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AN IDEA SCHOOLS CAN USE: LESSONS FROM SPECIAL EDUCATION LEGISLATION

*Terry Jean Seligmann**

I. INTRODUCTION

The Individuals with Disabilities Education Act (the "IDEA")¹ has been a part of our public education system since 1975. The IDEA was enacted in response to the exclusion and inadequate education of children with disabilities.² The IDEA is widely viewed as having opened the doors to education to previously excluded children.³ The Act also assisted schools in identifying children who have disabilities and providing them with special

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1. 20 U.S.C. §§ 1400-1419 (1994). The 1975 legislation was entitled the Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 774. In this essay, the acronym IDEA is used to refer both to the current statute and its predecessors.

2. Two lawsuits had produced rulings that children were being unlawfully denied access to educational opportunity on the basis of their disabilities. *See Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (holding that the Board of Education for the District of Columbia violated students' rights to due process by failing to provide publicly supported specialized education to students who had been labeled as mentally retarded, emotionally disturbed, hyperactive, or behaviorally dysfunctional); *Pennsylvania Ass'n for Retarded Child. v. Pennsylvania*, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (enjoining the state of Pennsylvania from denying mentally retarded children a free public education); *Pennsylvania Ass'n for Retarded Child. v. Pennsylvania* 343 F. Supp. 279, 282 (E.D. Pa. 1972) (declaring a state statute unconstitutional under Pennsylvania's constitution and enjoining the state from excluding disabled school-aged children from receiving a free education because they were "uneducable" and "untrainable"). When Congress enacted the Education For All Handicapped Children Act of 1975, the predecessor to the present IDEA, it found that over one million children were entirely excluded from a public school education and that many others had failed in school because their disabilities had never been recognized and appropriately addressed. *See* 20 U.S.C. § 1400(b)(4-5) (D) (1994).

3. *See* Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 208-09 (Jay P. Heubert ed., 1999) (citing statistics that show several positive trends in the education of disabled students).

educational services.⁴ Today over six million children receive some kind of special education services; about thirteen percent of a total school population of forty-eight million children in school.⁵

Reform of public education is not a new topic for public discussion. Shifts in educational philosophy and calls for change have characterized education since the beginning of the common school.⁶ Likewise, special education has been a subject of scrutiny since its inception.⁷ During the summer of 2001, as Congress labored to pass new standards for public education, the Secretary of Education under President George W. Bush's administration resisted efforts to increase funding for special education, asserting that the IDEA needed reforms that money could not address.⁸

This article argues that the resources already available through the IDEA can, if used inclusively, help provide a better education

4. See Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 371 (1987) (collecting statistics indicating that over 650,000 more children with disabilities received education services in 1985-86 than in 1974-75, before the IDEA was enacted).

5. 22 OSEP ANN. REP. pt. II, at 12, 19 (2000).

6. See, e.g., generally William Lowe Boyd, *The Three "Rs" of School Reform and the Politics of Reforming or Replacing Public Schools*, 1 J. EDUC. CHANGE 225, 234-37 (2000) (identifying four waves of reform since the release of *A Nation at Risk* report in 1983); DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 41-129 (2000) (reviewing reform movements, including the 1890's "Committee of Tens" call for a liberal education, the progressive movement, and the industrial education movement of the early decades of the 1900's); DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 40-59 (1995) (criticizing the nature of educational reform and noting the recycling of reform proposals and rhetoric).

7. See generally DISABILITY & DEMOCRACY: RECONSTRUCTING (SPECIAL) EDUCATION FOR POSTMODERNITY (Thomas M. Skrtic ed., 1995) [hereinafter SKRTIC] (deconstructing modern special education theory and arguing that this necessarily leads to the deconstruction of all public education); SPECIAL EDUCATION AT THE CENTURY'S END: EVOLUTION OF THEORY AND PRACTICE SINCE 1970 (Thomas Hehir & Thomas Latus eds., 1992) [hereinafter CENTURY'S END] (collecting selected articles from the HARVARD EDUCATIONAL REVIEW); Symposium, *Children with Special Needs*, 48 LAW & CONTEMP. PROBS. 1 (1985) (compiling a two issue symposium on children with special needs in public schools).

8. Lynn Olson & Erik W. Robelen, *ESEA Passage Unlikely Before Fall*, EDUC. WK., July 11, 2001, available at 2001 WL 12046541 (reporting Secretary of Education Rod Paige's speech to the National Education Association asking to postpone the debate over IDEA funding until the 2002 reauthorization and citing "serious problems with how we deliver special education services to our students."). A recent "think-tank" report edited by a former education adviser to President Reagan cites the increased numbers of children identified as in need of special education as signs of a broken system. Chester E. Finn, Jr., Andrew J. Totham, and Charles R. Hokanson, Jr., *Conclusions and Principles for Reform*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 23, 27 (Chester E. Finn et al. eds., 2001) [hereinafter RETHINKING].

to every school child. They can bring personnel, training, and support into the classroom that will give each child more individual attention and more chances to learn. The increasing number of children identified as needing special education should be viewed not as a failure of special education, but as a warning about the inability of traditional classrooms to meet the needs of many children.

There are lessons from the IDEA that can inform educational policy for all children. The commitment to an appropriate education is costly, but special education resources and expertise about how to meet the individual educational needs of children can be shared and put to work school-wide. One size does not fit all; children learn in different ways and we must be willing to teach children with an array of strategies and techniques that build their strengths and compensate for their weaknesses. We should not square off and fight over funds or services, playing tug of war between "regular" and "special" education or "regular education kids" and "special education kids." Instead, we should use available funds in inclusive ways, and recognize that most children with disabilities are already members of our classrooms today. We need to fund all education adequately to avoid disadvantaging one child in order to serve another.

Moreover, the principles that shape the IDEA should be preserved and expanded. A focus on the individual child's needs, parental involvement, enforceable rights, and a range of services should be part of every school child's life, not only those designated as "special." Until this occurs, though, it will ill-serve education to withdraw resources from those served under the IDEA in the name of either equity or excellence.⁹

II. THE PRINCIPLES BEHIND THE IDEA

The IDEA embodies several policy choices about the best way to provide students with disabilities access to an appropriate, publicly funded education.¹⁰ These can be summarized as follows:

9. Cf. SKRTIC, *supra* note 7, at 246-51 (arguing that the basic goals of public education in a democracy must be achieving both excellence and equity).

10. See William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for all Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 12-14 (Winter 1985) (identifying five implementation assumptions of Congress). These authors identify, as among the assumptions Congress made in enacting the IDEA, that there would be few assessment errors, that the IEP process would help assure appropriate services, that the due pro-

1. Tailoring educational services to the individual needs of the child.¹¹
2. Requiring that parents have a role in planning the child's educational program.¹²
3. Offering a range of different placements and ways to deliver educational services.¹³
4. Educating the child in the most integrated environment appropriate for that child's learning.¹⁴
5. Treating the delivery of an appropriate education as an enforceable right.¹⁵
6. Offering clear and known routes for parents to resolve disputes with school districts.¹⁶

Each of these principles plays out in the statutory scheme of the IDEA.

The IDEA is a funding statute that provides federal funds to states that comply with its conditions.¹⁷ The central commitment is to provide each disabled school-aged child with a free, appropriate public education.¹⁸ The IDEA process begins with the referral of a child for evaluation to determine whether the child has a disability as defined under the Act¹⁹, whether the child needs special educational or related services in order to progress in the general curriculum²⁰, and what services are needed. A teacher or parent can

cess provisions would make it easier to succeed in holding school districts to their obligations, and that the funding anticipated by Congress would be forthcoming. *Id.*

11. 20 U.S.C. § 1414(d)(1)(A) (2001).

12. *Id.* § 1414(d)(1)(B)(i).

13. *Id.* § 1401(25).

14. *Id.* § 1412(a)(5).

15. *Id.* § 1412 (a)(1).

16. *Id.* § 1415.

17. States receiving funds under the IDEA must satisfy the IDEA's conditions, including the provision of a "free appropriate public education" (FAPE) to children with disabilities. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889-90 (1984) (outlining the requirements of the IDEA and explaining an FAPE); *see also* 20 U.S.C. § 1414(a)(1)(A) (2001) (stating that a primary condition of receiving federal money is that the state implement a policy "that assures all handicapped children the right to a free appropriate public education."); *Id.* § 1401(8) (defining FAPE as "special education and related services").

18. 20 U.S.C. § 1414(a)(1)(C)(ii) (2001); *see also id.* § 1412 (a)(1) (noting that a free appropriate education is available to all children with disabilities between the ages of three and twenty-one even if that child has been suspended or expelled from school).

19. *Id.* § 1414(a)(1)(B).

20. *Id.*

request an evaluation, but the parent must consent for it to proceed.²¹

Once the child is evaluated, a team meets to review the evaluation and other relevant information. They determine whether the child has a disability and they develop an individualized educational plan (IEP) for that child.²² The IEP team must include the child's parent.²³ If the child is to be educated in the regular classroom, then the classroom teacher is also a member of the team.²⁴ The product of the team meeting is an IEP which describes the child's disability, the short term and long term goals of that child's educational plan, the particular services and strategies that will be used to teach the child, and the place and amount of services to be provided.²⁵ An IEP for an autistic child, for example, could call for placement in a separate classroom staffed by specially trained teachers and supplemented with home-based therapies for several hours a week.²⁶ An IEP for a visually disabled student might stipulate that Braille reading materials be supplied in the child's classroom, and that voice recognition software be available for use with school computers.²⁷

The IDEA's commitment to a free appropriate public education is not limitless. The school system retains the discretion to choose between methodologies: for example, to select one reading program over another if both address the child's learning needs.²⁸ The standard for services is what the child needs to progress adequately, not what would be ideal, or what would maximize the child's achievement.²⁹ The cost of a service, however, is not a basis for refusing to provide special education and related services if

21. *Id.* § 1414(a)(1)(C).

22. *Id.* § 1414(d)(1)(B).

23. *Id.* § 1414(d)(1)(B)(i).

24. *Id.* § 1414(d)(1)(B)(ii).

25. *Id.* § 1414(d)(1)(A).

26. *See Renner v. Bd. of Educ.*, 185 F.3d 635, 638-40 (6th Cir. 1999) (describing IEP possibilities for autistic children).

27. *See generally* 34 C.F.R. §300.24 (2001) (defining "related services" that may be included in an IEP and discussing options for blind students).

28. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (noting that Congress did not intend to displace a state's "choice of appropriate educational theories").

29. In *Rowley*, the Court stated as the standard that the educational and related services be sufficient to permit the child to "benefit educationally" from instruction. *Id.* at 203-04. In the case of a child in the regular classroom, the Court found the standard was met if the services were "reasonably calculated" to enable the child to pass from grade to grade. *Id.* The 1997 Amendments to the IDEA set as the standard enabling "progress in the general curriculum" when such progress is an appropriate goal. 20 U.S.C. §§ 1400(c)(5)(A), 1414(d)(1)(A)(ii)(I) (2001).

their provision is necessary for the child to obtain an appropriate public education.³⁰ In *Cedar Rapids Community School District v. Garret*,³¹ the Supreme Court rejected the school district's cost-based objections to providing an aide who could suction the breathing tube of a ventilator-dependent child, because the child could not attend school without the services.³² The IDEA also requires choice of the least restrictive environment in which an appropriate education can be provided.³³ If the needs of the child cannot be addressed within the school district, the IDEA provides that the child can be placed into an appropriate program outside the district or into a private school.³⁴ But, if there is an adequate and appropriate placement within the district, the public does not have to fund a parent's preference for private school.³⁵ The IEP is reviewed and updated each year,³⁶ and the child's disability and need for special education and related services is reevaluated at least every three years.³⁷

Parents are guaranteed involvement in the planning of their child's educational placement and services.³⁸ Parents consent to evaluation and are members of the IEP team.³⁹ Furthermore, parents must approve any change in the child's educational placement.⁴⁰ The IDEA provides that at most significant stages in the IEP process, parents are to be given notice of their rights to pre-

30. Related services are those needed for the child to educationally benefit from school, and may include transportation and other supportive services including speech-language pathology, physical and occupational therapy, recreation (including therapeutic recreation), social work services, and counseling services, as well as medical services for diagnostic and evaluation purposes. 20 U.S.C. § 1401(22) (2001).

31. *Cedar Rapids Cmty. Sch. Dist. v. Garret*, 526 U.S. 66 (1999).

32. *Id.* at 79.

33. 20 U.S.C. § 1412(a)(5) (2001).

34. *See id.* § 1401(25) (defining special education as "specially designed instruction" to meet the child's unique needs which may include classroom, home, hospital, or other institutional settings); *Id.* § 1412(a)(10)(C)(ii) (providing for reimbursement of private school costs if it is determined that the child was enrolled in a private school that was an appropriate placement and that the public system did not make a free appropriate education available).

35. *Id.* § 1412(a)(10)(C)(i).

36. *Id.* § 1414(d)(4)(a).

37. *Id.* § 1414(a)(2).

38. *Id.* § 1414(A)(1)(C) (requiring parents' informed consent for the initial evaluation); *Id.* § 1414(d)(1)(B)(i) (making parents part of the child's individual education program team).

39. *Id.* §§ 1414(a)(1)(C), 1414(d)(1)(B)(i).

40. *Id.* § 1415(j) (stating that unless parents agree, the child shall remain in the current educational setting pending dispute resolution).

sent complaints or challenge any aspect of their child's education.⁴¹ The goal is for parents and schools to work together in the interest of the child's appropriate education.

The IDEA also provides a route for parents to enforce their child's IDEA rights. If parents and school districts disagree over the child's eligibility for special educational services, the nature of those services, or the child's placement, the parent can seek an impartial hearing before a state administrative officer, with appeal available to a federal district court.⁴² The state must also offer mediation when a parent initiates due process procedures by filing a complaint.⁴³ A parent who prevails in an administrative or court proceeding may be awarded attorney's fees.⁴⁴

III. THE IDEA TODAY AND THE CALLS FOR REFORM

Since the enactment of the IDEA, the number of children identified as having disabilities and served under the IDEA has increased, from 3.7 million in 1976-1977 to 6.1 million in 1999-2000.⁴⁵ Today, approximately one in ten children in the public school system receives some kind of special educational services.⁴⁶

Special education finds itself caught in the crossfire of debates between both regular and special education reformers. Critics seek to dismantle or cut back on the nation's commitment to special education, while supporters are concerned with the program's implementation.⁴⁷ This essay examines some of the major issues under debate.⁴⁸ Increased numbers of children are identified as

41. *Id.* § 1415(b)(3) (stating written notice to parents is necessary when decisions about changes in educational placement are made).

42. *See e.g., id.* § 1415(f)(1) (defining and discussing a parent's right to an impartial due process hearing if a complaint is filed); *see also id.* § 1415(i)(2) (stating that after exhausting administrative appeals parents may bring a civil action in state or federal district court).

43. *Id.* § 1415(e).

44. *Id.* § 1415(i)(3).

45. 22 OSEP ANN. REP. pt. II, at 19-20 (2000); Wade F. Horn & Douglas Tynan, *Time to Make Special Education "Special" Again*, in RETHINKING, *supra* note 8, at 23, 27. Beginning in the 1991-1992 school year, states were required to make special educational services available to pre-school children beginning at age three, and current data include these children as well. 22 OSEP ANN. REP., preface, at ix (2000).

46. *See generally* 22 OSEP ANN. REP. pt. II (2000).

47. *See infra* notes 55-161 and accompanying text.

48. Two current topics in special education that are not dealt with in this essay are the extent of accommodations in testing for children with disabilities, and the standards for discipline of children with disabilities. *See* MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 161-94 (1997) (discussing accommodations on law school exams); Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the*

having the need for special education, particularly in the category of learning disabilities. These increases have been questioned by critics on both practical and legal grounds.⁴⁹ Other reformers point out that our present special educational practices, like those which preceded the IDEA, may be continuing to segregate and track minority students disproportionately.⁵⁰ Assessing the program against the background of a concern over the state of public education generally, some supporters of meeting the special educational needs of children argue that a program of special education establishes a separate and unequal system of education. Such educators, who see much wrong with the group-oriented approaches traditional in public school classrooms, call for a transformation of all classrooms into places where individualized teaching is the norm. Reformers call for the merger of special and regular education through inclusion of all children within the regular classroom as the way to accomplish this.⁵¹ As with public education generally, there are calls for better examination of outcomes, in the form of evidence that students receiving special educational services fare better as a result.⁵² Questions have also been raised about the

Disabled Student, 75 WASH. L. REV. 1, 79-84 (2000) (analyzing and criticizing the effect of the 1997 amendments); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 122-27 (2000) (explaining the disciplinary regulations of the IDEA and identifying policy and practical issues yet to be resolved). See generally Thurlow, *supra* note 55, at 3-4 (discussing what an accommodation is and the differences in beliefs about the appropriateness of accommodations).

49. See generally KELMAN & LESTER, *supra* note 48 (critiquing legal justifications for differential treatment of learning disabled students).

50. See Matthew Ladner & Christopher Hammons, *Special but Unequal: Race and Special Education*, in RETHINKING, *supra* note 8, at 85 (providing a statistical analysis of race, poverty and special education and discussing the disproportionate number of minority students placed in special education programs). See generally 22 OSEP ANN. REP. pt. II, at 25-27 (2000) (providing statistical information on the number of minority students with disabilities being served under the IDEA).

51. See Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367 (1987), reprinted in CENTURY'S END, *supra* note 7, at 123 (arguing that, contrary to legislative intent, the IDEA has resulted in increased segregation); William Stainback et al., *A Rationale for the Merger of Regular and Special Education*, 51 EXCEPTIONAL CHILD. 102 (1984), reprinted in EDUCATING ALL STUDENTS IN THE MAINSTREAM OF REGULAR EDUCATION 15 (Susan Stainback et al. eds., 1989) [hereinafter STAINBACK] (questioning the dual system of regular and public education and calling for a merger which would consolidate all of the resources and services (e.g. funding, curriculum, and personnel)).

52. See, e.g., Martha L. Thurlow, *Standards-Based Reform and Students with Disabilities: Reflections on a Decade of Change*, in 33 FOCUS ON EXCEPTIONAL CHILD. 1 (2000) (outlining the development of "standards-based reform" in public education in the 1990's and the lessons learned about including students with disabilities in these

usefulness of the elaborate due process procedures in resolving disputes and delivering educational services when needed.⁵³ Finally, criticisms also cite the cost of the program and its effect on local educational budgets.⁵⁴

This essay concludes that while many of these critiques of special education are valid, the IDEA remains the best way to provide necessary and appropriate educational services to a large portion of our public school population. Calls to merge special education with regular education, or to make categorical cut backs in eligibility for special education services are premature. They would require as a predicate a more extensive modification of the general education system than either exists now, or could be expected to occur on a systemic scale without a true national commitment, both legal and financial, to the education of every child. Under the present system, full funding of special education at the federal level would loosen the budgetary ties on many school districts, and inure to the benefit of all students. Ultimately, extending the entitlement to an appropriate education is preferable to reducing it to some. Developing resources for schools to support programs in which teachers and special educators work together, adopting an individualized and intensive instructional techniques for all children who need them, could move us closer to the day when the lines between special and regular education cease to have meaning.

A. Eligibility and the Nature of Disability

Because the IDEA requires the categorizing of children during the eligibility process, the data collected typically reflects the assignment of children receiving special education to one of several categories based on their primary disability.⁵⁵ Disabilities currently recognized by the IDEA include the following: mental retardation, hearing impairments, orthopedic impairments, other health impairments, visual impairments, deafness and blindness, speech

reforms); Clune & Van Pelt, *supra* note 10, at 19-20, 29-30 (noting differences between the IDEA's requiring of paper compliance versus verifying actual changes in teaching); Margaret J. McLaughlin & Sandra Hopfengardner Warren, *Outcomes Assessment for Students With Disabilities: Will It Be Accountability or Continued Failure?*, in 36 PREVENTING SCHL. FAILURE 29, 29-31 (1992) (noting the recent efforts of some states to develop "outcome indicators" for special education).

53. See *infra* notes 107-126 and accompanying text.

54. See *infra* notes 128-146 and accompanying text.

55. 22 OSEP ANN. REP. pt. II, at 19-20 (2000) (identifying the disability categories and providing statistics on the increase in the number students with disabilities served under the IDEA from 1989-1990 to 1998-1999).

and language impairments, specific learning disabilities, serious emotional disturbance, developmental delay, autism, and multiple disabilities.⁵⁶ The largest disability category, and the one in which the most growth has occurred, is that of learning disabilities.⁵⁷ Learning disabilities under the IDEA can take many forms. Learning disabilities are defined as “disorder[s] in one or more of the basic psychological processes involved in understanding or using language, spoken or written,” which can manifest itself in problems with listening, speaking, writing, reading, spelling, or mathematics.⁵⁸ Conditions such as dyslexia, minimal brain dysfunction, perceptual disabilities, brain injury, and developmental aphasia are included as learning disabilities.⁵⁹ Learning disabilities are defined by the IDEA in part by a discrepancy between ability and achievement, with ability generally measured by intelligence testing.⁶⁰ The IDEA definition excludes children whose difficulties are thought to be attributable to socio-economic factors rather than learning disabilities.⁶¹

The IDEA’s coverage of children with learning disabilities has become a point of contention. Some attack the notion that learning disabilities exist at all⁶², while others note that the difficulty of

56. 20 U.S.C. § 1401(3) (A)(i) (2001); *see also* 22 OSEP ANN. REP. pt. II, at 19-20 (2000) (providing statistical information on these categories and the percent change in the number of students served under the IDEA from 1989-90 to 1998-99).

57. The number of children reported as having specific learning disabilities increased from 2 million in 1989 to 2.8 million in 1998, and represents 50.8% of students with disabilities served under the IDEA in 1998-99. OSEP ANN. REP., pt. II, at 19-20 (2000). *See also* KELMAN & LESTER, *supra* note 48, at 2 (discussing the proliferation of children being diagnosed with learning disabilities); Horn & Tynan, *supra* note 45, at 28 (characterizing learning disability definitions as Congress’ response to advocacy group demands to expand the definition of students eligible for special education, in particular to include children with attention deficit disorder).

58. 20 U.S.C. § 1401(26) (A) (2001).

59. *Id.* §1401 (26)(B).

60. 34 C.F.R. § 300.541(a)(2) (2001); *see* Donna L. Terman et al., *Special Education for Students with Disabilities: Analysis and Recommendations*, in 6 SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES: THE FUTURE OF CHILDREN 4, 8 (Richard E. Behrman ed., 1996) (detailing the diagnosis process).

61. 20 U.S.C. § 1401(26)(C) (2001) (excluding learning problems that are primarily the result of “environmental, cultural, or economic disadvantage”); 34 CFR § 300.541(b)(4) (2001).

62. Robert J. Sternberg & Elena L. Grigorenko, *Which Queue?*, 97 MICH. L. REV. 1928, 1930-32 (1999), (reviewing KELMAN & LESTER, *supra* note 48). These authors, publishers of the popular culture oriented book *Our Labeled Children*, argue that the labeling of a lack of a particular ability as a “disability” is a cultural and societal phenomenon, and that learning disabilities are the product of an interaction between the individual and the environment. *Id.* at 1931-35; *see also* ROBERT J. STERNBERG & ELENA L. GRIGORENKO, *OUR LABELED CHILDREN* 3 (2000) (arguing that virtually

diagnosing disabilities results in increasing numbers of children being classified as disabled.⁶³ All children have strengths and weaknesses and when lines are drawn, inequities become apparent. In their book *Jumping the Queue*, Kelman and Lester argue that anti-discrimination theory cannot support claims on behalf of the learning disabled for preferential distribution of scarce resources.⁶⁴ Others, looking at least in part to trim the costs of special education, have suggested removing or substantially redefining the category of learning disabilities, and redirecting resources to early intervention for all children with reading difficulties.⁶⁵

everybody has a learning disability, but that society chooses to recognize only some in a "lottery" like process).

63. See Terman et al., *supra* note 60, at 5-7 (explaining that students are said to be disabled because they have "real, persistent, and substantial individual differences and education needs that regular education has been unable to accommodate" but noting that many of these same students will not be considered disabled once they leave school); see also KELMAN & LESTER, *supra* note 48, at 34-36 (concluding that students with learning disabilities cannot be identified accurately); Gartner & Lipsky, *supra* note 51, at 373 (suggesting that 80% of the school population could be classified as learning disabled under one or more of the definitions then in use, and that students identified as learning disabled "[could] not be shown to differ from other low achievers with regard to a wide variety of school-related characteristics"). It has also been suggested that middle class parents are behind the growth in the population of children classified as having learning disabilities and that their motive is to help their under-performing children gain special accommodations, particularly on high stakes college admissions testing. Wade F. Horn & Douglas Tynan, *Revamping Special Education*, PUB. INT., July 1, 2001, 2001 WL 10162875 at *4 (noting that special education today offers attractive accommodations, explaining the high rate of designation in suburban districts).

64. KELMAN & LESTER, *supra* note 48, at 226. See also Anne Proffitt Dupre, Book Review, 49 J. LEGAL EDUC. 301, 302 (1999) (reviewing *Jumping the Queue* and crediting Kelman and Lester for arguing that the policy toward learning-disabled students is flawed because of the misconception that "treatment of the learning disabled is a civil rights matter" and that there is an overuse of antidiscrimination theory). But see Sternberg & Grigorenko, *supra* note 62, at 1929 (agreeing in theory with Kelman and Lester's assessment that accommodations which benefit individuals would benefit anyone, but arguing that they fail to take a stand on what should be done legally or practically); Andrew Weis, *Jumping to Conclusions in "Jumping the Queue"*, 51 STAN. L. REV. 183, 183, 198-219 (1998) (disputing Kelman and Lester's contention that people with learning disabilities should not qualify as a rights protected group).

65. One argument is that this is the point where it will be the most useful rather than waiting for school failure to trigger a need for services. See G. Reid Lyon et al., *Rethinking Learning Disabilities*, in RETHINKING, *supra* note 8, at 259, 270-71, 279-81 (arguing that use of scientific data can better inform debates surrounding learning disabilities and, that sound prevention programs can reduce the number of older children diagnosed with learning disabilities); see also Horn & Tynan, *supra* note 63, at *6, 10-12 (arguing that regular education should be altered to accommodate students with minor disabilities).

Some experts defend both the existence of learning disabilities and the need these children have for special educational services.⁶⁶ Among the reasons suggested for the increase in the number of children categorized as having learning disabilities is that this category is less stigmatizing than were more antiquated labels like mild, or educable mental retardation.⁶⁷ Others point to the medical advances which now save the lives of more children born prematurely or with health impairments, conditions known to be associated with later disabilities.⁶⁸ Finally, observers have noted that at the school district level, teachers and administrators look for ways to obtain services for children who are not succeeding academically,

66. See Terman et al., *supra* note 60, at 7 (noting that students with learning disabilities have "particular, persistent educational needs that are not being met in the regular classroom.").

67. See Gartner & Lipsky, *supra* note 51, at 373 (referring to this as a form of "classification plea bargaining"); see also Christine E. Sleeter, *Radical Structuralist Perspectives on the Creation and Use of Learning Disabilities*, in SKRTIC, *supra* note 7, at 153, 161-62 (suggesting that depending upon the school district, learning disabilities classification may be either a protective category for low-achieving white students or a more acceptable" category than mental retardation or emotional disturbance for students of color experiencing school difficulties); Terman, et al., *supra* note 60, at 7 (attributing growth to increased awareness of existence and impact of learning disabilities; ambiguous definitions; inability of regular education to provide individual accommodations in an era of increased academic expectations and diminishing resources; and the attraction of a less stigmatizing label).

The most recent data shows rapid rates of growth in other categories. 22 OSEP ANN. REP. pt. II, at 21-22 (2000). Among low-incidence disabilities, orthopedic impairments, traumatic brain injury and autism have shown the greatest increases. *Id.* at 21. This growth is attributed both to better diagnosis and identification, and to reclassification of children into the newer disability categories. *Id.* at 27. Among high incidence categories, there has been substantial growth in the category of "other health impairments," a category which encompasses services to some children with attention deficit disorder. *Id.* at 20.

68. According to Glenn Koocher, the executive director of the Massachusetts Association of School Committees, growth in the special education population is due to "[i]ncreased diagnoses of children with learning disabilities, such as attention deficit disorder and dyslexia, . . . along with better prenatal care that has resulted in longer lives for children who once might not have survived birth." Susan Milligan, *Jefford's Special-Ed Plan Revived as Power Shifts, Democrats Press for Full Funding*, THE BOSTON GLOBE, June 4, 2001, at A1; see also Thomas B. Parrish & Jay G. Chambers, *Financing Special Education*, in 6 SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES 121, 125 (Richard E. Behrman ed., 1996) (noting that the population is expected to include increasing numbers of students with high risk characteristics related to learning problems and developmental disabilities, including poverty, low birth weight, substance abuse, and HIV infection); cf. Sheldon Berman et al., *The Rising Costs of Special Education in Massachusetts: Causes and Effects*, in RETHINKING, *supra* note 8, at 183, 200 (contending that the increase in special education costs is due not to school district policy but to medical, economic, and social factors including improved care of premature infants, survival and school attendance of children with birth asphyxia, epilepsy, and autism).

sometimes testing repeatedly until that state's particular threshold for discrepancies between ability and achievement is met.⁶⁹ Though it is possible that some special education resources will be used for children who may not meet a categorical definition, this is not necessarily discouraging if the child does, in fact, need assistance.⁷⁰ Indeed, accounts suggest that despite the criticisms, few children are getting special educational services who do not need them.⁷¹ Children remain who could benefit from these kinds of personalized, special education teaching techniques, but who do not receive them, either because the categorical definitions do not permit it, or because their state does not define these disabilities as inclusively as another state may.⁷²

69. One Mississippi administrator is quoted as saying:

In an effort to help more children, you're going to say that this kid has a learning disability so that we can give him some special ed assistance that we normally would not be able to do without the eligibility. . . . We're going to reevaluate to see if we can't fit that discrepancy somewhere. "Did we get it yet? Has he fallen far enough behind in achievement now that we can make him eligible for special ed?"

KELMAN & LESTER, *supra* note 48, at 100; *see also* Kate Zernike, *Special Education Debate Shifts From Money to New Ideas*, N.Y. TIMES, May 13, 2001, at A31 (interviewing another special education director who noted that, "[f]or a long time, there was the message that special ed was the only game in town; if your child needed some sort of help, go there").

70. *See* KELMAN & LESTER, *supra* note 48, at 159-60 (endorsing programs which involve a high degree of "leakage" of special educational resources to other needy students, while attacking many aspects of the IDEA's treatment of learning disabilities).

71. Terman, et al., *supra* note 60, at 7 (noting that "[w]hat is clear is that *the group of children identified with learning disabilities has particular, persistent educational needs that are not being met in the regular classroom.*"); *see* Horn & Tynan, *supra* note 63, at *3 (stating that "it is unlikely that children without any learning difficulties are being placed in special education"); Robert Cullen, *Special Education at Coles Elementary School*, in RETHINKING, *supra* note 8, at 132 (commenting that "there appear to be no students in the special education classes [at Coles Elementary School] who don't need help").

72. *See* KELMAN & LESTER, *supra* note 48, at 19-23 (observing the exclusionary federal definition that leaves out poor performers whose low achievement is due to identifiable factors such as limited English proficiency and socioeconomic disadvantage, and noting state variations in the proportions of children diagnosed with learning disabilities); G. Reid Lyon et al., *Rethinking Learning Disabilities*, in RETHINKING, *supra* note 8, at 259, 262, 279 (stating that "[t]he issues we raise involve whether classifications used for [learning disabilities] identify *all* children who would benefit from special education services and/or specialized instruction," and recommending that the definition stop excluding children because of inadequate instruction, cultural and social factors, and emotional disturbance because "it is just these factors that may lead to inadequacies in neural and cognitive development that place children at significant risk for [learning disabilities]").

B. Mainstreaming and Segregation of Special Education Students

The IDEA calls for services to be provided to children in the "least restrictive" setting that is appropriate.⁷³ Only for a small proportion of children with disabilities will that be a separate school building a private day school or a residential setting.⁷⁴ Such settings are called for by the IDEA only when the type of services needed by a child cannot be provided in a less restrictive environment.⁷⁵ Many people once thought special education for children with disabilities meant separate classes or schools for those who could not learn in regular classes. Today seventy-five percent of children receiving special education services obtain their education completely in the regular school classroom or leave that classroom for only parts of the day.⁷⁶ While children with learning disabilities comprise a large part of the special education population, for the most part they are in the least restrictive special education settings, with over eighty percent attending regular classrooms and receiving services and support there, or via separately scheduled sessions with specialists.⁷⁷ On a per child basis, these services are the least expensive to deliver, as compared to those for children with severe and multiple disabilities who may require a hospital or residential placement.⁷⁸

The data collected reflects that a higher percentage of minority children, and particularly African-American children, are referred to and served by special education than their proportion in the overall school population.⁷⁹ To the extent that these children are

73. 20 U.S.C. § 1412(5) (2000).

74. In the 1997-98 school year, only 2.9 percent of children with disabilities ages six through twenty-one were served in a separate facility, .7% in residential facilities, and .6% in a home or hospital setting. 22 OSEP ANN. REP. pt. III, at 4 (2000).

75. 20 U.S.C. § 1412(5)(A) (2001).

76. During the 1998-99 school year, 46.4% of all children with disabilities were served outside of the regular classroom for 0-21% of the day; 29.0% for 21-60% of the day. 22 OSEP ANN REP. pt. III, at 4, Table III-1 (2000).

77. *Id.*

78. See Jay G. Chambers, *The Patterns of Expenditures on Students with Disabilities: A Methodological and Empirical Analysis*, in FUNDING SPECIAL EDUCATION 89, 99-103 (Thomas B. Parrish et al. eds., 1999) (explaining that the least expensive students were those categorized as learning disabled or speech impaired, and that more restrictive, segregated placements are more costly than less restrictive placements); Parrish & Chambers, *supra* note 68, at 122-24 (indicating that expenditures vary greatly by type of disability and nature of services received).

79. Using data from the 1998-1999 school year, while black (non-Hispanic) students account for 14.8% of the general population in the 6 to 21 age group, they are 20.2 % of the special education population overall. 22 OSEP ANN. REP. pt. II, at 25-

obtaining needed educational services for documented learning difficulties, this over-representation might not be a particular cause for concern. However, before the IDEA, there was a history of excluding children from schools, particularly minority children, based on their behavior rather than in response to their educational needs.⁸⁰ Despite the IDEA's intent to eliminate such segregation, this may still be happening.⁸¹ Moreover, if these children are attending school in systems which are more likely, as some of the data suggest, to remove them from regular classes and place them into separate classes where they stay for much of their school career, the tracking and segregation that ensues is more troubling.⁸²

C. Outcomes for Special Education Students

It is difficult to measure how well the goal of providing each child with an appropriate education is being realized due to the difficulty of analyzing aggregate data. Certainly, far fewer chil-

27 (2000). Black students' representation in the mental retardation and developmental delay categories was more than twice their national population estimates. *Id.*

There are a variety of factors that may be at work here. A tendency to refer children for evaluation based upon their behavior was suggested by some researchers as resulting in higher referrals of African-American children to special education in suburban, majority schools than in inner-city or predominantly minority schools. Matthew Ladner & Christopher Hammons, *Special but Unequal: Race and Special Education*, in *RETHINKING*, *supra* note 8, at 85, 104-08. There is also, though, a correlation between, race, poverty, inadequate health and nutrition, and resulting disabilities that could account for some of the data. Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *LAW AND SCHOOL REFORM* 205, 228-32 (Jay P. Heubert ed., 1999). For example, rates of minority children are higher in categories of disability such as hearing and vision impairment, which would not be the result of subjective classification. *Id.*

80. See 20 U.S.C. § 1400(c)(3)-(9) (2000) (identifying the rationale for passing the IDEA).

81. See Clune & Van Pelt, *supra* note 10, at 16-17 (noting that, historically, special education has been associated with cultural bias in that minorities with similar physical/mental conditions have been disproportionately identified as having learning disabilities); see also Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 416-23 (2001) (agreeing with Clune and Van Pelt and discussing the harmful effects of an inappropriate placement in a more restrictive learning environment).

82. According to researchers, minority students across nearly all disability categories are more likely to be placed in restrictive special education environments than white students. Executive Summary, Conference on Minority Issues in Special Education, Civil Rights Project, Harvard University, at <http://www.law.harvard.edu/civilrights/conferences/SpecEd/exsummary.html>.

dren have been institutionalized since the IDEA's enactment.⁸³ Drop-out rates among disabled students are high,⁸⁴ but graduation rates of students are increasing.⁸⁵ The IDEA envisioned the individualized education plan ("IEP") as a critical planning and strategic document.⁸⁶ However, its implementation is criticized as mandating paperwork, measuring compliance in form through the completion of IEPs, rather than mandating substantive success, by examining the services actually delivered and the extent of successful outcomes of students.⁸⁷ On the other hand, there is an abundance of narrative material from parents, children, and teachers that suggests the IDEA has indeed delivered on its promises for

83. See Terman et al., *supra* note 60, at 4-5 (stating that the IDEA has been "given partial credit for decreasing the rate of institutionalization of individuals").

84. Some research shows that disabled students are twice as likely to drop out of school as their nondisabled peers. Hehir & Gamm, *supra* note 79, at 227; see also KELMAN & LESTER, *supra* note 48, at 149-52; Terman et al., *supra* note 60, at 6 (reporting that 30% of all students with disabilities in one study dropped out of high school; 30% of students with learning disabilities participated in post-secondary education as compared with 68% of general population youth). One national study in 1988 of eighth graders with less severe disabilities, who were followed up in 1994, found a drop-out rate of 10%, but found that 75% had earned a high school diploma. 22 OSEP ANN. REP. pt. IV, at 15 (2000).

85. Although only 25% of students with disabilities aged 17 and older graduated with a standard high school diploma in 1997-98, this represented 61.6% of the students who left the educational system that year. *Id.* pt. IV, at 16. Not surprisingly, graduation rates vary considerably by disability, with those students with mental retardation, multiple disabilities, and autism least likely to graduate. *Id.* pt. IV, at 17. State graduation policies also vary widely from state to state. *Id.* pt. IV, at 18.

86. See 20 U.S.C. § 1414(d)(1)(A) (2000) (defining IEP as a written statement for each disabled child that is "developed, reviewed, and revised" to include the services to be provided and the goals for the student); Clune & Van Pelt, *supra* note 10, at 19, 28-31 (stating that despite the paper compliance standards the IEP requirement has led to positive education effects).

87. See Judith Singer & John A. Butler, *The Education for All Handicapped Children Act: Schools as Agents of Social Reform*, reprinted in CENTURY'S END, *supra* note 7, at 164-65 (noting procedural compliance with IEP requirements but expressing concerns that it has led to excessive routinization); McLaughlin & Warren, *supra* note 52, at 29-31 (noting the recent efforts of some states to develop "outcome indicators" for special education); see also Terry G. Cronis & David N. Ellis, *Issues Facing Special Educators in the New Millennium*, in 120 EDUC. 639, 642 (2000) (arguing that reliable data is lacking); Barbara K. Keogh, *What the Special Education Research Agenda Should Look Like in the Year 2000*, in 9 LEARNING DISABILITIES RESEARCH AND PRACTICE 62, 62-63 (1994) (calling for research on outcomes and performance); Terman et al., *supra* note 60, at 16 (summarizing research as "not strong" and lacking comparisons to comparable control groups, and concluding that it is difficult to reach conclusions about the effectiveness of special education); Thurlow, *supra* note 52, at *6-7 (contending a lack of assessments has resulted in the special education field having little meaningful data on the performance of students).

many children.⁸⁸ The 1997 IDEA amendments mandated that school-wide assessments and testing include children with disabilities, so there will likely be increased research and attention to outcomes in the future.⁸⁹

D. The Inclusion Debate

Perhaps the largest debate in special education over the past decade has been over the issue of inclusion.⁹⁰ Inclusion calls for

88. E.g., Daniel P. Hallahan, *Sound Bytes from Special Education Reform Rhetoric*, in 19 REMEDIAL AND SPECIAL EDUC. 67, 69 (1998) (providing various narratives); Morton M. Kondrake, *Congress Should Join High Court in Aiding Disabled*, ROLL-CALL, May 31, 2001, 2001 WL 7039502 (recounting the success of the author's daughter with dyslexia, who would not have graduated from medical school at John's Hopkins without the IDEA); Weis, *supra* note 64, at 208-09 (crediting special education for his success in legal training at Stanford).

89. McLaughlin & Warren, *supra* note 52, at 31 (arguing for accountability of special education to be based on "actual student performance outcomes"); Thurlow, *supra* note 52, at *2 (noting that the IDEA requires inclusion of students with disabilities in general state assessments); see James Shriner, *Legal Perspectives on School Outcomes Assessment for Students with Disabilities*, in 33 J. OF SPECIAL EDUC. 232, 233 (2000); see also Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & EDUC. 185, 193-95 (2001) (discussing the legal challenges to the high stakes testing of children with disabilities).

90. See, e.g., STAINBACK, *supra* note 51, at 252 (contending that inclusion should be the norm and that the focus should be on enabling and not disabling); THE ILLUSION OF FULL INCLUSION: A COMPREHENSIVE CRITIQUE OF A CURRENT SPECIAL EDUCATION BANDWAGON x (James M. Kauffman & Daniel P. Hallahan eds., 1994)[hereinafter ILLUSION] (arguing that full inclusion provides only an "illusion of support" for all students); Jack E. Andrews et al., *Bridging the Special Education Divide*, in 21 REMEDIAL AND SPECIAL EDUCATION 258 (2000) (describing disputes over whether special education is basically sound but capable of improvement or whether it requires substantial reconceptualization); W. N. Bender, *The Case Against Mainstreaming: Empirical Support for the Political Backlash*, 105 EDUC. 279 (1985) (citing to evidence that the mainstreaming of handicapped children compromises the education of the non-handicapped and discussing negative teacher and peer attitudes); Sherman Dorn et al., *A Historical Perspective on Special Education Reform*, 35 THEORY INTO PRACTICE 12 (1996) (warning against the use of the inclusion arguments to gut special education rights); Lori Goetz & Wayne Sailor, *Much Ado About Babies, Murky Bathwater, and Trickle-Down Politics: A Reply to Kauffman*, 24 THE J. OF SPECIAL EDUC. 334 (1990) (explaining and rebutting Kauffman's description of inclusion as a "trickle-down" theory that calls for dedicating greater resources to "high-performing" students and placing disabled students in regular classrooms); James M. Kauffman & David P. Hallahan, *What We Want for Children: A Rejoinder to REI Proponents*, in 24 THE J. OF SPECIAL EDUC. 340 (1990) (criticizing the Regular Education Initiative (REI) as a pretext for retrogression in special education funding and regulation); James McLesky et al., *Reform and Special Education: A Mainstream Perspective*, in 24 THE J. OF SPECIAL EDUC. 319 (1990) (arguing that Kauffman's position on REI is extreme and divisive); Marleen C. Pugach, *The Moral Cost of Retrenchment in Special Education*, 24 THE J. OF SPECIAL EDUC. 326 (1990) (contending that Kauffman's exaggerated position compromises two important aspects of special education:

the elimination of separate classes, teachers, and programs and the education of all, or nearly all, children with disabilities within the regular classroom.⁹¹ This merger of special education with regular education is seen in part as a moral imperative designed to avoid the segregation of children with disabilities into a separate but unequal system.⁹² Its proponents argue that it will also improve education for all children by replacing the use of one rigid, curriculum for all those in the regular classroom. Instead, it could bring the expertise and training of special educators into regular classrooms to better serve all children, rather than reserving this expertise for use in a separate system of resource rooms and special classrooms.⁹³ The educators who have pressed for inclusion see the need for a more responsive educational system, one that treats each child as special and marshals all available resources to help teachers effectively reach the whole class.⁹⁴ As an educational concept, this is certainly attractive, but practically, inclusion requires both major changes in the way teachers are trained, and the enthusiastic participation of teachers and administrators to succeed.⁹⁵

Opponents of complete inclusion have characterized it as a Reaganomics inspired effort to remove needed resources from special

the commitment to understanding all students with difficulties and the willingness of special educators to be flexible and responsive). As a matter of federal educational policy, a 1986 OSEP report by Madeline Will, then Assistant Secretary of Education under President Reagan, proposing the Regular Education Initiative (REI), calling for partnership between regular and special education to serve children with disabilities in regular classrooms, is significant. Anne C. Smith, *Systematic Education Reform and School Inclusion: A View From A Washington Office Window*, 20 EDUCATION AND TREATMENT OF CHILDREN 7, 10 (1997) (citing MADELINE WILL, U.S. DEPT. OF EDUC., EDUCATING STUDENTS WITH LEARNING PROBLEMS—A SHARED RESPONSIBILITY (1986)).

91. STAINBACK, *supra* note 51, at 252.

92. *Id.* Inclusion is also seen as a way for society to confront and reexamine the way it treats differences. See Jennifer York-Barr, *Introduction to the Topical Issue*, 17 REMEDIAL AND SPECIAL EDUCATION 131, 131 (1996) (commenting that the “ideal of inclusive schooling extends beyond the difference of disability” and into areas of diversity among ethnic groups, learning styles, and so on).

93. See JACK L. NELSON ET AL., CRITICAL ISSUES IN EDUCATION: DIALOGUES AND DIALECTICS 424-39 (4th ed. 2000) (summarizing the arguments for and against inclusion).

94. James McLesky et al., *supra* note 90, at 320; see also STAINBACK, *supra* note 51, at 252 (noting the need to shift “attention from disabling to enabling” children).

95. See Naomi Zigmond & Janice M. Baker, *Is the Mainstream a More Appropriate Educational Setting for Randy? A Case Study of One Student With Learning Disabilities*, in 9 LEARNING DISABILITIES RESEARCH AND PRACTICE 108, 108 (1994) (reporting on one experimental inclusion effort); see also Smith, *supra* note 90, at 17 (describing inclusion as an evolutionary process which works well only in the context of reinvented schools).

education.⁹⁶ They point out that before the IDEA, many children with disabilities, those not entirely excluded or consigned to institutional treatment, were included in the regular educational system, where they languished or failed for lack of identification and assistance.⁹⁷ It is not clear that students with disabilities fare better academically within the general classroom.⁹⁸ Because the foundations of the inclusion philosophy are largely ideological, and not empirical, its claimed benefits largely "await documentation."⁹⁹ Moreover, critics of full inclusion argue that there will always be children for whom the regular classroom is not appropriate due to the severity of their disabilities or the extent of the interventions they require, so complete inclusion is not feasible.¹⁰⁰ And the isolated success of inclusive programs that involve committed and collaborative teachers does not mean that full-scale, mandatory inclusion can succeed when pressed upon a reluctant school system.¹⁰¹ One scholar surveying the research con-

96. James M. Kauffman, *The Regular Education Initiative as Reagan-Bush Educational Policy: A Trickle-Down Theory of Education of the Hard-to-Teach*, in *ILLUSION*, *supra* note 90, at 125.

97. See Hallahan, *supra* note 88, at 69 (stating students with disabilities are typically identified for special education because they are unable to learn the general education curriculum); Sherman Dorn et al., *supra* note 90, at 16 (arguing that inclusionists express unrealistic optimism about the ability and willingness of regular classroom teachers to accommodate a much greater diversity of students; such accommodation generally has not occurred in the history of United States schooling).

98. Terman, *supra* note 60, at 17 ("At best, several models of inclusive programs have shown modest positive effects and have required considerable resources in the form of training and assistance for teachers, planning time, access to additional supportive services, and administrative support."); see also Zigmond & Baker, *supra* note 95, at 9 (reporting on a child in a carefully planned mainstreaming program who still made little progress); Naomi Zigmond et al., *Special Education in Restructured School: Findings from Three Multi-Year Studies*, *PHI DELTA KAPPAN*, March 1995, at 531 (citing studies that suggest general education settings produce achievement outcomes for students with learning disabilities that are neither desirable nor acceptable, despite investment of tremendous professional and financial resources).

99. Keogh, *supra* note 87, at 63.

100. Mitchell L. Yell, *School Reform and Special Education: A Legal Analysis*, 36 *PREVENTING SCHOOL FAILURE* 25, 27 (1992). Others have also suggested that full inclusion may provide a disservice to other children in the classroom if it drains away teacher time and resources or disrupts the class. W.N. Bender, *The Case Against Mainstreaming: Empirical Support for the Political Backlash*, 105 *EDUCATION* 279, 284 (1985); Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion"*, 72 *WASH. L. REV.* 775, 854-58 (1997).

101. Terman, *supra* note 60, at 19; Zigmond et al., *supra* note 98, at 531, 540; see also Margaret P. Weiss & Frederick J. Brigham, *Co-Teaching and the Model of Shared Responsibility: What Does the Research Support?*, in 14 *ADVANCES IN LEARNING AND BEHAVIORAL DISABILITIES* 217 (2000) (reviewing the paucity of research on teacher satisfaction and student outcomes of co-teaching models).

cluded that it "does not make a compelling case for or against inclusion."¹⁰²

For the most part, the debate has been an academic one, taking place largely among education scholars and outside of the legal arena.¹⁰³ Still, the IDEA has incorporated the central premise of a preference for integration by requiring that children be educated in the least restrictive environment where their educational needs can be appropriately met.¹⁰⁴ It has also required that school districts consider and make available a range of placements and services so that each child's needs are served.¹⁰⁵ It is hard to quarrel with a vision of education that focuses on reaching and meeting every child's needs. Indeed, as a goal, this draws support from every political and philosophical point on the spectrum.¹⁰⁶ But it makes no sense to remove the mandate to serve the educational needs of part

102. Terman, *supra* note 60, at 17.

103. See *supra* note 90. It has dominated and divided special educators, however. See, e.g., Andrews, *supra* note 90, at 258-60 (outlining and contrasting views on special education reform as between incremental improvement of a basically sound system, and substantial reconception of a fundamentally broken system); Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, in *CENTURY'S END*, *supra* note 7, at 214 (stating the debate is whether a new, single, adaptable system should be formed, or politically, given that the general system is non-adaptable and special education practices have room for improvement, special education should be retained).

104. See *supra* notes 33-35 and accompanying text. For a review of judicial handling of inclusion principles in the context of the IDEA, see Dupre, *supra* note 100, at 794; Mitchell L. Yell & James G. Shriner, *Inclusive Education: Legal and Policy Implications*, in 40 *PREVENTING SCHOOL FAILURE* 101 (1996).

105. 34 C.F.R. § 300.551 (2000)(requiring a continuum of alternative placements).

106. Andrews, *supra* note 90, at 267 (stating that "[w]e need to push ahead with traditional and nontraditional research for improving knowledge and practice about enhancing individual student capacity and promoting a caring school culture in which the line between student categories meld. Our shared goal is the welfare of students with disabilities and all children."); Horn & Tynan, *supra* note 45, at 42 (arguing that "the most effective educational strategies for [learning disabled] students are the same ones that help most students in regular education. These include frequent individualized monitoring and feedback and intensive direct instruction."); Milton Budoff, *Engendering Change in Special Education Practices*, 45 *HARVARD EDUC. REV.* 507, 523 (1975), reprinted in *CENTURY'S END*, *supra* note 7, at 83 (stating that "special education reform . . . is a logical extension of the broader concern with the educational needs of all children who are ill-served by schools [I]f educators recognized the relevance of [special education's] principles for school practice in general, perhaps the majority of children would never have to drop into the special needs category at all."); Terman, *supra* note 60, at 18; Richard A. Weatherley & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47 *HARVARD EDUC. REV.* 171, 196 (1977), reprinted in *CENTURY'S END*, *supra* note 7, at 116 (noting that "the vision of educators with whom we spoke was that the [special education] law would open the way to treating every child as deserving individual assessment and an individualized learning plan").

of our school population when most agree that we are failing to meet the needs of the whole.

E. Compliance and Enforcement

The values in the IDEA favor a cooperative planning effort between school administrators, teachers, and parents that yields an understanding of the individual child, a plan to meet that child's educational needs, and the resources to realize that plan. Yet observers have reported that children are grouped, categorized, and offered set programs based upon the school district's offerings.¹⁰⁷ Compliance is viewed at the school level as procedural (whether the IEP meeting is held, and the IEP is prepared and filed) rather than substantive.¹⁰⁸

Mandatory parental participation and a specified right to seek administrative and judicial review of eligibility, services, and placement determinations were seen at the IDEA's passage as an important part of the statutory structure.¹⁰⁹ To advocates and drafters, the right to an appropriate education required the fair resolution of disputes between parents and schools so that the child's rights were not left to the discretion of local school systems.¹¹⁰ Attorneys' fees provisions were explicitly added to the IDEA with an

107. See Weatherley & Lipsky, *supra* note 106, at 106 (finding that in early implementation of state special education program, availability of services influenced decisions); Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, in SKRTIC, *supra* note 7, at 203, 216-19 (analyzing special education service delivery in organizational behavioral terms as reflecting the combination of outer machine bureaucracy decoupled from internal professional bureaucracy structure of schools, which deflect the IDEA's collaborative, problem-solving (adhocratic) goals and result in separate systems).

108. Clune & Van Pelt, *supra* note 10, at 29; see also McLaughlin & Warren, *supra* note 52, at 31 ("For too long, accountability for special education has consisted of documenting that students were identified and services were provided.").

109. See Bd. of Educ. v. Rowley, 458 U.S. 176, 205-06 (1982) (noting that "congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard." (internal citation omitted)); see also David L. Kirp, *Student Classification, Public Policy, and the Courts*, 44 HARVARD EDUC. REV. 7, 43 (1974) in CENTURY'S END, *supra* note 7, at 3, 30-37 (identifying the appeal of procedural safeguards in making a school's decision appear more fair); Milton Budoff, *Engendering Change in Special Education Practices*, 44 HARVARD EDUC. REV. 507, 516-17 (1974) reprinted in CENTURY'S END *supra* note 7, at 69, 77; Hehir & Gamm, *supra* note 79, at 214-16 (explaining how due process and the legal system relate to special education).

110. Kirp, *supra* note 109; see also Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in LAW AND SCHOOL REFORM, *supra* note 79, at 1, 32 (stating that the role of legalization and due process linked with improved programs for students with disabilities); Paul Weckstein, *School Reform and Enforce-*

eye toward making the due process system available to those who would otherwise be unable to find legal representation.¹¹¹

Some of the litigation generated by the IDEA has produced significant interpretations of the statute. These include cases setting the standard for an appropriate education,¹¹² providing for equitable remedies including tuition reimbursement¹¹³ and compensatory education¹¹⁴ for children who were not furnished an appropriate education; and construing the scope of services covered by the IDEA.¹¹⁵ The majority of cases, though, have focused on the indi-

able Rights to Quality Education, in *LAW AND SCHOOL REFORM*, *supra* note 79, at 306, 314-18 (describing students' and parents' rights).

111. Handicapped Children's Protection Act, Pub. L. No. 99-372 §§ 2-5, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415 (I)(3), (I) (2001)). The amendments followed the decision in *Smith v. Robinson*, 468 U.S. 992, 993-94 (1984) which precluded the use of the general attorneys' fees provisions in the Civil Rights Act when raising an EHA claim.

112. *See, e.g., Rowley*, 458 U.S. at 203-04 (upholding plan if it conferred some educational benefit and provided services needed to allow a child to progress from grade to grade if such a goal was appropriate in light of the child's disability). The 1997 IDEA amendments altered this standard somewhat, and now uses as a yardstick the services needed to help children progress in the general curriculum. *See* 20 U.S.C. §§ 1400, 1414(d)(1)(A)(ii)(I) (2001).

113. *See Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 370-71 (1985) (holding that reimbursement of private school tuition for parents is appropriate where the school district failed to provide appropriate services); *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993) (holding that a private school need not be on a state's list of approved schools for reimbursement to be ordered).

114. *See, e.g., Bd. of Educ. v. Ill. State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996) (recognizing, after *School Committee v. Department of Education*, 471 U.S. 359, 369-70 (1985), the right of a district court to award a full range of equitable remedies under the IDEA); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496 (9th Cir. 1994) (holding that a district court did not abuse its' discretion by denying compensatory education for alleged failures to provide appropriate special education services); *Pihl v. Mass. Dept. of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (holding that the IDEA empowers courts to grant compensatory education as a remedy for disabled students beyond the statutory age of entitlement for services); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991) (recognizing a court's right to grant compensatory relief); *Lester v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990) (upholding the district court's power to grant compensatory education as a remedy); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (holding that the board of education was required to reimburse parents of a handicapped child for out-of-pocket expenses incurred at a treatment center which was an appropriate placement); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988) (affirming the district court's decision to award a handicapped student one and one-half years compensatory education where the student was deprived a free appropriate public education), *vacated and remanded sub. nom. Sobol v. Burr*, 493 U.S. 902 (1989), *reaff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (upholding a disabled child's right to compensatory education where the student was denied a free appropriate education).

115. *See Cedar Rapids Comty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999) (holding that the obligation to supply related services in form of an aide who could, among

vidual child and the adequacy of the program proposed by the school district to meet that child's needs.¹¹⁶ Not surprisingly, the cases that survive the state administrative process and reach a court decision often involve financially sizable consequences, typically over whether a child requires a private school placement and who should bear that cost.¹¹⁷

Some studies have identified the due process provisions of the IDEA as problematic. They note that school officials complain about the time spent if a case proceeds to a hearing and court review and the financial exposure forced by the district if it does not prevail.¹¹⁸ They suggest that the due process procedures have encouraged an adversary atmosphere rather than one that encourages the IDEA goal of collaboration.¹¹⁹ They also point out that the due process provisions are used most often by middle-class, educated parents who can master the complex system, while less sophisticated parents tend to accept what the school district offers

other things, suction breathing tube for child with severe physical disabilities was not limited by cost); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984) (finding that intermittent catheterization to be performed by nurse or trained layperson was related service).

Other decisions have related to the application of disciplinary sanctions to children with disabilities. See *Honig v. Doe*, 484 U.S. 305, 325-27 (1988) (interpreting IDEA's change in placement procedures as applicable to school suspensions of more than ten days). The current form of the IDEA modifies in part and incorporates in part the holding in *Honig*. See Seligmann, *supra* note 48, at 87-100.

116. See James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 *EXCEPTIONAL CHILD* 469, 478 (1999) (identifying the placement of child as the primary issue in 63% of the representative sample of all litigated cases between 1975 and 1995). In reviewing state administrative decisions in special education cases, courts use a standard of review that defers somewhat to the administrative decision. See *Rowley*, 458 U.S. at 206 (noting that the reviewing court should give "due weight" to administrative proceedings); *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist.*, 144 F.3d 692, 698-99 (10th Cir. 1998) (discussing the manner of review of a two-tiered state proceedings).

117. Newcomer & Zirkel, *supra* note 116, at 472-73, 478 (reporting that forty-one percent of students were in private schools or hospitals at the time dispute arose, and that in three out of four placement disputes, parents favored a more restrictive setting than that proposed by school district).

118. See, e.g., MILTON BUDOFF & ALAN ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION* 199-215 (1982) (reviewing the first few years of implementing chapter 766 of Massachusetts General Laws, a law dealing with special education); Hehir & Gamm, *supra* note 79, at 205-06 (quoting one special education director who manages due process hearings as saying he spends more time with lawyers than with teachers); Kevin J. Lanigan et al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, in *RETHINKING*, *supra* note 8, at 213, 225-27 (discussing the efficacy of due process and litigation enforcing the IDEA from various perspectives).

119. Clune & Van Pelt, *supra* note 10, at 37; Hehir & Gamm, *supra* note 79, at 207.

due to their respect for its expertise, intimidation by its authority, or ignorance of their rights.¹²⁰

Others point out that for every case that is filed, many others are negotiated to agreement.¹²¹ Given the number of children receiving special educational services, the rate of complaints seeking resolution through the due process system is very small.¹²² When a single court decision is rendered, many school districts will change their practices to avoid other disputes.¹²³ The 1997 IDEA amendments, also foster mediation, building on the existing practices of many states, by including a requirement that states offer mediation as an alternative to a formal administrative hearing.¹²⁴

The alternatives to individual case-by-case enforcement, however, are likely to be less efficient in terms of getting educational services to children in need of them. The federal government can withhold funds from a state which is not complying with the IDEA.¹²⁵ Such a draconian measure, however, would deprive many children of educational services and is unlikely to be undertaken absent gross, systemic non-compliance. Placing enforcement responsibilities in state or federal agencies risks overburdening and further bureaucratizing the process. Experience under other statu-

120. BUDOFF & ORENSTEIN, *supra* note 118, at 45 (finding families that brought private school cases to be affluent and well educated); Clune & Van Pelt, *supra* note 10, at 31-32 (attributing low rate of parental participation in IEP conferences in early years of IDEA to possible deference to perception of professional expertise); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW AND CONTEMP. PROBLEMS 63, 76-78 (1985) (suggesting that relying primarily on due process to effect policy change can be questioned when lower income parents do not have the option of paying for private school, and thus may believe that circumspection is in their best interests).

121. Hehir & Gamm, *supra* note 79, at 214; Clune & Van Pelt, *supra* note 10, at 38 (reasoning that due process gives parents leverage in dealing with school districts).

122. One out of 1000 children receiving special education services requests a due process hearing. Attachment 2: Summary of Potential Benefits and Costs, Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,656, 12,660-61 (1999) [hereinafter *Summary of Benefits and Costs*]. Surveys also show high rates (81-87%) of parental satisfaction with special education services provided to their children. 22 OSEP ANN. REP. pt. II, at 19 (2000).

123. See BUDOFF & ORENSTEIN, *supra* note 118, at 342 (noting ripple effect of decisions on school practices); Hehir & Gamm, *supra* note 79, at 214-16 (concluding that hearings play important role in attaining compliance with special education laws and in promoting professionalism and quality of educational services).

124. Mediation must be offered on a voluntary, confidential basis. 20 U.S.C. § 1415(e) (2001). Federal regulators reported that thirty-nine states were already offering mediation before the IDEA requirements were implemented, and holding mediations in sixty percent of the cases in which hearings were requested. *Summary of Benefits and Costs*, *supra* note 122, at 12,658.

125. See 20 U.S.C. § 1416 (2001).

tory schemes such as Title VII suggests that administrative enforcement can supplement, but not replace, individual enforcement.¹²⁶

F. The Cost of Special Education

Special education costs are sizable, and the federal government has never funded the full forty percent of the costs of furnishing special education services that the original legislation contemplated.¹²⁷ Federal funding is now at about 12.7% of the average per pupil expenditure for special education.¹²⁸ There is wide variation from state to state in the amounts reported as spent on special education.¹²⁹ Analysts have observed that schools may have financial incentives to classify children as being eligible for special education in order to maximize the funds flowing to the school.¹³⁰ Also, because of the increasing number of special education children served in mainstream settings, experts find that it is no longer possible for the states to accurately divide expenditures between

126. Cronis & Ellis, *supra* note 87, at 4; *see also* Terman, *supra* note 60, at 15 (reviewing conflicts between parent and school perspectives, effectiveness of meetings, and concluding that due process provisions are critical).

127. 146 Cong. Rec. S9259-60 (daily ed. Sept. 26, 2000) (statement of Sen. Smith).

128. This is despite a doubling of federal funding from \$2.6 million in 1997 to \$4.9 million in 2000. *Id.* Efforts to fully fund special education are viewed by some in Congress as an important step to avoiding inappropriate and unfair funding conflicts between children with and without disabilities thought to arise when public schools divert general resources to fund special education programs. *See id.* As one legislator further noted, “[I]nsufficient funding for special education compromises the education of every student.” Siobhan Gorman, *Why Special Education Could Spark a Veto*, NAT’L J., Aug. 4, 2001, 2001 WL 25925970 at *2 (reporting the view of Republican Representative Michael Ferguson). Federal percentages of special education funding vary greatly from state to state. *See* Parrish & Chambers, *supra* note 68, at 122 (reporting that in 1987-1988, federal aid ranged from 65% of the total special education expenditure in Kentucky to 3% of the costs in Minnesota and New York); Thomas B. Parrish & Jean Wolman, *Trends and New Developments in Special Education Funding: What the States Report*, in FUNDING SPECIAL EDUCATION, *supra* note 78, at 215 (surveying special education expenditures in 24 states and noting federal percentages of support ranging from 4 to 17%).

129. Parrish & Chambers, *supra* note 68, at 122-24; Parrish & Wolman, *supra* note 128, at 214-19.

130. Parrish & Chambers, *supra* note 68, at 128 (stating that parts of funding system may have created fiscal incentives to identify children as having special needs); Parrish & Wolman, *supra* note 128, at 210-14 (noting that depending on the weighting system used, incentives can be created to misclassify students into specific types of placements or into categories of disabilities receiving higher reimbursements); *see also* Robert Cullen, *Special Education at Coles Elementary School*, in RETHINKING, *supra* note 8, at 111, 119 (quoting an elementary school principal as saying “Special education keeps a small school like ours afloat.”); Richard Rothstein, *Rethinking Special Needs Without Losing Ground*, N.Y. TIMES, July 5, 2000, at B12 (stating that schools seeking funds may refer borderline cases to special education).

general and special education.¹³¹ Changes in the 1997 IDEA amendments have somewhat altered the formulas governing the disbursement of federal funds. In the future, the formula will be partially based upon total student enrollment and the poverty level in the state, rather than just on the number of children served with special education services.¹³² School districts complain that because the IDEA mandates services regardless of cost, they must reduce other services to work within their budgets.¹³³ On the other hand, as one administrator observed, sometimes a mandate provides a way for educators to get personnel, programs, and services that they otherwise cannot obtain: "IDEA gives me political clout with the school board to get them to fund all successful remedial programs for all students in the district who can use them, in situations where ordinary requests might be turned down for fiscal reasons."¹³⁴

Schools trying to maximize services to children with learning difficulties have already seen the financial benefits of funding services as special education, and of leveraging special educational services to reach throughout the school.¹³⁵ Parents are willing to risk having their children labeled as "disabled" in order to provide them with the help they need.¹³⁶ Those who decry the expenditure of resources on special education must acknowledge that those re-

131. Parrish & Chambers, *supra* note 68, at 121.

132. See Parrish & Wolman, *supra* note 128, at 210 n.3 (explaining that under the 1997 Amendments to the IDEA, funding will continue on the same child-count formula until \$4.9 billion in appropriations is spent, at which time the new formula will become effective).

133. E.g. Susan Milligan, *Jefford's Special-Ed Plan Revived as Power Shifts, Democrats Press for Full Funding*, BOSTON GLOBE, June 4, 2001, at A1 (reporting that Boston spent nearly a fourth of its general funds budget on special education and quoting Superintendent Thomas W. Paysant as saying, "It means we can't do as much in general education as we would like to do.").

134. KELMAN & LESTER, *supra* note 48, at 101 (quoting a New York administrator in a high socio-economic district in which most students with academic difficulties receive some aid).

135. See Parrish & Chambers, *supra* note 68, at 122-24 (noting that cost reports for special education are not really accurate. Although the costs are considerable, most states do not separately break out all expenditures related to special education—for example, the use of personnel in regular classroom which is the largest variable affecting per pupil cost); see also Kate Zernike, *Special Education Debate Shifts From Money to New Ideas*, N.Y. TIMES, May 13, 2001, at 27 (reporting that Greenwich, Connecticut has created a special education team that moves among regular classrooms, providing support and advice to classroom teachers on how to deal with students rather than referring them to special education).

136. See Sternberg & Grigorenko, *supra* note 62, at 1945 ("The worst of it is that [underperforming] children may only receive the special services if they have the LD label . . . from the parents' own standpoint, they are acting in a rational way: they

sources can, should, and probably are funding educational services to a large percentage of our needy public school population, whether that population meets a traditional conception of disability or not. The IDEA offers a vehicle for funding and delivering services that are relatively "protected," due to statutory mandates, from political and budgetary vicissitudes.

Some analysts have suggested that part of the answer to the mounting costs of special education lies in offering schools resources without tying them to particular categorical programs or requirements.¹³⁷ There is some merit to loosening the restrictions on the use of federal funds to allow them to support specialized instruction and services for more students in need of them. The 1997 IDEA amendments removed some of the strictures on the use of funds so that special education funds can be used in ways that benefit all children in a class or school, so long as the needs of children with disabilities are being appropriately met.¹³⁸ For example, a classroom aide whose salary is supported through special education funds may be called for in a child's IEP. Within the classroom, though, that aide need not be glued to the side of that specific child. He may work with small groups of children on reading or writing skills, freeing the classroom teacher to do the same. Or he may lead a class lesson while the classroom teacher works individually with a child on a particular learning skill. Similarly, a reading specialist can enter the classroom and work with a group of below grade level readers, even though only some of them may be on IEPs that call for such instruction. This kind of cross-fertilization and leveraging of special education resources can raise the level of educational instruction for all children—what parent would not prefer a student-teacher ratio of 12:1 over that of 24:1?¹³⁹

If categorization and eligibility lines are eliminated in favor of making *all* children facing learning difficulties eligible for IEP and services, some administrative burdens, line-drawing difficulties,

have found what often they believe is the only route to special services for their children.")).

137. See Margaret J. McLaughlin, *Consolidating Categorical Educational Programs at the Local Level*, in *FUNDING SPECIAL EDUCATION*, *supra* note 78, at 22-40 (presenting summaries and analysis of two studies that examined how special education resources can be consolidated with other educational programs).

138. *Id.* at 25.

139. See Terman, *supra* note 60, at 17 (reporting research that students without disabilities may benefit academically from increased resources in regular classroom in inclusive programs; citing study where additional resources allowed classroom to maintain teacher-student ratio of 1 to 14 and nondisabled students showed greater academic gains than peers in regular, noninclusive classes).

and accompanying costs of the current special education system could be lessened.¹⁴⁰ But elimination of large groups of children from special education coverage, or the consolidation of all federal funds into unrestricted grants, unless coupled with an enforceable commitment to educate all children appropriately, risks the redirection of resources for purposes that do not result in better or more thoughtful educational practices.¹⁴¹

Another suggestion favors providing the resources directly to parents in the form of vouchers, on the theory that they will be able to choose the right placement for their child from alternative competing schools.¹⁴² The use of school vouchers to obtain an appropriate education for children not adequately served by the public school system is hardly a solution for all children, with or without disabilities. The present limited experimentation with charter schools indicates that many schools are still coming to terms with their obligations with respect to accepting and appropriately educating children with disabilities.¹⁴³ Further, parents with vouchers will not necessarily have the resources or expertise needed to purchase an appropriate education for their child.¹⁴⁴

140. See Parrish & Chambers, *supra* note 68, at 129-30 (finding that in 1985-1986, for students with mild disabilities in resource room programs, 22% of funds were spent on assessment and 15% on program administration. Yet special education teachers report the need to reassess students to determine their instructional needs because the eligibility assessment does not prove useful for this purpose).

141. Terman, *supra* note 60, at 14; Parrish & Chambers, *supra* note 68, at 136 (stating that "even advocates who support enhanced flexibility in the use of special education funds express concerns about replacing traditional accountability measures with simple trust."); see also McLaughlin, *supra* note 137, at 29, 33 (finding collaboration's effectiveness related to leadership, program advocacy, personnel, including teachers' attitudes, and knowledge about how to collaborate; but citing concerns that blending programs would usurp funds and neglect certain students); Margaret J. McLaughlin & Deborah A. Verstegen, *Increasing Regulatory Flexibility of Special Education Programs: Problems and Promising Strategies*, in 64 EXCEP. CHILD. 371, 380-82 (1998) (acknowledging concerns that special education will "usurp" all educational funding and finding that educators interviewed favored the consolidation of services but not of funding).

142. Daniel McGroarty, *The Little-Known Case of America's Largest School Choice Program*, in RETHINKING, *supra* note 8, at 289-305.

143. Cheryl M. Lange & Camilla A. Lehr, *Charter Schools and Students with Disabilities: Parent Perceptions of Reasons for Transfer and Satisfaction with Services*, 21 REMEDIAL AND SPECIAL EDUC. 141, 142, 150 (2000) (noting that charter schools are struggling with the special education mandate and that directors report fewer services available than those traditionally available in public schools).

144. In an interview for the PBS series "School," Jonathan Kozol commented: "The day the conservative voucher advocates tell me that they would like to give every inner city black, Hispanic or poor white kid a \$25,000 voucher to go to Exeter, I will become a Republican!" *School: The Story of American Public Education* (PBS televi-

Moreover, most parents continue to look to public schools for their children's education.¹⁴⁵

Increasing the federal share of special education funding to the forty percent level the IDEA originally envisioned would have a major effect on public school budgeting that would benefit all school children. Leveraging funds to support special education personnel, services, and training for school children both with and without IEPs would allow schools to move toward more collaborative methods of delivering individualized educational services, and reduce the friction between special and regular education while improving all education.¹⁴⁶

G. Legalization and Special Education

Some policy analysts question whether the top-down development of educational policy, and its legalization in statutory form, is feasible when dealing with complex organizations like schools.¹⁴⁷ One scholar has characterized the special education system as an attempt to require collaborative, or ahocratic ends through a top-down, "machine bureaucracy" treatment of personnel who actually function as specialized professionals with a finite repertoire of practices.¹⁴⁸ This scholar calls for a radical restructuring of school

sion broadcast, September 3-4, 2001), available at http://www.pbs.org/kcet/public_school/about_the_series/press.html.

145. See Boyd, *supra* note 6, at 227, 240 (stating that 56% of surveyed parents in 1999 would still send their child to public school even if the government paid tuition and quoting an estimate by Diane Ravitch that voucher plans would only shift from 90 % attending public schools to an 80-20 distribution of the school population).

146. Jon Franden, *GNS Special Report*, Gannet News Service, June 8, 2001, 2001 WL 5110191 (noting the Maine Municipal Association's estimate that full funding of special education would result in a 5% cut in property taxes; also that the full funding of special education is the National School Boards Association's top priority in helping schools meet other educational needs such as hiring more teachers and repairing schools, and is seen as the major way to reduce friction and complaints of favoritism).

147. See Weatherly & Lipsky, *supra* note 106, at 89, 112-17 (studying implementation by "street-level" bureaucrats, i.e., those charged with delivering public programs, whom the authors characterize as constrained but not directed in their work); Thomas M. Skrtic, *Special Education and Student Disability as Organizational Pathologies: Toward a Metatheory of School Organization and Change*, in SKRTIC, *supra* note 7, at 190, 198-199 (discussing the inner structure of school organizations as a professional bureaucracy).

148. "Structurally, the problem with the [IDEA] is that it requires professional bureaucracies to function as adhocracies by treating them as if they were machine bureaucracies." SKRTIC, *supra* note 7, at 216.

organizations in order to realize the democratic ideals of an appropriate education for all children.¹⁴⁹

There has never been a shortage of proposals for the reconstruction of public education. As one historical analysis notes, though, "At the core of the school— in classroom instruction— change was slow."¹⁵⁰ The call to make public education "special" for every child is not a new one and has the compelling moral appeal of both equity and excellence.¹⁵¹ Our experience with public education gives us considerable reason to doubt, however, that without a legally enforceable right to an appropriate education, and a commitment to spend what it takes to provide it, there is reason to hope this goal will be achieved.¹⁵² Our school finance system is heavily reliant on property taxes and the resulting variations in revenues that they yield.¹⁵³ School funding is subject to the political pressures of communities with competing needs and a majority of voters without children in the schools.¹⁵⁴ As a new round of challenges to the financing of public education has surfaced, the evidence that our financial support of public education is failing to provide adequate education to children with and without disabilities has been affirmed.¹⁵⁵

Legalization of special education as a right has its detractions and limitations, to be sure. Statutes by themselves do not produce the resources to carry out their mandates. Most school administra-

149. Skrtic argues that neither the inclusionists nor their opponents' proposals can work without extensive restructuring of schools into multi-disciplinary teams of specialists and consumers. Thomas M. Skrtic, *Deconstructing/Reconstructing Public Education: Social Reconstruction in the Postmodern Era*, in SKRTIC, *supra* note 7, at 250-51.

150. TYACK & CUBAN, *supra* note 6, at 9. See also Boyd, *supra* note 6, at 233 (finding that it is easier to change structures and policies than the regularities of how teachers teach).

151. Gartner & Lipsky, *supra* note 51, at 141 (stating that to eliminate inequality, "it is not special education but the total educational system that must change").

152. Paul Weckstein, *supra* note 110, at 316 (calling law an instrument to give parents, teachers and students the power to better control events that effect them). See Deborah A. Verstegen, *Trends and New Developments in Special Education Finance Litigation*, in FUNDING SPECIAL EDUCATION, *supra* note 78, at 230, 255 (discussing school finance litigation, and asking, "Might special education case law provide important legal reasoning and precedent to courts as they seek to interpret this right to an education for all children?").

153. Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM, *supra* note 79, at 88, 93 (funding decisions made "by over 15,000 school districts with dramatically different levels of local wealth and student needs").

154. See *id.* at 89 (noting that the political arena seldom prefers educational funding over reduced taxes).

155. Verstegen, *supra* note 152, at 255.

tors have supported the IDEA, but continue to advocate its funding in order to realize its goals fully.¹⁵⁶ Nor can legislation eliminate the effects of bureaucracy, or guarantee good faith. But the history of social movements and legislation teaches us that without a legal mandate, change is slow and spotty; with it, change occurs.¹⁵⁷

IV. CONCLUSION

There is still a need to continue to examine whether and why the collaborative ideals of the IDEA are not realized within our school systems as much as we want them to be and to attempt to assist school districts in complying with the spirit of the IDEA and not just its paperwork. If we are truly to “leave no child behind,”¹⁵⁸ solutions to these problems must be found without abandoning the goals of the IDEA. The ideal of an inclusive school system in which collaboration is the rule rather than the exception; stigma and labeling are eliminated; and all teachers are trained to think outside the box and to draw upon the research and best practices in education to reach all children should not be abandoned.¹⁵⁹ This ideal, however, will not be realized until and unless the resources are there to make it happen.¹⁶⁰ Setting a goal that every child learn

156. National Education Association, *NEA Legislative Action Center* (2001), available at <http://www.nea.org/lac/>; National School Boards Association, *2001-2002 Resolutions of the National School Boards Association* (March 23, 2001), available at <http://www.nsba.org/about/resolutions.htm>.

157. For extended discussion of legalization's functions and limits as a method of social change, see Clune & Van Pelt, *supra* note 10, at 39-46. See also Neal & Kirp, *supra* note 122, at 74-76, 84-87 (suggesting the need to move toward collaboration among professionals).

158. This phrase is one of the current administration's mainstays. See, e.g., George W. Bush, *Statement by the President on Brown v. Board of Education 50th. Anniversary Commission*, U.S. NEWswire, Sept. 19, 2001, 2001 WL 21898347.

159. “Ideally, every child's education should be tailored to need. If schools get smaller classes with better trained faculty, and census-based finance or similar reforms work as planned, slow learners could get more individualized instruction, without formal plans and with fewer specialists. And that's how their non-disabled classmates should be taught as well.” Rothstein, *supra* note 130, at B12.

160. “Research has shown that regular education, if properly modified, can meet the needs of many more students with disabilities, but doing so is challenging. Increased resources must be provided in the regular classroom, and major changes should be made in typical instructional practice, requiring extensive training of teachers. Local schools and teachers must be committed to inclusion to make it work. Each of these requirements is a potential stumbling block. Inclusion cannot be expected to take the place of special education in the near future. As schools experiment with inclusion, the IDEA's guarantees of appropriate education based on the individual needs of students with disabilities should be maintained.”

to read is a political platitude that no one can criticize.¹⁶¹ Making that statement an enforceable right of parents and children could move the educational system forward toward that goal.

Terman, *supra* note 60, at 21.

161. See Mike Allen, *Back in Florida, Bush Pushes Education Plan*, WASHINGTON POST, Sept. 11, 2001, at A12.