

**Special education—**  
***Its ethical dilemmas, entitlement status,***  
***and suggested systemic reforms***

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The views expressed herein are the author's and do not represent her law firm or any other person or entity.

## Abstract

Since it was enacted in 1975, the nation's special education law successfully accomplished its mission, to provide access for all students with disabilities to public school programs. Now, eligible students are entitled to a FAPE (a free appropriate public education). We honor and celebrate this amazing accomplishment. However, having achieved its mission, this entitlement program continued to grow and morph, bringing the special education system into the quagmire of unintended consequences. Now, almost 40 years later, let us acknowledge that the law, as written and implemented, has outlived its purpose. It interferes with our focus on educating all children. The entitlement should end. Suggestions for systemic reform are provided. We need an honest national discussion on how to fix this broken entitlement system. No longer can we afford to treat special education as sacrosanct and off limits in our national school reform conversation.

### Acronyms and terms

<b>ADD/ADHD</b>	<b>Attention deficit disorder/attention deficit hyperactivity disorder</b>
<b>ED</b>	<b>Emotional disturbance</b>
<b>ED</b>	<b>U. S. Department of Education</b>
<b>EHA</b>	<b>Education of All Handicapped Act</b>
<b>ESEA</b>	<b>Elementary and Secondary Education Act</b>
<b>FAPE</b>	<b>Free appropriate public education</b>
<b>IDEA</b>	<b>Individuals with Disabilities Education Improvement Act</b>
<b>IEP</b>	<b>Individualized Education Program</b>
<b>NCLB</b>	<b>No Child Left Behind Act</b>
<b>OECD</b>	<b>Organization for Economic Cooperation and Development</b>
<b>OSEP</b>	<b>Office of Special Education Programs</b>
<b>RtI</b>	<b>Response to intervention</b>
<b>SLD</b>	<b>Specific Learning Disability</b>
<b>SWD</b>	<b>Students with Disabilities</b>
<b>Title I</b>	<b>Title I of the Elementary and Secondary Education Act</b>

## A. Special education and its ethical dilemmas

### I. A bit of history—Eleanor’s story and how we got here.

*On the first day of school on a bright September morning in New York City in the late 1950’s, my friend’s mother took her little sister, Eleanor, to school.. Eleanor was six years old. At the schoolhouse door, the principal waved them away, “We don’t educate children like that.” Eleanor had Down syndrome. She returned home with her mother and never went to school.*

Stories like Eleanor’s led to court decisions and ultimately to our first national special education law in 1975. About a million students with mental, physical, and other handicaps were excluded from public schools or denied access to appropriate education.<sup>2</sup>

Of note, President Gerald R. Ford signed this law reluctantly (facing a veto threat).<sup>3</sup> This was evident from his opening word, ‘unfortunately.’ “Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains.”<sup>4</sup> His signing statement, which is attached, has turned out to be prescient.

The purpose of the law was to provide access for students with disabilities (SWD) to appropriate services. First called the EHA, the law is now the IDEA (Individuals with Disabilities Education Improvement Act).<sup>5</sup> It is a funding statute for states that choose to participate (all of them do now). States, through local public schools, provide access for all SWD to a free appropriate public education (called a FAPE). Through a written IEP

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<sup>2</sup> This paper is adapted from Miriam Kurtzig Freedman, “Where is Willie Sutton When We Need Him to Fix Special Education?” Texas Study of Secondary Education, Texas Association of Secondary School Principals, Spring 2011, Page 37-39. [www.tassp.org](http://www.tassp.org) and [Fixing Special Education—12 Steps to Transform a Broken System](http://www.schoollawpro.com), 2009, (hereinafter, Freedman, [Fixing](http://www.parkplacepubs.com)), School Law Pro and Park Place Publications. [www.schoollawpro.com](http://www.schoollawpro.com); [www.parkplacepubs.com](http://www.parkplacepubs.com).

<sup>3</sup> Michelle R. Davis, “Ford’s legacy includes a special education law he signed despite worries,” [Education Week](http://www.educationweek.com), January 3, 2007.

<sup>4</sup> <http://www.presidency.ucsb.edu/ws/index.php?pid=5413#axzz1OjApa6Pz>

<sup>5</sup> Last reauthorized in 2004, its next reauthorization is now overdue.

(Individualized Education Program), developed for each eligible child by the school and parents, schools are required to provide these children with “specialized instruction that is designed to meet the individual needs of the child in the least restrictive setting.”<sup>6</sup>

## II. Where we are now.

**Changed realities.** We now serve all children with SWD in our nation’s K-12 schools, many in inclusive settings.<sup>7</sup> Our world view and language have changed—how distant are the terms ‘educable,’ ‘non-educable’ or ‘trainable.’ Today’s mantra is, *all* children can learn. We live in an inclusive society. Educators have more expertise and sensitivity to the issues involved. Parents are included in decision-making. We have higher expectations for all students, including SWD.<sup>8</sup> And, while the dropout rate for SWD remains high, the percentage of SWD who graduate from high school continues to rise.<sup>9</sup>

**Numbers of students now.** The law now educates 6.8 (or 6.48) million students.<sup>10</sup> Intended to educate 10% of students, it now educates between 13-14% of all students nationwide. We have wide eligibility discrepancies among the states, ranging from a low of 9+% in Texas to over 18% in Rhode Island.<sup>11</sup>

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<sup>6</sup> Board of Education of the Hendrick Hudson School District v. Rowley, 458 US 176 (1982).

<sup>7</sup> The special education entitlement to a FAPE ends with high school graduation or when the student ‘ages out’ in accordance with state laws. It does not continue to post- secondary education.

<sup>8</sup> Jim Walsh, presentation, “Fixing Special Education: A Book Review, 2010.”  
[www.legaldigest.com](http://www.legaldigest.com).

<sup>9</sup> 23<sup>rd</sup> Annual Report on Special Education to Congress.  
<http://www.fape.org/research/23rdAnnRpt.htm>

<sup>10</sup> Compare Janie Scull and Amber M. Winkler, “Shifting Trends in Special Education,” Thomas B. Fordham Institute, May 2011. <http://www.edexcellence.net/publications-issues/publications/shifting-trends-in-special.html>. (Hereinafter Scull and Winkler) with Center for Education Reform, [http://www.edreform.com/Fast\\_Facts/K12\\_Facts/](http://www.edreform.com/Fast_Facts/K12_Facts/).

<sup>11</sup> *Id.*, Scull and Winkler, at 7.

Of these numbers, the largest disability category identifies students with SLD, a “specific learning disability.” Back in 1975, this law was designed to serve children with more severe physical and mental impairments. Students with SLD were not targeted.

**Costs of educating SWD.** The Fordham Institute estimates that *special education* costs \$110,000 billion per year and consumes “21% of all education spending across the nation.”<sup>12</sup> Yet, this high number does not tell the tale, as it does not estimate the cost to *educate SWD*. Since most SWD also receive regular education services and resources, we need to add the *non-special education funding* that is spent on their education. A 2009 report about California cites this substantial non-special education funding as ‘encroachment.’<sup>13</sup> We lack national studies. Indeed, the 2011 Fordham report highlights the fact that we do not know how much is spend to educate SWD.

Yet we know precious little about how this money is spent at the state or district level. Indeed, state special-education expenditures are not easy to obtain; states are not required to report these data to the federal government and few volunteer to disentangle their special-education expenditures from their reported general-education expenditures.

Accurate accounting of state, district, and school-level spending on special education simply does not exist.... In a time of tight resources—and special-education expenditures surpassing \$110 billion per anum—there’s an increasing need for reliable financial data at all levels. That such large swaths of state and district budgets can go **essentially unmeasured and unreported is scandalous**.... We can no longer view these as **untouchable expenditures**....”<sup>14</sup> (Emphasis added)

Yet, even with these statistics, special education is largely ignored in current reform efforts. It seems to be untouchable and sacrosanct. It is the third rail that public officials and

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<sup>12</sup> *Id.* at 12.

<sup>13</sup> Stephen Lipscomb, “Special Education Funding in California—A Decade after Reform,” Public Policy Institute of California [http://www.ppic.org/content/pubs/report/R\\_809SLR.pdf](http://www.ppic.org/content/pubs/report/R_809SLR.pdf).

<sup>14</sup> *Id.*, Scull and Winkler, at 15.

others are afraid to touch.<sup>15</sup> Instead, reformers focus on charter schools, vouchers, and ‘choice.’ These numbers tell the tale:

Of the more than 55 million students in America’s K-12 schools in 2009:

- **1.5 million** students were in charter schools (**2.7%**). Vouchers may have educated **1-2%** of students. Together, these reforms **may** reach 3-4% of students.
- **6.8 million** students were in special education programs (**13-14%**). **Close to five times as many!**
- **Funding.** Services for SWD account for 20-40% of school budgets—**2-3 times more than for general education students, including those who attend charter schools or receive vouchers.**

Clearly, the numbers of students in charter schools and those who receive vouchers pale in comparison to SWD. Per “Sutton’s Law,” it is time to add special education to our school reform efforts. We need to focus attention on diagnosing and fixing the obvious—where the students and the money are.<sup>16</sup>

### III. Ethical dilemmas.

The special education system is built on the premise that parents and schools are not on the same page working cooperatively for the benefit of children. Instead, the law presumes that parents need protections from their schools and need to advocate for their children against their schools. This flawed premise has damaged our schools over the past 35+ years. To feed it, special education added layers of requirements through federal, state, local, and court action. These involve IEP development and implementation, parental rights, eligibility issues, and a complex due process legal system, among others. While well

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<sup>15</sup> See Scull and Winkler, and Freedman, Fixing.

<sup>16</sup> The bank robber Willie Sutton, when asked why he robs banks, reportedly answered, “It’s where the money is.”

intended, this law has spawned a host of unintended consequences, creating dilemmas for educators, parents, and citizens. Let us consider three that impact *all* students.

**Mission creep and flawed policies.**

**Issues of fairness and equity.**

**Adversarial climate in our schools.**

**First, mission creep and flawed policies.**

**A. Procedures rule!** This law created a bureaucratic morass for schools and parents, whose purpose at times appears to be simply to guarantee compliance with its rules. Too often procedures and regulations, focused on inputs, structures, and rights (not outcomes, results, and student learning) are only remotely (if at all) related to improved learning for SWD. Teachers leave the field because of burdensome paperwork. A 2002 study conducted for the U.S. Department of Education (ED), found “53 percent of elementary and secondary special education teachers report that routine duties and paperwork interfere with their job of teaching to a great extent.” Paperwork emerged as “significant in the manageability of special education teachers’ jobs and their intent to stay in the profession.”<sup>17</sup> It is still so.

**B. The ‘label’ controls services.** Under the IDEA, students need a diagnosis in order to receive services. This is the so-called medical model. Evaluators are gatekeepers—a huge industry. We thus have a ‘wait to fail’ model that often serves students too late.<sup>18</sup>

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<sup>17</sup> Spense Fact Sheet, “Study of Personnel Needs in Special Education,” Office of Special Education Programs (OSEP) of the U.S. Department of Education (ED), 2002. [www.spense.org](http://www.spense.org).

<sup>18</sup> See, in contrast, the system now used in Finland, a country that many in the U.S. wish to emulate. Reportedly, Finnish schools focus early and effectively on struggling students before they fall behind. We do “a poor job of identifying weak students in the earliest grades and supporting them effectively.” Carol Kinlan, “Rethinking Special Education in the U.S.,” *Hechinger Report*, January 21, 2011. See also “The Global Search for Education: More Focus on Finland,” *Education News*; [http://www.educationnews.org/ed\\_reports/157152.html](http://www.educationnews.org/ed_reports/157152.html).

The system expanded to 14 categories, including specific learning disabilities (SLD), attention deficit disorder with or without hyperactivity (ADD/ADHD), ED (emotional disturbance), and speech and language disabilities. These labels are of questionable reliability, inequitable, unfair, and often seem to track a child's zip code, parental advocacy, or school culture. They also have racial and ethnic discrepancies.<sup>19</sup> The above four categories make up 70-80% of all children served by the IDEA, overshadowing those with severe and profound disabilities.<sup>20</sup> Digging deeper, almost 50% of all SWD are labeled SLD, and approximately 90% of students with SLD are so labeled because they did not learn to read.<sup>21</sup> The flawed 'wait to fail' model at work.

**C. Other realities.** While education at large now focuses on student outcomes and achievement, special education largely continues to be process and input-driven. In addition, we now have two overlapping, confusing, and contradictory federal laws to teach the same students how to read, write, and do math. These are the IDEA and the 2002 version of Title I of the ESEA, the No Child Left Behind Act (NCLB) for children in poverty. Where is research on the **corrosive impact** on schools trying to run two systems—*all in a six-hour school day*?<sup>22</sup> Would anyone truly interested in improving teaching and learning for all students ever create such a system?

**D. Questionable research basis.** Too often, the IDEA lacks research to support its policies and directives. Consider just three out of many examples.

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<sup>19</sup> 20 U.S.C. 1400, Congressional findings.

<sup>20</sup> See Freedman, *Fixing*, at 8.

<sup>21</sup> Erin Dillon, "Labeled: The Students Behind NCLB's "Disabilities Designation," *Education Sector*, July 2007.

<sup>22</sup> See one attempt to deal with the issue, the joint initiative between National Title I Association and the National Association of State Directors of Special Education's, the Title I/ IDEA Working Group. Its effort is to align these two laws, and end the "duplication, confusion and a lack of coordination," and the dueling requirements in these laws. The paper is posted at both associations' websites. [www.nasdse.org](http://www.nasdse.org); <http://www.nationaltitleiassociation.org>.

► **Inclusion.** The law promotes inclusion as a civil right, in spite of weak data supporting it as an educational ‘best practice.’ To make it ‘work,’ schools often provide one-one aides, accommodations, and other questionable approaches to maintain the child in a classroom, not to help her learn more. We should instead only “follow civil rights goals and mottoes when they are consistent with best teaching practices.”<sup>23</sup> **Query**—if inclusion is so effective, why do parents most often litigate to remove their children to private schools that offer no inclusion?

► **Focus on student weaknesses.** The law focuses on student weaknesses. In contrast, psychological research and real-world experience emphasize strengths. Yet, seemingly in its own universe, the special education law continues to splice and dice student weaknesses and all but ignore their strengths.

► **Overuse of ‘accommodations.’** The law appears to encourage the overuse of accommodations—to help a student ‘pass’ and ‘get through school.’ Yet, often the use of accommodations does not help students learn—it hinders learning. What is ‘special’ about reading to a youngster who should learn to read? Or providing a calculator, instead of teaching her ‘number facts.’<sup>24</sup> Nothing, really.

The special education law requires schools to do for students—demanding nothing from them. Thus, schools must provide services and accommodations that are procedurally and substantively compliant. And, if students fail, parents can attempt to

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<sup>23</sup> Freedman, Fixing, at 72. The Illusion of Full Inclusion: A Comprehensive Critique of a Current Special Education Bandwagon, 2<sup>nd</sup> ed. (Austin, TX: Pro-Ed, 2005). See also Michael J. Petrilli, “All Together Now?—Educating high and low achievers in the same classroom,” Education Next, Winter 2011, at 49-55.

<sup>24</sup> John Hechinger and Daniel Golden, “When Special Education Goes Too Easy on Students: Parents Say Schools Game System, Let Kids Graduate without Skills,” Wall Street Journal, August 21, 2007.

sue schools for failing to provide a FAPE! How do these policies promote student effort and hard work? In my judgment, they do not. Quite the opposite.

**Second, whither fairness and equity? Consider these four issues.**

► **Who is special?** The answer is both highly subjective and matters a great deal in our schools. A student may be SLD in one town but not another. See above, for the wide discrepancy among states in their eligibility numbers. What about average, ‘at risk’, or gifted and talented students? How do we balance the needs of all students, when only some are labeled as ‘special?’ Recent international test scores reveal that our top students are not so ‘top’ these days— below the average for the 34 nations in the OECD.<sup>25</sup> We continue to ignore them at our peril. How should we balance the need for excellence and equity?<sup>26</sup>

The SWD designation has power in many arenas. For example, in school **discipline policies**, the law requires schools to continue to serve SWD who violate serious school rules, but schools can banish others to street corners. The law provides no effective protection for education for the classmates of disruptive students.

► **Why do only parents of SWD have due process rights to dispute their child’s program?** When the law achieved its mission of providing educational access for all SWD, why did this inequality continue? What of parents who can’t ‘work the system’ and most parents who have no ‘system to work?’

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<sup>25</sup> Erik W. Robelen, “High Achievers Scarce in Math, Science in U.S.,” Education Week, January 12, 2011, at 14. See also Eric A. Hanushek, Paul E. Peterson, and Ludger Woessmann, “Teaching the Talented,” Education Next, Winter 2011, at 10.

<sup>26</sup> Richard A. Epstein, Daniel Pienko, Jon Schnur, and Joshua Wyner, “Are we lifting all boats or only some? –Equity versus Excellence and the Talented Tenth,” Education Next, Summer 2011.

► **Unfairness in the use of accommodations.** They are supposed to ‘level the playing field,’ not ‘change the game’ or give advantage.<sup>27</sup> Yet, often, they do. Consider grades, tests, and, very troubling, the SAT and ACT that provide some students with extended time that is unreported.<sup>28</sup> What about gaming the system and the ensuing cynicism? Ask any high school guidance counselor. It is corrosive.

► **Many new general education reform dollars** end up in special education.

Special-education spending has risen at a fast rate over the last few decades. Between 1996 and 2005, an estimated 40 percent of all new spending in education went to special-education services.<sup>29</sup>

Special education costs between 20 and 40% of public school funds, often upending school budgets. It (quietly, to date) pits groups against each other—without supporting data to prove that this bureaucratic system improves student learning and is fair to all students. In short, as the only education entitlement program, special education is an uncontrolled mandate.

## **B. Special education—the only entitlement program in our schools**

The special education law was enacted during the civil rights era when the use of the courts to solve society’s problems and attain rights was *au courant*. Thus, this law created an adversarial, due process system of litigation in our schools—on the flawed premise of distrust described above.<sup>30</sup> Under this law, both parents of SWD and schools have the right

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<sup>27</sup> PGA Tour, Inc. v. Martin, 536 U.S. 661 (2001).

<sup>28</sup> Miriam Kurtzig Freedman and Samuel Abrams, “Disabling the SAT: The College Board Undermines its Premier Test,” Education Next, Fall 2003. See also ABC News, “SAT Help,” March 31, 2006, video report, <http://abcnews.go.com/video/playerIndex?id=1789267>.

<sup>29</sup> Scull and Winkler, at 12.

<sup>30</sup> 20 U.S.C. 1415.

to file for a due process hearing about a student's special education status and placement. As a practical matter, it's usually the parents who do so.<sup>31</sup>

Notably, since creating the IDEA, Congress has created no other educational entitlement program. The NCLB has NO due process rights. As well, students who are English language learners<sup>32</sup> and gifted or talented students have no individual entitlement to services or procedures, even as it is estimated that the U.S. spends 143 times as much on special education as on the education for gifted students.<sup>33</sup>

### **Third, litigation—loss of trust.**

**A. Parents as enforcers.** This law makes parents its enforcers. This adversarial approach has turned out to be the law's pervasive "structural design flaw,"<sup>34</sup> forcing parents to 'advocate' for their child **against** their schools! As discussed above, this approach is built on the damaging premise of distrust between schools and parents.

**B. 'Mansion' industry.** As a result of this litigious approach to education, hearing officers and judges often determine programs for SWD! We have built a 'mansion industry' of lawyers (of which I am one), 'experts,' evaluators, advocates, and others, with no end in sight. While litigation in other arenas declines (Even lawyers look for work these days!), this

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<sup>31</sup> Schaffer v. Weast, 546 U.S. 49 (2005).

<sup>32</sup> See, e.g., Lau v. Nichols, a lawsuit by Chinese Americans who believed they were discriminated upon under the Civil Rights Act of 1964. The Supreme Court agreed. However, there is no comparable federal funding statute for English language learners. Neither they nor their parents have an individual entitlement to services. See also discussion in Miriam Kurtzig Freedman, Meeting NCLB's Mandate: Your Quick-Reference Guide to Assessments and Accountability, LRP Publications, 2008, Second Edition. [www.lrp.com](http://www.lrp.com).

<sup>33</sup> Some states include these students in their special education laws or provide for them in other ways. This estimate is found in B. and J. Davidson, Genius Denied: How to Stop Wasting our Brightest Minds, Simon and Schuster, 2004.

<sup>34</sup> Professor Bill Koski, Stanford Law School, pers. comm., 2009.

litigation in our courts grows.<sup>35</sup> Reportedly, the IDEA is the fourth most litigated federal civil statute.

**C. Continued confusion enflames the growth of case law.** The law entitles SWD and their parents to a FAPE, a confusing term that has led to more than 35 years of lawsuits. We still argue, on a case-by-case basis, about the meaning of a ‘free appropriate public education.’ What is ‘appropriate’? The law’s built-in tension also feeds litigation, as parents often want what is ‘best’ for their child, while schools are obligated to provide what is ‘appropriate.’ These battles are costly in time, dollars, effort, and emotion. Furthermore, we face the ‘creeping judicialization of special education hearings’ as they become “more like full, formal court proceedings.”<sup>36</sup> Thus, most states now use hearing officers who are lawyers, not educators.<sup>37</sup>

**D. Fear of litigation.** This fear is pervasive, strangles schools in procedural nightmares, and creates dysfunction in our schools.<sup>38</sup> A 2002 study found 814 federal monitoring requirements for states and schools.<sup>39</sup> President Barack Obama, in a Wall Street Journal op-ed<sup>40</sup> wrote, “We are also making it our mission to root out regulations that conflict, that are not worth the cost, and that are just plain stupid.” He should direct the ED to focus attention here. The fear of litigation drives education. “The threat of a hearing is an

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<sup>35</sup> “Special Education Court Decisions on the Rise,” Education Week, January 28, 2011.

<sup>36</sup> Perry A. Zirkel, Z. Karnxha, and A. D’Angelo, “Creeping judicialization of special education hearings: An exploratory Study,” Journal of the National Association of Administrative Law Judiciary, 27, 27-51 (2007).

<sup>37</sup> Perry A. Zirkel and Gina Scala, “Due Process Hearing Systems Under the IDEA: A State-by-State Survey,” Journal of Disability Policy Studies 21(1) 3-8 (2010). (hereinafter Zirkel and Scala) <http://jdps.sagepub.com>.

<sup>38</sup> Philip K. Howard, Life without Lawyers: Liberating Americans from Too Much Law. New York; W.W. Norton, 2009.

<sup>39</sup> President’s Commission, “A New Era: Revitalizing Special Education for Children and Their Families,” (hereinafter President’s Commission)

[www.ed.gov/inits/commissionsboards/whspecialeducation/index.html](http://www.ed.gov/inits/commissionsboards/whspecialeducation/index.html)

<sup>40</sup> January 19, 2011.

essential element in the relationship between districts and parents because it raises the stakes in disputes over placements.”<sup>41</sup>

As a result, educators practice defensive education. “Educators spend more time on process compliance than on improving educational performance of children with disabilities.”<sup>42</sup> In the process, parents cry. Teachers cry. Many leave the field, creating a recruitment and retention challenge. Most damaging, the system takes teachers and students away from teaching and learning. Time in the *six-hour school day* is precious. We waste it.

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<sup>41</sup> Thomas Hehir and Sue Gamm, “Special Education: From Legalism to Collaboration, in Law and School Reform, New Haven, CT. Yale University Press, 1999, at 215.

<sup>42</sup> President’s Commission.

**C. Six suggestions to improve the education of SWD—  
in the context of educating all students**

<b>PROPOSED SPECIAL EDUCATION REFORMS</b>	
<b><u>HOW THE LAW IS</u></b>	<b><u>HOW THE LAW SHOULD BE</u></b>
<b>Input driven.</b>	<b>Output driven.</b>
<b>Compliance driven; bureaucratic.</b>	<b>Results driven; focus on teaching and learning.</b>
<b>Adversarial, 20<sup>th</sup> century law.</b>	<b>Education-driven, 21<sup>st</sup> century law. Do what works for students.</b>
<b>Based on the premise that parents and schools are not on the same page and cannot trust each other.</b>	<b>Trust-based special education—based on the premise that parents and schools ARE on the same page!</b>
<b>Entitlement-driven.</b>	<b>End the entitlement status of special education.</b>
<b>Rights and dogma-based.</b>	<b>Research-based.</b>
<b>Wait to fail model.</b>	<b>Preventive, good practices, e.g., “RtI”—Response to Intervention.</b>
<b>13-14% of students served.</b>	<b>Per law’s intent, serve up to 10%.</b>
<b>Costs based on one child’s entitlement.</b>	<b>Costs based on educating all children with fairness and equity.</b>
<b>Mission accomplished. Fear of change. Fear of reverting to pre-1975 schools.</b>	<b>Sunset this law. Change the mission. Reform law to meet 21<sup>st</sup> century reality for all students.</b>

We have known for many years that the system is broken. See, e.g., the 2002 “President’s Commission on Excellence of Special Education” and the 2001 Fordham Institute/Progressive Policy Institute report, “Rethinking Special Education for a new

Century.”<sup>43</sup> Both called for systemic reform. We are well into the ‘new century,’ and the system is still broken.

**So, what can we do now? First, change the premise** so parents and educators will be on the same page, working for children. Change the incentives. Change the climate in our schools. **Build a trust-based system for all students in our schools.** Without trust, we cannot succeed. Spend scarce resources on creative trust-building, not litigation-winning approaches. For example, see *Procedures Lite*, a trust-building option now piloted in several Massachusetts school districts.<sup>44</sup> This will be the ‘climate change’ we like!

Specifically,

1. **End special education’s entitlement status.** The U.S. reformed welfare in the 1990’s. In 1996, President Bill Clinton promised to “end welfare as we know it” and Congress passed the law that ended the entitlement program, substituting it with block grants to the states.<sup>45</sup>

It is now time to “**end special education as we know it.**” Education should be based on what improves teaching and learning, not what lawyers and advocates espouse. We need to end the current adversarial input and procedures- driven law and substitute it with a pedagogically driven system.

2. **Even if we won’t or can’t end the entitlement right away, end litigation and the fear of litigation about a proposed FAPE.** After more than 35 years of litigation, Congress should define a FAPE once and for all and end the damaging, confusing,

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<sup>43</sup> President’s Commission; Chester E. Finn Jr., Andrew J. Rotherham, and Charles R. Hokanson Jr., Eds. Rethinking Special Education for a New Century, (hereinafter, Rethinking), Washington, DC: Thomas B. Fordham Foundation and the Progressive Policy Institute, 2001.

<sup>44</sup> For information, please visit <http://www.specialeducationday.com>.

<sup>45</sup> Almanac of Policy Issues. [http://www.policyalmanac.org/social\\_welfare/welfare.shtml](http://www.policyalmanac.org/social_welfare/welfare.shtml)

and costly litigation about this term. There were 2033 hearings in 2008-2009, which was down from an approximated average of 2800 in 1997.<sup>46</sup> By personal experience, I know that this number represents a small percentage, perhaps 4-5% of all hearings. Most cases are settled with cost-shares between parents and schools, or withdrawn. These huge numbers affect schools everywhere.

Hearing officers and judges are ill equipped to decide the reading program for a child or which approach to use with a child with autism. Professional educators and experts, with parental input (as for all programs), can and should decide. If program disputes arise for SWD or other students, schools can create innovative resolution methods, such as having an ombudsman, a public advocate, an independent review committee, SpedEx,<sup>47</sup> and other systems. Get lawyers out of classrooms!

3. **Change parents' role.** Relieve them from their "law enforcement" burden.

Encourage them to work with, not against, schools. Enhance the schools' advocacy and accountability responsibilities. Foster trust building among parents, schools, and students rather than continuing the legally sanctioned system of distrust. The current system is neither sustainable nor wise. We need to stop making schools the enemy.

4. **End the gatekeeper labeling function of this law.** Instead of spending (and wasting) millions on diagnoses, target resources to teach children how to read, since it is the lack of reading skills in the early grades that fuels the growth of SLD.

Students should go to school to learn, not to get diagnosed.

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<sup>46</sup> Zirkel and Scala, at 6-7. However, see note 35 *supra* reporting the rise of decisions in the courts.

<sup>47</sup> SpedEx is a Massachusetts Department of Elementary and Secondary Education dispute resolution innovation. <http://www.doe.mass.edu/sped/spedx>.

5. **Mandate paperwork requirements and procedures only when they directly improve student learning.** A pruning of this law is long overdue.
6. **Use research-based approaches, not dogma or conventional wisdom to create programs.** Thus, inclusion should be a means to improve learning, not an end in itself. The use of one-one paraprofessionals and accommodations should help children learn, not just get them through school. Focus on student strengths, not just weaknesses. We need to end approaches that lack research support.

#### **D. Conclusion**

The IDEA achieved great success and accomplished its mission. Today, all Eleanors are in schools and have access to a FAPE. It is time to end the special education entitlement. Classrooms should advance student achievement, not compliance. Mission creep, inertia, and fear of change are NOT good public policy. Working to meet the 21<sup>st</sup> century needs for *ALL* students is. Special education is where many students, much money, the only education entitlement program, and overwhelming systemic dysfunctions are. Today's general education reform climate may finally provide the opportunity for systemic reform of special education by allowing us to stop treating it as the untouchable, sacrosanct, third rail in our schools. People of good will built the system we now have. Now, people of good will can work together to build a better system.

## Appendix

### President Gerald R. Ford's signing statement

I have approved S. 6, the Education for All Handicapped Children Act of 1975.

*Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains. Everyone can agree with the objective stated in the title of this bill--educating all handicapped children in our Nation. The key question is whether the bill will really accomplish that objective.*

*Even the strongest supporters of this measure know as well as I that they are falsely raising the expectations of the groups affected by claiming authorization levels which are excessive and unrealistic.*

*Despite my strong support for full educational opportunities for our handicapped children, the funding levels proposed in this bill will simply not be possible if Federal expenditures are to be brought under control and a balanced budget achieved over the next few years.*

*There are other features in the bill which I believe to be objectionable and which should be changed. It contains a vast array of detailed, complex and costly administrative requirements which would unnecessarily assert Federal control over traditional State and local government functions. It establishes complex requirements under which tax dollars would be used to support administrative paperwork and not educational programs. Unfortunately, these requirements will remain in effect even though the Congress appropriates far less than the amounts contemplated in (the law).*

*Fortunately, since the provisions of this bill will not become fully effective until fiscal year 1978, there is time to revise the legislation and come up with a program that is effective and realistic. I will work with the Congress to use this time to design a program...*

Source: Public Papers of the Presidents; 1975, Book II, pages 1935-1936