to students and families, or establish procedures for dispute resolution or formal disciplinary hearings.²²¹ Lastly, Defendants failed to evaluate the students' learning styles, assess English and native language abilities, provide instruction in the Havasupai language, or include aspects of Havasupai culture in the curriculum as required.²²²

The remaining claims, Counts III, IV, V, and VI, involve the Defendant's failure to comply with special education law under Section 504 of the Rehabilitation Act and its implementing regulations.²²³ Count III, which is the more standard claim, alleges a failure to provide special education for Plaintiffs with disabilities.²²⁴ The complaint explains that the Defendants failed to employ a sufficient number of qualified special education teachers or provide a special education classroom.²²⁵ Havasupai Elementary School does not even have an occupational therapist, physical therapist, or speech therapist.²²⁶ Additionally, students with disabilities are repeatedly excluded from the classroom in violation of Section 504 via suspensions.²²⁷

Counts IV, V, and VI, on the other hand, present a momentous argument that has only been raised once before.²²⁸ Uniquely, in Count IV, Plaintiffs claim that as a part of the school's failure to establish a system to deliver specialized instruction, the school failed to provide special education services to students whose ability to learn has been

218. *Id.* at 57.

219. *Id.* at 57.

220. *Id.* at 57-58.

221. *Id.* at 58.

222. *Id.*

223. *Id.* at 60-67.

224. *Id.* at 61.

225. *Id.*

226. *Id.*

227. *Id.* at 61-62.

228. *See* P.P. v. Compton Unified Sch. Dist., 135 F.Supp.3d 1098 (C.D. Cal. 2015).

impacted by exposure to childhood adversity or complex trauma.²²⁹ The definition of a “disability” under Section 504 is a “physical or mental impairment that substantially limits one or more life activities,” such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, *learning, reading, concentrating, thinking, communicating,* and working.”²³⁰ Pointing to this definition, Plaintiffs argue that complex trauma is a disability because it physically alters an individual’s brain structure and limits an individual’s “ability to learn, read, concentrate, think, communicate, and to generally receive an education and have the opportunity to succeed in school.”²³¹

For example, the complaint further explains that Stephen C.’s adversity “consists of long-term, repeated, ongoing, and overlapping stressors,” and Stephen C. has experienced “historical trauma, including family experience with boarding schools, which has . . . contributed to present day adversity.”²³² As a result, Plaintiffs contend that Stephen C., and other Plaintiffs with complex trauma, are eligible for special education services on this basis alone; and these services should include behavioral health resources, mental health resources, and culturally relevant interventions.²³³ Likewise, Counts V and VI involved the failure to locate, identify, and implement procedural safeguards to Havasupai students who are not receiving an adequate education on account of their disabilities, including disabilities related to complex trauma and its effects.²³⁴

In 2018, Count IV survived a motion to dismiss.²³⁵ In a historic decision, the district court declared that the “Plaintiffs have adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities within the meaning of Section 504 of the Rehabilitation

229. Third Amended Complaint for Declaratory and Injunctive Relief, *supra* note 200, at 64.

230. 42 U.S.C.A. § 12102(1)(A), (2)(A) (2009) (emphasis added).

231. Third Amended Complaint for Declaratory and Injunctive Relief, *supra* note 200, at 63.

232. *Id.* at 15.

233. *Id.* at 63.

234. *Id.* at 65-67.

235. Stephen C. v. Bureau of Indian Educ., No. CV-17-08004-PCT-SPL, 2018 U.S. Dist. LEXIS 68083 at *17 (D. Ariz. Mar. 29, 2018).

Act.”²³⁶ Therefore, the district court established that the Plaintiffs were disabled under Section 504 “by virtue of their exposure to complex trauma and adversity, including, but not limited to: ‘experiences of physical and sexual violence, involvement in the child welfare and juvenile justice systems, alcohol and substance abuse in the family and community, extreme poverty, denial of access to education, and historical trauma.’”²³⁷ However, the district court also held that five of the student Plaintiffs did not have standing because these Plaintiffs were no longer enrolled at Havasupai Elementary School.²³⁸

In December of 2019, though, the remaining Plaintiffs lost all of their viable claims. The district court held that the general education claims (Counts I and II) were barred by the Administrative Procedure Act (APA), reasoning that Plaintiffs failed to “identify a final, discrete agency action that is reviewable by the Court,” and that “Plaintiffs’ challenges, when aggregated, rise to the level of an impermissible, systematic challenge under the APA that should not be resolved by the courts.”²³⁹ For this holding, the district court relied on the Supreme Court decision *Lujan v. National Wildlife Federation*²⁴⁰ to determine that “plaintiff cannot seek ‘wholesale’ improvement of an agency program under the APA through the courts.”²⁴¹ The district court also dismissed Count III on the grounds that Plaintiffs’ claims were moot because they no longer attend Havasupai Elementary School.²⁴² The crux of this decision depended on whether Plaintiffs still had an effective remedy if they no longer attended Havasupai Elementary School.²⁴³ Plaintiffs argued that they still qualified for the equitable remedy of compensatory education, which is designed to make up for “educational services the child should have received in the first place.”²⁴⁴ The court held, however, that Plaintiffs did not have any

236. *Id.* at 14.

237. *Id.* at 11-12.

238. *Id.* at 9.

239. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2019 WL 6875496 at *3 (D. Ariz. Dec. 17, 2019).

240. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

241. *Stephen C. v. Bureau of Indian Educ.*, 2019 WL 6875496 at *2.

242. *Id.* at 7.

243. *Id.*

244. Appellants’ Reply Brief at 21, *Stephen C. v. Bureau of Indian Educ.*, (No. 21-15097), 2021 WL 5513542 (citing *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011)).

effective relief.²⁴⁵ Therefore, the court concluded that compensatory education is not an equitable remedy, but rather money damages which are barred by the APA.²⁴⁶

Concerningly, the special education claims were also dismissed on the grounds that Section 504 does not apply to BIE schools at all.²⁴⁷ However, following a request for partial relief in May of 2020, the district court held that dismissing Counts III and IV regarding the special education claims was “manifest error.”²⁴⁸ The court clarified that Section 504 does apply to BIE schools.²⁴⁹ The Department of Education’s regulations implementing Section 504 do not apply to BIE schools, but the BIE is still subject to the U.S. Department of Interior’s implementing regulations.²⁵⁰ The court then granted summary judgment for Plaintiffs on Count III because it was not disputed that Defendants violated Section 504.²⁵¹ The court also denied Defendant’s request for summary judgment on Count IV because the “reasonableness” of trauma-informed accommodations is a factual issue.²⁵² Therefore, Plaintiffs still had two viable claims—Counts III and IV.

On September 28, 2020, the district court approved a landmark settlement agreement between Plaintiffs and Defendants on Counts III and IV regarding the special education non-compliance. As part of the settlement agreement, Defendants agreed to allocate \$240,000 to the twelve student Plaintiffs for compensatory educational services, which amounts to \$20,000 per student Plaintiff.²⁵³ Additionally, Defendants agreed to pay up to \$35,000 for an independent and neutral monitor to review Havasupai Elementary School’s compliance with Section 504.²⁵⁴ The monitor would have access to school records, would be allowed to

245. *Stephen C. v. Bureau of Indian Educ.*, 2019 WL 6875496 at *7.

246. Appellants’ Reply Brief, *supra* note 244, at 23.

247. *Stephen C. v. Bureau of Indian Educ.*, 2019 WL 6875496 at *6.

248. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2020 WL 2319976, at *3 (D. Ariz. May 8, 2020).

249. *Id.*

250. *Id.*

251. *Id.* at 3.

252. *Id.*

253. See Settlement Agreement between Plaintiffs Taylor P. et al. and Bureau of Indian Education et al. (2020) <https://www.bie.edu/sites/default/files/inline-files/stephen%20settlement%20agreement%209.24.20%20FINAL%20%28fully%20executed%29.pdf> (last visited March 26, 2022).

254. *Id.* at 2.

visit Havasupai Elementary School every sixth months, and would provide a compliance report to the parties every sixth months for the next three years.²⁵⁵ Defendants also agreed to develop an initial compliance plan and corrective action plan with the monitor and with consideration of Plaintiffs comments and recommendations.²⁵⁶ Lastly, Defendants agreed to pay Plaintiffs \$725,000 for attorney fees and costs.²⁵⁷ The settlement agreement and corrective action plan are posted on the BIE's website.²⁵⁸

After the settlement agreement was entered on the special education claims (Counts III and IV), Plaintiffs filed an appeal to the Ninth Circuit Court on the general education claims (Counts I and II) and the decision to dismiss Plaintiffs on the basis that their claims are moot.²⁵⁹ On March 16, 2022, the Ninth Circuit reversed and remanded the case, explaining that the district court erred in relying on *Lujan v. National Wildlife Federation*²⁶⁰ because “*Lujan* did not foreclose judicial intervention whenever such intervention might result in sweeping changes to an agency program.”²⁶¹ The Ninth Circuit recognized that a court can only compel agency action under the APA when an agency fails to take “‘a specific, unequivocal command’ placed on the agency to take ‘discrete agency action.’”²⁶² Nonetheless, it explained that the Plaintiffs met this burden in identifying thirteen regulations under the Indian Education Act that Defendants “unlawfully withheld or unreasonably delayed” at Havasupai Elementary School.²⁶³ The Ninth Circuit also reversed the decision that the Plaintiffs claims were moot.²⁶⁴ The Ninth Circuit reasoned that compensatory education qualifies as an equitable remedy, which is not barred by the APA’s “seeking relief other than money damages” requirement under 5 U.S.C. § 702.²⁶⁵ Therefore, Plaintiffs are

255. *Id.* at 2-3.

256. *Id.*

257. *Id.*

258. *B.I.E. Students and Section 504*, BUREAU OF INDIAN EDUC., <https://www.bie.edu/landing-page/504-plans> (last visited March 26, 2022).

259. *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141 at *2 (9th Cir. Mar. 16, 2022).

260. *See generally* *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

261. *Stephen C. v. Bureau of Indian Educ.*, 2022 WL 808141 at *2.

262. *Id.* at *1 (*citing* *Viet. Veterans of Am. v. C.I.A.*, 811 F.3d 1068, 1075 (9th Cir. 2016); 5 U.S.C. § 706(1); 25 C.F.R. Pt. 36)).

263. *Id.*

264. *Id.* at 2.

265. *Id.*

now able to proceed with the general education claims (Counts I and II) at the district court level.

While the outcome of *Stephen C. v. Bureau of Indian Education* is promising for Indian education, it should not go unnoticed how difficult it can be to hold a BIE school accountable even when the facts of the case are very straightforward. After extensive litigation, the Plaintiffs ultimately prevailed on two of the special education claims; however, special education compliance is still an issue at Havasupai Elementary School even with the settlement agreement and increased oversight.²⁶⁶ Additionally, as of June of 2022, the general education claims have still not been resolved despite the case initially being filed in 2017.

III. IMPROVING INADEQUATE AND INEQUITABLE PUBLIC SCHOOLS

It is vital that education advocates understand Indian education rights for two reasons. First, BIE schools should not be left behind in efforts to improve education and schools, especially considering the federal government's need to address its early role in Indian education and its lasting harms. Second, countless lessons can be learned from prior efforts to improve Indian education that can be utilized to help ensure a more effective outcome for public schools. These lessons are critical as state courts have once again become hostile towards school finance litigation, and education advocates continue to struggle to hold inadequate and inequitable public-schools accountable. Therefore, this section will begin to explore what education advocates can learn from Indian education rights in addressing inadequate and inequitable public schools. The first part of this section will discuss creating a federal right to education for all children within the United States with consideration of the federal right to education for Indian children. The second part of this section will then consider the potential for improving schools by

266. See Rebecca Youngman, HAVASUPAI ELEMENTARY SCHOOL SECTION 504 COMPLIANCE PLAN INDEPENDENT MONITOR REPORT 2 (2021) (the July 23, 2021, compliance report revealed that Havasupai Elementary School was not providing any special education services under Section 504 of the Rehabilitation Act due to COVID-19).

addressing trauma as a part of special education compliance following the *Stephen C. v. Bureau of Indian Education* case.

A. CREATING A FEDERAL RIGHT TO EDUCATION FOR ALL CHILDREN IN THE UNITED STATES

The Ninth Circuit's holding in *Stephen C. v. Bureau of Indian Education*²⁶⁷ proves monumental in showing that a federal right to education, despite its flaws, can be an effective means to improve inadequate and inequitable schools. In effect, the Ninth Circuit invited federal accountability by establishing that general education claims involving BIE schools can be brought in federal court.²⁶⁸ Therefore, not only is the federal government likely to be held accountable for not providing an adequate education at Havasupai Elementary School, but the federal government could also have to face its shortcomings with every other BIE school through similar lawsuits. In fact, given the very rural nature and limited research of BIE schools, federal lawsuits could play an important role in raising awareness of the federal government's failure to provide an adequate education to Indian children. As shown by *Stephen C. v. Bureau of Indian Education*, even injustices that are occurring at an elementary school—which has less than 400 students and is located at the bottom of the Grand Canyon²⁶⁹—can gain national attention from education and Indian law scholars and supporters through a federal lawsuit.

In agreement, education scholars and advocates argue that recognizing a federal right to education for all children in the United States would help improve inadequate and inequitable public schools. Where many scholars and advocates disagree, however, is how this federal right to education should be recognized. Essentially, three broader avenues could recognize a federal right to education: (1) the U.S. Supreme Court could recognize a federal right to education based on existing law, (2) Congress could pass a federal statute establishing a federal right to education, or (3) Congress could pass a constitutional amendment creating a federal right to education.

267. See generally *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141 (9th Cir. Mar. 16, 2022).

268. See *Id.*

269. *Frequently Asked Questions*, *supra* note 201.

In considering the avenues for recognizing a federal right to education, advocates should consider that, despite Indian children having a federal right to education, BIE schools are in much worse conditions than public schools and there is a major achievement gap among Native students and non-native students in public schools. Even though the *Stephen C.* case shows that the federal right to education for Indian children has massive potential, these discrepancies still indicate that it is one thing for the federal government to explicitly commit to guaranteeing education, and another thing for it to actually ensure adequate and equitable educational opportunities. Thus, *how* a federal right to education is created may be key to actually improving schools. There is a lot that advocates can learn from the history of Indian education rights in deciding whether to pursue a U.S. Supreme Court decision, a federal statute, or a constitutional amendment to establish a federal right to education. This section only begins to analyze this deeply unexplored relationship between Indian education rights and how a federal right to education should be created to improve public schools.

1. ***RECOGNIZING A FEDERAL RIGHT TO EDUCATION BASED ON EXISTING LAW***

One challenge with recognizing a constitutional federal right to education is that the U.S. Constitution does not actually contain the word “education”; therefore, the U.S. Supreme Court would need to be convinced that a right to education is implied by the U.S. Constitution. The leading theories for recognizing an implied right to education involve the Fourteenth Amendment to the U.S. Constitution.²⁷⁰

Under the Equal Protection approach, scholars argue that education is an implied ‘fundamental right’ protected by the Fourteenth Amendment’s requirement for “equal protection of the laws.”²⁷¹ The idea here is that states have declared a constitutional right to education and, as a result, citizens cannot be treated differently in regard to state

270. U.S. CONST. amend. XIV, § 1.

271. Derek W. Black, *Implying a Federal Constitutional Right to Education in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 135, 147 (Kimberly Jenkins Robinson ed., 2019).

education rights.²⁷² In effect, state law sets the minimum standard for educational opportunity, and a federal right to education would ensure equal access to these opportunities.²⁷³ Notably, recognizing education as an implied fundamental right would require the court to apply a heightened scrutiny standard of review, which would make it significantly easier for student plaintiffs to prevail on equal protection grounds.²⁷⁴ This approach is problematic, however, because it fails to ensure an adequate education. Also, the U.S. Supreme Court might only apply an intermediate scrutiny standard of review, which would seriously limit its effectiveness.

Under the Due Process approach, scholars argue that a federal right to education can be recognized by the Fourteenth Amendment's requirement that states cannot "deprive any person of life, liberty, or property, without due process of law."²⁷⁵ For example, the U.S. Supreme Court has recognized an implied right to marry under the Due Process Clause of the Fourteenth Amendment because the "right to marry . . . draws meaning from related rights of childrearing, procreation and education," all of which are a "central part" of "the liberty protected by the Due Process Clause."²⁷⁶

The citizenship approach, in contrast, draws on the United States unique history with education. Scholars argue that the citizenship clause of the Fourteenth Amendment—that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside"²⁷⁷—was specifically intended to guarantee education as a right of state citizenship.²⁷⁸ This intent is mainly demonstrated by Congress's requirement for states to rewrite their constitutions after the civil war so that they would include an explicit right to education.²⁷⁹ Congress even made this education requirement a condition to be readmitted to the Union.²⁸⁰ Therefore, the right to education is implied as a part of state

272. *Id.* at 139.

273. *Id.*

274. *Id.*

275. Black, *supra* note 271, at 177.

276. *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

277. U.S. CONST. amend. XIV, § 1.

278. Black, *supra* note 271, at 149.

279. *Id.* at 148-49.

280. *Id.* at 149.

citizenship, and state citizenship is guaranteed by the Fourteenth Amendment.

The main problem with recognizing an implicit right to education in the U.S. Constitution is that the U.S. Supreme Court has previously declined to do so. In 1954, in *Brown v. Board of Education*,²⁸¹ the Supreme Court only determined that a right to education must be provided on equal terms “where the state has undertaken to provide it.” Moreover, in *San Antonio Independent School District v. Rodriguez*,²⁸² the plaintiffs argued that education was implicit in the U.S. Constitution’s right to free speech, or alternatively, the U.S. Constitution’s right to vote; but, the Supreme Court rejected both of these arguments.²⁸³ Significantly, in *Rodriguez*, the U.S. Supreme Court specifically held that there was not “any basis for saying [education] is implicitly so protected.”²⁸⁴ Following *Rodriguez*, the Supreme Court has demonstrated an even greater reluctance to recognize implicit rights from the U.S. Constitution.²⁸⁵

Recent cases have sought to avoid *Rodriguez*’s bar to federal challenges involving inadequate education but have had mixed results. In *Gary B. v. Whitmer*,²⁸⁶ the Sixth Circuit held that a right to literacy is a fundamental federal right under the Due Process Clause to the U.S. Constitution and that literacy requires adequate facilities, teaching, and educational materials. Although, after the decision the Sixth Circuit announced that it would rehear the decision *en banc*, which vacated the initial holding and usually indicates a reversal is forthcoming.²⁸⁷ Fortunately, before the *en banc* hearing, the parties settled and the case

281. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

282. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

283. *Id.* at 35-36.

284. *Id.*

285. *See e.g.*, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. (2022) (*citing San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)) (holding that there is not a constitutional right to an abortion).

286. *Gary B. v. Whitmer*, 957 F.3d 616, 660 (6th Cir. 2020).

287. Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, SIXTH CIR. APP. BLOG (June 11, 2020), <https://www.sixthcircuitappellateblog.com/case-updates/sixth-circuit-vacates-right-to-literacy-ruling/>.

was dismissed.²⁸⁸ Similarly, plaintiffs in *A.C. v. Mckee*²⁸⁹ argued that there is a fundamental right to a civics education, but the First Circuit rejected this argument.

Gary B. v. Whitmer and *A.C. v. Mckee* present creative arguments for avoiding *Rodriguez* and recognizing an implicit federal right to education in the U.S. Constitution. However, the plaintiffs in these cases failed to take advantage of arguments stemming from Indian education rights. For example, the federal right to education for Indian children was initially established by treaties between the federal government and tribal nations.²⁹⁰ Being careful not to diminish the federal-tribal trust responsibility, education advocates could argue that a comparable international obligation exists for all children in the United States based on other U.S. treaty obligations or customary international law. After all, in the ISDEAA, Congress declared that “true self-determination *in any society* of people is dependent upon an educational process which will ensure the development of qualified people to fulfill meaningful leadership roles.”²⁹¹

Moreover, *Meyers v. Board of Education* suggests that the federal government may have a “moral obligation” to provide Indian education which it had “voluntarily assumed.”²⁹² The court did not have to address this issue because it held that, regardless of a potential moral obligation, Indian children have a federal right to education based on federal statutes.²⁹³ Consequently, advocates could argue that the federal government voluntarily assumed a moral obligation to ensure an adequate education for all children in the United States. In support, the federal government has been extensively involved in public education, just as it has been in Indian education. Congress has enacted numerous legislation involving public education, including the “GI Bill of Rights” in 1944, the National Defense Education Act in 1958, the Elementary and Secondary Education Act in 1965, the Individuals with Disabilities Education Act in 1975, the No Child Left Behind Act in 2001, the

288. See Press Release, Gov. Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020) (available at <https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b--literacy-case>).

289. *A.C. v. Mckee*, 23 F.4th 37, 41 (1st Cir. 2022).

290. See *Worcester v. Georgia*, 31 U.S. 515, 557 (1832).

291. 25 U.S.C.A. § 5301(b)(1) (2016) (emphasis added).

292. *Meyers v. Bd. of Educ. of the San Juan Sch. Dist.*, 905 F. Supp. 1544, 1561-62 (1995).

293. *Id.*

National Assessment of Educational Progress Act in 1969, and the Every Student Succeeds Act in 2015.²⁹⁴ History reveals even more extensive involvement of the federal government in education as, for example, the 1795 Northwest Ordinances ensured that land would be designated for public schools,²⁹⁵ and the federal government required state constitutions to provide a right to education.²⁹⁶

Another strategy to avoid *Rodriguez* and improve public schools could be enforcing Indian education rights in public schools. For illustration, if a lawsuit is filed on behalf of Indian public-school students, it could endure even if the court declines to recognize a federal right to education for all children in the United States. While the issue has not been addressed directly, *Meyers* strongly suggests that the federal government's obligation to Indian education is not absolved by the presence of a public school, and the state government's obligation to public education is not absolved by the presence of a BIE school.²⁹⁷ Specifically, *Meyers* determined that "at a minimum" the state had a duty to provide an education to Navajo Mountain children in grades nine through twelve because the BIE school in the area only provided education for grades one through eight.²⁹⁸ Similarly, the court suggested that the federal government was not fulfilling its obligation to Indian students because students in grades nine through twelve were required to attend a state public school or another "remote" BIE school.²⁹⁹ This supports the argument that the federal government can be held accountable for inadequate and inequitable public schools that Indian children attend.

2. *ENACTING A FEDERAL STATUTE ESTABLISHING A FEDERAL RIGHT TO EDUCATION*

294. Southern Education Foundation, *No Time to Lose: Why the United States Needs an Education Amendment to the US Constitution*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 208, 212-15 (Kimberly Jenkins Robinson ed., 2019).

295. *Id.* at 212.

296. *Id.*

297. *Meyers v. Bd. of Educ. of the San Juan Sch. Dist.*, 905 F. Supp. at 1555-56.

298. *Id.*

299. *Id.*

If Congress decides to create a federal right to education for all children by enacting a statute, one leading education scholar, Kimberly Jenkins Robinson, argues that Congress should take an incremental approach.³⁰⁰ Congress should first raise awareness regarding the need for high-quality education.³⁰¹ Then Congress “should create incentives that invite states to adopt reforms in order to establish a foundation for the federal right to education.”³⁰² After evaluating the effectiveness of these various reforms, Congress should provide federal financial incentives that are targeted towards effectively proven reform programs.³⁰³ Next, Congress should include conditions within the Elementary and Secondary Education Act to test potential approaches to a federal right to education and, finally, Congress should enact a “clear and unequivocal” federal statute that must be followed by the states.³⁰⁴

Robinson argues that the enacted statute should also include a “collaborative enforcement mechanism,” which would consist of four parts.³⁰⁵ First, the federal government should establish a commission of experts to review state annual reports regarding the federal right to education and then create guidelines for the school which should be released to the public.³⁰⁶ Second, the federal government should provide research and technical assistance to help empower states to address obstacles in providing education and, third, the federal government should increase financial assistance as needed to implement the federal right to education.³⁰⁷ Lastly, the statute should provide a federal judicial remedy for when a state fails to provide the right to education.³⁰⁸

The history and current status of Indian education rights supports Robinson’s incremental approach. Robinson claims that “[b]y testing a federal right to education before it becomes a directive, Congress could take the lessons learned from this process to craft an enduring right that

300. Kimberly Jenkins Robinson, *A Congressional Right to Education Promises, Pitfalls, and Politics*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 186, 188 (Kimberly Jenkins Robinson ed., 2019).

301. *Id.* at 189.

302. *Id.*

303. *Id.* at 190.

304. *Id.* at 192.

305. *Id.* at 194.

306. *Id.*

307. *Id.*

308. *Id.*

gains bipartisan support because it has been crafted to benefit most, if not all, schoolchildren.”³⁰⁹ Arguably, the federal right to education does not need to be “tested” because the federal government already has experience in creating a federal right to education for Indian children. On the other hand, Indian education rights demonstrate just how difficult it is to improve schools even when there is a robust federal right. It should not be forgotten how Congress hastily thought it would improve Indian education by merely enacting the Johnson-O’Malley Act in 1934. To ensure a better outcome for public schools, Congress needs to move forward carefully while relying on experts and evidence-based practices. The incremental approach could, in effect, help Congress get it right the first time—something that it still has not been able to achieve for Indian education.

As a part of the incremental approach, Congress should consider the substance and effectiveness of Indian education statutes. For example, the Johnson-O’Malley Act was improved by requiring contracts to have an “education plan” that “contains educational objectives which adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives.”³¹⁰ Similarly, one potential explanation for the current inadequacies of Indian education is that the Indian Education Amendments of 1978 did not set out specific requirements for Indian Education within the statute. Rather, it delegated the critical task of developing minimum academic standards to the Department of Interior.³¹¹ For comparison, the Individuals with Disabilities Education Act is known for being effective in part because it is very specific.³¹² Providing specific requirements within the statute creates a more robust right because, unlike regulations, statutes are more difficult to repeal or amend, and statutes provide less discretion to agencies. The more discretion that an agency has, the more vulnerable it is to political pressures from the executive branch.

The proposed “collaborative enforcement mechanism” is also supported by the history of Indian education rights. Most significant is

309. *Id.* at 193.

310. 25 U.S.C.A. § 5345 (1975).

311. *See* 25 U.S.C.A. § 2011(a) (2002).

312. *See e.g.*, 20 U.S.C.A. § 1414 (2016).

the need for the statute to set out a judicial remedy for when states fail to provide an adequate education. Such a remedy should be crafted to ensure that federal judicial relief is actually attainable. The lack of effective judicial relief is likely a major contributor to the current state of Indian education. For instance, the plaintiffs in *Stephen C. v. Bureau of Indian Education*³¹³ faced additional barriers to recovering relief because agencies can only be sued for “final and discrete agency action” and for non-monetary damages. As a result, rather than just addressing the actual issue of an inadequate general and special education, the parties had to engage in a long legal battle over whether the failure to provide an adequate education is “discrete agency action” and whether compensatory education is an impermissible monetary damage.³¹⁴ While the Ninth Circuit agreed with the Plaintiffs in *Stephen C.*, other circuit courts could still decide otherwise. Likewise, for Indian children in public schools that receive funding under O’Malley contracts, there is a lack of understanding of whether the state or federal government is liable for an inadequate education. The lack of lawsuits that have been raised regarding Indian education also reflects a lack of awareness or resources to bring such claims, which careful drafting of a statute could account for. Ultimately, a statute creating a federal right to education must provide a more effective means of judicial review than what has been provided in Indian education rights.

Indian education rights also suggest that additional oversight, as provided within the collaborative enforcement mechanism, is necessary. It is very clear that BIE schools do not have sufficient staff to oversee school expenditures, and this has had extremely costly consequences.³¹⁵ To avoid these sorts of outcomes for public schools, adequate oversight should certainly be accounted for when creating a federal right to education for all children.

3. *ENACTING A CONSTITUTIONAL AMENDMENT CREATING A FEDERAL RIGHT TO EDUCATION*

313. *Stephen C. v. Bureau of Indian Educ.*, No. 21-15097, 2022 WL 808141 (9th Cir. Mar. 16, 2022).

314. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2019 WL 6875496 at *5 (D. Ariz. Dec. 17, 2019).

315. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-121, BUREAU OF INDIAN EDUCATION NEEDS TO IMPROVE OVERSIGHT OF SCHOOL SPENDING 33-34 (2014).

There are various arguments in support of amending the U.S. Constitution to create a federal right to education. Namely, current federal statutes involving education, such as the Elementary and Secondary Education Act and the No Child Left Behind Act, are insufficient.³¹⁶ Unlike a federal statute, a constitutional amendment would create a *permanent* commitment to education.³¹⁷ It would also increase public expectations and bring national attention to education.³¹⁸

The history of Indian education rights does not have as much to offer regarding a constitutional amendment because, obviously, there is not a constitutional amendment explicitly establishing Indian education rights. However, the history and current status of Indian education rights does serve as a warning that an explicit federal right to education alone is likely not enough. While a constitutional amendment could certainly be key in raising awareness and making a permanent federal right to education for all children, it would likely not create actual change without carefully drafted federal statutes and sufficient federal funding. Therefore, it may be more effective to pursue a constitutional amendment in addition to Robinson's incremental approach to enacting a federal statute. This combination could help raise awareness and public attention, which is currently lacking for Indian education rights, while also providing clear and specific directives that must be followed.

B. REQUIRING TRAUMA INFORMED SCHOOLS AS A PART OF SPECIAL EDUCATION COMPLIANCE

Stephen C. v. Bureau of Indian Education is also significant because the district court established that complex trauma qualifies as a disability under Section 504³¹⁹ and, therefore, schools must provide special education services to children who suffer from complex

316. Southern Education Foundation, *supra* note 294, at 216.

317. *Id.* at 222.

318. *Id.* at 226.

319. While the recognition of trauma as a disability under the Individuals with Disabilities Education Act would provide even greater support and protections for children with trauma, IDEA's less open-ended definition of a disability makes this determination more difficult. *See e.g.*, *Northfield City Bd. Of Educ. v. K.S. ex rel. L.S.*, 847 F. App'x 130, 133 (3d Cir. 2021) (holding that school's knowledge of a student's "history of trauma" was not even sufficient to put the school on notice that the student might be "disabled" under IDEA).

trauma.³²⁰ Prior to *Stephen C. v. BIE*, only one other court recognized trauma as a disability under Section 504.³²¹ Similar to *Stephen C.*, the plaintiffs in *P.P. v. Compton Unified School District*³²² sought “whole school trauma-sensitive practices” and “an approach that creates a foundational infrastructure that provides a level of mental health support appropriate to meet student needs,” but in a public school.³²³ Given the success of both *Stephen C.* and *P.P.* in utilizing Section 504, lawsuits are likely to follow in order to address trauma in public and BIE schools. The potential for these lawsuits are powerful because plaintiffs could pursue compensatory education services while also pushing for systematic trauma-informed changes in their schools. In other words, more outcomes similar to what was achieved in the *Stephen C.* settlement agreement could be reached.

It is clear that education advocates should follow *Stephen C. v. Bureau of Indian Education*’s lead and also push for trauma informed practices as a part of special education compliance. Trauma informed schools would ensure that students with trauma have access to an education. Further, if states remain hostile towards school finance litigation, or if a federal right to education for all children proves unsuccessful, enforcing trauma informed practices under Section 504 provides an alternative strategy to improving inadequate and inequitable public-schools. This section explains how trauma informed practices could improve both Indian education and public-school systems.

1. IMPROVING INDIAN EDUCATION BY ADDRESSING TRAUMA

The movement towards recognizing trauma as a disability under Section 504 is especially pivotal for improving BIE schools because research shows that there is an alarmingly high prevalence of trauma among Indian children. In a recent study, researchers collected data from thirty-four states between 2009 and 2017 to determine that Native

320. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2020 WL 2319976, at *2 (D. Ariz. May 8, 2020).

321. *See P.P. v. Compton Unified Sch. Dist.*, 135 F.Supp.3d 1098 (C.D. Cal. 2015).

322. *See generally Id.*

323. Complaint for at 159 & 161, *P.P. v. Compton Unified Sch. Dist.*, 135 F.Supp.3d 1098 (2015) (No. CV 15-3726-MWF) (PLAX).

individuals had an average Adverse Child Experience (ACE)³²⁴ score of 2.32, which is approximately 40% higher than for individuals who identify as Black (1.66) or Hispanic (1.63), and over 50% higher than for individuals who identify as white (1.53).³²⁵ Another study found that Native children are almost twice as likely to experience two or more ACEs than white children (40.3% vs. 21%), and Native children are three times as likely to experience five or more ACEs than white children (9.9 percent vs. 3.3 percent).³²⁶ Looking at tribes specifically, a 2003 study found that 86% of participants in the study reported at least one ACE, and 33% reported four or more ACEs.³²⁷ Similar results were found in a 2015 study that focused on adolescents and young adults in a plains reservation (78% for one or more ACEs, 58.6% for two or more ACEs, and 37% for three to six ACEs).³²⁸

These high rates of ACEs among Indian children have been considered a consequence of historical trauma as, during the 1880s to the 1950s, the United States turned to “kidnapping and imprisoning Indian children in oppressive boarding schools.”³²⁹ The destruction of tribal languages and cultural practices, as well as the sexual, physical, emotional, and mental abuse that boarding school students experienced

324. *Fast Facts: Preventing Adverse Childhood Experiences under Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/fastfact.html> (last visited Mar. 26, 2022) (ACEs “are potentially traumatic events that occur in childhood,” such as “experiencing abuse or neglect,” or “growing up in a household with substance use problems or mental health problems. . .”).

325. Zachary Giano et al., *Adverse Childhood Events in American Indian/Alaska Native Populations*, 60(2) AM. J. PREVENTIVE MED. 213, 216 (2020).

326. Mary Kay Kenney & Gopal K. Singh, *Adverse Childhood Experiences among Indian/Alaska Native Children: The 2011-2012 National Survey of Children’s Health*, 2016 SCIENTIFICA 1, 8-9 (2016).

327. Mary P. Koss et al., *Adverse Childhood Exposures and Alcohol Dependence Among Seven Native American Tribes*, 25(3) AM. J. OF PREVENTIVE MED. 238, 242 (2003).

328. Teresa N. Brockie et al., *The Relationship of Adverse Childhood Experiences to PTSD, Depression, Poly-Drug Use and Suicide Attempt in Reservation-Based Native American Adolescents and Young Adults*, 55 AM. J. CMTY. PSYCH. 411, 415 (2015).

329. See Fletcher & Singel, *supra* note 39, at 891 (citing BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES (Clifford E. Trafzer et al. eds., 2006)); see also Teri Bissonette & Susan Shebby, *Trauma-informed school practices: The value of culture and community in efforts to reduce the effects of generational trauma*, AM. PSYCH. ASS’N: CFY NEWS (Dec. 2017), <https://www.apa.org/pi/families/resources/newsletter/2017/12/generational-trauma>.

devastated tribal communities.³³⁰ In effect, “[w]hen the victims returned home to their communities, they often brought these abuses with them.”³³¹ This idea is consistent with the disproportionate rates of trauma, child abuse and neglect, and parental incarceration among Indian children.³³² Additionally, Indian boarding school attendance itself has been linked to intergenerational psychological consequences on future generations, such as increased suicidal thoughts and attempts,³³³ and self-reported depressive symptoms.³³⁴ A 2019 study also confirmed “that both individual and paternal [Indian] boarding school attendance are associated with chronic health problems.”³³⁵

Considering the high prevalence of trauma among Native children, addressing trauma in schools could be a large factor in resolving the achievement gap between Native students and non-native students in public schools, and between public and BIE schools generally. BIE schools particularly would benefit from trauma being addressed in schools considering that most BIE schools are located in rural or remote communities that have limited access to health care.³³⁶ Therefore, a child who has experienced trauma may not have other mental health providers to turn to. Also, significantly, the district court in *Stephen C. v. Bureau of Indian Education* referred to “historical trauma” in its determination that Plaintiffs had successfully alleged trauma as a disability.³³⁷ Therefore, schools should consider a student’s current

330. See Bissonette & Shebby, (Dec. 2017), <https://www.apa.org/pi/families/resources/newsletter/2017/12/generational-trauma>.

331. *Id.*

332. NAT’L INDIAN CHILD WELFARE ASS’N, TRAUMA-INFORMED CARE FACT SHEET (2014), (available at https://www.nicwa.org/wp-content/uploads/2016/11/2014_TraumaInformedCare_FactSheet.pdf).

333. Brenda Elias et al., *Trauma and suicide behavior histories among a Canadian indigenous population: An empirical exploration of the potential role of Canada’s residential school system*, 74 SOC. SCI. & MED. 1560, 1566 (2012).

334. Amy Bombay et al., *The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma*, 51 TRANSCULTURAL PSYCHIATRY 320, 324 (2014).

335. Ursula Running Bear et al., *The impact of individual and parental American Indian boarding school attendance on chronic physical health of Northern Plains Tribes*, 42 FAM. CMTY. HEALTH 1, 5 (2019).

336. See Mary Smith, *Native Americans: A Crisis in Health Equity*, 43 A.B.A. HUM. RTS. 2018, at 14, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/.

337. *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2020 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018).

trauma(s), as well as the effects of historical trauma, including family experience with Indian boarding schools. Perhaps the arguments can be made to consider cultural, racial, and intergenerational trauma moving forward.

2. IMPROVING PUBLIC SCHOOLS BY ADDRESSING TRAUMA

Just as recognizing trauma as a disability could help improve BIE schools, it could also help ensure adequate and equitable public schools. In fact, nearly half of all the children in the United States, which is approximately 34.8 million children, have been exposed to at least one potentially traumatic event.³³⁸ Further, “one in ten children nationally has experienced three or more ACEs” and, as a result, are considered high risk.³³⁹ Addressing trauma in public schools is especially critical following the COVID-19 pandemic. As a recent study explains, the enormous economic and social shifts caused by COVID-19, including social isolation, substantial economic hardship, and the absence of mandated reporters, “may have created the ideal conditions to witness a rise in children’s experience of abuse and neglect.”³⁴⁰ Moreover, over one million individuals in the United States have died from COVID-19,³⁴¹ and just between April 1, 2020, and June 30, 2021, over 140,000 children in the United States experienced the death of a parent or grandparent caregiver due to COVID-19.³⁴² Accordingly, education advocates should follow *Stephen C. v. Bureau of Indian Education*’s lead, and force schools to address trauma through special education compliance.

Trauma has proven to harm health and development by dysregulating and over-activating the body’s stress-response system,

338. *Did You Know Childhood Trauma Affects Nearly Half of American Children?*, NAT’L INST. FOR CHILDS. HEALTH QUALITY, <https://www.nichq.org/insight/bringing-trauma-forefront-early-childhood-systems> (last visited Mar. 20, 2022).

339. Vanessa Sacks & David Murphey, *The prevalence of adverse childhood experiences, nationally, by state, and by race or ethnicity*, CHILD TRENDS (Feb. 12, 2018), <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity>.

340. Christina M. Rodriguez et al., *The Perfect Storm: Hidden Risk of Child Maltreatment During the Covid-19 Pandemic*, 26(2) CHILD MALTREATMENT 139, 139 (2021).

341. *Covid Data Tracker*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (Aug. 7, 2023).

342. Hills et al., *supra* note 169, at 7.

physically altering children's brain structures, causing inflammation that affects multiple organ systems, and even changing gene expression.³⁴³ Complex trauma specifically—which is multiple, chronic, or prolonged experiences with trauma—causes such chronic overactivation and dysregulation of the nervous system that the body is not able to restore homeostasis; rather, the body stays in a “fight, flight, and freeze mode” due to constantly elevated stress hormone levels.³⁴⁴ These physiological effects are especially problematic for children, as their brains are still developing.³⁴⁵ Trauma causes areas of the brain that are responsible for fear, anxiety, and impulsivity to overproduce neural connections during development, while impairing neural growth for areas of the brain needed for school success.³⁴⁶

It is also clear that the effects of trauma have a direct impact on children's learning. For example, children suffering from trauma are more likely to make decisions from the lower part of their brains, which are responsible for emotions and survival impulses, instead of the prefrontal cortex of the upper brain which is responsible for executive functions.³⁴⁷ As a consequence, “trauma often manifests as poor executive function skills, symptoms of ADHD, problems with memory, problems with language and auditory processing, speech and language problems, hypersensitivity or hyposensitivity to sensory stimuli, difficulties with math or reading, and social-emotional impairments.”³⁴⁸ Trauma also promotes misbehaviors as a result of the brain associating non-threatening stimulus as threatening.³⁴⁹ When this happens, a child will experience overwhelming and unpleasant emotions that could manifest in “fighting, disrespectful language, opposition and defiance

343. Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 798 (2020).

344. *Id.* at 798-99.

345. *Id.* at 798 (citing DONNA JACKSON NAKAZAWA, *CHILDHOOD DISRUPTED: HOW YOUR BIOGRAPHY BECOMES YOUR BIOLOGY, AND HOW YOU CAN HEAL* 98 (2015)).

346. *See Id.* at 799 (“[T]rauma impairs the development of neural connections between the parts of the brain needed for self-regulation, attention, emotional regulation, logical and sequential thinking, healthy relationships, sensory processing, organizing, language development, measured judgment, and storage and retrieval of memories—all of which are vital for learning and behavioral success at school.”).

347. *Id.* at 800 (citing JIM SPORLEDER & HEATHER T. FORBES, *THE TRAUMA-INFORMED SCHOOL: A STEP-BY-STEP IMPLEMENTATION GUIDE FOR ADMINISTRATORS AND SCHOOL PERSONNEL* 15 (2016)).

348. *Id.*

349. *Id.* at 801.

to instruction, leaving the classroom or school, or other behaviors that schools traditionally interpret as signs of bad character, moral failings, laziness, or lack of willpower.”³⁵⁰

In agreement, studies established a relationship between ACEs and the following indicators of poor school functioning:

being disengaged at school; failing to complete homework; being a victim or perpetrator of bullying; expulsion from preschool; chronic absenteeism; being disruptive at school; failure to meet grade-level standards in math, reading, or writing; academic failure; failure to graduate from high school; and failure to graduate from college.³⁵¹

Additionally, a child who has experienced at least one ACE is 10.3 times more likely to experience a learning or behavior problem, while a child who has experienced at least four ACEs is 32.6 times more likely to experience a learning or behavior problem.³⁵²

Identifying trauma as a disability under Section 504 of the Rehabilitation Act not only recognizes that trauma impacts a child’s ability to access an appropriate education, but requires schools to address it. In compliance with Section 504 requirements, schools must provide services and accommodations that are necessary for a particular child with a disability to have equal access to the general education curriculum.³⁵³ For instance, research shows that children who suffer from trauma need specialized instruction that strengthens neural pathways involved with academic and social competency.³⁵⁴ Moreover, an educational environment that prioritizes “relationship, trust, and emotional and physical safety” is necessary.³⁵⁵ An instructor should remain self-regulated and express a “genuine interest and concern” for

350. *Id.*

351. *Id.* at 790-91.

352. *Id.* at 791.

353. *See* 34 C.F.R. § 104.33 (2017).

354. Tuchinda, *supra* note 343, at 825.

355. *Id.* at 823-824 (*citing* JIM SPORLEDER & HEATHER T. FORBES, THE TRAUMA-INFORMED SCHOOL: A STEP-BY-STEP IMPLEMENTATION GUIDE FOR ADMINISTRATORS AND SCHOOL PERSONNEL 36 (2016)).

a child even when the child is dysregulated, and a child may benefit from preferential seating so that they can remain close to a teacher or student who they perceive as a safe person.³⁵⁶ Traditional services under Section 504 plans—such as speech and language services, occupational therapy services, and psychological and counseling services—could also be used to assist children whose language development, sensory processing, self-regulation, or other social skills were impaired as a result of trauma.³⁵⁷ Psychotherapy, social skills group therapy, parent counseling and training, and other evidence-based intervention programs could be provided as needed under a child’s Section 504 plan as well.³⁵⁸

Recognition of trauma as a disability under Section 504 also requires schools to provide services and accommodations to address behavior problems that result from trauma. Importantly, Section 504 prohibits a child from being excluded from the classroom because of the child’s disability.³⁵⁹ Therefore, considering trauma as a disability prevents schools from resorting to suspensions or expulsions to address a child’s problematic behaviors that are related to their trauma. This is critical because students who have experienced trauma are frequently excluded from the classroom, and suspensions and expulsions could re-traumatize children who suffer from trauma or it could undermine their sense of belonging.³⁶⁰ Additionally, traditional behavior systems, such as suspensions, expulsions, and even point systems, are ineffective for children who have experienced trauma, and the child may even perceive these methods as coercive or threatening.³⁶¹ In fact, the use of suspensions and expulsions as a behavioral modification technique to address trauma in schools has only led to a surge in the juvenile court system.³⁶²

Instead, research shows that children who suffer from trauma become accountable for their behaviors when they are in a relationship based on “trust, consistency, acceptance, unconditional support, and a

356. *Id.* at 825.

357. *Id.* at 827.

358. *Id.* at 827-28.

359. 29 U.S.C.A. § 701(a)(3)(F) (2014).

360. Tuchinda, *supra* note 343, at 832.

361. *Id.* at 830.

362. Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACES) in Post-Brown America*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 115, 130-31 (2020).

sense of belonging.”³⁶³ Further, accommodations should work to create a calm and predictable classroom which minimizes a child’s exposure to their unique triggers.³⁶⁴ Ultimately, a Section 504 plan—which could include a behavior intervention plan (BIP)—could be very effective in finally addressing behaviors of children who suffer from trauma because it could implement the above practices and more depending on a child’s unique needs. While schools should not be the only institution turned to when a child has experienced trauma, certain services and accommodations in school are critical to ensure that children who have experienced trauma can still access an education.

Providing special education services and accommodations to children who have experienced trauma would also help address a major contributor to inequitable public schools, as trauma disproportionately impacts children of color and children of low socioeconomic status. For illustration, one in three Black children nationally have experienced two to eight ACEs, compared to only one in five white children.³⁶⁵ Many studies even determined that the experience of racism itself has toxic health effects associated with trauma.³⁶⁶ There is also a clear and robust relationship between socio-economic position and risk of ACEs and maltreatment.³⁶⁷ Altogether, as one scholar has explained bluntly, “[t]he trauma that has resulted from structural racism has subsequently been exploited as a basis to over-discipline Black and Brown students through highly punitive zero tolerance school policies, which operate to funnel predominantly minority children into the criminal justice system as a means of sustaining a racial caste system that has never been fully dismantled.”³⁶⁸ In addition to these harmful disciplinary practices, low-income and minority students in particular are not provided the trauma-informed services and accommodations that are necessary to access an education.³⁶⁹ Considering these clear relationships, recognizing trauma

363. Tuchinda, *supra* note 343, at 831.

364. *Id.* at 826.

365. *Id.*

366. E.g., Gene Brody et al., *Discrimination, Racial Identity, and Cytokine Levels Among African American Adolescents*, 56 J. OF ADOLESCENT HEALTH 496, 497 (2015).

367. David Walsh et al., *Relationship between childhood socioeconomic position and adverse childhood experiences (ACEs): A systematic review*, 73 J. EPIDEMIOLOG. COMMUNITY HEALTH 1087, 1091 (2019).

368. Carr, *supra* note 362, at 116.

369. See Grant, *supra* note 22, at 144.

as a disability would have drastic effects in improving student outcomes at underfunded public schools that primarily serve low-income and minority students.

IV. CONCLUSION

While public schools were not founded on the dark assimilation tactics as BIE schools were, public schools are still overcoming barriers stemming from segregation and systematic racism. The history of Indian education indicates that the path to recovering from a destructive history is a long and complicated one. BIE schools even today have not recovered and fail to provide adequate and equitable education opportunities. There are unique factors involving Native American history that likely contribute to the difficulties in improving BIE schools, including the remote nature of BIE schools, the fact that BIE schools are operated by the same department that once sought to eliminate the “Indian problem,” and the lack of public awareness regarding Indian education rights and BIE schools. Nonetheless, there are still countless lessons that advocates can learn as they strive to improve public schools and create another federal right to education—just as the federal government once did in the 1700s.