A System of Men and Not of Laws: What Due Process Tells Us About the Deficiencies in Institutional Review Boards

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THE “IDEA” OF SPECIAL EDUCATION: PRODUCING RESULTS OR APPEALING TO EMOTION?

Richard Bahrenburg*

Education is a topic of hot debate in American politics and daily life. Much of the debate regarding education is focused on reform to achieve a higher level of achievement output. Special education is often overlooked in the popular debate on education, but not many would argue against the need for special education. What most people may not know is just how expensive special education programs in America are, and what impact special education has on local school district budgets. This article attempts to survey the data regarding the achievement of students in special education programs. This article also discusses the costs of special education and how it affects the budget of local school districts. Throughout this article, the cost of special education will be weighed against the results of special education. The point of this article is to better inform the public and legislatures about special education in hopes that special education reform becomes part of the popular debate.

* J.D., Georgetown University Law Center; B.A., Psychology, Stony Brook University. I would like to thank the editors of the Northwestern University Interdisciplinary Law Review for their continuous help with critiquing and editing this article. The views expressed in this article are mine alone, as well as any faults.
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INTRODUCTION

"Indeed, this first key of wisdom is defined, of course, as assiduous or frequent questioning."

– Peter Abelard, Prologue to Sic et Non

It is January 11, 1999, and Joanna Smith just gave birth to twin girls.¹ She names them Alexa and Jaine. With olive skin and big eyes, they are a true vision of their mother. As they grow, Jaine is always steps ahead of Alexa in development and play. Joanna notices this delay and has Alexa seen by her doctor who refers her to a specialist. Alexa is ultimately diagnosed with a fatal condition that will leave her severely mentally delayed and with a life expectancy of twelve years. Alexa qualifies for special education and enters school with Jaine.

As she gets older, Alexa requires more assistance. Alexa’s primary doctor advises Joanna that a nurse is needed to be with Alexa at all times to care for her needs. Joanna requests this accommodation from the school but the school district pushes back, insisting that the general school nurse can be called to care for Alexa when Alexa requires the care. Joanna is not happy about this push back, and this case makes its way to a federal court. The court ultimately rules that the private nurse for Alexa is required in order for her to receive an appropriate education, forcing the school district to pay the nurse’s bill. This story garners large media attention, and special interests groups post the story on special education blogs so that other parents can know their rights.

The cost to educate Alexa was already around $50,000, and now the cost will be over $140,000 with the private nurse’s salary included. After eight years of paying this bill, totaling $1.2 million, sadly, Alexa dies. Was the money spent worth spending? Would the answer change if Alexa only had a disability and lived an otherwise normal life? Would the answer change if Alexa dropped out of high school? Would it change the answer if Alexa were happy with her living situation after special education? What if she never obtained a job that offered financial independence? Most importantly, is there any rationale that would conclude the money should not have been spent?

¹This story is fiction based on a compilation of non-fiction cases. Its purpose is to invoke questioning about the ideas society holds as true from an economical point-of-view.
The questions posed above do not have wholly correct answers. Instead, the answer to each depends on a plethora of beliefs that make up society. One possible criticism with the first question posed is that it could be applied to any student with a terminal illness — then the question would be: should terminally ill children be educated when their contribution back to society is limited? By no means does this article pose that specific question because special education and general education are different in one particular way: general education is accessible to all while special education is restricted to few and carries additional financial responsibilities for schools to pay. Instead, the question addressed in this article is: while society may take the loss on general education if some students do not “succeed” — with the hope that the majority will outweigh the minority — should it take that same loss when the minority can outspend the majority?

Throughout this article, questions will be posed, requiring the reader to make a judgment. The purpose is to reflect on the ideas society holds when presented with facts that might otherwise lead to a different answer. The cognitive dissonance\(^2\) that may result from this article must be ameliorated — but will it be through changing personal beliefs or through dismissal of the facts?\(^3\) For the purposes of this article, it is acknowledged that special education may be a socially sensitive topic. This article also acknowledges that there may be benefits that stem from special education. However, this paper will question the costs of those benefits in the limited fiscal world.

This article contains five main parts. Part I discusses the key steps Congress has taken in the field of special education. Part II discusses special education’s funding. Part III discusses the performance

\(^2\) Cognitive dissonance is defined, simply, as “psychological conflict resulting from simultaneously held incongruous beliefs and attitudes (as a fondness for smoking and a belief that it is harmful).” Cognitive Dissonance Definition, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/cognitive\%20dissonance; see Leon Festinger, A Theory of Cognitive Dissonance (June 1, 1957), available at http://www.sup.org/book.cgi?id=3850.

of students in special education. Part IV investigates general effects of special education on general education, and Part V provides two recommendations for the future of special education.

I. SPECIAL EDUCATION INITIATIVES

The subject of “disability rights” has been a topic for activists for many years. From the days when society frowned upon individuals with disabilities as being inferior, to the modern laws protecting against many forms of discrimination, individuals with disabilities have gained noticeable protections over the years. Education in America has also been a topic of discussion. Overall, education in America has had a tumultuous past. From education as a privilege for the elite, then education as a right for all in a segregated school system, to the modern concept of equal educational opportunities for all, America’s education system has been built on a long progression of struggles.

Margaret Spellings explained it best, “Education is unlike any other policy. It’s a deeply personal and emotional issue wrapped up in ideological battles and entrenched special interests.” This statement is especially true when discussion enters the realm of special education. Special Education may be defined as “instruction that is specially designed to meet the unique needs of a child with a disability.”

Discussion of special education in the past was focused around funding, while modern discussion is focused around results. In the realm of special education, there have been three major steps taken by Congress

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7 Special Education, NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, http://nichcy.org/schoolage/iep/iepcontents/specialeducation. “Disability” is defined as fitting into one of the categories provided in IDEA. See 20 U.S.C. § 1401(3)(A)

8 See id.
to give broad protections to students with disabilities. Those three protections are discussed below.

A. The Rehabilitation Act of 1973

The first of these protections is found in Section 504 of the Rehabilitation Act of 1973 (Section 504). Section 504 is described by the United States Department of Education as an "antidiscrimination law." Section 504 provides that no program or activity receiving federal funding may exclude from participation an individual with a disability based solely on the disability. This law has broad application that spans universities and employment. In total, it is a promise that the federal government will not tolerate discrimination preventing persons with disabilities from participating in activities.

B. Americans with Disabilities Act: Title II

The second protection is found in Title II of the American’s with Disabilities Act of 1990 (Title II). Title II is a promise to people with disabilities that no entity receiving state funds can deny participation in a function on the basis of one’s disability. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” This language replicates the language used in Section 504 and provides similarly broad protections against discrimination. The third protection is found within the

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9 The three do not constitute an exhaustive list.
13 Id.
The “IDEA” of Special Education

Richard Bahrenburg

Individuals with Disabilities Education Act (IDEA). This article will only discuss IDEA.

C. IDEA: In a Nutshell

IDEA is a grant statute that conditions federal funding upon a list of specific requirements that states and local school districts must fulfill. IDEA consists of Parts A, B, C, and D, but this article will only discuss Part B. Part B is the major substantive portion of IDEA, applicable to children between the ages of Three and Twenty-One.

IDEA places broad requirements on schools. For example, IDEA mandates that local school districts actively search for students who may be qualified to receive special education services. Once a student is qualified for services under IDEA, the school district is obligated to provide that student with a Free and Appropriate Education (FAPE). To meet this education requirement, schools are obligated to create a Individualized Education Program (IEP) for each eligible student. An IEP “must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential,” which is open ended and allows broad definitions of “meaningful.”

1. Eligibility

Eligibility under IDEA is a two-step process. First, the student must have one or more of the thirteen enumerated disabilities. Second, it

15 Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400, (West, Westlaw through P.L. 113-49 approved); Eligibility for Assistance- States, 34 C.F.R. § 300.100 (through Nov. 21, 2013); Conditions of Assistance-Local, 34 C.F.R. § 300.200, (through November 21, 2013).
17 Id.
18 State Monitoring and Enforcement, 34 C.F.R. § 300.600(d)(2) (through Nov. 21, 2013).
20 What Requirements Must a Local Educational Agency Meet, 34 C.F.R. § 222.52 (through Nov. 21, 2013).
22 The list of qualified disabilities is: “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this...
must be shown that as a result of that disability, special education is required for the student to make academic progress and benefit from an educational program. In determining a child’s disability classification, the school must also determine that the following factors are not the reason for the student’s difficulty in school: 1) lack of appropriate instruction in reading; 2) lack of instruction in math; and 3) limited English proficiency. If a child is not eligible under IDEA, that child may be eligible under Section 504 of the rehabilitation act of 1973.

2. Enforcement Provisions

If parents of children in special education do not believe that their children are receiving a FAPE from the local school district, IDEA provides two key safeguards for children. First, parents can immediately file a complaint against the district to initiate a proceeding against the school district for its alleged failure to provide a FAPE, and seek relief. In that situation, the school district is obligated to inform the parents “of any free or low-cost legal and other relevant services.” Second, parents can unilaterally remove their children from the school district, place them into another school and request tuition reimbursement from the original school district for the cost of the alternative schooling. If the original school district refuses to pay the costs of the alternative schooling, a court may force payment by the district if: 1) the original district did not provide a FAPE and; 2) the parent sought “appropriate” private placement.


22 Filing a Due Process Complaint, 34 C.F.R. § 300.507 (through Nov. 21, 2013).

23 Id.

24 Id.

25 Filing a Due Process Complaint, 34 C.F.R. § 300.507 (through Nov. 21, 2013).

26 Id.


28 Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) ([W]hen a public school fails to provide the required FAPE and a child’s parents place the child in an appropriate private school without the school district’s consent, a court may require the district to reimburse the parents for the cost of the private education.}).
choose which avenue they prefer when taking action against a school district. These enforcement provisions also serve as a deterrent for schools to withhold services because of their desire to avoid litigation.

3. Mandatory School District Expenditures

IDEA requires school districts to pay “related services” needed to provide a FAPE, aside from just education.29 “Related services” is defined by a vast array of activities.30 In defining the contours of “related services,” IDEA and its federal regulations appear to exempt “medical services” from coverage that are not solely for diagnostic or evaluation purposes.31 At first glance, this appears to mean that school districts would not be responsible for any nursing or medical aid a student may require in school because it is not a “related service.” However, this is not the case.

The Supreme Court has interpreted “related services” as representing Congress’s intent to assure that students with disabilities receive “services that enable a disabled child to remain in school during the day.”32 With this reasoning, the Supreme Court has held that local school districts are required to pay for medical services, such as a private nurse but not a doctor, if that service is needed to keep the student in school throughout the day, regardless of costs.33 When medical services have not been covered under IDEA, it is because those services were found to have not been “required” for the student to stay in school for the day.34

As outlined above, IDEA is broad and provides tools for enforcement that parents may utilize. With the power of enforcement

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30 Related services “means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 C.F.R. § 300.34(a) (through Nov. 27, 2013).
31 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(c)(5) (through Nov. 21, 2013).
33 Id.
34 See Mary T., 575 F.3d at 248 (holding that a long-term psychiatric residential treatment center is not a service required for the student to remain in school).
given to parents, the burden of the services is placed largely – if not solely – on the local school district. The burden grows once medical services are required to keep a special education student in school for the day. While this financial burden may be moot in an education system with infinite funds, that is not a modern reality. Where then do local school districts locate funding to pay for special education and its related services?

II. FUNDING SPECIAL EDUCATION

When Congress passed IDEA, it gave itself a cap to fund up to 40% of the cost of special education. Between 1980 and 1995, between $1.5 and $2 billion a year was provided to help fund IDEA, which was around 7% of special education’s cost.\(^{35}\) Since then, Congress has steadily provided more funds for special education, with an average amount of roughly $12 billion a year,\(^{36}\) which is approximately 18% the cost of special education.\(^{37}\) This money is distributed to states in a two-step process. First, 85% of the funding is distributed to states based on the amount of children whose ages allow them to be applicable for IDEA.\(^{38}\) Second, 15% is distributed to states based on their relative percentage of students living in poverty.\(^{39}\) After the federal distribution of funds, each state is then responsible for distributing the funds to the local school districts.

New York’s federal funding for IDEA places this process into context. For the 2013-2014 year, the federal government has allotted $662,280,838 for public school districts in New York alone.\(^{40}\) This amount of subsidy is meant to help educate 6,365,828 children with

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\(^{35}\) Charts: K-12 Education Funding, UNITED STATES DEPARTMENT OF EDUCATION, http://www2.ed.gov/about/overview/fed/10facts/edlite-chart.html#1 (last visited Dec. 6, 2013).

\(^{36}\) Id.


\(^{39}\) Id.

disabilities in New York for one year.\textsuperscript{41} For the 2012-2013 year, the Federal Government allotted New York public school districts $687,125,204 to educate 6,316,969 special education students, 87,822 of them living within the poverty bracket.\textsuperscript{42} Thus, between 2012 and 2014, the Federal Government has given the state of New York alone $1,349,406,042 for special education in public schools for an average of 6,341,398 special education students. Although this may seem like a substantial amount of money, it only translates to an average federal allotment of $212 per student per year. As discussed later in Part IV, $212 per student is far below the actual cost of one student in special education and requires the remainder of the cost be paid locally.\textsuperscript{43}

\textbf{A. Localized School Funding: Assessing the Disparities}

Public schools receive federal, state, and local funds to subsidize the costs of education.\textsuperscript{44} However, the majority of a public school's funding comes from localized district property taxes.\textsuperscript{45} Affluent neighborhoods have houses with higher value, which translates into higher property taxes than those homes in poor neighborhoods.\textsuperscript{46} When a school district receives more funding, it is able to maintain diverse school programs, attract high quality teachers through higher salaries, and keep up with expanding technologies. In low-income districts, property taxes are low while student population might be the same or even higher than high-income school districts. This translates to low-income school districts struggling to educate their student bodies with very limited funds. Underfunded school districts produce under-educated future adults, and the low-income community remains impoverished.\textsuperscript{47}

There are disparities between rich and poor educational qualities throughout the world. As discussed above, there is a link between

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} \textit{Infra} Part IV.
\textsuperscript{45} Id.; Department of Psychology, School Funding – Local Property Taxes, THE UNIVERSITY OF MICHIGAN, available at http://sitemaker.umich.edu/finaldompierre.356/how_public_schools_are_funded (last visited Dec. 6, 2013).
\textsuperscript{46} Id.
\textsuperscript{47} Id.
property value and school district quality. Unfortunately, this does not seem to be taken into account when the federal government distributes special education funding to individual districts. Long Island, New York is just one example of concentrations of stark diversity in home value and social composition that can be seen as clear as a line in the sand; it is possible to see two different tax bracket communities living within blocks of each other. Interestingly, income and home value is not the only diversifying line that can be seen on Long Island.

Long Island is broken down into two counties: Nassau County and Suffolk County. Nassau County, which is just east of Queens, New York, has a population of approximately 1,339,532 people. Nassau County’s population composition is, generally: 73% White, 11.1% Black, and 14.6% Hispanic.48 Suffolk County, which is just east of Nassau County, has a population of approximately 1,492,350 people.49 Suffolk County’s population composition is, generally: 80.8% White, 7.4% Black, and 16.5% Hispanic.50

Certain towns within Long Island are predominantly occupied by specific minority ethnicities. Central Islip, for example, has is over 50% Hispanic.51 Long Island’s minority population has increased from 15.9% in 1990 to 23.6% in 2000 and continues to increase.52 Minority communities tend to have low-value homes as compared to non-minority communities.53 Should the funding take this disparity into account?

48 Infra note 51.
49 Id.
50 Id.
B. Federal Funding Across Diverse Communities

Central Islip, New York, has a population of about 34,000. Its average income per capita (per person living in the home) is approximately $21,557. Its average home value is approximately $223,000, with a median household income of around $67,000. All of this results in the median residential property taxes to be approximately $6,454 per year. Its public school system is ranked among the worst public school educations on Long Island. The Central Islip School District has received $18,707,210 under IDEA between 2000 and 2012. This funding was given to educate an average of 1,037 special education students per year, making the average allotment per student $18,039, and an average of $1,288 per student per year.

In the years 2000-2001, there were 1,318 students receiving special education and only $833,365 came from the Federal Government, making the allotment per student $632. However, in the years 2011-2012 the number of special education students dropped to 873, while the federal funding jumped to $1,755,293 making the total allotment per student $2,010. It seems that although the number of students in special education dropped, the aid for special education more than doubled. It is unclear what caused the funding to increase while the number of students receiving special education to decrease.

55 Id.
57 Supra note 54.
58 Id.
61 Id.
62 Id.
63 Id.
64 However, as discussed later in Part IV, special education costs are not driven by just numbers of students. The addition of new students with exceptional need may require increased expenditures.
Syosset, New York, has a population of approximately 18,800. Its average income per capita is approximately $50,000. Its median home value is approximately $678,000, with a median household income of approximately $126,000. This results in average residential property taxes of approximately $10,001 per year. Its public school system is ranked among the best on Long Island. The Syosset School District has received $13,128,469 for an average of 921 students in special education between the years 2000 and 2012. The average allotment per student was $14,254, which is on average $1,018 per student per year. While these numbers appear lower than the allotment per student at low-income districts, the amount of Federal aid money greatly increased to the Syosset school district without a proportional increase in special education students. For the years 2000-2001, there were 703 students receiving special education with a federal allotment of $436,468. In the years 2011-2012, 881 students were receiving special education, while the federal aid more than doubled to $1,209,118.

Looking outside of Long Island, the East Ramapo Central School District educates some of the poorest communities in New York with over 50% of its students living in poverty. From 2000 to 2012, the school district has received approximately $39,222,011 in federal aid to serve on average 1,795 students in special education every year. This averages out to approximately $1,821 per student per year for

[^66]: Id.
[^67]: Id.
[^68]: Id.
[^71]: Id.
[^72]: Id.
special education. In 2012, the school district paid approximately $36,507,527 for special education, making the average cost per student approximately $20,338. The cost of general education was approximately $47,716,318 to serve around 7,900 students making the allotment per student $6,040. The special education bills are paid in spite of the fact that its school district has limited funding and is among the worst performing in the state. Currently, the public interest group named "The Power of Ten" is filing a lawsuit against this district claiming that the costs for special education are "exorbitant," demanding "millions of dollars from local taxpayers." General education students appear, according to this group, to be overlooked and "sold" at the expense of special interests.

The above statistics show that federal aid appears to be distributed without much consideration of local economic conditions. Both rich and poor districts receive relatively similar amounts of money to aid in special education costs. This distribution is known as "general allocation," where funding is given based on the approximate percentage of students with disabilities, allowing the states to determine how to distribute those funds. Yet rich districts have more funds to cover extra expenses. The core of the lawsuit against the East Ramapo County School District is that the community is spending large amounts of money on special education, while the general education program is one of the lowest performing programs in New York.

If the lawsuit against East Ramapo has factual merit (what they claim is true) and money is funneled away from general education to pay for special education, is this a practice that society will condone?

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75 Id.
77 Id.
78 Supra note 73.
80 Id.
81 Id.
83 Supra note 76.
Should money be taken from one group to pay for another group? While it is true that some students can and have excelled due to special education, would these successes justify special education if they represent a minority?

III. STUDENTS IN SPECIAL EDUCATION: RESULTS

"In the bill I sign today, we're raising expectations for the students. We're giving schools and parents the tools they need to meet them."

– President George W. Bush, reauthorizing IDEA

When questioning the wisdom and continuity of a program, we should look at that program’s results. With special education, Congress wanted to know how well students with disabilities have done since the implementation of IDEA. In 2000, Congress commissioned the National Longitudinal Transition Study-2 (NLTS2). The NTLS2 followed over five thousand students with disabilities aged between Thirteen and Fourteen for ten years. At the conclusion of the study, the NTLS2 produced a series of statistics showing the outcomes of students who received special education services under IDEA. The study provided volumes of statistical results on academic performance, secondary education, and quality of life ratings. Those results are discussed below.

A. Special Education Academic Performance

One measure of a program’s success is the grades students receive as a metric for their intellectual abilities. This paper acknowledges the

87 Id.
88 Id.
89 Infra Part III(A)-(B).
knee-jerk reaction that comes from comparing special education to
genral education: it is a comparison of apples to oranges. Ideally, the
cmparison should be between how students did before IDEA and how
they are doing after IDEA. Yet that data eludes this article and other
research.\textsuperscript{90} However, comparing special education with general
education is likely in line with the intent behind special education
initiatives. As mentioned in the definition of special education, the
purpose is to teach students in ways that are specific to their disability.
Many disabilities that qualify for special education do not directly affect
intellectual abilities, such as orthopedic and hearing impairments\textsuperscript{91} Even
so, it is logical that a goal of special education is to bridge the gap
between those with certain, enumerated, disabilities and those without
certain, enumerated, disabilities.

The NLTS2 reported that an average of 75.7\% of students in special
education received grades, an average of 2\% of students received grades
from some classes but not all classes, and an average of 19.6\% of
students did not receive grades for any of their classes.\textsuperscript{92}

\textit{Figure 1:} Showing the percentage of students in special education
that receive grades.

\begin{center}
\includegraphics[width=0.5\textwidth]{grading_special_education.png}
\end{center}

\textsuperscript{90} This lack of data makes sense when discussed with the understanding of the
history of special education in America. As discussed above, the history has shown that
the concept of special education was non-existent.
\textsuperscript{91} 20 U.S.C. § 1401(3)(A)
\textsuperscript{92} Wave 2, Table 74, NLTS2,

259
This mixed trend of arbitrary grading highlights a problem with special education research. Without a uniform metric of achievement, it is difficult to know precisely how twenty percent of students in special education are advancing intellectually.

Also, there appears to be a relationship between household income and whether a special education student receives grades in school. As the income of a household increases, so does the percentage of students in special education from that household who receive grades. Conversely as household income decreases, the percentage of students within those households receiving no grades increases.

Additionally, there are relationships between students' particular disabilities and their likelihood of receiving letter grades. For example, grading of children with multiple disabilities is almost split, with 49.8% receiving grades, and 45% not receiving grades. Among autistic children, 59.5% received grades, while 38% do not. Among children with mental retardation, 73% received grades while 24.1% do not.

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93 Id.
94 Id.
95 Id.
96 Id.
97 Supra note 90
98 Id.
Figure 2: Showing distribution of grades among disabilities

Of the students who were given grades, approximately 57.8% of those students have failed one or more of their classes. In English 35.5% of students have failed, in basic Math 27.5% of students have failed, in Science 32.1% of students have failed, and in any Social Science class 33.6% of students have failed.

With all the money spent, special education results are still below those of general education children. Those students who did not fail received an average Grade Point Average (GPA) of a 2.2 in English, 2.2 in basic Math, 2.0 in Science, and a 2.1 in any Social Science class. On average, special education students under IDEA have achieved a GPA of 2.1 out of a 4.0 (generally classified as a “C”). General education GPA numbers are significantly higher than those of special education. In 2009, the average GPA in English was a 2.85, the average GPA in Math was a 2.65, the average GPA in Science was a 2.70, and the average GPA in Social Studies was a 2.89. The average

Source: NLTS2.


\[100\] Id.


\[102\] Id.

GPA for all high school students was a 3.0 out of a 4.0 (generally classified as a “B”).

**Figure 3:** Showing grade-point-averages (GPA) between general and special education.

![Students' GPA by Subject](image)

**Source:** NLTS2, National Center for Education Statistics.

This disparity in performance is not just limited to GPA. When state averages on the Scholastic Aptitude Test (SAT) are calculated, two averages can appear: one average without including the scores of special education students, and one average with the scores of special education students. In California, when those averages are measured against each other, the addition of special education students’ SAT scores brought the state average down by up to four points. This drop is significant because only a small fraction of students are in special education, so it follows that the scores must have been so much lower than the average to cause such a large impact.

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EDUCATION, [http://nces.ed.gov/nationsreportcard/pdf/studies/2011462.pdf](http://nces.ed.gov/nationsreportcard/pdf/studies/2011462.pdf) at Figure 9 (last visited Dec. 6, 2013).

104 *Id.*

105 *Id.*

106 Dana Beyerle, Spring SAT Scores are Recalculated to Include Special Education Students, GADSEN TIMES (August 9, 1996), available at [http://news.google.com/newspapers?nid=1891&dat=19960809&id=g70fAAAAIBAJ&sjid=NdgEAAAAIBAI&pg=2689,88990.3](http://news.google.com/newspapers?nid=1891&dat=19960809&id=g70fAAAAIBAJ&sjid=NdgEAAAAIBAI&pg=2689,88990.3)
4. State Testing Results

Illinois has seen similar trends in the underperformance of special education students meeting state standards. For example, in 2011 the state reported that only 20.3% of special education students met the state's Adequate Yearly Progress (AYP) objectives when the target was 85%. Illinois set a target for its AYP in Reading and Math to be 42% and 40% respectively. The state's results showed that 40.2% met the target AYP in Reading and 52.3% met the target AYP in Math.

*Figure 4: Showing Illinois' Adequate Yearly Progress (AYP) testing results in special education.*

SOURCE: Illinois State Board of Education.

Massachusetts has experienced similar results in state testing. In Massachusetts, 41% of students with disabilities score below basic proficiency in Reading, while only 11% of non-disabled students score below basic proficiency. Similarly in Mathematics, 44% of students

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108 Id.

109 Id.

110 Id.

111 2011 National Assessment of Educational Progress in Reading and Mathematics, Summary of State Result: Table 11-B, MASSACHUSETTS DEPARTMENT OF EDUCATION,
with disabilities score below basic proficiency, while only 9% of non-disabled students scored below basic proficiency.\footnote{Id., Table 12-B, http://www.doe.mass.edu/mcas/naep/results/11ReadingMath.pdf (last visited Jan. 5, 2014).}

\textit{Figure 5:} Showing Massachusetts testing results for students scoring below basic proficiency in a subject.

\begin{center}
\includegraphics[width=\textwidth]{massachusettsStudentsScoringBelowBasicProficiency.png}
\end{center}

\textit{SOURCE: Massachusetts Department of Education.}\footnote{Id.}

As seen in Figure 4 and Figure 5, states’ testing results will support those results found in national studies.

5. Nationally Assessed: Special Education Slips Under General Education

The National Assessment of Educational Progress (NAEP) lends further support to the trend described above. The NAEP is the “largest nationally representative and continuing assessment” of how American children are doing educationally.\footnote{Institute of Educational Science, National Assessment of Educational Progress (NAEP), NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/nationsreportcard/about/ (last visited Dec. 6, 2013).} The United States Department of Education is responsible for conducting the NAEP through the Commissioner of Education Statistics, who heads the National Center for
Education Statistics. The 2009 NAEP showed that in Science, students with disabilities scored an average of a 120 out of 300, while students without disabilities scored an average of a 153 out of 300.

These numbers translate to mean that 70% of students with disabilities performed below a basic proficiency, while only 37% of non-disabled students performed below a basic proficiency. In Mathematics, an average of 65% of students with disabilities performed below basic proficiency, while only 28% of non-disabled students scored below basic proficiency. In Mathematics, the gap has narrowed, however, since 1996 when 83% of students with disabilities performed below basic proficiency.

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115 Id.
119 Id.
Figure 6: Showing the national study’s results of students scoring below basic proficiency according to subject.

SOURCE: National Assessment of Educational Progress.120

6. Strictly Grade-Point-Average: Special Education Lags Behind

In 2009, the High School Transcript Study showed that there was a statistically significant gap between students with disabilities and students without disabilities.121 Overall, this study found that the average overall GPA for students with disabilities was a 2.65 and in core academic subjects the average GPA was a 2.43.122 In fine arts, foreign languages, and computer studies, students with disabilities received an average GPA of a 2.74.123 These numbers are compared against the average GPA of a 3.03 overall, a 2.82 in core academic subjects, and a 3.18 in fine arts, foreign languages, and computer studies, for students without disabilities.124

120 Id.
122 Id.
123 Id.
124 Id.
The results in Figure 7 resemble the results of the NLTS2 study. Both studies show that special education students receive a lower GPA than their non-special education peers. However, scores on standardized tests are not an absolute or even proper measure of success. Success is subjective and is measured by the goals initially formed for an endeavor. If the goal of special education is to make students happy with their current living situation, then the NTLS2 offers positive results— a majority of previous special education students are “happy” with their current living situations. If this were the goal then special education is a success. However, what if success is measured by providing students with the ability to excel in life by gaining a college education?

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125 Id.
126 See supra note 101.
B. Special Education Preparation for College.

“Having all students graduate from high school ready for college, careers and productive lives is an important national goal.”

Yumiko Sekino, U.S. Department of Education\(^{129}\)

College is still viewed as a lifetime investment that can provide a future of higher salaries and additional career choices.\(^{130}\) Looking at how special education students ultimately did with college preparation and advancement, the results may not seem too promising. Graduation rates for special education students reflect a similar trend in underperformance in relation to non-special education students. Approximately 22.4% of special education students dropped out from high school within the four years,\(^{131}\) while the national dropout rate is 3.4%.\(^{132}\) Although the special education dropout rate appears much higher than general education rates, approximately 53.5% of those students who dropped out of special education eventually went on to earn their General Education Diploma, or equivalently;\(^{133}\) of that 53.5%, 48.9% earned a diploma and 51.1% earned a certificate.\(^{134}\)

Looking to post-secondary education, the numbers are not very high. Of the 75.5% of special education students graduating high school,
18.5% went on to attend a four-year college or university, and 42.9% enrolled in a two-year college/university.  

**Figure 8:** Showing post-secondary education of prior special education students.

SOURCE: NTLS2.  

Before attending the four-year college/university, special education students took many months off before attending college, with a mean of 12.5 months off before starting. Within the four-year college/university, approximately 39.4% of those students ultimately received a diploma, certificate, or license. Within the two-year college/university, approximately 31.9% of those students received degrees.  

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135 Table 172, Postsecondary Education 4-Year College/University, NTLS2, http://www.nlts2.org/data_tables/table/14/np5S5a_A3i-everfrm.html (last visited Dec. 6, 2013); Table 121, Postsecondary Education 2-Year/Community College, NLTS2, http://www.nlts2.org/data_tables/table/14/np5S3a_A3a-everfrm.html (last visited Dec. 6, 2013).  
136 Id.  
137 Table 174, id., http://www.nlts2.org/data_tables/table/14/np5S5b_K8a-everfrm.html (last visited Dec. 6, 2013).  
139 Table 147, Postsecondary Education 2-Year/Community College, NLTS2, http://www.nlts2.org/data_tables/table/14/np5S3a_A3a-everfrm.html (last visited Dec. 6, 2013).
Figure 9: Showing degree attainment of prior special education students within college.

Source: NLTS2.140

Do these statistics signify success? Is the rate of enrollment and graduation high enough to signify that special education has prepared these students for college?

IV. THE EFFECT OF IDEA ON THE PURSE AND BEYOND

"Any human endeavor can never be wholly good; it must always have a cost."

– William Golding, The Spire

As discussed, Special Education is not cheap. Because IDEA has created a private right of action for parents if a school does not provide a child a FAPE, schools are obligated to pay any costs associated with that FAPE. These costs take a toll on a school district’s budget, and bring school programs into dangerous risk of deletion or serious mismanagement. The United States Department of Education has fully briefed the issue of funding over the years and determined one thing: More than 40% of low-income schools do not get a “fair share” of funding to start.141

140 Id.; supra note 136.
D. Exorbitant Fees Due to Special Education Take a Severe Toll on the Budget of Various School Districts

Sending a Special Needs child to another school for educational services is costly, but must be done under the law if the school district itself cannot provide a special education student with a FAPE. One example of the exuberant fees school districts must pay for outsourcing the education of special needs students is the Robert Louis Stevenson School in New York City. This school has announced that it is in danger of closing because the Department of Education has not paid the tuition for its students in over a year. The school educates sixty-three special education students between grades Eight and Twelve. Tuition for each student— which the state is expected to pay—is $51,000.

Pennsylvania school districts have been fighting a battle for increased special education funding for years. Pennsylvania has a dual system for funding special education at a state level. First, every school district receives 16% of the cost of educating a special education student, on top of the marginal percentage of federal funds. Second, the state places $9.3 million into a contingency fund to help pay for those students with “extraordinary needs and expenses.” This contingency fund appears too cute by half, because

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143 Id.

144 Id. The parents of the students owe the tuition, and the Department of Education reimburses the parents for the tuition, who in turn pay the school. Thus, the Department of Education does not owe the school directly the money but instead owes the parents of the students in the school the cost of tuition. This system makes it difficult to appeal funding issues.


146 Id.

147 Id.

every school district in Pennsylvania is capped at only receiving $150,000 a year from the contingency fund regardless of the number of students with extraordinary needs and expenses.\textsuperscript{149}

When tapping into this contingency fund, the most expensive students are paid for first, and the additional money is paid in descending order from most expensive until the $150,000 cap is reached.\textsuperscript{150} Any needs that remain, after the cap is reached, must be paid by the local school district.\textsuperscript{151} This issue was discussed at a recent Special Education Budget meeting, and no redress was offered.\textsuperscript{152} As it stands, if a school district has multiple students with “extraordinary needs and expenses” then that district has to find independent ways of paying the expenses, because the state will only give that district the max of $150,000. This is just one example of a state setting a limit to what it thinks is excessive for school districts to pay without taking into consideration the differences between districts’ limited budgets.

\textit{E. Playing with Fire: What Must Go for Special Education to Stay?}

Everyone publicly abides by the mantra of “education for all,” but very few seem to offer an adequate solution for funding that mantra. At the federal level, IDEA is a proclamation that children with disabilities are entitled to an education. Under an elaborate formula, the federal government gives states a very limited supply of funding that goes towards special education,\textsuperscript{153} as previously discussed.\textsuperscript{154} The states are then responsible for distributing that, as well as state aid funding, towards local public school districts’ special education programs. After the Federal and State subsidies have been distributed to the school districts, the school districts are left to fend for themselves. With this heavy financial burden, local school districts, somehow, find the money to pay for special education.

\begin{footnotes}
\item[149] \textit{Id.}; see \textit{infra} note 150.
\item[150] \textit{Id.}
\item[151] \textit{Id.}
\item[154] See \textit{supra} discussion.
\end{footnotes}
The threat of litigation forces school districts to cut school budgets and other programs to provide the “free” and appropriate education. As discussed above, this education is anything but “free” monetarily. When a hot topic like “special education” or “disabilities rights” is discussed, monetary costs are not considered. Instead, the politically correct platform that society takes is the “no expense spared” approach to educating students with disabilities. This section explores that the expense for special education may, in fact, be the suppression of poor, non-special-education, students.

1. Special Education and Impoverished Communities

Special education has been described as the “third rail” when talking about cutting funding to certain programs in school; if you touch it you will “get shocked.” Because IDEA is unique in creating a private cause of action for parents to bring directly against the district, school districts are weary of cutting any funding to special education. This fear of litigation has caused some states to directly request approval to reduce funding special education from the United States Department of Education.

Interestingly, when parents sue school districts, there is a noticeable disparity between the socio-economic statuses of the plaintiffs. Research has shown that there are enforcement disparities between high income and low-income families with children in special education. While the correlation is not perfect, families with higher income and socio-economic status are more apt to enforce IDEA in court than their low-income counterparts.

The cost of special education is inelastic with regards to the finances of a school district. For example, if a nurse is required to be

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156 Id.
157 Id.
159 Id.
160 IDEA does not scale the cost of any special education according to the financial differences within a school district’s budget. See 20 U.S.C. §§ 1400-1482. Accordingly, the cost to provide special education to a student could be $30,000 and that would be the cost regardless of whether that student was situated in a rich or poor school district.
with a student in special education, the cost of that nurse will not change from district to district based on the finances of the district. With largely fixed costs, what happens when a school district serving an impoverished community has to locate funds in its budget to pay for special education under IDEA by providing this “free” and appropriate education?

Camden High School is one of the high schools located within the Camden City School District. In 2013, Camden High School’s composition showed that approximately 38% of its students were in special education, and approximately 72.5% of the entire student body was enrolled in Free/Reduced Lunch Programs. This district received $3,340,273 in IDEA funding from the federal government and $8,244,198 from the state of New Jersey to help educate 38% of the students (those in special education) for one year.

On average, special education instruction costs $23,255,592 per year for the City of Camden School District, which spends among the highest amounts of money per student on education in the nation – approximately $21,726. It is not clear from looking at any of the district’s budgets where all of this money is going. One thing appears clear when salaries of teachers are distributed through the students – each student costs the budget approximately $10,858 a year for teachers’ salaries and benefits. While this issue with Camden City School District’s management is not new – some call it “the worst education money can buy” – perhaps special education has a role to play in the underperformance.

Camden High School has approximately four times the national average of special education students, which could mean it spends


Camden City School District leaves blank an explanation for how students are placed into special education in its “operating procedures.” Standard Operating Procedures, CAMDEN CITY SCHOOL DISTRICT, http://www.camden.k12.nj.us/operating_procedures.jsp#58


163 Id.

164 Id.

quadruple the national average on special education. As discussed above, schools are obligated to spend whatever it costs to provide students with a FAPE. Camden High School has a significantly high percentage of students in poverty (as classified by those on the free / reduced lunch program). Home values in Camden are very low, causing local taxes to be low, which is the primary source of schooling funding. Somehow the special education bills are paid, but no one in the Camden City School Districts cares to explain how this is possible.

One way to find the source is to look at the result and work backwards. The results of Camden High School tell a tale. In 2012, only 26% of twelfth grade students took the SAT and 0% (zero percent) of tenth and eleventh grade students took the Practice SAT. The state average for students taking the SAT in the twelfth grade is 74.4%. Of those students taking the SAT in Camden High School, only 2% scored a 1550 or better, which is the basic score the SAT Board classifies as “ready for college,” while the state average was 43% scoring a 1550 or better. In Camden High School, the graduation rate is approximately 42%, while the state average is approximately 75%. Of those students who graduate, only 34% advance to college within a span of sixteen months after graduation.

While it is true that many factors can play into this underperformance of a school, the question remains whether the high rate of special education students in Camden draw the attention and resources of the school. It is likely, however, that the group of special education students –because it is a relatively high percentage of the student body– draws attention away from general education and contributes to the school’s underperformance. Other school districts, in fact, have cut from or discussed the strain on general education from the costs of special education, so this inference is not too far removed from reality.

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167 Supra note 160.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
2. Special Education’s Pull on General Education

The budgetary strain of special education is not a completely new topic. In the 1990s, the Milwaukee Public School district in Wisconsin described special education as a strain on other school resources.\textsuperscript{173} Many districts funneled general school resources into special education even when the general resources became increasingly limited.\textsuperscript{174} This type of practice has grown since the 1990s as more children are classified as disabled within the meaning of IDEA.\textsuperscript{175} In 2008, the Massachusetts Department of Education described special education as a “budget buster,” as costs have increased significantly in the past ten years.\textsuperscript{176} Massachusetts noted that special education costs have been increasing while federal and state funding has not kept up, placing the primary burden on local school districts. Transportation and private tuition for special education were the primary cause for budget strains, which “can run as high as $90,000 per student.”\textsuperscript{177}

In 2012, the Amesbury Public School District reported that special education costs are growing exponentially and straining the budgets because of the need to provide appropriate education under IDEA.\textsuperscript{178} The school district reported that a big strain came as six new special education students entered the district, who required out-of-district education and one-on-one services, costing the district $365,768.\textsuperscript{179} The district noted that although the budget for special education increased from the previous year, the district had to make $1.9 million in cuts to general education to cover increased special education expenses.\textsuperscript{180}


\textsuperscript{174} Id.

\textsuperscript{175} Id.


\textsuperscript{177} Id.


\textsuperscript{179} Id.

\textsuperscript{180} Id.
Interestingly, Massachusetts claims that it will help local school districts pay for the private school tuition in special education.\textsuperscript{181} However, the state will only reimburse a local school district if the cost of private special education is four times the amount of general education.\textsuperscript{182} If the cost of private education tuition is not four times the cost of general education, then the state will not step in to supplement the private tuition.\textsuperscript{183} If the private special education tuition is more than four times the cost of general education, the state will only supplement a portion of the tuition up to the rate that is four times general education, leaving the excess cost on the local public school district.\textsuperscript{184}

This creates a clear issue for public schools in Massachusetts abiding by IDEA’s mandate for a FAPE by outsourcing special education students to private schools. Local school districts are left to fall into two categories: 1) pay all of the private education if the education’s cost is lower than the state thinks is excessive (which is still high) or; 2) local school districts must pay a, sometimes large, difference when the cost is so high that the state refuses to provide supplemental support.\textsuperscript{185} This “Goldilocks and the Three Bears” approach leaves school districts hurting for funding when the cost of special education is either too high or too low.

Connecticut noted the point touched on in Part II: even if the number of students in special education decreases, the cost of special education can continue to grow.\textsuperscript{186} In 2013, Connecticut saw special education costs increase by 66\%, taking up approximately 20\% of the entire state’s expenses on education.\textsuperscript{187} Here, the state will cover only the portion of special education that exceeds 4.5 times the cost of general education, leaving the local school district with the entire bill up to that rate.\textsuperscript{188} This state initiative – while beneficial to special education students requiring very costly services – hurts the entire state budget in

\textsuperscript{181} Supra note 174.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{188} Id.
general funding, resulting in many instances of default in funding because the money was simply nonexistent. The burden is then shifted to the local districts to pay whatever costs are left, which means cutting programs or benefits, which are often general education.

The director of special education for Stamford Public Schools has stated, “We can’t tell special education students that we can’t provide them the services required. Our programs aren’t driven by costs.” This mentality is problematic when placed in a real world of budgets and limited finances. Furthermore, what is this director’s definition of “cost?” In the context, it appears that “cost” is confined to money, but what about the cost to other students who find their programs reduced? Do special education professionals narrowly view “cost” as only financial, while disregarding what must be cut in order to find the funds for special education?

The questions remain. Should statements like the one made by the Stamford Public Schools be reconsidered? Should there be a point at which the school districts engage in a cost benefit analysis? The main problem is that once a school district pursues this type of analysis, the law will not give way. Telling a parent that the benefit of educating his/her child would not outweigh the cost would likely lead to the school district being vulnerable to a lawsuit.

F. Brief Look at General Education Results

IDEA obligates schools to include disabled children in the general education classroom as a preferred method of placement. This is thought to be the “least restrictive environment” for children with disabilities. This inclusion method has resulted in some benefits to students with disabilities by increasing their confidence, and de-stigmatizing special education. However, inclusion does create

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189 Id.
190 Id.
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concerns with a teacher’s ability to effectively educate a special education student in a general setting, with mixed special education results between academic benefits for some and disadvantages for others.

Teaching special education often requires a slower pace and more attention to the concerns and questions of a special education student, which can create problems in general education settings. A slower pace is required in the inclusion classroom where special education students are mixed with general education. It is easy to see the result: a teacher slows down pace and continues on a subject for the benefit of the special education students, while the non-special education students are forced to re-cover subjects they understand and cannot progress to their fullest potential. When this is not the case, special education students are hurt because they are “streamlined” in the general education setting and forced to keep pace with non-special-education students. In disadvantaged (minority) groups, where motivation and familial support might be low, a slower paced education might cause non-disabled students to become disinterested with or disengaged in their own education; low performance would likely result. Perhaps this is one of the factors responsible for Camden High School’s low performance discussed previously.

Much attention is given to special education with funding while other groups of children remain overlooked and underperforming.

6, 2013).


Stepping away from special education for a moment, the NAEP showed that there are still significant gaps between White students and both Hispanic and Black students, particularly in the areas of Reading and Mathematics. 198 Although it appears that the gap between the races has narrowed since the 1970s, minority students still lag behind White students by between twenty to thirty-five points when nationally assessed. 199 Some of this disparity may prove to be a relic of the times because of the slow increase in minority students entering college, 200 who would in turn become parents, breaking the cycle. Yet, some research still shows that minority students do not excel at the pace of their non-minority peers. 201 This is relevant because there appears to be an overall increase in student scores when his/her parent graduated college as opposed to those children whose parents did not – the educational score gap between students in those circumstances was as great as 30 points. 202

A large gap in academic performance also exists between urban school districts and large city school districts. A sample of twenty-one urban school districts showed that the majority of urban school districts performed lower than their large city peer school districts in

199 Id.
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Mathematics, while the same trend is also seen in Reading, and Science. A minority of school districts did show slightly higher scores than their peer large city school districts. No simple explanation is given for this disparity between urban and large city students’ performance.

However, one thing is clear: minority and poor students are disadvantaged in school and are socially disabled when it comes to academic performance. While federal aid initiatives are in place to help minority and poor children, such as Title I, none of them compare to the force that IDEA has in educating students with disabilities through funding obligations and legal tools.

IDEA represents a policy choice that students with disabilities should get ample attention in school, while the research above has shown that they might not have the potential that earns such critical attention. As it stands, minority and poor children are being left behind, yet society funnels resources into special interests.

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206 See supra note 201; see supra note 202; see also supra note 203.


V. RECOMMENDATIONS

In order to proffer a solution, first the problem must be understood. As it currently stands, Congress has issued unfunded mandates.\footnote{Although Congress gave itself a cap for funding IDEA, it did not obligate itself to fund any portion. \textit{See supra Part II.}} This has strained many school districts’ budgets and caused cutbacks in general education. The population is growing, although at a progressively lower rate each year.\footnote{See U.S. and World Population Clock, UNITED STATES CENSUS BUREAU, http://www.census.gov/popclock/ (last visited Dec. 6, 2013).} The costs of special education have been on a continual increase, with no sign of slowing down.\footnote{See \textit{supra} Part III.} If funding does not increase for special education and schools are forced to accommodate more students with the same limited funding, more drastic cuts might been seen.\footnote{The cuts may amplify in states like Connecticut, where general education has already seen millions of dollars in budget cuts because of special education expenses. \textit{See supra Part IV.}} The problem amplifies for low-income communities which are working with already limited funds.\footnote{Because of the inelastic nature of special education expenses, those impoverished school districts will be further burdened with special education’s costs and required to pay. \textit{See Part I(C) (discussing the mandate on school districts to provide a FAPE).}}

Two possible solutions, while perhaps radical, may help resolve this future problem.

A. Special Education Subsidy Tax

The first solution is to have states create a separate “special education tax” that will spread out the cost of education throughout the state.\footnote{Currently, no direct tax exists at a national level for special education. This tax could be as low as an extra $10 a month in federal taxes, and would still result in a large pool of supplemental funds.} This tax can then be paid directly to local public schools to cover the costs of special education that extend beyond the cost of general education. The money would then be distributed based on the cost of the special education and the school district’s actual ability to pay for that education.

To qualify, districts would have to submit an application and relevant documents. The required documents would resemble those used to qualify for other government or state programs; a certain weighted number based on income would be used as a cutoff for...
funding. This weighted number would come from the amount of
financial resources the school district has versus the number of students
in special education and the cost of that education.

This formula would not exempt, automatically, affluent school
districts because those districts may face instances where special
education actually causes hardship.215 However, this would likely benefit
poor districts. This method would spread the cost of special education to
a large population so that no individual person feels the effect in a
significant way – significance in this sense is measured by the effect the
tax has on a person’s daily budget. This would resemble the practices in
countries, such as New Zealand and Australia, where there is funding for
centrally defined activities.216

As a whole, this tax would benefit all students. Non-special-
education students would benefit from increased quality of education. If
funds from general education were being cut for special education, then
this tax would allow funding to flow back into general education and, in
theory, produce better general education results.217 For special-
education students, the funding would be more reliable, allowing
school districts to plan in advance for new programs or services.218

B. Cost-Benefit Modification to IDEA

The second, and more radical, solution is to modify IDEA to include
a cost benefit analysis in which local school districts can engage. Under
this proposal, schools would still be required to provide a free and
appropriate education “only if the cost of the education is not outweighed
by compelling reasons, such as the need to educate the majority or
whose education quality would decrease due to the costs of special
education.”219 This modification would give the school district the

215 See supra Part IV (discussing the issues states like Connecticut have faced
with excessive costs due to special education).
216 Supra note 82.
217 This may resolve the low performance problems within Camden High
School, discussed in Part IV.
218 See Associated Press, Special Education Costs Seen as Costly Service, CBS
BALTIMORE (Jan 19, 2011), http://baltimore.cbslocal.com/2011/01/19/special-
education-costs-seen-as-costly-service/ (discussing states’ requests to spend less
money on special education); see also Part IV(A)&(C).
219 Author’s proposed language modification to IDEA appearing within
quotation marks. See Jimenez, et. al., Can Cost-Benefit Analysis Guise Education
Policy in Developing Countries?, THE WORLD BANK, available at

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ability to engage in realistic discussions about the benefits of special education for a particular student without the fear of litigation.

This change in the law would confine IDEA to what is practically possible without forcing school districts to cut general education funding. Yet, this modification may not change the status quo. Schools may still cut general education funding to supplement special education because of the possible social backlash that may ensue from telling a parent his/her child will not get services. This modification would, remove the school’s legal cover and make the school accountable to the public. Conversely, schools would not be obligated to provide costly services without question. For this to work, however, states would need to cooperate because many grant a constitutional right to an education in the state’s constitution – otherwise parents may still have a state constitutional argument while the federal argument is removed.

This standard may cause litigation to increase if schools deny special education by claiming that the costs of special education are outweighed. However, if the modification in the law would serve to benefit the majority, should the fear of possible litigation change its enactment? Perhaps. But the benefit could be an increase in general education quality as the funds that would be taken from general education are funneled back into struggling programs. In a democracy, should not a benefit to the majority outweigh the minority? Congress passed IDEA, so did the majority confine its own benefits? Was the majority persuaded by emotion or, more importantly, did the majority even know what results may ensue?


220 Such as the cuts discussed in Part III.

221 When action is taken against a school district – as seen in Part II(B) with the lawsuit against the East Ramp School District claiming the misappropriate of school funding – then the school district will be directly accountable for its own actions without any claim that it was obligated to make budget cuts to meet a federal mandate.


223 See supra note 44 (discussing state constitutional amendments give students a state right to an education).
CONCLUSION

Special education has had a tumultuous past. Before the 1970s, special education was not an option for many students. Before Congress acted, countless students with disabilities were overlooked by the educational system. Since then, special education has grown into a new and non-recognizable species when compared to what special education was pre-1970s. Today, special education is a hot button topic that creates strong appeals to emotion when discussed. On the one hand is the idea that a disability should not be a reason for writing off groups of individuals from schooling. On the other hand is the cost of schooling those individuals with disabilities.

Although there are no clear answers, there are clear questions. One is: does every child actually have the potential to excel academically? If that answer is yes, then special education makes sense but needs reform. If that answer is no, then what steps should be taken? Should notions of “right” and “wrong” push through to the conclusion that special education is necessary for children even when the results seems to point in the opposite direction? Perhaps society should look past statistics because the majority during one election may become the minority in another election. Providing benefits to this minority serves the enlightened self-interest of the non-disabled majority, – one day those who are not initially benefitted by special education may eventually need those programs. If all programs that do not appeal to the majority are cut, then society may turn into a state where only the luckiest and wealthiest excel, thus creating only an elite class and a poor class without anything in between.

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224 See supra Part I.
225 Supra note 5.
226 See supra note 185.
227 See supra Part VI.
228 Id.
229 “Enlightened self-interest” is simply defined as “behavior based on awareness that what is in the public interest is eventually in the interest of all individuals and groups.” Enlightened self-interest Definition, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/enlightened%20self-interest (last visited Jan. 4, 2014).
With the idea that special education may be needed because its removal would not benefit society, the issue of funding special education must be addressed. The cost of special education should not be the education of non-special education students. The cost of special education continues to increase while funding does not keep pace. Society must push for funding initiatives towards special education with the same force that it fights for the need of special education. The time has come for society to put its money where its heart is and fund this socially just program. If society feels so strongly about special education but is not willing to pay anything extra to properly fund it, then perhaps this concern for special education is not as altruistic as one may wish to believe.

230 See supra note 174.