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Preschool and Lead Exposed Kids: The Idea Just Isn't Good Enough

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PRESCHOOL AND LEAD EXPOSED KIDS: THE IDEA JUST ISN'T GOOD ENOUGH

*Karen Syma Czapanskiy**

On April 25, 2014, the Flint Water Crisis began when the city manager, for purely fiscal reasons, changed the city's source of water to the Flint River.[1] Mandatory water treatment requirements were ignored, and the untreated water released lead from water pipes into homes, schools, factories and other buildings throughout the city. Lead is a neurotoxin that is unsafe for humans at any level of exposure. Especially vulnerable populations include fetuses, infants and young children.[2] According to the census, 8,657 children under the age of 6 were exposed to the leaded water.[3] At least 50 percent more of these children had elevated blood lead levels after the crisis began than before.[4]

When a fetus, infant or young child is exposed to lead, even at very low levels, the resulting brain injury creates a high risk of learning problems.[5] The degree of harm that a child experiences may be

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[1] MONA HANNA-ATTISHA, WHAT THE EYES DON'T SEE: A STORY OF CRISIS, RESISTANCE, AND HOPE IN AN AMERICAN CITY 18-20, 29 (2018).

[2] *See* Stephen A. Rauch & Bruce P. Lanphear, *Prevention of Disability in Children: Elevating the Role of Environment*, 22 THE FUTURE OF CHILDREN 193, 196-97 (2012);

[3] HANNA-ATTISHA, *supra* note 1, at 298-99. A total of approximately 30,000 children were put at risk of lead poisoning because of the water crisis. Order Denying Defendant MDE's Motion to Dismiss; Denying Defendant GISD's Motion for Judgment; Granting in part and Denying in part Defendant FCS's Motion to Dismiss at 2, D.R. v. Mich. Dep't of Educ., No. 2:16-CV-13694-AJT-APP (E.D. Mich. Sept. 29, 2017).

[4] Mona Hanna-Attisha et al., *Elevated Blood Lead Levels in Children Associated With the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response*, 106 AM. J. PUB. HEALTH 283, 283 (2016).

[5] *See* HANNA-ATTISHA, *supra* note 1, at 225-26 (summarizing the likely impact of childhood lead exposure, even at low levels, on child's IQ, education, employment prospects, health and development).

mitigated, however, if the child attends preschool.[6] Since every fetus, infant and young child in Flint risked exposure to leaded water after the crisis began, I argue in this article that remediation efforts should include universal access to preschool. Universal access to preschool should not be limited to Flint, however. The Flint Water Crisis was an emergency, but routine exposure to lead and other neurotoxins is still common in many places in the country.[7] Wherever early exposure to lead and other neurotoxins has not been eliminated, I argue, children should be provided with access to preschool.

My argument should not seem radical since a statute for addressing learning problems arising out of disabilities has existed for decades.[8] First enacted in 1975, the Individuals with Disabilities Education Act, or IDEA, opened doors for millions of school-age and, later, preschool kids to participate in public education.[9] Decades later, the promise of education is more real for many of these children than the reality.[10] The IDEA's failure to guarantee access to preschool is a good example.

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[6] *See infra* notes 30-36 and accompanying text.

[7] *See* Hernán Gómez & Kim Dietrich, *The Children of Flint Were Not 'Poisoned'*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/opinion/flint-lead-poisoning-water.html (discussing that while the percentage of Flint children with EBLL > 5 µg/dl is 2.4%, same was true of 8.8% of Detroit children, 8.1% of Grand Rapids children and 14% of Highland Park children).

[8] *See* Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 THE FUTURE OF CHILDREN 97, 99 (2012) (explaining that the IDEA is a "more proactive law protecting the educational rights of children with disabilities").

[9] *Id.* at 100.

[10] What follows are a few of the numerous articles documenting the failures of the IDEA to provide help for various groups of students in need of special education. *See, e.g.*, Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 905-07 (2018) (discussing disabled students assigned to "alternative educational placements" or AEPs, where educational and other services are typically inferior to that available in schools); Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733 (2014) (arguing that special education fails to reach eligible children because the process is not accessible to all parents); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1421 (2011) (discussing concerns about the misallocation of special education resources); COLIN ONG-DEAN, DISTINGUISHING DISABILITY: PARENTS, PRIVILEGE, AND SPECIAL EDUCATION 113-60 (2009) (noting that few parents seek hearings and even fewer prevail; pursuing relief requires investment of resources that few parents possess; the possibility of gain relative to loss is important for parental decision, so parents are more likely to seek hearings for reimbursement); Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1 (2016) (arguing that individualization obstructs planning for children with common educational needs).

The IDEA is designed to help individual kids,[11] and its hallmark is individualization.[12] A systemic approach would be preferable in situations like Flint, however, where so many children are exposed to lead at an early age. The IDEA does nothing to require a systemic approach and may, in fact, stand in the way of, or at least delay, systemic change. The "radical" part of my argument is that the IDEA paradigmatic individualization needs to be replaced, or at least modified, where a systemic approach would do a better job of helping children learn.

The conclusion that the IDEA does not guarantee universal access to preschool is not theoretical for Flint's children. A lawsuit brought on their behalf, *D.R. v. Michigan Department of Education*, alleged failures by the state and local school systems to address special education needs after the water crisis. The suit demanded, among other things, access to preschool for every lead-exposed child.[13] The defendants lost their motion to dismiss the case as to every demand except that one.[14]

This article concludes that the district court was right to dismiss the demand under the IDEA and explains why that conclusion exposes the soft underbelly of the IDEA: its failure to force school systems to provide systemic educational changes when that is what will help the students more than individualized educational plans.

Part I describes the effects of childhood lead exposure on the capacity of children to get an adequate education. The Flint Water Crisis shone a spotlight on the risks of lead poisoning, but it was not the sole source of the problem. As in thousands of locations around the country, exposure to lead and other environmental toxins can come from paint, from air and from soil as well as from water. Research suggests strongly that high quality preschool has a prophylactic effect that mitigates the impact of brain injuries suffered by exposed children.

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[11] When enacting the IDEA, Congress indicated that one purpose was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (2018).

[12] David B. Rubin, *Standardized IEPs: One Size Fits None?*, 46 J.L. & EDUC. 227 (2017).

[13] Class Action Complaint, D.R. v. Mich. Dep't of Educ., No. 2:16-CV-13694-AJT-APP (E.D. Mich. Oct. 18, 2016), http://www.edlawcenter.org/assets/files/pdfs/D.R.%20v.%20Michigan/D_R_v_MDE_et.%20al.pdf.

[14] Order Denying Defendant MDE's Motion to Dismiss, *supra* note 3, at 24-25 ("[T]here is no legal requirement under any of the statutes which Plaintiffs have invoked that provide for this relief.").

Part II demonstrates how the IDEA fails to guarantee access to preschool for most children who are exposed to lead. States may fail to find and evaluate young children who could benefit from services. Even if found, evaluation procedures may not reveal that a child needs services. Among other problems, the full detrimental effects of lead exposure often do not show up until children are in elementary school, particularly where the usual measurement of lead exposure, a blood test, demonstrates a relatively low level of exposure. Finally, despite its recognized desirability, preschool may not be included in the educational plan created for a particular child.

Part III proposes two fundamental changes to the IDEA. Both changes focus on how to help as many children as possible as early as possible, an approach which stands in strong contrast to the usual individualized processes of the IDEA. First, children who have been exposed to lead before birth or who test positive for lead exposure at any level before reaching the age of 4 should be identified and deemed presumptively eligible for services at the earliest possible moment. Second, every child who is identified should be offered a slot in a high quality preschool. A full assessment may identify the need for additional services, but the assessment process should not delay the child's opportunity to attend preschool for a year before the child enters kindergarten.

I. LEAD POISONING AND PRESCHOOL

Like children in many older cities, mining communities and rural areas, many of Flint's children were exposed to lead before the water crisis began.[15] Some were exposed prenatally because their mothers were exposed before becoming pregnant. Others were exposed because their homes still contain lead paint decades after its use in residences was prohibited or because the soil in their neighborhoods has remained contaminated by the residue of leaded gasoline which was banned decades before their birth. The good news is that the percentage of children with elevated blood lead levels (hereinafter "EBLL") had been declining in Flint and across the country, a tribute to years of effort by communities and public health

[15] Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Colo*r, 41 HARV. ENVTL. L. REV. 493 (2017).

authorities. Attention to childhood exposure to lead also declined, at least until disclosures began about the Flint Water Crisis.

As the result of the Flint Water Crisis, at least 561 more children experienced lead exposure sufficient to increase the level of lead in their blood above 5 micrograms per deciliter of blood (µg/dl), the reference level set by the Centers for Disease Control and Prevention (hereinafter "CDC") as one for concern.[16] Many more children probably had EBLL below 5 µg/dl.[17] Regardless, no blood lead level is safe.[18]

The number of children whose blood tests revealed an EBLL above 5 µg/dl is undoubtedly smaller than the number of children who experienced that level of exposure as a result of the Flint Water Crisis.[19] The window of opportunity to accurately measure lead exposure through a blood test is relatively short, because lead steadily moves from the blood to bones and organs.[20] In Flint, because of the government's cover-up of the water crisis, among other reasons,[21] many children were not tested until over a year after the greatest risk of lead exposure had passed. Infants, whose risk is exacerbated by the use of warm water to mix with powdered formula, are not usually

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[16] Hanna-Attisha, *supra* note 4; HANNA-ATTISHA, *supra* note 1, at 269.

[17] *See* Maura McInerney & Alissa S. Werzen, *Lead and Its Impact on Learning: What Schools, Parents & Policymakers Need to Know and Do*, EDUC. L. CTR., at 8, Feb. 2016, https://www.elc-pa.org/wp-content/uploads/2016/02/ELC-Impact-of-Lead-on-Learning-Report-February-2016Rev-PDF.pdf (estimating that low-level lead exposure affects approximately one in four children under the age of 6 having BLLs in the range of 2 to 10 µg/dl).

[18] *CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations in* "Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention," CENTERS FOR DISEASE CONTROL & PREVENTION, June 7, 2012, https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf (concurring in principle that there is no safe level of childhood exposure to lead).

[19] *See* HANNA-ATTISHA, *supra* note 1, at 156-57. The total number of exposed children is unknown, because, among other things, many children are not tested for elevated blood lead levels or the results of the testing are not reported. *See* Eric M. Roberts et al., *Assessing Child Lead Poisoning Case Ascertainment in the US, 1999-2010*, 139 PEDIATRICS 1, 7 (2017) ("During this period [1999 to 2010], 1 in 3 children believed to have EBLL in participating states went unreported. Although the majority of reported cases resided in the Northeast and Midwest, the largest numbers of children with EBLL resided in the South, and pronounced underreporting took place in the South and West.").

[20] HANNA-ATTISHA, *supra* note 1, at 228.

[21] *Id.* at 276-92 (describing aspects of the cover-up); *see id*. at 105 (discussing that too few children are screened on a regular basis); Aron & Loprest, *supra* note 8, at 108 (explaining that screening procedures to identify children in need of early intervention often fail to do so, even when particular screenings are mandated under Medicaid).

tested before they turn a year old.[22] Many children, therefore, probably experienced higher levels of blood exposure than was revealed by blood tests.

Childhood and prenatal exposure to lead, whether through ingestion, inhalation or other means, leaves youngsters with irreversible neurological damage.[23] Among the most vulnerable to the neurotoxin are the youngest consumers—newborns, including those exposed in the womb,[24] infants and preschoolers. All are likely to suffer some kind of developmental problems in realms such as cognition, emotion, behavior, hearing, and speech.[25] Many affected children have problems learning to read and risk never achieving functional literacy.

The CDC "reference level" of a blood lead level exceeding 5 µg/dl does not accurately distinguish between lead-exposed children who experience problems in school from those who do not, because no amount of exposure to lead is safe.[26] Studies in recent years have found

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[22] HANNA-ATTISHA, *supra* note 1, at 227-28.

[23] *See* Plaintiffs' Motion for a Preliminary Injunction, D.R. v. Mich. Dep't of Educ., No. 16-CV-13694-AJT-APP, (E.D. Mich. Oct. 16, 2017), Report of Dr. Theodore I. Lidsky, Exhibit 1, ¶ 9 ("It is well established that many children with elevated blood lead levels experience IQ decrements, poor school performance, and problematic behavior (e.g. aggression, poor impulse control)"; "peer reviewed lead poisoning scientific literature is voluminous.").

[24] *See* David C. Bellinger et al., *Early Sensory-Motor Development and Prenatal Exposure to Lead*, 6 NEUROBEHAVIORAL TOXICOLOGY & TERATOLOGY 387 (1984) ("These data are compatible with the hypothesis that low levels of lead delivered transplacentally are toxic to infants.").

[25] *See* Monica K. Silver et al., *Low-Level Prenatal Lead Exposure and Infant Sensory Function*, 15 ENVTL. HEALTH 65, 73 (2016) ("[A]uditory and visual systems maturation appears delayed in infants with higher prenatal lead exposure during late pregnancy, even at relatively low levels."); Wieslaw Jedrychowski et al., *Prenatal Low-Level Lead Exposure and Developmental Delay of Infants at Age 6 Months (Krakow Inner City Study)*, 211 INT'L J. HYGIENE & ENVTL. HEALTH 345, 349 (2008) (discussing that the risk of developmental delay increases as lead level increases in umbilical cord); Wieslaw Jedrychowski et al., *Very Low Prenatal Exposure to Lead and Mental Development of Children in Infancy and Early Childhood*, 32 Neuroepidemiology 270, 270 (2009) ("[A] significant inverse association of mental function and [prenatal] lead exposure" are shown at 24 months and 36 months).

[26] *See Standard Surveillance Definitions and Classifications*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/lead/data/definitions.htm (last updated Nov. 18, 2016) (updating the reference level to 5 µg/dl in 2012); *Low Level Lead Exposure Harms Children: A Renewed Call for Primary Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION, at *ix*, Jan. 4, 2012, https://www.cdc.gov/nceh/lead/acclpp/final_document_030712.pdf ("Based on a growing body of studies concluding that blood lead levels (BLLs) <10 µg/dL harm children, the Centers for Disease Control and Prevention (CDC) Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP) recommends elimination of the use of the term 'blood lead level of concern.'"); *CDC Response to Advisory Committee*,

a correlation between cognitive issues and very low blood lead levels, including levels well below 5 µg/dl.[27] Behavioral problems that interfere with learning such as ADHD are also found in lead-exposed children with blood lead levels far below the reference level.[28] In short, every child exposed to lead is likely to need an education that includes features that differ from what is generally thought to be general education.[29] For young children, the greatest benefit is likely to come from attending preschool.

While lead exposure irreversibly injures a child's brain, early intervention and preschool can mitigate the impact.[30] For example, researchers in Cleveland, where universal high quality preschool is available, studied the impact of one year of preschool on the readiness of children for kindergarten.[31] They compared children with no record of exposure to lead with children who showed low levels of lead in their blood (<5 µg/dl) and children who showed higher blood lead

supra note 18, at 5 (concurring in principle that there is no safe level of childhood exposure to lead).

[27] *Educational Interventions for Children Affected by Lead*, CENTERS FOR DISEASE CONTROL & PREVENTION, at 3-4, Apr. 2015, https://www.cdc.gov/nceh/lead/publications/educational_interventions_children_affected_by_lead.pdf (showing decrements in IQ in children with BLLs below 5 µg/dl and as low as 1 µg/dl); Pat McLaine et al., *Elevated Blood Lead Levels and Reading Readiness at the Start of Kindergarten*, 131 PEDIATRICS 1081, 1088 (2013) ("[L]ead exposure at levels well below 10 µg/dL contributes to decreased reading readiness at kindergarten entry."); *Low Level Lead Exposure Harms Children*, *supra* note 26, at 7-8.

[28] *See* Tanya E. Froehlich et al., *Association of Tobacco and Lead Exposures with Attention-Deficit/Hyperactivity Disorder*, 124 PEDIATRICS 1054 (2009) (nearly 600,000 children with elevated blood lead levels as low as 1.3 µg/dl meet criteria for ADHD).

[29] *Educational Interventions for Children Affected by Lead*, *supra* note 27, at 13-15 (showing a consistent link between low-level lead exposure and the reduced ability of children to do well in school and suggest that lead exposure is responsible for a significant and modifiable effect on the achievement gap); McLaine, *supra* note 27, at 1088 (discussing that lead exposure at levels well below 10 µg/dL contributes to decreased reading readiness at kindergarten entry); *Low Level Lead Exposure Harms Children*, *supra* note 26, at 7-8.

[30] *See Educational Interventions for Children Affected by Lead*, *supra* note 27, at *vii* ("[S]tudies of educational interventions improving developmental outcomes for children who have conditions other than lead . . . demonstrate[] that children with developmental delays or at high risk for developmental delays benefit most from interventions that start at an early age"); David C. Bellinger et al., *A Developmental Perspective on Early-Life Exposure to Neurotoxicants*, 94 ENV'T INT'L 103, 105 (2016) (discussing that it is not inevitable that "the deficits associated with exposure [to] neurotoxicants are irreversible or that interventions cannot help children to reduce the adverse impact of exposure on their health and well-being").

[31] Elizabeth R. Anthony et al., *The Association Between Elevated Blood Lead and School Readiness Among Children Attending Universal Pre-Kindergarten in Cleveland*, CTR. ON URB. POVERTY & COMMUNITY DEV./CWRU, June 2015, https://assets.documentcloud.org/documents/2475227/upkleadbracken.pdf.

levels (>5 µg/dl).[32] While children with no history of lead exposure exhibited the most improvement, children in all three categories demonstrated significant levels of improvement.[33]

Similar results are found in the realm of executive functioning, a neurological issue that is common among children exposed to lead. Targeting executive functioning and related self-regulatory skills in preschool and early elementary grades "can and do alter young children's early academic trajectories . . . [and] at least partially, if not fully, close the gap in neurocognitive function and academic achievement."[34]

Unsurprisingly, in light of this research, impressive improvements in kindergarten readiness in multiple realms have been found in Cummings, a preschool program in Flint where half the children had EBLLs ranging from 5 µg/dl to 30 µg/dl.[35] Like the Cleveland program, Cummings offers a full-day program with a low teacher-student ratio of one to eight. Its year-round program is family-oriented and includes wraparound services as well.[36]

Providing a child and family with early intervention services and access to preschool may have another positive impact: interrupting a downward spiral that can result from childhood lead poisoning. For example, a child who experiences lead exposure early in life may enter kindergarten with impaired executive functioning, a reduced IQ and attention deficit disorder.[37] What is predictable, based on the combination of early cognitive and behavioral problems, is a poor trajectory over time, including a greater likelihood of dropping out of school and engaging in anti-social behavior. Early intervention and preschool might interrupt the negative cascading effects and, instead, help "lead a child away from an undesirable pathway."[38]

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[32] *Id.*

[33] *Id.*

[34] C. Cybele Raver & Clancy Blair, *Neuroscientific Insights: Attention, Working Memory, and Inhibitory Control*, 26 THE FUTURE OF CHILDREN 95, 111 (2016).

[35] *See* Chastity Pratt Dawsey, *Preschool Works Wonders for Flint Water Crisis Kids. But Funding Is Running Out.*, BRIDGE (June 6, 2018), https://www.bridgemi.com/children-families/preschool-works-wonders-flint-water-crisis-kids-funding-running-out.

[36] *Id.*

[37] *See Educational Interventions for Children Affected by Lead*, *supra* note 27, at 3-8.

[38] Bellinger, *supra* note 30, at 106; *see* Fedders, *supra* note 10, at 901-02 (discussing an example of cascading impact of poverty, race discrimination and disability, including disability arising from exposure to toxic substances, in the context of overrepresentation of children with disabilities among students assigned to "alternative educational placements" or

The neurological impact of early lead poisoning may manifest in some children right away, at least in some realms. The full impact may not be evident in every child early in life, however, because some of the effects are "best measured in the older child, adolescent, and young adult."[39] For example, a child may learn to decipher words but have difficulty making the transition from learning to read to the more difficult task of reading to learn.[40] Intervention at that point in the educational process may be helpful,[41] but it may be more useful to begin to intervene much earlier, prior to the manifestation of clear evidence of a need for special education services.

A logical public policy response to the Flint Water Crisis would be to make preschool available for at least a year for every child whose family was exposed to the city's water. If the preschool experience were of the quality available at Cummings in Flint and in Cleveland, almost all of Flint's lead-affected children would enter kindergarten more ready to learn than they would have been without the preschool experience. Improved readiness might be a factor in interrupting, at least to some degree, what otherwise seems to be an inevitable and negative cognitive, behavioral and emotional trajectory for these children.

In fact, the importance of preschool is so well accepted that millions of federal and state dollars have been made available to increase the number of preschool slots available to Flint's children.[42] Not every child has been provided with an opportunity for preschool, however, and the funding is temporary, so fewer of the younger children are likely to have the same opportunity.[43]

AEPs, a typically inferior educational setting from which students are more likely to drop out or get expelled).

[39] *Educational Interventions for Children Affected by Lead*, *supra* note 27, at 10; Plaintiffs' Motion for a Preliminary Injunction, Report of Dr. Theodore I. Lidsky, *supra* note 23, at ¶ 14 (noting the "lag effect" of lead poisoning).

[40] *Educational Interventions for Children Affected by Lead*, *supra* note 27, at 11.

[41] *Id.* at 12.

[42] *Genesee County Receives $5.5 Million for Early Head Start*, MICH. HEAD START ASS'N (Mar. 20, 2017), www.michheadstart.org/news/genesee-county-receives-55-million-early-head-start (describing funds made available on emergency basis over two years for additional preschool slots); *HHS Expands Head Start in Flint*, U.S. DEP'T HEALTH & HUMAN SERVICES, Mar. 2, 2016, https://wayback.archive-it.org/3926/20170127185604/https://www.hhs.gov/about/news/2016/03/02/hhs-expands-head-start-in-flint.html (describing the allocation of $3.6 million for Flint's Head Start and Early Head Start services).

[43] *See* Dawsey, *supra* note 35 (quoting Amy Hesse, central administrator for UM-Flint's early childhood development program).

No research is available yet about how wider access to preschool affected the school accomplishments of the youngest of Flint's affected children when they reached kindergarten or elementary school. Standardized statewide testing, however, demonstrates that the risk of harm from a lack of appropriate intervention is great. Older children have done significantly worse academically since the beginning of the Flint Water Crisis.[44] On the reading tests, "Flint saw a score reduction average of 59%" between the testing prior to the crisis and the testing done afterward. The oldest students—those in high school—had a pass rate of 15.5%, while the average pass rate for the state of Michigan was 46%.[45]

II. THE IDEA FAILS TO ENSURE ACCESS TO PRESCHOOL TO EVERY LEAD-POISONED CHILD

The first question for this article is straightforward. Does the IDEA ensure access to preschool for every lead-exposed child whose preschool experience could improve the child's readiness for kindergarten and mitigate the longer-term cognitive, behavioral and emotional harms of lead poisoning? The answer to that question goes far beyond Flint, because it is only one of hundreds of places in the country where exposure to neurotoxins like lead routinely happens to children.[46] The IDEA, however, turns out to be a dicey path to delivering help through access to preschool for at least two reasons: eligibility issues and service plans.

The route to preschool or an educational experience similar to preschool could go through Part B or Part C of the IDEA. States accepting funding under the IDEA accept the responsibility under Part

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[44] This result is entirely predictable based on studies of school performance by lead-poisoned children in other jurisdictions. *See Educational Interventions for Children Affected by Lead*, *supra* note 27, at 13-15.

[45] Analysis conducted by Dr. William J. Therrien (Sept. 28, 2017) (on file with author); *see* Prachi Gupta, *Reading Proficiency Among 3rd-Graders Has Dropped Nearly 75 Percent in Flint Schools Affected by Water Crisis*, JEZEBEL (Feb. 6, 2018, 6:40 PM), https://jezebel.com/reading-proficiency-among-3rd-graders-has-dropped-nearl-1822777060. The inverse relationship of lead exposure and reading scores is well-established. *See* Haifa Haroon, *Lead (Exposure) in the Time of Standardized Tests*, MIND SCI. GAP (Mar. 2, 2013), http://www.mindthesciencegap.org/2013/03/02/lead-in-the-time-of-standardized-tests.

[46] Roberts et al., *supra* note 19, at 6 ("At the same time, EBLL remains an ongoing threat to the health of the nation's children. Although events in Flint, Michigan focused the attention of the American public, 31 subsequent analyses have demonstrated that thousands of communities throughout the country are known to have higher prevalences of EBLL based on the partial reporting that does occur.").

B to provide a "free and appropriate public education," or FAPE,[47] to residents age 3 through 21.[48] The statute's "Child Find" obligation requires states to have a plan for identifying and evaluating children of any age who might be eligible for services.[49] Children younger than 3 are served under Part C. Where a child received services as an infant or toddler under Part C, states can continue to provide services under Part C after the child turns 3.[50]

Part B access is more significant in terms of numbers of children served. Nationally, in 2015, 763,685 children ages 3 to 5 were served under Part B.[51] Of children in the same cohort who had received Part C services as infants and toddlers, only 8,131 continued to receive Part C Services after reaching the age of 3.[52] As this Section shows, however, neither Part B nor Part C is likely to deliver access to preschool for every lead-exposed child who lives in a community like Flint.

A. Part B of the IDEA

1. Identification and Evaluation

Identification. Whether a child is an infant, toddler or preschooler, the first responsibility of a state receiving funds under the IDEA is to find the child so that an evaluation for possible disability can begin. The statute requires states to be comprehensive in carrying out this responsibility; the requirement is that "[a]ll children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated."[53]

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[47] "A FAPE, as the Act defines it, includes both 'special education' and 'related services.' § 1401(9). 'Special education' is 'specially designed instruction . . . to meet the unique needs of a child with a disability'; 'related services' are the support services 'required to assist a child . . . to benefit from' that instruction. §§ 1401(26), (29)." Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

[48] 20 U.S.C. § 1412(a)(1) (2018).

[49] *Id.* § 1412(a)(3).

[50] *Id.* § 1432(5)(B).

[51] *39th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2017*, U.S. DEP'T OF EDUC., at 26, Jan. 2018, https://www2.ed.gov/about/reports/annual/osep/2017/parts-b-c/39th-arc-for-idea.pdf.

[52] *Id.* at 18.

[53] 20 U.S.C. § 1412(a)(3)(A).

Every child under the age of 6 residing in Flint after the water crisis began was at least at risk of having ingested water containing harmful quantities of lead.[54] Given the relationship between lead exposure and disabilities affecting the capacity of a child to learn, the statute's Child Find requirements appear to impose on the state a duty to reach out to residents, especially in the areas most likely to have the highest levels of exposure, and to make appropriate testing, evaluation and services available promptly. Instead, what happened was that, even after the cover-up ended in 2016, the state still left parents with inadequate resources for identifying and evaluating affected children. Many children may still remain in need of identification and evaluation, four years after the Flint Water Crisis began.[55]

A class action lawsuit on behalf of Flint's school children alleged, among other things, significant failures with respect to Child Find.[56] First, despite knowing that the water crisis meant that hundreds of children were exposed to lead, defendant schools and the state education agency failed to take affirmative steps to identify the affected children or even to educate teachers about how to identify affected children. Second, the state failed to provide children with an evaluation appropriate to the type of neurological harms caused by exposure to lead. Third, the state education agency had repeatedly been told about the deficits in Child Find affecting Flint's children, but took no action.

Rather than defend its conduct, defendants settled the Child Find claims. The settlement creates a program to facilitate the identification and evaluation of children for special education.[57] The program includes a registry designed to "connect participants to programs designed to minimize the effects of lead on their health."[58] The local public hospital's neurodevelopmental evaluation center is being expanded into the "Neurodevelopmental Center of Excellence"

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[54] *See generally* HANNA-ATTISHA, *supra* note 1.

[55] Plaintiffs' Motion for a Preliminary Injunction, *supra* note 23, Report of Dr. William J. Therrien, Exhibit 3, ¶ 17 ("There has not been a significant increase in the number of students receiving special education services under IDEA in the Flint Community Schools since the lead crisis. Further the percentage of students receiving special education services in the Flint Community Schools is lower than comparable urban school districts (e.g., Detroit) that did not experience the Flint water crisis.").

[56] Plaintiffs' Motion for a Preliminary Injunction, *supra* note 23.

[57] Stipulation Regarding Partial Settlement and Request for Hearing, D.R. v. Mich. Dep't of Educ., No. 16-CV-13694-AJT-APP (E.D. Mich. Apr. 9, 2018), Settlement Agreement, Exhibit A, at 7.

[58] *Id.* at 3.

so that trained staff is available to conduct evaluations appropriate to lead-exposed children.[59] Teachers, administrators and staff in schools serving Flint's children will receive training in the identification and reporting of children to refer to the program.[60] Defendants committed themselves to encouraging parents and guardians to voluntarily enroll their children in the program and to provide employees to help encourage enrollment and evaluation.[61] Every school will have a "Wellness Center" or equivalent tasked with helping parents, guardians and students to enroll and participate in the program.[62]

The settlement, it is hoped, will lead to the identification of affected children and comprehensive evaluations that can be the basis for an adequate plan for each child. It is still problematic with respect to preschool children, however. While the program is open to younger children, the settlement's outreach provisions are directed mainly at school-age children and their parents or guardians.[63] Further, children under the age of 5 whose parents seek screenings in the program are to be referred to Michigan's Early On (Part C) program.[64] As discussed below, however, Michigan elects to serve children above the age of 3 in its Part B program, not in its Part C program.[65] What Early On is supposed to do about 4-year-olds referred by the program is, therefore, a mystery.

Even if preschool children were the focus of the settlement, nearly four years will have passed before the new assessment capacities are activated.[66] During that time, hundreds of children were

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[59] *Id.* at 17-19

[60] *Id.* at 7.

[61] *Id.* at 3.

[62] *Id.* at 6-7.

[63] At least one public service announcement directed to parents of younger children and featuring Dr. Mona Hanna-Attisha is already online. Dr. Hanna-Attisha's message is "don't wait—evaluate." *Early On® Genesee County*, GENESEE INTERMEDIATE SCH. DISTRICT, https://www.geneseeisd.org/cms/one.aspx?pageId=649376 (last visited Dec. 1, 2018). Michigan's Part C Plan includes, as required, a Child Find plan, and it appears adequate on its face. *See Early On® Michigan Part C of the Individuals with Disabilities Education Act (IDEA)*, MICH. DEP'T EDUC., at 24-32, Mar. 2016, https://www.michigan.gov/documents/mde/Michigan_State_Plan_-_Final_3-2016_518546_7.pdf. Why many children appear to remain unfound, therefore, still requires consideration.

[64] Stipulation Regarding Partial Settlement and Request for Hearing, *supra* note 57.

[65] *See infra* notes 92-94 and accompanying text.

[66] The Flint Registry and the Genesee Health System/Neurodevelopmental Center of Excellence, which was agreed to as part of the settlement of the Child Find part of the lawsuit, was scheduled to be operational in the fall of 2018. Stipulation Regarding Partial Settlement and Request for Hearing, *supra* note 57. Until a child is identified and tested, no IEP is

not identified or evaluated, so none of them could have an IEP and receive the special education and related services they needed. If that can happen in Flint, despite the spotlight shining because of the crisis and coverup, things are no doubt worse in the hundreds of places, including Flint, where childhood lead exposure is a chronic problem.

The IDEA provides no guarantee of a better outcome in the absence of a lawsuit in which systemic failings of the Child Find responsibility are demonstrated. An acceptable Child Find plan does not have to require that educational agencies work with medical providers to establish a registry of every child with an elevated blood lead level. Child Find may require that teachers be educated about when a child should be referred for an evaluation. By definition, however, preschool children are not in schools, so they have no teachers to be trained. Preschool children may come to the attention of a daycare provider, a medical provider, or a community organization, but Child Find does not require that educational agencies engage in effective community outreach. All it requires, at bottom, is that states make some effort to let parents and some providers know what to do if a child seems to be having problems.

An alternative approach is found in the mandate of the district court in a case brought in the District of Columbia on behalf of preschool children who were never identified, evaluated or served. During most of the thirteen years covered by the litigation, the District's Child Find system had identified fewer than 7 percent of the city's young children for services even though at least 8.5 percent of the children were likely to be eligible.[67] After years of resistance and noncompliance with statutory requirements and court orders, the District was ordered to take proactive steps to identify preschoolers in need of services.[68] Among other things, the court order requires regular and ongoing outreach to referral sources, including medical care providers, community groups, advocacy and service organizations and others who come into contact with young children. Materials must

established and the school system has no obligation to deliver special education or related services.

[67] DL v. District of Columbia, 194 F. Supp. 3d 30, 48 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

[68] *Id.* at 101-03 (stating that the national average of 6% is not a relevant measure in D.C. where risk factors increase the vulnerability of children, including high rates of single-parent families, non-English-speaking households, parents with less than a high school education, poverty as measured by SNAP (Supplemental Nutrition Assistance Program) eligibility, concentrated poverty and housing instability).

be developed to educate parents, guardians and anyone who might identify a child about the availability of services, and those materials have to be distributed widely. Referrals must be accepted from everyone and in any form, and the evaluation process must be streamlined and include a case manager for every family. Finally, the District is required to conduct screenings to identify possible referrals, with an emphasis on screenings in places where the most vulnerable children live, and to accept existing medical and other records rather than requiring duplicative testing.[69]

On appeal, the District objected to the programmatic changes required by the trial court's injunction. Using language equally applicable to the problems facing parents in Flint, the Court of Appeals rejected the District's claim that an order requiring systemic change is beyond the court's power under the IDEA:

> In the District's view, it would be up to each and every parent, many of whom are poor, homeless, and perhaps disabled themselves, to somehow determine whether their children are eligible for special education services and then to retain counsel to sue the District to obtain the services to which they are entitled. Given the purpose of IDEA, we cannot imagine a more preposterous argument.[70]

Evaluation. A child is eligible for special education and related services under the IDEA if the child has a disability and, "by reason of that disability, needs special education."[71] The two-part test means that an evaluation must address two questions: 1) the child demonstrates a disability and 2) that disability is the reason for the child needing special education.

The questions could have presumptively correct answers, or a more detailed analysis could occur. The presumptively correct answers, for children exposed to lead, can be yes to both. As discussed earlier, nearly every preschool child who has had a blood test which shows a lead level above zero is going to be disabled in some way affecting learning such as cognitive deficits, inattentiveness, or an inability to control impulses. Preschools, or at least high quality preschools, appear to act as a prophylactic intervention for an

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[69] *Id.*

[70] *DL*, 860 F.3d at 731 (listing other cases requiring systemic changes under the IDEA).

[71] 20 U.S.C. § 1412(a)(3)(B) (2018).

extremely large percentage of lead-poisoned children in one or more realms. Every preschool child with an elevated blood lead level, therefore, is disabled and needs special education because of the disability in the sense that every such child's vulnerability to long-term learning problems is increased by exposure to lead and could be mediated, at least to some degree, by access to preschool.

More complicated evaluations are, of course, possible, for all children. Further, some children will not gain much benefit from preschool without additional evaluation because of the complexity of their physical, emotional or developmental issues. There is no "signature" injury affecting children exposed to lead, so every child could be found to need additional services tailored for that child's particular circumstances.[72] The question is whether additional evaluations should be the routine approach for preschool children or whether they should be undertaken only when needed for some specific reason.

One of the problems with requiring additional evaluations rather than presumptively finding lead-poisoned children eligible is the nature of the evaluations needed to identify the problems caused by lead poisoning. Among the affidavits filed in support of the motion for preliminary injunction by the plaintiffs in *D.R. v. Michigan Department of Education* were two by neuropsychologists who examined a total of seven children. All of the children were five or older, and all were found to be in need of particular special education services. The neuropsychological and other testing described in the affidavits was extensive and uncovered multiple issues with respect to each child. According to Dr. Lidsky, one of the neuropsychologists, the usual psychological testing that is done to determine the nature of the child's need for special education is inadequate in the context of lead exposure.[73] Because lead inflicts injury to the brain, neuropsychological testing is required. Those tests are more complex and appear to uncover problems with higher-order capacities that students need as they progress through school. Also, retesting is recommended at regular intervals.

A neuropsychological evaluation requires special expertise as well as greater expense and time. The new center being created as part of the settlement in *D.R. v. Michigan Department of Education*

[72] Plaintiffs' Motion for a Preliminary Injunction, Report of Dr. Theodore I. Lidsky, *supra* note 23, at 8-9.

[73] *Id.* at 5-7.

includes access to neuropsychological evaluations and will cost upwards of four million dollars to establish.[74] If a neurological evaluation adds something significant to the IEP process for most preschool children, the expense and time could be worthwhile. No such claim has been established, however; the benefits these children receive in preschool do not appear to turn on whether a detailed analysis has been done about the nature of the brain injury the particular child has suffered from having been exposed to lead.

If every affected child is afforded access to preschool, therefore, most will benefit and the others will, at a minimum, be in an environment where the need for further evaluation can be assessed. At the same time, the time and money needed for evaluation can be minimized, since all that would be required is a blood test that reveals an elevated lead level.

Presumptive eligibility appears to be a hard sell, despite its clear benefits. Administrators who have the opportunity to ask for complex evaluations often appear inclined to do so, even when state policy points in the opposite direction. For example, a North Carolina study showed that presumptive eligibility was found in only 18 percent of cases of children referred for early intervention services even though 66 percent of the cases qualified under state policy for presumptive eligibility.[75] The additional eligibility procedures delayed the delivery of services. In *DL v. District of Columbia*, the trial court found that, instead of using presumptive eligibility to qualify children for services under Part B when the child reached age three and aged out of Part C services, school officials routinely referred children for evaluations which took time, were repetitive and delayed the delivery of Part B services beyond the child's third birthday.[76] Where the IDEA allows for eligibility based on simpler testing, the likelihood of promised services reaching the child in a timely way improves.

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[74] Jennifer Chambers, *Judge Oks Plan to Give Flint Kids Lead Screening*, DETROIT NEWS (Apr. 12, 2018), https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2018/04/12/flint-kids-lead-screening/33761965/.

[75] Donald W. Mott & Carl J. Dunst, *Use of Presumptive Eligibility for Enrolling Children in Part C Early Intervention*, 29 J. EARLY INTERVENTION 22, 27 (2006).

[76] DL v. District of Columbia, 194 F. Supp. 3d 30, 68-74, 102-03 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

2. Services

Once a child has been "found" and evaluated, the state must provide a FAPE[77] in accordance with the child's "individualized education program," or IEP.[78] The IEP is developed by a team that includes teachers, school officials and the child's parents,[79] after consideration of and in response to the child's individual circumstances.[80] According to the most recent pronouncement of the Supreme Court, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[81] According to the Court, in the usual case, "a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade."[82]

High quality preschool may be part of a FAPE for a lead-exposed child, but, as with finding and evaluating a child, the IDEA makes no guarantees. A high quality preschool is identified by several criteria, including the staff-student ratio, the education and training of teachers and other staff, the length of the school day and the quality of interactions among teachers, staff and children.[83]

An IEP for a lead-exposed preschooler may be legal even if it lacks a high quality preschool. First, and probably most important, in places where no preschool slot exists for a particular child, the IDEA does not require that a school system create one. Second, an IEP team may conclude that the child does not need preschool but rather needs other services that can be provided in the child's home or at the child's daycare provider. The research that supports universal preschool for lead-poisoned children should be considered, but an IEP team and local educational agency are not under an obligation to include

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77 20 U.S.C. § 1412(a)(1).

78 *Id.* § 1401(9)(D).

79 *Id.* § 1414(d)(1)(B).

80 *Id.* § 1414(3)(B).

81 Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 991 (2017).

82 *Id.* at 1000.

83 *See* Robert Pianta et al., *Quality in Early Education Classrooms: Definitions, Gaps, and Systems*, 26 THE FUTURE OF CHILDREN 119 (2016); Rebekah L. Dorman et al., *Investing in High Quality Preschool: Lessons from an Urban Setting*, 37 EARLY YEARS 91, 97 (2017) ("Classroom size is limited to twenty children, with a staff-child ratio of 1:10. Lead teachers must have at least an Associate's Degree (2-year degree) and be working on a professional development plan to move to a Bachelor's Degree (4-year degree). The curriculum must be from an approved list that is consistent with Ohio's Early Learning Content Standards.").

science-based practices in an IEP.[84] Third, the requirement that the child be placed in the least restrictive environment may preclude a placement in a local preschool if that school is available only to children with disabilities and the particular child does not need to be in a restricted environment.[85]

B. Part C of the IDEA

Under Part C, the state provides "early intervention services" to infants and toddlers with disabilities and their families.[86] States can include children under the age of 3 "who would be at risk of experiencing a substantial developmental delay" in the absence of services.[87] Once a young child is identified for services, the state may elect to continue to deliver services until the child reaches kindergarten age.[88] Those services must include school readiness and other educational components that resemble preschool,[89] and parents of covered children must be notified that preschool may be an alternative.[90]

Among the congressional purposes of Part C are two that offer promise to young children exposed to lead:

> (1) to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first three years of life; [and]
> (2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need

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[84] *See infra* note 103.

[85] *See* Alefia Mithaiwala, *Universal Preschool: A Solution to A Special Education Law Dilemma*, 2004 B.Y.U. EDUC. & L.J. 373 (2004); Theresa M. DeMonte, *Finding the Least Restrictive Environment for Preschoolers under the IDEA: An Analysis and Proposed Framework*, 88 WASH. L. REV. 157 (2010); Dear Colleague Letter from Ruth E. Ryder, Acting Director, Office of Special Education Programs, *Dear Colleague: Preschool LRE*, U.S. DEP'T EDUC., OFF. SPECIAL EDUC. & REHABILITATIVE SERVICES, Jan. 9, 2017, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/preschool-lre-dcl-1-10-17.pdf (discussing the applicability of the least restrictive environment requirement of the IDEA to preschools).

[86] 20 U.S.C. § 1433 (2018).

[87] *Id.* § 1432(1).

[88] *Id.* § 1432(5)(B); *Id.* § 1435(c).

[89] *Id.* § 1432(5)(B)(ii)(I).

[90] *Id.* § 1432(5)(B)(ii)(II).

> for special education and related services after infants and toddlers with disabilities reach school age.[91]

Despite the promising statutory language and purpose statement, however, many lead-exposed preschoolers in Flint will fail to be found eligible for services under Part C and none will be offered services after reaching the age of 3.

1. Eligibility

Michigan limits eligibility for Part C services because, unlike five states, Michigan does not elect to make Part C services available to "at-risk" children.[92] As a result, only children with a demonstrated disability are served.[93] The election is problematic for many children who have been exposed to lead because, as explained earlier, brain injuries caused by lead may not be readily identified in preschool children even though the children's development is affected by those injuries. Services such as early intervention and preschool are a kind of prophylactic intervention intended to keep a child from experiencing the most extreme consequences of being exposed to lead prenatally or early in life.

Access to Michigan's Part C services is available if a child is diagnosed with one of a number of established conditions or one of three developmental delay diagnoses.[94] While Michigan's program has been described as having one of the broadest definitions of developmental delay,[95] the same cannot be said for its definitions of established conditions. Lead exposure is identified as an established

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[91] *Id.* § 1431(a)(1)-(2).

[92] *IDEA Section 618 Data Products: Static Tables*, U.S. DEP'T EDUC., www2.ed.gov/programs/osepidea/618-data/static-tables/index.html (last modified Oct. 4, 2018) (showing states serving at-risk children under Part C in 2016-17 were California, Massachusetts, New Hampshire, New Mexico and West Virginia; Guam also serving at-risk children); Steven A. Rosenberg et al., *Part C Early Intervention for Infants and Toddlers: Percentage Eligible Versus Served*, 131 PEDIATRICS 38, 39 (2013).

[93] Children under the age of six—"especially those with disabilities—are difficult to assess" and assessment results are, nonetheless, "a major determinant of eligibility for IDEA services." Kathleen Hebbeler & Donna Spiker, *Supporting Young Children with Disabilities*, 26 THE FUTURE OF CHILDREN 185, 187-88 (2016).

[94] 20 U.S.C. § 1432(3); Aron & Loprest, *supra* note 8, at 108 (discussing that states allowed "a great deal of latitude" with respect to eligibility for Part C, including the option to exclude children at-risk of developmental delay).

[95] Rosenberg, *supra* note 91, at 41. At the same time, Michigan has a relatively low rate of serving infants and toddlers eligible for Part C. *Id.* at Figure 1. Only one of 26 eligible children received services. *Id*. at 41.

condition, but only under narrow circumstances that preclude a finding of eligibility for many affected children. First, the exposure has to be post-natal. Second, the exposure has to be measured by a blood test. Third, the elevated blood lead level must exceed the CDC "reference value," currently set at 5 µg/dL.

In Flint, as in other communities where exposure to environmental toxins is widespread, some children were no doubt exposed prenatally rather than after birth. Exposure can occur if the pregnant woman drinks the tap water containing lead.[96] Alternatively, the pregnant woman could have been exposed to lead earlier in her life, and the lead could have been stored in her bones. That lead, which replaces calcium, could have been leached during the pregnancy and could have reached the fetus.[97]

As to the blood test requirement, the problem is that lead does not remain in the blood indefinitely. If the child was born shortly after the water crisis began, blood testing could have been delayed for more than 18 months because of the state's continuing denial of problems. After the delay, the blood test would be unlikely to reveal the highest degree of exposure that the child experienced.

Finally, as discussed earlier, the CDC "reference value" provides no bright line that distinguishes between lead-exposed children who suffer cognitive, behavioral and emotional harms from those who do not. Where a child has a lower EBLL, therefore, the child and family could be experiencing problems that can be addressed through Part C services.

Even if the criteria for lead exposure were more inclusive, some children and families would not be found eligible.[98] Under

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[96] *See* Christopher Ingraham, *Flint's Lead-Poisoned Water had a 'Horrifyingly Large' Effect on Fetal Deaths, Study Finds*, WASH. POST (Sept. 21, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/21/flints-lead-poisoned-water-had-a-horrifyingly-large-effect-on-fetal-deaths-study-finds/?noredirect=on&utm_term=.88033d1c3742 (demonstrating a link between ingestion of leaded water by pregnant women to a 58% increase in fetal death rates; other studies also demonstrate a link between ingestion of leaded water during pregnancy with "prenatal growth abnormalities, reduced gestational period, and reduced birth weight").

[97] U.S. DEP'T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, GUIDELINES FOR THE IDENTIFICATION AND MANAGEMENT OF LEAD EXPOSURE IN PREGNANT AND LACTATING WOMEN 29-31 (Adrienne S. Ettinger & Anne Guthrie Wengrovitz eds., 2010), https://www.cdc.gov/nceh/lead/publications/leadandpregnancy2010.pdf.

[98] Even in states where eligibility is easier to establish, some Part C families do not get prompt access to services. For example, North Carolina authorizes presumptive eligibility for Part C services. In other words, a child and family would be found eligible for services if the child has a covered condition without further assessment about the need for intervention. One

Michigan's program, once the condition is established, a multi-disciplinary team must review the record and conclude that the "identified conditions . . . are associated with developmental concern and there is a need for developmental, therapeutic, or educational intervention."[99] Only then is the child and family found eligible and planning for services begun. Because of the delayed onset of identifiable symptoms, however, some children will not look like they need specific services that the teams are accustomed to providing.

2. Services

Once a child and family are found eligible for Part C services, services may be continued until the child enters kindergarten, depending on a state's election. Part C services for children between the ages of 3 and 5 must have "an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills."[100] Alternatively, parents can be offered the option of preschool under Part B.

Michigan did not elect to provide Part C services to children older than 3. Accordingly, transition plans for Part B must be put in place at least 90 days before the child turns 3.[101] For some children, the planning process will determine potential eligibility for Part B services and an appropriate referral to an educational agency is made. For others, services will come to an end when the child turns 3.

Michigan's annual report to the federal government about Part C compliance in 2014 indicated that, of 422 toddlers who turned three and therefore were no longer eligible for Part C services, 418 were potentially eligible for Part B services.[102] In almost every case, the

study of presumptive eligibility in practice, however, demonstrated that few families benefitted. The state's Part C program undertook a full review of the record by a multi-disciplinary team in most cases. As a result, two-thirds of the children who could have been found presumptively eligible under the state's rules were subjected to the reviews before being found eligible. The reviews disclosed few children who were not eligible. Delays in the eligibility findings for eligible children ranged from under 30 days to more than 100 days. Further, planning for service delivery begins only after the eligibility finding is made. Given how young eligible children are for Part C services, delaying the beginning of planning for services for over three months is not trivial. Mott & Dunst, *supra* note 74, at 27-29.

[99] *Eligibility for Early On*, MICH. DEP'T EDUC., https://www.michigan.gov/documents/mde/Eligibility_for_Early_On_352750_7.pdf (last visited Dec. 2, 2018).

[100] 20 U.S.C. § 1435(c) (2018).

[101] *Id.* § 1412(a)(9).

[102] *FFY2014 State Performance Plan/Annual Performance Report*, MICH. DEP'T EDUC., at 36-37, Feb. 1, 2016, https://osep.grads360.org/#report/apr/2014C/publicView?state=MI&ispu

transition plan was communicated to the local educational agency before the child's third birthday.

If the local educational agency, after carrying out its Part B process, agrees with the transition report, then the child may be offered preschool or some other services, such as speech and language therapy, as part of the child's IEP, as described earlier. This transition can be smooth or bumpy, depending on many factors, including whether the Part C agency and the local educational agency have a history of cooperation and effectiveness around transitions.[103] Unfortunately for lead-exposed children in places like Flint, the statute does not require a continuation of services during the transition. Children who qualify for Part C services may receive no services after turning 3 unless the local educational agency promptly assesses the child, develops the IEP and gets the plan implemented. The plan may or may not, as explained earlier, include preschool at age 3 or even at age 4.

III. CHANGING THE IDEA

Making sure that a child has a chance to succeed in school is not a controversial proposition. When a child is exposed to lead or other neurotoxins early in life, however, much must be accomplished before the child enters kindergarten to give that child the chance to succeed. Relying on the IDEA in its current form is dicey. The focus of change needs to be on helping as many affected children as possible as early as possible. Doing that requires paying attention to the systems through which children are identified and served. The IDEA, in its current form, emphasizes individualized approaches over systemic interventions, but the individualized process, as demonstrated earlier, puts too many children at risk of getting no services or inadequate services.

A reimagined IDEA should accomplish two goals. First, children who have been exposed to lead before birth or who test positive for lead exposure at any level before reaching the age of 4 should be identified and deemed presumptively eligible for services at the earliest possible moment. Second, every child who is identified should be offered a slot in a high quality preschool. A full assessment may identify the need for additional services, but the assessment

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[103] *See* DL v. District of Columbia, 860 F.3d 714, 720 (D.C. Cir. 2017) (describing "rocky" transition from Part C to Part B); Czapanskiy, *supra* note 10.

process should not delay the child's opportunity to attend preschool for a year before the child enters kindergarten.

At least four changes in the IDEA will be necessary to accomplish these goals. Additional changes to the IDEA may become apparent once the focus shifts to systemic approaches to serving the needs of children exposed to lead and other neurotoxins early in life.

First, Child Find needs to include the kinds of proactive outreach procedures ordered by the district court in *DL v. District of Columbia*, discussed earlier. Identifying infants and preschoolers is not easy. In the absence of strong relationships with the community and providers, agencies risk missing many children in need.

Second, states should not be able to opt out of serving children at risk of developmental delay under Part C, and every child with an elevated blood lead level should be identified as a child at risk of developmental delay. As discussed earlier, many children who are exposed to lead may not manifest diagnosable signs of developmental delay in the preschool years. Nonetheless, the brain injury inflicted by lead is likely to leave each of them with some combination of cognitive, emotional and behavioral problems that will affect their learning. The risk of these harms appears to be close to universal, and waiting until problems manifest leaves children vulnerable to irremediable failures. In addition, extending Part C services to lead-exposed children and their families increases the opportunities for interrupting negative cascading effects of lead exposure. For example, Part C services can include working with parents to engage in more positive interactions with a child whose oppositional behaviors are related to lead exposure. Also, the process of receiving Part C services will result in the development of a record about the child's situation which can smooth the transition to Part B eligibility and preschool when the child turns three.

Third, the services offered to preschool children under Part B must be based on scientific research. One of the congressional findings on which the IDEA is based is that "education of children with disabilities can be made more effective by . . . the use of scientifically based instructional practices, to the maximum extent possible."[104] Given the brief window of time during which preschool can be used to mitigate the damage of lead exposure, this fairly self-evident proposition needs to be taken seriously. Rather than being framed as

[104] 20 U.S.C. § 1400(c)(5)(E).

a finding, therefore, a requirement for scientifically based instructional practices should be imposed with respect to deciding whether preschool should be included in the IEP of a 3 or 4-year old with a history of lead exposure. The present state of the research, as described earlier, should give rise to a presumption that high quality preschool is included in the IEP of every exposed child. Additional services should be provided as needed, but an alternative to high quality preschool should be offered only when it serves the needs of the particular child.

Fourth, when a lead-exposed child ages out of Part C, Part B eligibility should be presumed without additional testing or evaluation. Otherwise, as was documented in *DL v. District of Columbia*, services can be delayed for a substantial period of time even though additional evaluation will not eliminate the essential fact that the child was exposed to lead prenatally and/or early in life.

All of the proposed changes cost money. The movement for universal preschool may mean that some communities are already spending what is necessary.[105] As desirable as universal preschool is for lead-exposed children, however, a national movement seems unlikely in the near future. Funding debates around preschool for children like those in Flint may turn on the salience of arguments based in the constitution and disability law. Another argument, often overlooked, is moral and it may help to put the finger on the scales toward the children. The government, quite plainly, caused the Flint Water Crisis that put thousands of Flint's infants and young children at risk of irreversible neurological harms. Where exposure to lead and other neurotoxins is endemic, it's hard to remember that government actions and inactions also helped to put those children at risk.[106] These children and their families have been left without recourse for too long. If people take seriously the needs of children, families and communities, perhaps the Flint Water Crisis, by shining a spotlight on

[105] Cleveland is a good example. *See* Dorman, *supra* note 82 (surveying efforts in multiple locations to develop universal preschool and describing in depth the Cleveland process). *See generally* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49 (2006); Mithaiwala, *supra* note 84; *Preschool*, EDUC. L. CTR., edlawcenter.org/issues/preschool.html (last visited Dec. 2, 2018) (describing litigation in New Jersey mandating funding of high quality preschool in the state's poorest urban communities); Dear Colleague Letter from Ruth E. Ryder, *supra* note 84 (describing increased availability of preschool around the country).

[106] *See generally* HANNA-ATTISHA, *supra* note 1; Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Colo*r, 41 HARV. ENVTL. L. REV. 493, 498-99 (2017).

why and how infants and children got hurt, could begin to change the game.