

CATO HANDBOOK FOR CONGRESS

POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS

CATO
INSTITUTE

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29. Special Education

Congress should

- devolve responsibility for special education to the states,
- eliminate federal regulations that waste resources and pit parents against teachers, and
- refuse to turn the Individuals with Disabilities in Education Act into an entitlement for state governments.

Since 1975, the law now known as the Individuals with Disabilities in Education Act has promised a “free appropriate public education” to all children with disabilities. Local public schools have been required to accept all disabled students and provide them with an educational plan in compliance with various federal procedural requirements. In return, the act provides for some discretionary federal funding to assist school districts in establishing programs and procedures to meet the special needs of students with disabilities. Students with disabilities must be educated in the “least restrictive environment,” meaning that they should be accommodated in regular classrooms where possible.

IDEA was part of an important effort in the 1970s to end discrimination against disabled children by states and local school districts. Disabled students’ civil rights are protected by the Equal Protection Clause and Due Process Clause of the Constitution and by an anti-discrimination law commonly known as Section 504. When it became clear that disabled children were not being treated fairly under the law by public school systems, Congress passed IDEA in an effort to provide a regulatory framework, or process, as well as some funding to help states ensure that disabled children would not suffer from further discrimination.

IDEA is often conflated with the constitutional rights of disabled children by defenders of the status quo. They wrongly argue that changes to IDEA would amount to a denial of equal protection to students with special

needs. In fact, IDEA is a regulatory process—a mechanism—for helping to achieve the goal of equity for disabled students. Although IDEA has been successful in providing disabled children with greater access to public schools, it has largely failed to ensure an appropriate education for children with disabilities.

IDEA's Failed Dispute Resolution Model

IDEA's central failure is the complex and adversarial process required to determine the size and nature of each disabled child's entitlement to special services. Recognizing that the educational needs of disabled children differ widely, the act mandates that each child's "individual education plan," or IEP, be created out of whole cloth by his or her local school district in a series of meetings and due process procedures.

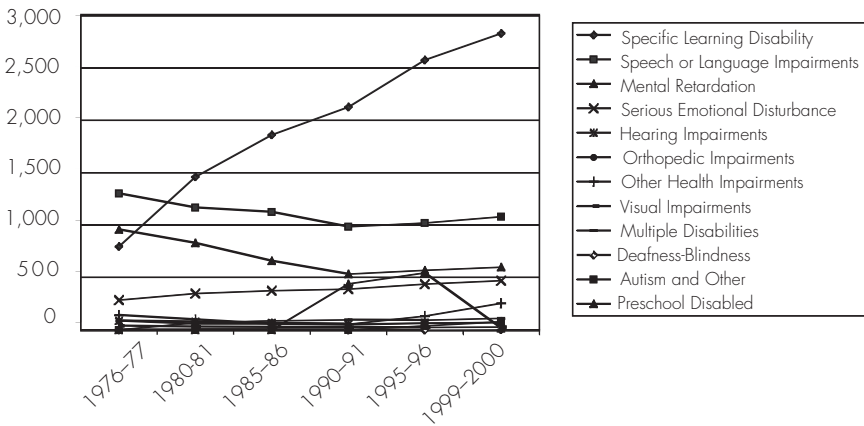
The process mandated by the statute has not only failed to achieve its purpose of ensuring an appropriate education for each disabled child. It also has marginalized the parents it was intended to empower and has created a barrage of compliance-driven paperwork so overwhelming that special educators are driven to quit the profession. Federal survey results show that special education teachers spend between a quarter and a third of each week on IDEA-mandated bureaucratic chores.

Worse, IDEA's adversarial nature has undermined relationships between parents and educators, pitting parent against school in a bitter struggle over limited resources. Because the act's procedures require savvy, aggressive navigation, its benefits flow disproportionately to wealthy families, often leaving lower-income children poorly served.

IDEA has also encouraged incorrect labeling of many students as learning disabled. The growth of special education can be attributed largely to a sharp rise in the number of children categorized as learning disabled. The number of children identified in this category grew by an extraordinary 242 percent between 1979 and 1997 (Figure 29.1). The number of children served in all the other disability categories combined increased by only 13 percent during the same period. Today, children diagnosed as learning disabled account for nearly 50 percent of children in special education.

Although the 1997 amendments to IDEA sought to alleviate this problem by changing federal fiscal policy, schools will continue to overidentify children as learning disabled as long as funds that follow a disabled child into a school are controlled by the school rather than by the child's parents. Under IDEA's current dispute resolution model for determining benefits, funds received from state and federal sources for each identified child

Figure 29.1
Number of Children in Federally Supported Programs for the Disabled, by Category (thousands)



SOURCE: National Center for Education Statistics, *Digest of Education Statistics, 2001* (Washington: U.S. Department of Education, 2002), Table 52.

need not actually be spent on that child. If the school can identify a child in need of few special services, that child's special education funds can be shifted to other children with more expensive needs, or to cover the bureaucratic costs of administering the program. Because learning disabilities have no known organic basis and require fewer services than most other types of disabilities, the label is especially ripe for abuse.

Unsurprisingly, IDEA has precipitated a financial crisis in schools. In 1977 services for disabled students accounted for 16.6 percent of total education spending. Today the \$78.3 billion spent on special education students at the local, state, and federal levels accounts for 21.4 percent of the \$360.2 billion spent on elementary and secondary public education in the United States. The number of school-age children receiving special education services also increased during this period, from about 8.5 percent in 1977-78 to nearly 13 percent in 1999-2000.

Regulatory compliance and litigation costs related to IDEA's failed dispute resolution framework are soaking up precious resources needed for education. For the year 1999-2000, the American Institutes for Research estimates that \$6.7 billion was spent at the state and local levels for "assessment, evaluation and IEP related activities." Moreover, the \$6.7 billion estimate does not appear to include many due process and litigation expenses, nor does it include fee awards to successful plaintiffs' attorneys.

Choice-Based Reform

The battle between parents and schools over each child's educational plan must end with a decisive victory for parents in the form of portable benefits. Special education should be reformed to allow parents to control how their child's educational dollars are spent in the public or private school of their choice.

Choice-based reform would improve educational outcomes by allowing parents to choose their child's very best option, and successful schools would be those that served parents and children well. Accompanied by massive deregulation, thoughtful choice-based reform will free teachers to teach and allow funds currently wasted on administration to be returned to the classroom.

Devolution of all responsibility for special education to the states would be optimal. If complete devolution is not immediately possible, Congress should amend IDEA to allow states to opt into a reformed special education system, which would eliminate the failed dispute resolution model entirely in favor of a state-administered, largely state-funded system based on parental choice.

A state would opt into the program by creating a matrix of disability categories and monetary contributions designed to represent the total average cost of both general and special services required to educate a child in each category of disability. The state would then create a menu of special education services no less comprehensive than those currently available in each school district and their estimated cost per child per hour or per semester, as appropriate.

Parents in a reformed special education system would find themselves transformed from combatants into customers. Instead of fighting each year over educational programming, parents would be invited to their local school to select from the menu of available special services with the advice of special educators or anyone else the parent felt was appropriate, up to the amount of the child's defined monetary contribution under the matrix. Or the parent could take his or her child's total educational allowance to a private school of choice.

Because parental choice would replace negotiation as the method of determining a child's educational plan, Congress should exempt states opting into a reformed system from all of the IEP and due process requirements of IDEA, and they should no longer be subject to civil suit under the act. The sole remaining potential dispute in a reforming state would be the accuracy of a child's diagnosis and, accordingly, the size of his or

her monetary contribution. Congress should ask those states to create rules for genuinely independent binding arbitration of disputes related to the diagnosis of a child covered by IDEA.

The end result for a state opting for reform would be a state-administered, largely state-funded portable benefits plan that would avoid IDEA's worst problems.

Choice-Based IDEA Reform Will Reduce Waste, Empower Parents

States opting for choice-based reform would each save tens of millions of dollars, now devoted to procedural compliance, legal posturing, and litigation. If even half of the annual \$6.7 billion devoted to "assessment, evaluation and IEP related expenditures" were eliminated, \$3.35 billion could be saved nationally on those items alone. States and parents would also save millions more on IDEA attorneys' fees and other legal expenses.

Choice-based reform will also alleviate the problem of overidentification of children as having disabilities, a phenomenon that has contributed to IDEA's increasing costs. By tying an agreed level of funding directly to each disabled child, and giving each family control over how those funds are spent, reform states will reduce any remaining tendencies of school districts to compete for extra funds through overdiagnosis.

Choice-based reform should also be effective in increasing the quality of education available to most disabled children. Choices are particularly beneficial to special education students because of the variety of disability types and because significant advances are being made in special education. Public institutions by their nature change too slowly to keep pace with rapidly evolving techniques and technologies in special education.

Parents have better information and better incentives than do school districts to make optimal decisions for their children. Although parents often lack the professional expertise of special educators, they have an incentive to seek out the very best sources of information and advice. A public school district will never be similarly motivated to spend weeks and months researching educational alternatives for a single child. Accordingly, choice-based reform should result in better educational outcomes for disabled children.

Choice-based reform will also relieve parents of their current Hobson's choice—accept an objectionable plan created by the school district or face the financial and personal costs of a potentially years-long hearing and

appeals process. Similarly, the elimination of the IEP and due process regimens will free special educators from the meetings and paperwork that have come to dominate their days, allowing them to focus once again on teaching children.

Perhaps most critically, replacement of the dispute resolution model of IDEA with parental choice will restore trust between parents and educators, whose interests will no longer be misaligned. With the size of a child's benefit no longer in question, teachers can collaborate with parents to determine how the child's allotment might best be spent. If the two cannot agree, the parent is welcome to find another teacher or school with which to work. As are other consensual fiduciary relationships—doctor and patient, attorney and client—the new teacher-parent relationship will be built on trust, honesty, and results. Successful special educators and schools will be those that serve parents and children well.

Congress Must Not Create an Entitlement for State Governments

State agencies are pressuring Congress to make an open-ended commitment to cover 40 percent of all costs labeled “special education” by states. Congress must decline to create a new federal entitlement program for state governments.

In addition to further expanding federal influence in what should be a state and local matter, education, an entitlement for state governments in the form of an open-ended funding commitment would provide states with huge incentives to expand the portion of the state educational system designated as “special education.” That in turn would mean more overidentification of students as disabled, one of the problems lawmakers should be trying to solve, not worsen.

Moreover, large funding increases would be counterproductive to state-level reform efforts, because they would discourage states from turning down federal funds in order to escape IDEA's suffocating regulatory compliance requirements. Congress would essentially be bribing states to stick with IDEA's failed dispute resolution model. By contrast, keeping the federal contribution small (recently around 15 percent of special education costs) would encourage states to reform their special education programs individually, discarding the federal money as not worth the compliance and litigation costs associated with IDEA.

Suggested Readings

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