

# Special Education: Its Ethical Dilemmas, Entitlement Status, and Suggested Systemic Reforms

Miriam Kurtzig Freedman<sup>†</sup>

## INTRODUCTION

Since it was enacted in 1975, the nation's special-education law has successfully accomplished its mission—to provide access for all students with disabilities to appropriate public school programs.<sup>1</sup> Now, eligible students are entitled to a free appropriate public education<sup>2</sup> (FAPE) in the least restrictive environment (LRE).<sup>3</sup> We honor and celebrate this amazing accomplishment. However, having achieved its mission, this entitlement<sup>4</sup> program has continued to grow and morph, creating today's quagmire of unintended consequences. Now, almost forty years later, let us acknowledge that the law, as written and implemented, has outlived its purpose. Special education still follows a twentieth-century input- or rights-driven approach, not a twenty-first century outcome- or accountability-driven approach. It interferes with our focus on educating all children and takes educators away from their primary mission: teaching and learning. We can no longer treat

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<sup>†</sup> Of counsel, Stoneman, Chandler & Miller LLP (representing Massachusetts Public Schools), author, speaker, consultant, reformer, visiting fellow at Stanford University, and former teacher and hearing officer. For further discussion of this topic, see Miriam Kurtzig Freedman, *Fixing Special Education: 12 Steps to Transform a Broken System* (School Law Pro & Park Place Publications 2009); <http://www.schoollawpro.com> (visited Jan 30, 2012); Miriam Kurtzig Freedman, *4 Common-Sense Proposals for Special Education Reform* (Apr 27, 2012), online at <http://www.theatlantic.com/national/archive/2012/04/4-common-sense-proposals-for-special-education-reform/256435/> (visited May 2, 2012); [www.parkplacepubs.com](http://www.parkplacepubs.com) (visited Jan 30, 2012). The views expressed herein are the author's and do not represent those of her law firm or any other person or entity.

I am very grateful to Richard Epstein for inviting me to participate; to many colleagues, including Marilyn Bisbicos and Edward Orenstein, for spirited discussions and innovations; to my law firm, Stoneman, Chandler & Miller LLP, for friendship, challenges, and support; to Jim Walsh and Ted Stiff of Park Place Publications for their powerful belief that publishing ideas can move the discussion forward; and to Linda Chase, Bill Koski, Nathan Levenson, and Gerald Zelin for their thoughtful and helpful contributions to this piece. The opinions and errors are mine.

<sup>1</sup> See Individuals with Disabilities Education Improvement Act of 2004, Pub L No 108-446, 118 Stat 2647 (2004), codified at 20 USC § 1400 et seq.

<sup>2</sup> See IDEA § 101, 20 USC § 1400(d)(1)(A).

<sup>3</sup> See IDEA § 101, 20 USC § 1412(a)(5)(A).

<sup>4</sup> The word “entitlement” is used here to mean a right to benefits specified by law for a specific group of individuals, each of whom can enforce these rights through due process and litigation.

special education as sacrosanct and off-limits in our national school-reform conversation. Let us preserve the spirit of the law—educating all students with disabilities—as we retool it for the 21st century. I suggest four systemic reforms.

This Article proceeds in three parts. First, a bit of history and current realities. Second, ethical dilemmas of this private-enforcement entitlement program: flawed policies, issues of fairness, and the adversarial climate in schools. Third, four suggestions to improve education for students with disabilities in the context of school reform for all students.

## I. SPECIAL EDUCATION AND ITS ETHICAL DILEMMAS

### A. A Bit of History—Eleanor’s Story

*Picture the first day of school in New York City some sixty years ago. My friend’s little sister, Eleanor, was six years old and her mother took her to school. But, they were stopped at the schoolhouse door, when the principal waved them away: “We don’t educate children like that.” Eleanor had Down syndrome. She and her mother returned home and she never went to school.*

Stories like Eleanor’s led to advocacy efforts, and court decisions<sup>5</sup> that ultimately resulted, in 1975, in our first national special-education law.<sup>6</sup> About one million students with intellectual, physical, and other disabilities were excluded from public schools or denied access to appropriate education.<sup>7</sup>

Of note, President Gerald R. Ford signed this law reluctantly (facing a veto override),<sup>8</sup> as evidenced by his opening words: “Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains.”<sup>9</sup>

The law’s purpose was to provide access for students with disabilities (SWD) to appropriate services.<sup>10</sup> First called the Education

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<sup>5</sup> See, for example, *Pennsylvania Association for Retarded Children v Pennsylvania*, 343 F Supp 279 (ED Pa 1972); *Mills v Board of Education of District of Columbia*, 348 F Supp 866, 876 (DDC 1972).

<sup>6</sup> See Education for All Handicapped Children Act of 1975 (EAHCA), Pub L No 94-142, 89 Stat 773 (1975), codified as amended at 20 USC § 1400 et seq.

<sup>7</sup> See EAHCA § 2, 89 Stat at 774.

<sup>8</sup> See Michelle R. Davis, *Special Education Law Was Signed by Ford, Despite Reservations: Measure Had ‘Unrealistic’ Goals, He Feared*, Educ Wk 21 (Jan 3, 2007).

<sup>9</sup> Gerald R. Ford, *Statement on Signing the Education for All Handicapped Children Act of 1975*, 1975 Pub Papers 1935, 1935.

<sup>10</sup> See IDEA § 650, 20 USC § 1450.

for All Handicapped Children Act<sup>11</sup> (EAHCA), the law was last reauthorized in 2004 and is now called the Individuals with Disabilities Education Improvement Act<sup>12</sup> (IDEA). It is a funding statute for states that choose to participate (all now do).<sup>13</sup> States, through public schools, provide access for SWD to a FAPE in the LRE. Through a written individualized education program<sup>14</sup> (IEP), developed for each eligible child at a team meeting attended by teachers, administrators, evaluators, service providers, and parents, schools provide “specialized instruction . . . which [is] individually designed to provide educational benefit to the handicapped child” in the least restrictive setting.<sup>15</sup> IDEA also provides parents of SWD with the right to participate meaningfully in the IEP development and to due process to resolve disputes.<sup>16</sup>

A few years after the passage of EAHCA in 1975, the law provided access to services for SWD.<sup>17</sup> By 1980, over four million students were served through special education programs.<sup>18</sup> Even then, it was big business.<sup>19</sup>

## B. Where We Are Now

### 1. Changed reality and worldview.

We serve all children with disabilities, ages three to twenty-one, in our nation’s K–12 schools, many in inclusive settings.<sup>20</sup> Our language changed. For example, the terms “educable,” “non-educable,” or “trainable” reflect a bygone era.<sup>21</sup> Today’s mantra is *all* children can

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<sup>11</sup> Pub L No 94-142, 89 Stat 773 (1975), codified at 20 USC § 1401.

<sup>12</sup> Pub L No 108-446, 118 Stat 2647 (2004), codified at 20 USC § 1400 et seq. Last reauthorized in 2004, its next reauthorization is overdue. See also American Recovery and Reinvestment Act of 2009 (ARRA), Pub L No 111-5, 123 Stat 115, 182 (2009).

<sup>13</sup> See Office of Special Education Programs, *Awards, Accounts & Reporting: Part B and C State Formula Grant Award Letters, Application Forms, Funding Tables and Other Information* (Department of Education 2011), online at <http://www2.ed.gov/fund/data/award/idea/index.html> (visited Oct 23, 2011).

<sup>14</sup> See 20 USC § 1414.

<sup>15</sup> *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 201 (1982).

<sup>16</sup> See 20 USC § 1414. See also 20 USC § 1415; *Rowley*, 458 US at 205.

<sup>17</sup> See EAHCA § 611, 20 USC § 1401.

<sup>18</sup> See Bob Algozzine, James E. Ysseldyke, and Sandra Christenson, *An Analysis of the Incidence of Special Class Placement: The Masses Are Burgeoning*, 17 J Spec Educ 141, 141–46 (1983).

<sup>19</sup> See *id.* at 142.

<sup>20</sup> See 20 USC § 1400(d)(1)(A). Some states serve children for more years than the IDEA requires.

<sup>21</sup> Language constantly evolves. See, for example, Lynn Nakagawa, ‘Retardation’ Cut From State Lexicon, Honolulu Star-Advertiser Online (July 12, 2011), online at [http://www.staradvertiser.com/news/hawaii/news/20110712\\_retardation\\_cut\\_from\\_state\\_lexicon.html](http://www.staradvertiser.com/news/hawaii/news/20110712_retardation_cut_from_state_lexicon.html)

learn. We now live in a far more inclusive society. Educators have more sensitivity and expertise. Parents of SWD are included in decision making. We have higher expectations for SWD and have demonstrated success.<sup>22</sup> Between 1995–96 and 2004–05, the dropout rate for SWD declined (but still exceeded the rate for general-education students), and their rate of graduating with “regular diplomas” rose to 54.4 percent (which is still lower than their nondisabled peers).<sup>23</sup>

## 2. Number of students now.

IDEA educates 6.48 million students.<sup>24</sup> Intended for 10 percent of students, IDEA now educates 14 percent of all students nationwide.<sup>25</sup> Notably, during the 1980–2005 period, the number of general education students grew by 20 percent, while the number of special education students grew by 37 percent.<sup>26</sup> Wide eligibility discrepancies exist among the states, ranging from 9 percent in Texas to over 18 percent in Rhode Island.<sup>27</sup>

Of these numbers, today’s largest disability category by far, close to 40 percent of all SWD, is specific learning disability (SLD).<sup>28</sup> Further, the 2002 President’s Commission on Excellence in Special

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(visited Oct 23, 2011) (discussing a recent Hawaii law that substitutes the term “intellectual disabilities” for “mental retardation” in the state’s lexicon). See also generally Act of October 5, 2010 (Rosa’s Law), Pub L No 111-256, 124 Stat 2643 (2010), codified at 20 USC § 1400 et seq (substituting the term “having intellectual disabilities” for “having mental retardation”).

<sup>22</sup> See generally Miriam Kurtzig Freedman, *Fixing Special Education: 12 Steps to Transform a Broken System* (School Law Pro & Park Place Publications 2009). See Thomas Hehir, *Looking Forward: Toward a New Role in Promoting Educational Equity for Students with Disabilities from Low-Income Backgrounds*, in Gary Sykes, Barbara Schneider, and David N. Plank, eds, *Handbook of Education Policy Research* 831, 839–40 (Routledge 2009).

<sup>23</sup> See Office of Special Education and Rehabilitative Services, 1 29th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2007 i, xix, 77–82 (Department of Education 2007), online at <http://www2.ed.gov/about/reports/annual/osep/2007/parts-b-c/29th-vol-1.pdf> (visited Oct 23, 2011). See also Hehir, *Looking Forward* at 832–33, 839–40 (cited in note 22) (arguing that gains are largely among white middle- and upper-class SWD).

<sup>24</sup> See Janie Scull and Amber M. Winkler, *Shifting Trends in Special Education* \*1 (Fordham Institute May 2011), online at [http://www.edexcellencemedia.net/publications/2011/20110525\\_ShiftingTrendsInSpecialEducation/ShiftingTrendsInSpecialEducation.pdf](http://www.edexcellencemedia.net/publications/2011/20110525_ShiftingTrendsInSpecialEducation/ShiftingTrendsInSpecialEducation.pdf) (visited Oct 23, 2011).

<sup>25</sup> See Federal Education Budget Project, *Background & Analysis: Individuals with Disabilities Education Act—Cost Impact on Local School Districts* (New America Foundation 2011), online at <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-cost-impact-local-school-districts> (visited Oct 23, 2011); Thomas D. Snyder and Sally A. Dillow, *Digest of Education Statistics 2010* 59, 82 (Department of Education 2011), online at <http://nces.ed.gov/pubs2011/2011015.pdf> (visited Oct 23, 2011).

<sup>26</sup> See Federal Education Budget Project, *Background & Analysis* at 8 (cited in note 25).

<sup>27</sup> See Scull and Winkler, *Shifting Trends* at \*7 (cited in note 24).

<sup>28</sup> See id at \*5.

Education estimated that 80 percent of these students are diagnosed with SLD because they did not learn how to read.<sup>29</sup> In contrast, when enacted, the EAHCA focused on children with more severe and profound physical, intellectual, and emotional impairments.<sup>30</sup>

### 3. Costs of educating SWD.

The Fordham Institute estimates that special education costs \$110 billion per year and consumes “21 percent of all education spending across the nation.”<sup>31</sup> This spending includes federal, state, and local funds.<sup>32</sup> Yet, even these high numbers do not tell the tale, as they do not estimate the cost of educating SWD. Since most SWD are in inclusive settings and receive regular education services and resources as well as special-education services, we need to add *non-special-education funding* that is spent on their education to ascertain the actual cost of educating SWD. A 2009 California report cites this substantial non-special-education funding as an “encroachment.”<sup>33</sup> We lack national studies. Indeed, the 2011 Fordham article reports as “scandalous” the fact that we still do not know how much is spent to educate SWD:<sup>34</sup>

Yet we know precious little about how this money is spent at the state or district level. Indeed, state special-education expenditures are not easy to obtain; states are not required to

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<sup>29</sup> President’s Commission on Excellence in Education, Office of Special Education and Rehabilitation Services, *A New Era: Revitalizing Special Education for Children and Their Families* 3 (Department of Education 2002), online at [http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres\\_Rep.pdf](http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf) (visited Oct 23, 2011).

<sup>30</sup> This article focuses on the 70–80 percent of SWD with milder disabilities, including SLD, ADD/ADHD, speech and language disorders, and so on. See notes 62, 65 and accompanying text.

<sup>31</sup> See Scull and Winkler, *Shifting Trends* at \*12 (cited in note 24).

<sup>32</sup> The federal contribution is approximately \$12 billion annually. See Federal Education Budget Project, *Background & Analysis: Individuals with Disabilities Education Act—Funding Distributions* (New America Foundation 2011), online at <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution> (visited Oct 23, 2011); *10 Facts about K–12 Education Funding* \*7 (Department of Education 2005), online at <http://www2.ed.gov/about/overview/fed/10facts/10facts.pdf> (visited Oct 12, 2011). The American Recovery and Reinvestment Act of 2009 added an additional one-time expenditure of \$12.2 billion to be spent in 2009–10. See ARRA § 703, 123 Stat 115, 182–83. Special education is the second largest federal education program, following Title I of the Elementary and Secondary Education Act (ESEA), now called the No Child Left Behind Act (NCLB), which received \$15.7 billion in 2008. See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L Rev 1413, 1421 n 23 (2011).

<sup>33</sup> Stephen Lipscomb, *Special Education Financing in California: A Decade after Reform* \*9 (Public Policy Institute of California 2009), online at [http://www.ppic.org/content/pubs/report/R\\_809SLR.pdf](http://www.ppic.org/content/pubs/report/R_809SLR.pdf) (visited Oct 23, 2011).

<sup>34</sup> See Scull and Winkler, *Shifting Trends* at \*15 (cited in note 24).

report these data to the federal government, and few volunteer to disentangle their special-education expenditures from their reported general-education expenditures.

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Accurate accounting of state, district, and school-level spending on special education simply does not exist. . . . In a time of tight resources—and special-education expenditures surpassing \$110 billion per annum—there’s an increasing need for reliable financial data at all levels. That such large swaths of state and district budgets can go *essentially unmeasured and unreported is scandalous*.

. . . We can no longer view these as *untouchable expenditures*.<sup>35</sup>

Yet, even with these large numbers, special education continues to be largely ignored in current education reform efforts. Instead, many reformers focus on “choice” through approaches such as charter schools and vouchers. But the small “choice” numbers tell the tale.

Of the more than 55 million students in America’s K–12 schools in 2010, only *1.7 million* were in charter schools (*3 percent*).<sup>36</sup> Vouchers may have educated 191,000 students.<sup>37</sup> Together, these reforms today *may reach 3 percent* of students, compared to the *14 percent* of students in special education.<sup>38</sup> Special-education services for SWD account for roughly 20 percent of school budgets<sup>39</sup>—*roughly two times more than the average per-pupil cost in general education*, including “choice” students.<sup>40</sup> In 2004, it was estimated that 143 times more was spent on special education than on education for gifted and talented students.<sup>41</sup>

In spite of the fact that the number of students in “choice” options pales in comparison to the number of SWD who receive services in schools, we continue to focus reform efforts on the former, not the latter. It is time for us to change our focus to programs where

<sup>35</sup> Id at \*12, 15 (emphasis added).

<sup>36</sup> See Center for Education Reform, *US K–12 Facts* (2010), online at [www.lwvbellinghamwhatcom.org/files/general\\_us\\_k-12\\_data\\_qr.pdf](http://www.lwvbellinghamwhatcom.org/files/general_us_k-12_data_qr.pdf) (visited Oct 23, 2011).

<sup>37</sup> American Federation for Children, *Facts* (2011), online at <http://www.federationforchildren.org/facts> (visited Oct 23, 2011).

<sup>38</sup> See Federal Education Budget Project, *Background & Analysis* (cited in note 25).

<sup>39</sup> See Scull and Winkler, *Shifting Trends* at \*12 (cited in note 24); Federal Education Budget Project, *Background & Analysis* (cited in note 25).

<sup>40</sup> See, for example, Tom Parish, *Policy Alternatives for Special Education Funding in Illinois* \*4 (American Institute for Research 2010), online at [http://www.isbe.state.il.us/spec-ed/pdfs/se\\_task\\_force\\_report.pdf](http://www.isbe.state.il.us/spec-ed/pdfs/se_task_force_report.pdf) (visited Oct 23, 2011). See text accompanying notes 31–36.

<sup>41</sup> Jan Davidson and Bob Davidson, *Genius Denied: How to Stop Wasting Our Brightest Young Minds* 16 (Simon & Schuster 2004).

far more students are and far more funds are spent. Special education can no longer be the third rail that public officials and others won't touch.<sup>42</sup>

## II. IDEA'S ADVERSARIAL PRIVATE ENFORCEMENT MECHANISM CREATES DILEMMAS

The special-education law was enacted during the civil rights era when the use of the courts to solve society's problems through new rights and procedural protections was *au courant*. It set up an adversarial private-enforcement system for the rights it created. Parents were to be "attorneys general" to enforce the law, protect their and their children's rights, and counteract weakness in public enforcement of those rights.<sup>43</sup> Alas, this adversarial system is built on the premise that parents and schools are not on the same page working cooperatively for the benefit of children. Instead, the law presumes that parents need protections from their schools and need to *advocate for* their children *against* their schools.

Schools and parents of SWD have the right to mediation, other dispute resolution options, or a due process hearing about a student's special-education status and placement.<sup>44</sup> As a practical matter, it is usually the parents who file for hearings.<sup>45</sup> Hearings can involve a FAPE, evaluations, eligibility issues, IEP development and implementation, parental rights, attorneys' fees,<sup>46</sup> and a complex due process system, among other issues.

Remarkably, since 1975, Congress has created *no* individual educational entitlement programs. Title I, reauthorized in 2002 as the

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<sup>42</sup> See Scull and Winkler, *Shifting Trends* at \*15 (cited in note 24). See also Freedman, *Fixing Special Education* 1 (cited in note 22). See also, for example, Education Commission of the States, *12 for 2012—Issues to Move Education Forward* (Jan 2012). Special education is not among the twelve suggested reforms. And see recent withdrawal of an earlier U.S. Department of Education letter that provided school district with some flexibility in the maintenance effort requirements. Compare Nirvi Shah, *Feds Back Off Easing Penalties for Districts That Cut Special Ed. Funding*, *Educ Wk* (Apr 14, 2011), with Nirvi Shah, *Rules Relaxed on Budget Cuts to Special Ed*, *Educ Wk* (Sept 14, 2011). Compare Alexa Posny, Assistant Secretary, Office of Special Education Programs, Letter to Kathleen Boundy, Co-director, Center of Special Education and Rehabilitative Services (Apr 4, 2012), with Melody Musgrove, Director, Office of Special Education Programs to Bill East, Executive Director, National Association of State Directors of Special Education (June 16, 2011), online at <http://www2.ed.gov/policy/speced/guid/idea/letters/2011-2/east061611partbmoe2q2011.doc> (visited Jan 23, 2012). The April letter indicates that the U.S. Department of Education will seek public comments on this issue.

<sup>43</sup> See 20 USC § 1415(a). See also Pasachoff, 86 *Notre Dame L Rev* at 1415, 1424 (cited in note 32).

<sup>44</sup> 20 USC § 1415(b)–(h).

<sup>45</sup> See, for example, *Schaffer v Weast*, 546 US 49, 55 (2005).

<sup>46</sup> 20 USC § 1415(i)(3).

No Child Left Behind Act<sup>47</sup> (NCLB), confers no enforceable rights to educational services for students or parents.<sup>48</sup> Neither students who are English language learners<sup>49</sup> nor those who are gifted and talented have an individual entitlement to services or process. Indeed, “the IDEA is unusual . . . in that it creates an individually enforceable right to services.”<sup>50</sup>

While well intended and historically apt, IDEA, premised on corrosive distrust rather than pedagogy, created a complicated system of federal, state, and local requirements, and has spawned a host of unintended consequences, full of dilemmas for educators, parents, and citizens. Let us consider three that impact *all* students: (1) flawed policies, (2) issues of fairness and equity, and (3) the adversarial climate in our schools.

#### A. Flawed Policies

##### 1. Procedures-bound education.

IDEA is still a twentieth-century input- rights-driven law, not a twenty-first century output- or results-driven law. In comparison, the NCLB (with all of its imperfections) focuses on student outcomes by mandating adequate yearly progress (AYP) and accountability for results.<sup>51</sup>

IDEA created a bureaucratic morass for schools and parents. The 2002 President’s Commission found 814 federal monitoring requirements for compliance by state and local agencies.<sup>52</sup> The “culture of process compliance” has not abated.<sup>53</sup> In a report to the New Hampshire Boards Association, attorney Gerald Zelin summarized the mass of regulation that has sprung up in the wake of IDEA: “Printed in small type, the IDEA is 113 pages long. The US Department of Education’s IDEA regulations are 115 pages long. The US Department of Education’s explanatory comments to those

<sup>47</sup> Pub L No 107-110, 115 Stat 1439 (2002), codified as amended at 20 USC § 6301 et seq.

<sup>48</sup> See Melanie Natasha Henry, Comment, *No Child Left Behind? Education Malpractice Litigation for the 21st Century*, 92 Cal L Rev 1117, 1166 (2004). See also *Association of Community Organizations for Reform Now v New York City Department of Education*, 269 F Supp 2d 338, 344 (SDNY 2003).

<sup>49</sup> See *Lau v Nichols*, 414 US 563, 565–69 (1974), narrowed in part by *Regents of the University of California v Bakke*, 438 US 265, 287 (1978). Neither the students nor their parents have an individual entitlement to due process or services. Miriam Kurtzig Freedman, *Meeting NCLB’s Mandate: Your Quick-Reference Guide to Assessments and Accountability 3* (LRP 2d ed 2008) (internal citations omitted).

<sup>50</sup> Pasachoff, 86 Notre Dame L Rev at 1422–23 (cited in note 32).

<sup>51</sup> See 20 USC § 6316 (outlining NCLB’s AYP requirement and accountability provisions).

<sup>52</sup> President’s Commission on Excellence, *A New Era* at \*12 (cited in note 29).

<sup>53</sup> *Id.* at \*11–12.

regulations are 213 pages long.”<sup>54</sup> These requirements have to be implemented by the 13,809 school districts, 98,706 public K–12 schools, and 5,453 charter schools in this country.<sup>55</sup> This is an impossible reality and burden. Each state adds its own regulations.<sup>56</sup> All of these requirements are to be implemented by large and small school districts across the country and by charter schools.

A 2002 study conducted for the US Department of Education, found “53 percent of elementary and secondary special-education teachers reported that routine duties and paperwork interfered with their job of teaching to a great extent.”<sup>57</sup> Paperwork emerged as “significant in the manageability of special-education teachers’ jobs and their intent to stay in the profession.”<sup>58</sup> It is still so.<sup>59</sup> Teachers leave the field because of the burdensome paperwork.

## 2. No label—no services.

Under IDEA, a student needs to be diagnosed with one of the statutorily recognized disabilities in order to receive services.<sup>60</sup> This “medical model” drives special education. Evaluators are gatekeepers—a huge industry. Under IDEA, a student with a disability is one who has been diagnosed with one of the law’s specified disability categories and, as a result, needs specialized instruction and related services. Thus, IDEA creates both a “wait to

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<sup>54</sup> Gerald M. Zelin, *The Expansion of Special Education Law and What Schools Can Do about It*, New Hampshire School Boards Association Appendix A \*9 (Jan 16, 2010), online at [http://www.nhsba.org/documents/1-GMZ\\_handouts\\_Jan16\\_2010\\_NHSBA.pdf](http://www.nhsba.org/documents/1-GMZ_handouts_Jan16_2010_NHSBA.pdf) (visited Oct 23, 2011). See also Michael Levin, ed, *20 USC §§ 1400-1482*, 1 2007 US Sch Laws & Rules 137, 137–249 (Thomson-West); Michael Levin, ed, *34 CFR §§ 300.1-300.818*, 2 2007 US Sch Laws & Rules 567, 567–682 (Thomson-West); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed Reg 156, 46540–46753 (2006).

<sup>55</sup> Center for Education Reform, *US K–12 Facts* at \*1 (cited in note 36).

<sup>56</sup> See, for example, 603 Mass Reg Code §§ 28.00–10 (providing forty additional pages of Massachusetts regulations, in addition to the law and Department of Elementary and Secondary Education guidance, letters, and analysis).

<sup>57</sup> Elaine Carlson, et al, *SPeNSE: Study of Personnel Needs in Special Education: Final Report of the Paperwork Substudy* \*1 (Office of Special Education 2003), online at <http://spense.education.ufl.edu/Finalpaperworkreport3-24-031.pdf> (visited Oct 23, 2011).

<sup>58</sup> See President’s Commission on Excellence in Education, *A New Era* at \*1, 5 (cited in note 29).

<sup>59</sup> See 20 USC § 1400(c)(5)(G).

<sup>60</sup> See 20 USC § 1414(b)(4)(A). See also 20 USC § 1401(3)(A) (defining “child with a disability” as one “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to . . . as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments [including ADD and ADHD], or specific learning disabilities [SLD]; and who, by reason thereof, needs special education and related services”). See Rosa’s Law, 124 Stat 2643 (cited in 21).

fail” model that often serves students too late and creates perverse incentives to get labeled as disabled.<sup>61</sup> The disability categories now include SLD, such as dyslexia, as well as attention deficit disorder with or without hyperactivity (ADD/ADHD), emotional disturbance, and speech and language disabilities.<sup>62</sup>

These labels can be inequitable, have racial and ethnic discrepancies, and often track a child’s zip code, parental advocacy, or school culture.<sup>63</sup> Congress is concerned about the overrepresentation of minority students in special education, a phenomenon called “disproportionality.”<sup>64</sup>

The above four categories make up 70 to 80 percent of all children IDEA serves, overshadowing those with severe and profound disabilities, such as intellectual disabilities, deafness, and blindness, that IDEA initially targeted.<sup>65</sup>

### 3. Duplicative and contradictory education laws.

While today education at large focuses on student outcomes and achievement, special education continues to be process-, rights-, and

<sup>61</sup> See Carol Kinlan, *Rethinking Special Education in the U.S.*, Hechinger Rept (Jan 21, 2011), online at [http://hechingerreport.org/content/rethinking-special-education-in-the-u-s\\_5003/](http://hechingerreport.org/content/rethinking-special-education-in-the-u-s_5003/) (visited Oct 23, 2011) (noting that the United States’ educational system does “a poor job of identifying weak students in the earliest grades and supporting them effectively”). See also C.M. Rubin, *The Global Search for Education: More Focus on Finland*, Educ News (June 1, 2011), online at [http://www.educationnews.org/ed\\_reports/157152.html](http://www.educationnews.org/ed_reports/157152.html) (visited Oct 23, 2011) (describing the system now used in Finland, which reportedly focuses early, and effectively, on struggling students before they fall behind).

<sup>62</sup> See 20 USC § 1401(3) (defining the disabilities that qualify a child for coverage under the IDEA). These labels are widely believed to have questionable reliability. See, for example, G.Reid Lyon, et al, *Rethinking Learning Disabilities*, in Chester E. Finn Jr, Andrew J. Rotherham, and Charles R. Hokanson Jr, eds, *Rethinking Special Education for a New Century* 259, 259–87 (Fordham Foundation and Progressive Policy Institute 2001), online at [http://www.dlc.org/documents/SpecialEd\\_complete\\_volume.pdf](http://www.dlc.org/documents/SpecialEd_complete_volume.pdf) (visited Oct 23, 2011).

<sup>63</sup> See Susan Foster, *Harvard Studies Find Inappropriate Special Education Placements Continue to Segregate and Limit Opportunities for Minority Students Nationwide* (Harvard Graduate School of Education Mar 2, 2001), online at [http://www.gse.harvard.edu/news\\_events/features/2001/speced03022001.html](http://www.gse.harvard.edu/news_events/features/2001/speced03022001.html) (visited Oct 23, 2011).

<sup>64</sup> See 20 USC § 1400(c); Lynda Richardson, *Minority Students Languish in Special Education System*, NY Times A1 (Apr 6, 1994). Many studies show that African American boys are more likely to be labeled as emotionally disturbed than others. See, for example, Foster, *Harvard Studies* (cited in note 63).

<sup>65</sup> For a discussion about the high number of SWD who are labeled as SLD because they did not learn how to read, see notes 28–30. See also Erin Dillon, *Labeled: The Students Behind NCLB’s ‘Disabilities’ Designation*, Educ Sector Online (July 12, 2007), online at <http://www.educationsector.org/publications/labeled-students-behind-nclbs-disabilities-designation> (visited Oct 13, 2011); Freedman, *Fixing Special Education* at 8 (cited in note 22); President’s Commission on Excellence, *A New Era* at \*23 (cited in note 29). For a discussion that this article focuses on the 70–80 percent group, not the students with severe and profound disabilities, see note 30.

input-driven. In fact, we now have two overlapping, confusing, and contradictory federal laws to teach the same students how to read, write, and do math—IDEA and the NCLB.<sup>66</sup> Where is the research on the *corrosive impact* on schools trying to run two systems—all in a six-hour school day?

For example, the NCLB requires all students, including SWD, to meet state standards and demonstrate proficiency through adequate yearly progress (AYP). In response, schools work to help SWD access the curriculum with accommodations and extra services. But, even when students “pass” general-education courses, schools are called to task for denying those student a FAPE by failing to focus on student disabilities.<sup>67</sup> What is a school to do? These laws lead in opposite directions.

Another question looms, resulting from the contradictory mandates of these laws: many states and schools are adopting the NCLB’s “response to intervention” (RtI) approach in regular education. That is, they focus in the early grades on teaching children through research-based instruction and progress monitoring, especially how to read. RtI does not require disability labels or “wait to fail” to provide services. RtI is intended to improve student performance in the early grades. As a result, fewer children will need special education. Yet, under IDEA, parents can invoke the IDEA’s procedures and protections to request an evaluation of their child at any time during the RtI process. In response, the school needs to evaluate the child or inform parents why it does not agree to do so, and the parents have the right to dispute that decision and seek due process.<sup>68</sup>

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<sup>66</sup> One attempt to deal with this issue is the joint initiative between the National Title I Association and the National Association of State Directors of Special Education—the Title I/IDEA Working Group. See National Title I Association and National Association of State Directors of Special Education, *Recommendations for Improved Coordination between Title I and IDEA* \*17 (June 2011), online at <http://www.nasdse.org/Portals/0/Documents/Title%20I%20and%20IDEA%20Coordination%20Report%20June%201%202011.pdf> (visited Oct 23, 2011).

<sup>67</sup> See, for example, *Montgomery Township Board of Education v S.C.*, 135 Fed Appx 534, 536 (3d Cir 2005); *In re Cohasset Public Schools*, No 09-4922 at \*21 (Mass Bureau of Special Education App, June 12, 2009), online at <http://www.doe.mass.edu/bsea/decisions/09-4922.doc> (visited Oct 23, 2011).

<sup>68</sup> See *Questions and Answers on Response to Intervention (RTI) and Early Intervention Services (EIS)* \*6 (Department of Education 2007), online at [http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary\\_key/8](http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/8) (visited Oct 23, 2011).

One is left to wonder if any nation truly interested in improving teaching and learning for all students would create such a disjointed, contradictory, and confusing system.<sup>69</sup>

### 3. Legal requirements based on inadequate research.

Often, IDEA services and practices lack research to support their policies and directives. Consider just three examples.

*a) Inclusion.* IDEA promotes inclusion as a civil right, in spite of weak data supporting it as a “best practice” for many SWD for improved educational results in many situations.<sup>70</sup> It requires schools to place students in the LRE with nondisabled peers to the maximum extent *appropriate*.<sup>71</sup> Neither IDEA nor the Supreme Court has defined “appropriate,” leading to costly disputes, fractured trust, and confusion. In fact, some practitioners ignore the word “appropriate,” substituting the words “possible” or “most appropriate.”<sup>72</sup> I believe that we should follow placement presumptions, goals, and mottoes when they are consistent with best teaching practices.<sup>73</sup> Pedagogy should trump placement—not vice versa.

To make inclusion “work,” schools provide paraprofessionals (or one-to-one aides), accommodations or modifications,<sup>74</sup> co-teaching, and other approaches to *maintain* the child in a classroom. Such practices are often provided even when there is scant or nonexistent

<sup>69</sup> The concern extends beyond the reality that when schools are judged under the NCLB’s AYP benchmark, one of the most common reasons for their failure is that SWD did not meet state standards.

<sup>70</sup> See John O’Neil, *Can Inclusion Work? A Conversation with Jim Kauffman and Mara Sapon-Shevin*, 52 *Educ Leadership* 7, 7–11 (Dec 1994) (discussing the potentials and pitfalls of inclusion and noting that it remains controversial).

<sup>71</sup> See 20 USC § 1412(a)(5)(A). See also 34 CFR § 300.114(a)(2). As with the FAPE requirement, the term “appropriate” is undefined in the LRE context.

<sup>72</sup> See, for example, Florida Diagnostic & Learning Resources System, *Placement and the Least Restrictive Environment* (Florida Department of Education), online at [http://www.escambia.k12.fl.us/fdlrs/For\\_Families/Documents/LREbrochure.pdf](http://www.escambia.k12.fl.us/fdlrs/For_Families/Documents/LREbrochure.pdf) (visited Oct 23, 2011); C.J. Newton, *Special Education Legal Primer for Parents of Children with Learning Disabilities, Attention Deficit Disorders, and Other Educational, Physical, and Cognitive Disabilities*, *FindCounseling.com Mental Health J* (Sept 1997), online at <http://www.findcounseling.com/journal/sped/least.html> (visited Oct 23, 2011).

<sup>73</sup> Freedman, *Fixing Special Education* at 72 (cited in note 22). See also Michael J. Petrilli, *All Together Now? Educating High and Low Achievers in the Same Classroom*, *Educ Next* 48, 49–55 (Winter 2011); James M. Kauffman, *The Regular Education Initiative as Reagan-Bush Education Policy: A Trickle-Down Theory of Education of the Hard-to-Teach*, 23 *J Special Educ* 256, 261–62 (1989).

<sup>74</sup> Accommodations are changes in programming or standards that the student needs in order to learn and have access to school programs that *do not* lower standards or fundamentally alter them. Modifications *do* lower standards or fundamentally alter them. In my experience, this distinction is not clearly articulated by many educators, parents, IEP teams, and policies, and as a result, schools often provide too many accommodations and modifications.

evidence that they actually improve learning for SWD and are not detrimental to other students.<sup>75</sup>

Query: If inclusion is so great, why do parents most often litigate to remove their children to private special-education schools that educate only SWD and offer no inclusion?<sup>76</sup>

*b) Focus on weaknesses.* IDEA continues to slice and dice weaknesses in an attempt to improve student performance. It does not focus on student strengths. In contrast, psychological research, real-world experience, and common sense emphasize people's strengths—whether academic, physical, social, or otherwise. Where is research to support this weakness-focused approach for SWD?

Query: Why do we cut programs, such as technical, vocational, and career education, that focus on student strengths and interests, when those programs work well for SWD and many other students?<sup>77</sup>

*c) Overuse of accommodations.* Unfortunately, the use of accommodations may hinder student learning.<sup>78</sup> Sometimes, these “accommodations” are actually modifications that lower expectations and standards and just help students pass and get through school. What is “special” about reading to a youngster who should learn to read? Or providing a calculator, instead of teaching her “number facts”?<sup>79</sup> Other than showing higher graduation numbers, what is the beneficial effect of these “accommodations”? Nothing, really.

Query: Do these practices promote learning, student effort, hard work, and grit?<sup>80</sup>

<sup>75</sup> See Nathan Levenson, *Something Has Got to Change: Rethinking Special Education* \*10 (Future of American Education Working Paper No 2011-01 2011), online at <http://www.aei.org/docLib/AEI-Working-Paper-Rethinking-Special-Education.pdf> (visited Oct 23, 2011); Michael F. Giangreco, et al, *Helping or Hovering? Effects of Instructional Assistant Proximity on Students with Disabilities*, 64 *Exceptional Children* 7, 17 (1997).

<sup>76</sup> See James R. Newcomer and Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 *Exceptional Children* 469, 478 (1999).

<sup>77</sup> See Alison L. Fraser, *Vocational-Technical Education in Massachusetts* \*18 (Pioneer Institute White Paper No 42, Oct 2008), online at <http://www.tri-county.tc/files/uploads/pdf-files/Pioneer-VTE.pdf> (visited Oct 23, 2011); Motoko Rich, *Tough Calculus as Technical Schools Face Deep Cuts*, *NY Times A1* (July 10, 2011).

<sup>78</sup> See Giangreco, et al, *Helping or Hovering?* at 17 (cited in note 75).

<sup>79</sup> See John Hechinger and Daniel Golden, *When Special Education Goes Too Easy on Students: Parents Say Schools Game System, Let Kids Graduate Without Skills*, *Wall St J A1* (Aug 21, 2007). See also *Montgomery Township Board of Education*, 135 Fed Appx at 537 (finding that a disabled student's “success” and passing in school were due to the overuse of accommodations and assistance, denying the student her right to a FAPE); *Sherman v Mamaroneck Union Free School District*, 340 F3d 87, 94 (2d Cir 2003); *Fisher v Board of Education of Christina School District*, 856 A2d 552, 559 (Del 2004).

<sup>80</sup> See Carol S. Dweck, *Mindset: The New Psychology of Success* 187 (Random House 2008); Paul Tough, *What if the Secret to Success is Failure?*, *NY Times Mag* 38, 42–43 (Sept 18, 2011).

## B. Whither Fairness and Equity? Consider These Three Issues

### 1. Who is “special” among students and parents?

The answer is both subjective and matters a great deal. A student may be SLD in one town, emotionally disturbed in another, and not labeled at all in a third. There is a wide discrepancy among states in their eligibility numbers.<sup>81</sup> Alas, much rides on this tenuous system.

These imperfect labels ignore many other students—for example, average, “at risk,” or gifted and talented students.<sup>82</sup> What about them? How do we balance the needs of all students, when just some “special” students receive a plethora of attention and services? As to our top students recent international test scores reveal they are not so “top” these days—below the average of the thirty-four member nations Organisation for Economic Co-operation and Development.<sup>83</sup> We continue to ignore them at our peril.<sup>84</sup>

The SWD designation is problematic and powerful in many arenas. Consider these examples. In school discipline policies, IDEA requires schools to continue to serve SWD who violate school rules, but schools can banish others to street corners.<sup>85</sup> The law provides no rights for classmates of disruptive students. As for parents, when IDEA achieved its mission of providing educational access for all SWD, why did it continue to provide due process rights only to parents of SWD?<sup>86</sup> Even among parents of SWD, this law leads to inequalities, as those rights are unevenly used. Generally only parents with economic and informational savvy assert their rights.<sup>87</sup> For example, in my eight years as a Massachusetts hearing officer in the

<sup>81</sup> See note 27 and accompanying text.

<sup>82</sup> See Jim Walsh, *The Common Sense Guide to Special Education Law: Ten Steps toward a More Effective Special Education Program* 16, 31–40 (Texas School Administrators’ Legal Digest 2007) (noting there is a group of students who need “specially designed instruction” but who fall outside IDEA’s provisions and describing these students as “WBFWR—Way Behind For Whatever Reasons”). IDEA does not cover them either.

<sup>83</sup> See Erik W. Robelen, *High Achievers Scarce in Math, Science in U.S.*, *Educ Wk* 14–15 (Jan 12, 2011). See also Eric A. Hanushek, Paul E. Peterson, and Ludger Woessmann, *Teaching Math to the Talented*, *Educ Next* 10, 15–18 (Winter 2011). See also Richard A. Epstein, et al, *Are We Lifting All Boats or Only Some? Equity versus Excellence and the Talented Tenth*, *Educ Next* 46, 53 (Summer 2011).

<sup>84</sup> In response, some argue that we should create individualized “rights” for *all* students. See, for example, Michael Hall, et al, *Response to Intervention and Gifted and Talented Education #2* (Montana Office of Public Instruction Fall 2009), online at [http://opi.mt.gov/pub/RTI/Resourses/RTI\\_Gifted\\_Talented.pdf](http://opi.mt.gov/pub/RTI/Resourses/RTI_Gifted_Talented.pdf) (visited Oct 14, 2011). That solution would, in my judgment, lead to more paperwork, requirements, and litigation—not improving matters.

<sup>85</sup> See 34 CFR § 300.530(d).

<sup>86</sup> See *Winkelman v Parma City School District*, 550 US 516, 526–29 (2007) (holding that the IDEA grants to parents—as well as their children—their own individually enforceable rights).

<sup>87</sup> See Pasachoff, 86 *Notre Dame L Rev* at 1428–29 (cited in note 32).

1980s, not even once did I need to hire a Spanish-language interpreter. What of parents who cannot “work the system” and parents who have no system to work? The law’s private-enforcement structure leads to inequitable and unfair results.

2. Unfair use of accommodations.

Designed to “level the playing field,” accommodations often “change the game” or advantage SWD, even though they are not designed to do that.<sup>88</sup> Consider grades and tests—including, very troublingly, the SAT and ACT, which provide some SWD with *unreported* extended time.<sup>89</sup> These college entrance exams lump the results of these modified tests with those taken under strict time limits.<sup>90</sup> Ask any high school guidance counselor about how the system is gamed and the ensuing cynicism in school communities. It is corrosive.

3. Many new general-education reform dollars end up in special education.

Special-education spending has risen at a fast rate over the last few decades: Between 1996 and 2005, an estimated 40 percent of all new spending in education went to special-education services.<sup>91</sup>

Special-education costs represent roughly 20 percent of public school funds, often upending school budgets, and *do not* include the additional regular education services that SWD also receive.<sup>92</sup> The costs (quietly, to date) pit groups against each other—without data to prove that this adversarial, bureaucratic, compliance-driven system either improves student learning or is fair to all students and parents.<sup>93</sup>

<sup>88</sup> See *PGA Tour v Martin*, 532 US 661, 671 n 16, 683 (2001).

<sup>89</sup> See Jed Appelrouth, *Extended Time and Other Accommodations on the SAT and ACT* (Appelrouth Tutoring Services Apr 27, 2006), online at <http://www.appelrouthtutoring.com/blog/2006/04/27/extended-time-and-other-accommodations-on-the-sat-and-act/> (visited Oct 23, 2011).

<sup>90</sup> Jake Tapper, Dan Morris, and Lara Setrakian, *Does Loophole Give Rich Kids More Time on SAT?* (ABC Nightline Mar 30, 2006), online at <http://abcnews.go.com/Nightline/story?id=1787712&page=1> (visited Oct 23, 2011); Miriam Kurtzig Freedman, *Disabling the SAT: How the College Board Is Undermining Its Premier Test*, *Educ Next* 36, 37, 42 (Fall 2003).

<sup>91</sup> Scull and Winkler, *Shifting Trends* at \*12 (cited in note 24).

<sup>92</sup> See notes 36–41 and accompanying text.

<sup>93</sup> See Levenson, *Something Has Got to Change* at \*18 (cited in note 75). See also Wade F. Horn and Douglas Tynan, *Time to Make Special Education “Special” Again*, in Chester E. Finn Jr, Andrew J. Rotherham, and Charles R. Hokanson Jr, eds, *Rethinking Special Education for a New Century* \*23, 47–48 (Fordham Foundation and Progressive Policy Institute 2001), online at [http://www.dlc.org/documents/SpecialEd\\_complete\\_volume.pdf](http://www.dlc.org/documents/SpecialEd_complete_volume.pdf) (visited Oct 23, 2011). And that was back in 2001!

In short, as the only education entitlement program, special education is an uncontrolled mandate that impacts school resources and focus.

### C. Litigation and Fractured Trust

#### 1. Parents as enforcers.

As discussed above, IDEA makes parents its enforcers.<sup>94</sup> This adversarial approach is the law's pervasive "structural design flaw," especially since many parents are not able to be effective enforcers.<sup>95</sup> It forces parents to "advocate" for their child *against* their schools! Often, litigation or the threat of litigation irreparably fractures the relationship between school and home.<sup>96</sup> Among its unintended consequence is that it undermines the need for and importance of deference for the expertise of professional educators.<sup>97</sup>

#### 2. Continued confusion about a FAPE in the LRE enflames the growth of case law.

Disputes about the entitlement to a FAPE in the LRE—confusing and undefined terms—have led to more than thirty-five years of lawsuits.<sup>98</sup> We still argue, on a case-by-case basis, about the meaning of a FAPE, what is "appropriate," and what the Supreme Court in *Board of Education of Hendrick Hudson Central School District v Rowley*<sup>99</sup> called "a basic floor of opportunity."<sup>100</sup> The law's built-in tension also feeds disputes, as parents may want what is "best" for their child, while schools are obligated to provide what is "appropriate." These costly battles often leave parents, students, and schools angry and frustrated.

The distribution of hearings among the states is very uneven. Of the 2,033 reported adjudicated decisions in the 2008–09 school year,

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<sup>94</sup> See notes 43–50 and accompanying text.

<sup>95</sup> Emails from Professor Bill Koski, Stanford Law School, to Miriam Kurtzig Freedman (2009–11) (on file with author).

<sup>96</sup> See Levenson, *Something Has Got to Change* at \*19 (cited in note 75) (urging the adoption of "clear eligibility requirements and standards," because as it stands now, the IDEA has "created an adversarial environment between parent and district, which in turn places a premium on fighting for more services and procedural compliance rather than raising achievement and reducing costs").

<sup>97</sup> For an article contrasting the US and Finland's regard for professional educators, see note 61.

<sup>98</sup> When the Supreme Court, in 1982, decided *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176 (1982), it chose not to define the substantive nature of a FAPE. In the intervening thirty years, Congress has not done so.

<sup>99</sup> 458 US 176 (1982).

<sup>100</sup> See *Rowley*, 458 US at 201.

four states and the District of Columbia accounted for 85 percent of all decisions in the country. These were the

District of Columbia: 880, New York: 550, California: 119, New Jersey: 89, and Pennsylvania: 84. . . . Adding in the hearings for the next five states—Maryland ( $n = 44$ ), Hawaii ( $n = 38$ ), Texas ( $n = 35$ ), Massachusetts ( $n = 34$ ), and Illinois ( $n = 29$ )—moved the proportion up to 91% of the total hearings.<sup>101</sup>

Over the years, disputes have dealt with the substantive nature of a FAPE. Hearing officers and judges, not educators, often determine programs for SWD.<sup>102</sup> They are ill-equipped to do so.<sup>103</sup> Professional educators and experts, with parental input (as for all programs), can and should decide. We have built a growth industry of lawyers (of which I am one), “expert” evaluators, advocates, and others. While litigation in other arenas declines (even lawyers look for work these days), IDEA litigation grows.<sup>104</sup> In addition, we face the “[c]reeping [j]udicialization of [s]pecial [e]ducation [h]earings” that become more like full, formal court proceedings.<sup>105</sup> Most tellingly, most states use lawyers, not educators, as hearing officers.<sup>106</sup>

### 3. Litigation and fear of litigation as a growth industry.

Reportedly, IDEA is the fourth-most litigated federal civil statute.<sup>107</sup> While the number of reported hearing decisions across the

<sup>101</sup> Perry A. Zirkel and Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J Disability Pol Stud 3, 4–6 (2010).

<sup>102</sup> See id at 3.

<sup>103</sup> See id at 7.

<sup>104</sup> See Christina Samuels, *Special Education Court Decisions on the Rise*, Educ Wk Online (Jan 28, 2011), online at [http://blogs.edweek.org/edweek/speced/2011/01/special\\_education\\_court\\_decisi.html](http://blogs.edweek.org/edweek/speced/2011/01/special_education_court_decisi.html) (visited Oct 23, 2011).

<sup>105</sup> See Perry A. Zirkel, Zorka Karanxha, and Anastasia D’Angelo, *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J Natl Assn Admin L Judiciary 27, 27, 49 (2007).

<sup>106</sup> See Zirkel and Scala, 21 J Disability Pol Stud at 4–5 (cited in note 101) (noting that a predominate proportion of hearing officers in the vast majority of jurisdictions have a background in law, not special education).

<sup>107</sup> See Advisory Commission on Intergovernmental Relations, *Federal Court Rulings Involving State, Local, and Tribal Governments; Calendar Year 1994: A Report Prepared under Section 304; Unfunded Mandates Reform Act of 1995*, 43–47 (July 1995), online at <http://www.library.unt.edu/gpo/acir/Reports/information/m-196.pdf> (visited Oct 23, 2011); Walt Gardner, Letter to the Editor, *Special Education Abuses*, NY Times Online (Apr 25, 2007), online at <http://www.nytimes.com/2007/04/25/opinion/125literacy.html> (visited Oct 23, 2011); Walt Gardner, *When Special Education Creates Special Issues*, Educ Wk Online (May 5, 2010), online at [http://blogs.edweek.org/edweek/walt\\_gardners\\_reality\\_check/2010/05/when\\_special\\_education\\_creates\\_special\\_problems.html](http://blogs.edweek.org/edweek/walt_gardners_reality_check/2010/05/when_special_education_creates_special_problems.html) (visited Oct 23, 2011). See also Susan Rose, *Transition Research Identifies Five Legal Issues “Themes”* (Texas Transition Resource Center), online at [http://www.partnerstx.org/TxTransition/trans\\_research\\_5themes.html](http://www.partnerstx.org/TxTransition/trans_research_5themes.html) (visited Oct 23, 2011).

nation may have declined to 2,033 in 2008–09, the number of special-education court decisions is on the rise.<sup>108</sup> It is important to note that these relatively small numbers represent but 5–9 percent of annual hearing requests, since most hearing requests are withdrawn or settled, often with cost-shares between parents and schools.<sup>109</sup> “The threat of a hearing is an essential element in the relationship between districts and parents because it raises the stakes in disputes over placement.”<sup>110</sup>

This pervasive fear of litigation strangles schools in procedural nightmares, drives decision making, and creates dysfunction. Educators document their every move with SWD. “Educators spend more time on process compliance than on improving educational performance of children with disabilities.”<sup>111</sup> In the process, parents cry. Teachers cry. Many leave the field, creating recruitment and retention challenges. Most damaging, the system takes teachers and students away from teaching and learning. Time in the *six-hour school day* is precious. We waste it.

### III. FOUR SUGGESTIONS TO IMPROVE THE EDUCATION OF SWD—IN THE CONTEXT OF EDUCATING ALL STUDENTS

For years, we have known that the system is broken—and commentators have called for systemic reform.<sup>112</sup> We are well into the new century. While we have tinkered at the edges of the law with each new reauthorization, the system is still pretty much intact—and broken. The upcoming IDEA reauthorization gives us an opportunity to propose real systemic reform.<sup>113</sup>

So, what can we do? First, work to change the law’s adversarial and compliance-driven premise, while preserving its mission to

<sup>108</sup> See Zirkel and Scala, 21 J Disability Pol Stud at 4–7 (cited in note 101) (reporting that there were 2,033 hearings in 2008–09, down from an annual average of 2,800 from 2005). See also Samuels, *Special Education Court Decisions*, Educ Wk Online (cited in note 104).

<sup>109</sup> See Bureau of Special Education Appeals, *Special Education Appeals: Fiscal Year 2010 BESA Statistics* (Massachusetts Department of Elementary & Secondary Education 2010), online at <http://www.doe.mass.edu/bseal/forms/10stats.html> (visited Oct 23, 2011); Nanette Asimov, *Extra-Special Education at Public Expense*, SF Chron A1 (Feb 19, 2006).

<sup>110</sup> Thomas Hehir and Sue Gamm, *Special Education: From Legalism to Collaboration*, in Jay P. Heubert, ed., *Law and School Reform: Six Strategies for Promoting Educational Equity* 205, 215 (Yale 1999).

<sup>111</sup> President’s Commission on Excellence, *A New Era* at \*11 (cited in note 29).

<sup>112</sup> See *id.* at \*7–9 (cited in note 29). See also Finn, Rotherham, and Hokanson, eds, *Rethinking Special Education for a New Century* \*v–vii (Fordham Foundation and Progressive Policy Institute 2001), online at [http://www.dlc.org/documents/SpecialEd\\_complete\\_volume.pdf](http://www.dlc.org/documents/SpecialEd_complete_volume.pdf) (visited Oct 23, 2011).

<sup>113</sup> For further discussion of reform proposals, see Miriam Kurtzig Freedman, *Where Is Willie Sutton When We Need Him to Fix Special Education?*, Tex Stud Secondary Educ 37–39 (Texas Association of Secondary School Principals Spring 2011); Freedman, *Fixing Special Education* at 40–97 (cited in note 22).

provide education opportunity for all SWD. Encourage parents and educators to get on the same page, focusing their efforts on improved results for children, not compliance or litigation preparation. Change the incentives. Create a “climate change” we will like through a trust-based system for all students that values educators as professionals and advocates for students. Spend scarce resources on creative approaches that build relationships and trust, not approaches focused on winning litigation. Change is hard. Trust needs to be rebuilt, one child and school at a time.

#### A. Consider Ending Special Education’s Entitlement Status

Over the years, I have come to the startling realization that it is time seriously to consider the end of this entitlement. The law succeeded in its mission and is now getting in the way of serving all children in our schools effectively. Many years ago, the United States tackled another dysfunctional entitlement system—welfare. In 1996, President Bill Clinton promised to “end welfare as we know it” and Congress passed the law that ended the entitlement program, substituting it with block grants to the states.<sup>114</sup>

It is time to *end special education as we know it*. Special education should focus on teaching and learning, not winning and losing. Teachers should spend precious professional development time on improving their craft, not compliance training.<sup>115</sup> We need to substitute the current adversarial input- and procedures-driven law with a pedagogically driven outcomes system. The costly and dysfunctional adversarial system distorts schooling for all students.<sup>116</sup> At the very least, we should appoint a commission to study the feasibility of ending this entitlement and creating alternate means to assure appropriate services for SWD. While undoubtedly this step is politically implausible, merely raising the possibility can help us frame the issues and start us on a positive path.

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<sup>114</sup> See Almanac of Policy Issues, *Welfare* (2001), online at [http://www.policyalmanac.org/social\\_welfare/welfare.shtml](http://www.policyalmanac.org/social_welfare/welfare.shtml) (visited Oct 23, 2011). See also Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub L No 104-193, 110 Stat 2150, codified at 42 USC § 601 et seq.

<sup>115</sup> *IDEA: What’s Good for Kids? What Works for Schools?*, Hearings before the Senate Committee on Health, Education, Labor & Pension Committee 8–9 (Mar 21, 2022) (testimony of Dr. Kim Ratcliffe, Director of Special Education, Columbia Public Schools, Columbia, MO and Co-Founder of Missouri School Boards’ Association’s Special Education Advisory Council), online at <http://www.help.senate.gov/imo/media/doc/Ratcliffe.pdf> (visited Jan 31, 2012).

<sup>116</sup> See Pasachoff, 86 *Notre Dame L Rev* at 1453–45 (cited in note 32) (discussing ending the individual entitlement on equity grounds—that it is ineffective because it does not reach poor children).

B. End the Litigation—and the Fear of Litigation—over a Proposed FAPE in the LRE

It is time to sunset this provision of the law. Congress should define a FAPE once and for all. Hearing officers and judges, often through battles of “experts,” should not be deciding how to teach children. That is the job of educators. Congress should revisit this law and the ponderous procedures it has accumulated and forge a more effective path for educating SWD in our schools.<sup>117</sup> If disputes arise, we need to create effective innovations to resolve them, such as an ombudsman, public advocate, peer navigator consultants, independent review committee, SpedEx, state complaint management system, inspectorate (as in Great Britain), or another system.<sup>118</sup> Surely, we can create a credible and effective system to serve SWD and allow parents and schools comfortably to leave the adversarial system behind.

C. Change the Parents’ Role

Parents did not choose to become “attorneys general,” bringing suit to enforce IDEA. IDEA thrust that role upon them when it created an adversarial system built on distrust. Relieve them from their “law enforcement” burden and encourage them to work with, not against, the schools. “[T]he almost exclusive focus on private enforcement is a mistake.”<sup>119</sup> In response to the argument that parents are the best advocates for their child, this is often not so. First, it erodes the natural advocacy role of teachers. Second, many parents have neither the information, resources, nor ability to be effective advocates. Instead, we need to rebuild the schools’ and teachers’ instinctive and natural advocacy and accountability responsibilities for children that the current system erodes. Questioning the

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<sup>117</sup> See Philip K. Howard, *Life without Lawyers: Liberating Americans from Too Much Law* 93–121 (WW Norton 2009). See generally *About Common Good*, online at <http://www.commongood.org/pages/about-us> (visited Oct 23, 2011).

<sup>118</sup> See, for example, *Search CADRE Processes and Practices Continuum* (National Center on Dispute Resolution in Special Education), online at <http://www.directionservice.org/cadre/ctu/pdefsearchC.cfm> (visited Jan 28, 2012) (providing a sample of the continuum of dispute resolution options). SpedEx is a Massachusetts Department of Elementary and Secondary Education dispute resolution innovation. See *Special Education Appeals: SpedEx* (Massachusetts Department of Elementary & Secondary Education 2010), online at <http://www.doe.mass.edu/sped/spedx> (visited Oct 23, 2011). The British inspectorate is the Office of Standards in Education (Ofsted), a nonministerial government department. See *Ofsted* (2011), online at <http://www.politics.co.uk/reference/ofsted> (visited Oct 23, 2011). See also note 56. Every state has a complaint management system that currently focuses on procedural compliance. Surely, after due process hearings are no longer, that focus can shift.

<sup>119</sup> Pasachoff, 86 Notre Dame L Rev at 1419 (cited in note 32).

professionalism of teachers and forcing them to become defendants at a hearing adds to the dysfunction that so damages our schools.

To assure appropriate services, perhaps we should explore and retool state complaint-management systems to become effective and responsive public (not private) enforcement mechanisms, or, as is underway in current regular education reform efforts, explore other options to hold programs accountable for student results.

The current special-education system, built upon distrust between parents and schools, is unwise and not sustainable. We need to stop making schools the enemy.

#### D. Common Sense and Research to Improve Teaching and Learning Should Drive Programs, Not “Rights” or Conventional Wisdom

We can improve our special-education programs with common sense ideas. There are so many examples but so little time. Here are a few:

- For starters, let us finally research how special educators spend their time and schools spend their resources. Do they spend it with students, focused on teaching and learning, or on paperwork, compliance, and litigation? We need this data to plan programs that work.
- Let us use one-to-one paraprofessionals, co-teaching, and accommodations when they help children learn, not just to get them to “pass” through school or to protect “rights.”
- Toward that end, in the upcoming reauthorization of IDEA, at the very least, let us amend the term LRE to be the LRAE—the least restrictive *appropriate* environment, to remind us that students need to be placed in programs that focus on teaching and learning.
- Let us focus on and build upon student strengths, not just weaknesses, and rebuild resources to do just that, such as modern day vocational and technical programs.
- Let us permit compliance requirements into our schools only if they directly improve student learning. President Barack Obama, in a *Wall Street Journal* op-ed, wrote, “[W]e are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.”<sup>120</sup> He should immediately direct the Department of Education to do just that in this arena.

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<sup>120</sup> President Barack Obama, *Toward a 21st-Century Regulatory System*, Wall St J A17 (Jan 18, 2011).

- Let us finally end the medical model that drives services for these students. Instead of spending (and wasting) millions on diagnoses, we need to target resources to teach all children, taking into account their current performance.<sup>121</sup> The “wait to fail” model—by which children are not diagnosed until their needs are great—is dysfunctional and costly, often providing services too late.

For some, this means that we need to teach reading skills in early grades through efforts like RtI, since it is the lack of those skills that fuels the growth of SLD.<sup>122</sup> For others, including advanced students, we need to target programs that challenge them at their current achievement levels. In this way we can rebalance the need for excellence and equity more strategically.

In short, let us promote practices that have strong research support—and common sense—to help all students learn and teachers teach.

#### CONCLUSION

IDEA achieved great success and accomplished its mission. Our nation should be applauded for its achievement. In short, today, all “Eleanors” are in schools and have access to a FAPE in the LRE. Even as we preserve those gains, we also need to confront the conflicts and dysfunction that this law spawned. Its focus on compliance, not learning, is costly, ineffective, and bad for our nation.

As effectively as we accomplished the law’s mission over the last thirty-five years, we need to acknowledge that today’s needs are different. Issues of access—long solved—no longer require the huge bureaucracy IDEA spawned. Instead, we now need to focus on improved teaching and learning for all students. It is time to end special education as we know it. We should consider ending the entitlement status of IDEA and the dysfunctional, adversarial, compliance-driven system that it engenders.

We need to stop treating special education as the untouchable, sacrosanct, third rail in our schools. Issues of fairness, equity, and the needs of all students demand this. Let us work to assure that today’s general-education reform climate, as well as the upcoming reauthorization of IDEA finally provides the opportunity for systemic reform of special education. People of goodwill built the system we

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<sup>121</sup> Miriam K. Freedman, *The Elevator Theory of Special Education*, Educ Wk Online (Feb 15, 1995), online at <http://www.edweek.org/ew/articles/1995/02/15/21freed.h14.html> (visited Oct 23, 2011).

<sup>122</sup> See Finland’s approach in note 56.

have today. People of goodwill can work together to build a better system going forward.

## APPENDIX A

## PROPOSED SPECIAL-EDUCATION REFORM APPROACHES

How the Law Is	How the Law Should Be
Input/rights driven	Make output/results driven.
Bureaucratic, regulatory compliance-driven	Build in flexibility and focus on teaching and learning.
Adversarial, twentieth century law with 35+ years of litigation, often about a FAPE	Substitute an education driven, twenty-first century law. Congress should define a FAPE once and for all.
Based on the premise that parents and schools are not on the same page and cannot trust each other	Work for a trust-based system, based on the premise that parents and schools ARE on the same page!
Entitlement driven	Create alternate means to provide appropriate services.
Rights based	Make research based.
“Wait to fail” medical model	Focus on performance, not labels. Use preventive good practices early, such as Response to Intervention.
Up to 14 percent of students served	Per law’s intent, serve up to 10 percent
Costs, currently unreported to Congress, based on one child’s situation	Create cost-benefit reports and develop fair and equitable accountability for all children.
Mission accomplished. All SWD now have access to appropriate services. Yet, fears abound of reverting to pre-1975 conditions.	Sunset this law. Preserve the spirit and change the mission. Reform the law to meet twenty-first century reality for all students.