

Where is Willie Sutton When We Need Him to Fix Special Education?

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“Why do you rob banks?” Reporter

“Because that is where the money is.” Willie Sutton

Most current school reform efforts leave special education untouched, focusing on standards, vouchers, charters, accountability, tests, teacher competence, etc. Special education reform should be on the front burner — not the third rail it has become, with public officials and others afraid to touch it. Special education is where many students (13-14 percent) and much money (upwards of \$80 billion) are. Per “Sutton’s Law,” we should focus our education reform efforts on diagnosing and fixing the obvious.

These national numbers (constantly updated) tell the tale:

Of the estimated 55 million students in America’s K-12 schools:

- 1.5 million students were in charter schools in 2009 (2.7 percent). At most, vouchers will educate 1-2 percent of students. Thus, taken together, these reforms may reach 3-4 percent of students.
- 6.8 million students are in special education programs (13-14 percent). Close to five times as many!¹
- In Texas, 12 percent of students have IEPs. [will confirm citation].
- National funding levels. Services for students with disabilities account for 20-40 percent of school budgets — two to three times more than for general education students, including students who are in charter schools or receive vouchers. In 2002, more than \$80 billion was spent on special education.² Special Education is an uncontrolled mandate, as it is the only entitlement program in our schools.

A Bit of History: How Did We Get Here?

On the first day of school on a bright September morning in the late 1950s, my friend’s mother took her little sister, Eleanor, to school in New York City. 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 million students with mental, physical and other handicaps were excluded from public schools or denied access to appropriate education. That was then.

First called the EHA (Education for the Handicapped Act), the law is now the Individuals with Disabilities Education Improvement Act (IDEA). Its mission was to provide access for all students with dis-

abilities to a free appropriate public education (FAPE). Through a written Individualized Education Program (IEP), public schools are to provide eligible children “specialized instruction that is designed to meet the individual needs of the child in the least restrictive setting.”³

Where Are We Now?

As the above statistics show, special education affects schools, teachers, students, parents and school budgets everywhere. Our nation now provides educational opportunities for students with disabilities. Many now graduate from high school, move on to further education, enter the nation’s workforce and become productive citizens.

Our schools have changed in other ways. Consider language: how distant are the labels “educable”, “trainable” and “noneducable.” Today’s mantra is, “All students can learn.” Indeed, the No Child Left Behind Act (NCLB), the 2002 version of the Elementary and Secondary Education Act (ESEA), required all students (with few exceptions) to become proficient on state standards (a topic for another day!). We now live in an inclusive society. The law succeeded in providing access to all students with disabilities to educational services.

We now must ask: What path should we pursue when a law achieves its mission and then morphs into dysfunction and unintended consequences? Special education has done just that. The law should have had a sunset provision to allow it to change mission. Alas, it did not.

Special education has evolved into a complex bureaucracy, as layers of requirements have been added through federal, state, local and court action over the past 35-plus years. These involve IEP development and implementation, parental rights, eligibility assessments and a complex due process legal system. This well-intended law, spawning a host of unintended consequences, has created dilemmas for educators, parents and citizens. Let us consider three concerns that impact education for *all* students — mission creep, adversarial climate in schools and issues of fairness.

Mission Creep. After succeeding in providing access for students with disabilities, this law morphed far afield.

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,

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focused on inputs, structures and rights (not outcomes, results and student learning), are only remotely (if at all) related to improved learning for students with disabilities.

The medical model ‘label’ rules! Students need a diagnosis in order to receive services. Evaluators are gatekeepers — a huge industry. As a result, we have developed a ‘wait to fail’ model and often serve students too late — after they are left behind.

The system has expanded to 14 categories, including specific learning disabilities (SLD), attention deficit disorder with or without hyperactivity (ADD/ADHD), emotional disturbance (ED), and speech and language disabilities. These labels are often inconsistent, of questionable reliability with racial and ethnic differentiation, and seem to track a child’s ZIP code, parental advocacy or school culture. The above four categories alone make up 70-80 percent of all children served under the IDEA, overshadowing children with severe and profound disabilities for whom the law was enacted. Digging deeper, almost 50 percent of all students with disabilities are labeled SLD. Of these, approximately 90 percent are so labeled because they did not learn to read.⁴ The flawed wait-to-fail model at work!

Other realities. While education at-large is now focused on student achievement and research and outcome-based, not input and process driven, special education continues to be process-driven. Thus, we have two federal laws to teach the same students how to read, write and do math — the IDEA and the NCLB. Where is research on the corrosive impact on schools trying to run two systems, with overlaps, confusion and policies that head in opposite directions? And all in a six-hour day!

Questionable research basis. Too often, the IDEA lacks research-based underpinnings of its policies and practices. Consider just four (out of a myriad of) examples.

The law promotes inclusion in spite of weak data supporting it. To make it ‘work,’ schools provide one-on-one assistants, accommodations and other questionable approaches often designed to maintain the child in a classroom, not to help her learn more. If inclusion is so great, why do parents litigate to remove their children to private schools without inclusion?

Special education does FOR students, demanding nothing FROM them. If students fail, parents can sue schools! Whither student (and parent) accountability for their own learning?

The law focuses on student weaknesses, in contrast to psychological research and real-world experience showing that strengths should be pursued. Special education continues to splice and dice student weaknesses and ignore their strengths.

The law appears to encourage the overuse of accommodations, often to get the child through school. What is “special” about reading to a young child who should learn to read? Or providing a calculator, instead of teaching her ‘number facts.’ Nothing, really.

Litigation—loss of trust.

Parents as enforcers. This law makes parents its enforcers. This adversarial system has turned out to be the law’s ultimate systemic design flaw. Parents have to “advocate” for their child **against** their schools! This adversarial law is built on a premise that schools and parents are NOT on the same page for the child, that schools are not to be trusted and that parents need protection FROM schools! Sad. As well, remember that litigation in this arena differs from most,

where parties may never see each other again. Here, schools and parents are stuck together, so long as families live in the community.

As a result, lawyers and judges often plan and approve programs for students with disabilities. We have built a “mansion industry” of lawyers (of which I am one), “experts” and others, with no end in sight. While litigation in other arenas declines (even lawyers are looking for work these days!), this litigation expands. “Special Education Court Decisions on the Rise,” reports “Education Week,” in its Jan. 28, 2011 issue. The IDEA is reportedly the fourth most litigated federal statute.

The law entitles students with disabilities 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, what a “free appropriate public education” is. Parents may 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.

Fear of litigation is pervasive, strangling schools in procedural nightmares. A 2002 study found 814 federal monitoring requirements for states and schools. President Barack Obama’s recent op-ed in the “Wall Street Journal” (January 19, 2011), calling for regulatory reform, included, “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 and the Department of Education should focus their attention here, on special education regulations!

Alas, special educators practice defensive education — not a way to inspire effective teaching. In the process, parents cry. Teachers cry. Many leave the field, creating a huge challenge in recruitment and retention. 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.

Whither fairness and equity? Consider these issues.

Who is special? The answer is highly subjective. A student may be SLD in one town but not another. What about gifted, bored, average or at risk students? They are not served and often left behind. Does the system make any sense? Is it fair? You decide.

What of **discipline policies** that serve some students and banish others to street corners? As for disruptive students, where is their classmates’ right to learn? Alas, no law protects them.

Why do only parents of students with disabilities have rights to sue about programming? When the law achieved its mission of educational access for all students with disabilities, why did this inequality continue? What of parents who can’t “work the system” and most parents who have no “system” to work?

Accommodations are supposed to level the playing field, not change the game or give advantage. Yet, often, they do. Consider grading and testing, including the SAT and ACT that provide some students with extended time that is not reported. What about fairness, 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 — the only entitlement program in our schools.⁵ Special education costs between 20 percent and 40 percent of public school funds. Its costs often upend budgets and pit groups against each other — all with no supporting data to prove that this system improves student learning.

Table 1. Proposed Special Education Reforms

HOW THE LAW IS NOW	HOW THE LAW SHOULD BE
Input driven.	Output driven.
Compliance driven; bureaucratic.	Results driven; focused on teaching and learning.
Entitlement-driven.	Consider ending the entitlement status of special education.
Rights and dogma-based.	Research-based.
Wait to fail model.	Preventive, good practices model.
Based on the adversarial system.	Based on pedagogy. Do WHAT WORKS for students!
Based on the premise that parents and schools are not on the same page and cannot trust each other.	Trust-based special education, based on the premise that parents and schools ARE on the same page!
13-14% of students served.	Back to law's intent to serve up to 10%.
Costs based on one child at a time.	Costs based on educating all children.
Mission accomplished; fear of change; Special education reform is the untouchable third rail in education reform.	Sunset this law. Change the mission.

Proposals

WHAT to do? Here are six proposals to get us started.

1. End litigation and the fear of litigation about a proposed FAPE.

After more than 35 years of case-by-case litigation, Congress should define a FAPE once and for all. We should end the damaging, confusing and costly litigation about this term. Lawyers and judges should not determine the reading program for a child or which approach to implement for a child with autism. Educators and educational experts, with parental input (as for all programs), should make these decisions. If there are programming disputes, schools can create innovative resolution methods, such as having an ombudsman, a public advocate, SpedEx and other trust-building systems. For information about SpedEx, a Massachusetts Department of Elementary and Secondary Education innovation, please visit <http://www.doe.mass.edu/sped/spedx>.

2. Change parents' role. Relieve them from their "law enforcement" burdens and encourage them to work with, not against, schools. Enhance the advocacy and accountability responsibilities of schools. Foster trust building among parents, schools and students rather than continuing the legally sanctioned system of distrust. The current system is not sustainable. We need to stop making schools the enemy.

3. End the gatekeeper function of labeling students for services to allow education to meet the needs of all children. The gatekeeper function is dysfunctional, inequitable and unfair. It often provides services too late — after a child has failed. It contradicts regular education reforms, including early intervention and response to intervention (RTI) services. Instead of spending (and wasting) millions on diagnoses, target our resources to teach children how to read, especially in the early grades. Recall that it is the lack of reading skills that fuels the growth of SLD, the main driver for the rise in students with disability numbers. We need to focus resources on teaching and learning — not procedures and gates. Students should go to school to learn, not to get diagnosed.

4. Allow only paperwork requirements and procedures that directly impact and improve student learning. A pruning of this law is long overdue. Follow President Obama's call for regulatory reform!

5. Use research-based instruction and approaches, not dogma to create programs. For example, inclusion should be a means to enhance teaching and learning, not its own rights-based goal. The

use of one-to-one paraprofessionals and accommodations should help children learn, not just get through school. We should focus on student strengths, not just weaknesses. It's time to question many other approaches that lack research support.

6. Develop systems to rebuild trust. Focus on all students. Confront the unfairness of this law's impact on other students (at risk, gifted, advanced) and the reality that *ALL* students deserve challenges and our full efforts. Disputes, procedures, fear of litigation and flawed policies detract from the mission of teaching, learning and achievement. They kill trust in our schools, without which we cannot succeed. An example of a trust-based approach is Procedures Lite, an option now piloted in Massachusetts that allows parents and schools voluntarily to opt out of regulatory requirements and jointly work for the child. For information, please visit www.specialeducationday.com

Conclusion

The IDEA achieved great success. All Eleanors have access to a FAPE. We live in an inclusive society. The law accomplished its mission. It is time to move on and get litigation out of our classrooms. Classrooms should advance student achievement, not compliance. Mission creep, inertia and fear of change are NOT good public policies. Working to meet the 21st century needs for *ALL* students is. Today's general education reform climate may finally provide the opportunity for systemic reform of special education that will reflect current realities.

Special education is where many students, much money, the only entitlement program and overwhelming systemic dysfunctions are. Where is Willie Sutton when we need him?

End Notes

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