Chapter 8

How Federal Special Education Policy Affects Schooling in Virginia

Frederick M. Hess and Frederick J. Brigham

Introduction

Federal special education legislation has an honorable heritage and a laudable purpose. Unfortunately, the manner in which Congress and the executive branch have pursued that purpose now impedes the ability of state school systems to serve children in both general and special education.

The current system of oversight and resource allocation focuses less on educational attainment and more on procedural civil rights.

The current system of oversight and resource allocation focuses less on educational attainment and more on procedural civil rights. Problems result from the federal government's use of this legalistic approach. In most areas of education, Washington offers supplementary funding as a carrot to encourage desired state behaviors. The challenge of compelling states to abide by federal dictates in special education, however, has produced a reliance on procedural oversight with deleterious effects for the federal-state partnership in education.

Under the present system, educators are restricted in their ability to make decisions regarding how best to assist children with disabilities. Instead, in response to federal dictates, states press school districts toward a defensive posture in which educators may spend more time attending to procedural requirements than to students' instructional and behavioral needs. Most discussions of reforming special education at the federal level ask what policy changes would alleviate this problem of excessive proceduralism. We suggest that such an approach is too narrow, that over-reliance upon procedural regulation actually arises from Washington's attempt to compel behaviors with insufficient incentives or guidance.

While seeking to get states to do its bidding with respect to disabled youngsters, Congress has provided neither inducements for them to cooperate nor flexibility in how they comply with federal direction. Lacking the capacity to implement special education policy on its own—considering that it does not operate public schools or employ their teachers—Washington has instead relied upon micro-managing state procedures and using the threat of legal action as a primary enforcement tool.

Lacking explicit federal direction or support, state officials cope by crafting their own muddled

guidelines. This permits the state, like the federal government, to forestall messy conflict over details regarding program eligibility and services by pushing such questions down to districts and schools. Principals and teachers complain that the nested levels of governance deepen the confusion as the rules grow more convoluted and cumbersome at each stage.[1]

In this essay, we explore how federal special education policy affects schooling in the Commonwealth of Virginia. The data were collected from official documents; interviews and discussions with more than 50 educators, policymakers, and other individuals involved with special education; and observation of state meetings and hearings. The research was conducted between June and October 2000.

Under the IDEA, a satisfactory program is defined as one that adheres to due process, regardless of its results.

The Federal Role in Special Education

The federal government shapes special education policy through both the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act. We shall briefly review both, discuss the role of litigation in enforcing special education requirements, and then explore the consequences for schooling in Virginia. The discussion focuses on key dimensions of policy and practice. In the first half of the paper, we discuss how special education's "free appropriate public education" (FAPE) and "least restrictive environment" (LRE) requirements are implemented in Virginia, how special education affects state education funding, and how special education services are monitored. In the second half of the paper, we discuss how these policies affect school practice in terms of individualized education programs (IEPs), discipline policy, and state education standards.

The IDEA

In making special education law, Congress and the executive branch have relied heavily upon judicial precedents rooted in the Equal Protection and Due Process Clauses of the 14th Amendment. Whereas most federal legislation is framed as a compromise between competing interests and claims, this more absolutist orientation means that special education policies turn on endowing claimants with an inviolable set of rights. That mindset is illustrated by the "inclusion" proponent who prominently argued, "It really doesn't matter whether or not [full inclusion] works...even if it didn't work it would still be the thing to do, because it's right."[2]

Under the IDEA, a satisfactory program is defined as one that adheres to due process, regardless of its results. Critics suggested that this orientation fed lower expectations for students with disabilities. In response, the 1997 IDEA reauthorization sought to emphasize academic performance by insisting upon "meaningful access to the general education curriculum to the maximum extent possible" for students with special needs. It is too early to judge the overall impact of these recent changes, though we will discuss some of their effects later in the paper.

Section 504

In theory, states are free to disregard the IDEA. The only federal sanction is the ability of the Office of Special Education Programs (OSEP) to withdraw IDEA grants. These grants amount to less than ten percent of state special education spending. This apparent freedom is illusory, however, because any state that fails to comply with the IDEA's requirements would still be liable

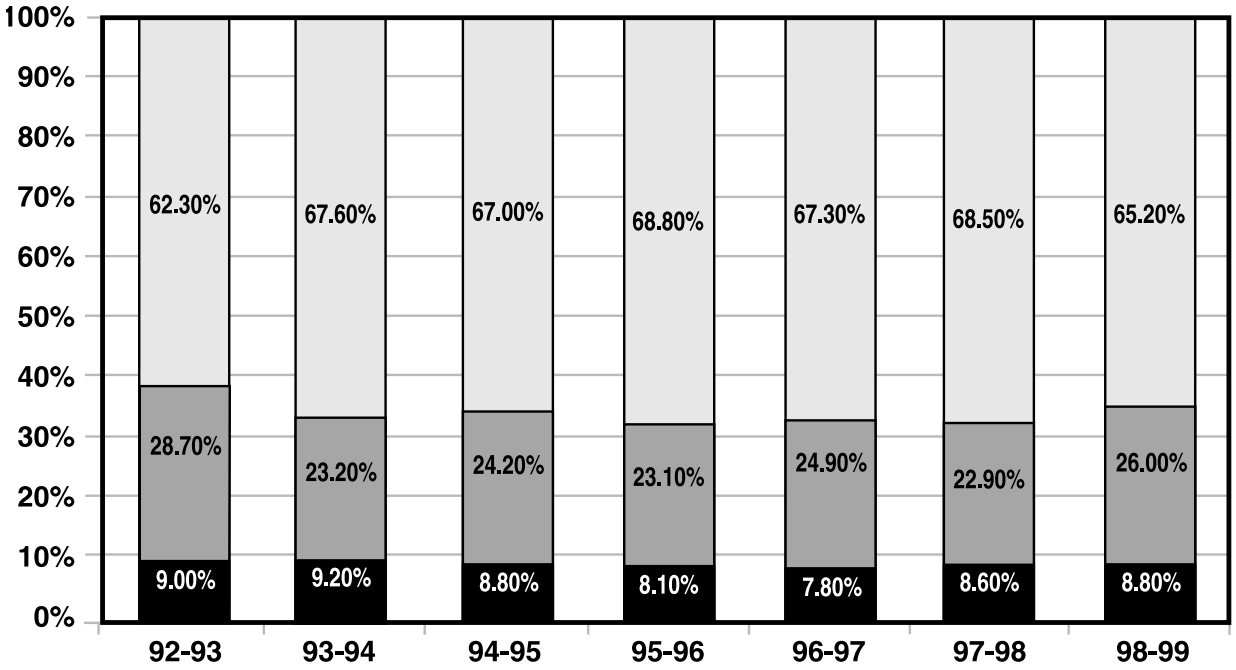
under Section 504 of the Rehabilitation Act of 1973. Section 504 is designed to protect individuals with "a physical or mental impairment which substantially limits one or more...major life activities." The initial regulations implementing Section 504 explained that the statute was intended "to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance." Although it supplies no funding, Section 504 applies to any entity receiving any federal funding, meaning that all states must abide by its directives. Because the courts have interpreted Section 504 as implying the same responsibilities as the IDEA,[3] schools would be required to fulfill the same federally imposed obligations even if they were to spurn IDEA funding.

Although the IDEA offers guidelines regarding various disability conditions, the provisions of Section 504 are so nebulous that it becomes extremely difficult to distinguish students entitled to special education services from those not entitled. As one administrator said, "In my opinion, IDEA is much more precise, much more specific....504 is the same as saying, 'you have a problem here.' [Anybody can say some problem] 'substantially limits' [a life activity]....What's the line there? So you're wide open."[4]

Special Education in Virginia

Special education comprises a substantial share of Virginia's K-12 educational expenditures. Between 1995 and 1998, special education students made up 13 percent to 14 percent of the state's student population, while the special education budget consumed 23 percent to 25 percent of the state's education budget. (See Figure 1.)

Figure 1. Sources of Special Education Funding in Virginia, 1992-99



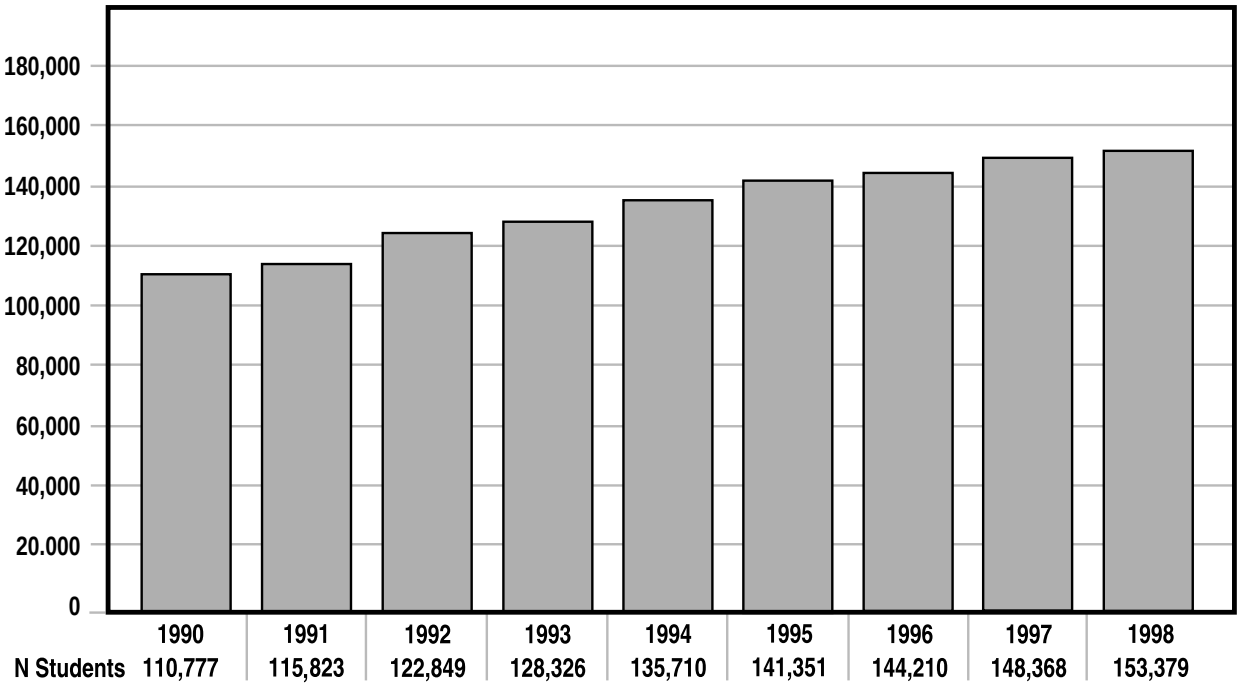
Source: Virginia Department of Education, "Local School Division Reported Expenditures for Special Education," available at <<http://www.pen.k12.va.us/VDOE/Instruction/Sped/by_percent.pdf>> (August 20, 2000).

During the 1990s, Virginia's special education student enrollment grew at a pace that outstripped the general education population. Special education enrollment grew 38 percent between 1990 and 1998, from 111,000 to 153,000. (See Figure 2.) During that same period, overall K-12 enrollment grew only 12 percent, from 1 million to 1.2 million.

From 1995 to 1999, costs for special education grew at roughly the same rate as for general education. (See Figure 3.) As general education spending per pupil grew by 17 percent during that period (from $4,858 to $5,675), special education spending grew by 18 percent (from $10,035 to $11,874). In other words, special education spending remained at approximately twice the level of general education spending.

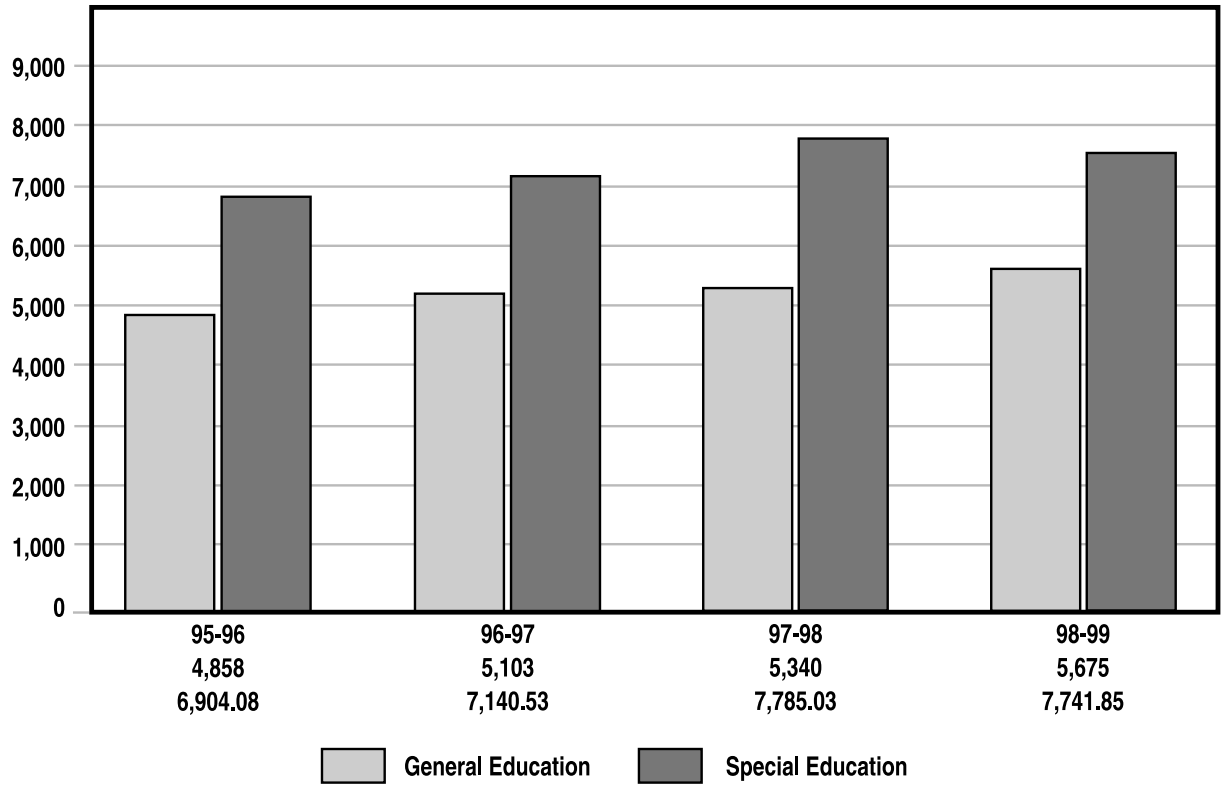
In Virginia, federal special education directives are interpreted and implemented by a designated group of professionals in the state Department of Education (DOE). Within the larger DOE, headed by the state Superintendent of Education, is a directorate for special education headed by a Director of Special Education and Student Services (SESS). Historically, the directorate for Special Education did nothing else. In 2000, DOE merged Special Education with "Student Services," the unit responsible for activities such as school health and safety. Despite this reorganization, Special Education remains relatively isolated from the other areas of the DOE. In January 2001, SESS included 23 positions devoted to oversight of special education. These individuals include specialists in learning disabilities, emotional disturbance, mental retardation, early childhood, and severe disabilities. Not one member is explicitly charged with coordinating policy with the other parts of the DOE.

Figure 2. Virginia's Increasing Special Education Enrollment, 1990-98



Source: Virginia Department of Education, *Report of Children and Youth with Disabilities Receiving Special Education*, available at <<http://www.pen.k12.va.us/VDOE/Publications/SPED_child_count/total98.html>> (August 15, 2000).

Figure 3. Virginia's Per-Pupil Costs for General and Special Education, 1995-99



Source: Virginia Department of Education, "Cost Comparison for Students Receiving Special Education Versus Students Not Receiving Special Education," available at <<http://www.pen.k12.va.us/VDOE/Instruction/Sped/compare_expend.pdf>> (August 20, 2000).

Virginia's DOE essentially runs parallel school systems, one staffed by special educators for students with disabilities, the second staffed by general educators for everyone else. Each side exhibits distrust and frustration with the other. A local special education administrator observed, "People in general education don't listen to us or even ask us about the kids in our caseloads." A state-level administrator said, "We have consistent problems with some of our districts," explaining that the state deals with such challenges by using legal and administrative sanctions to coerce general educators into "playing ball." General educators voice reciprocal concerns. One administrator spoke for many, saying, "I have all I can handle right now without attending to students with wildly varying educational and behavioral needs." A high school teacher reported similar frustration, relating, "I remember trying to teach history to one kid who had to pass the SOL [Standards of Learning] test, and all he was doing is [sic] sitting there and calling me a bitch. And, because he's in a special education program, there's nothing I can do about it and nothing that anybody else is willing to do about it."

The current structure ensures that special education policy decisions are mostly made by people removed from actual school practice and from the general decisionmaking process for K-12 curriculum and instruction. This makes it less likely that services for students with special needs

will be integrated or coordinated with the larger educational program. Meanwhile, general educators and board members are suspicious of special educators, worrying that they fail to recognize how their policies and actions impact the general student population. The structure of the DOE helps to divide general and special education personnel, while encouraging professionals to think differently about different categories of children, despite Congress' insistence that its goal is to eliminate distinctions among students.

Special Education Litigation

Despite the visibility of special education cases that reach the courts, such actions are relatively rare in Virginia. The most common legal or quasi-legal actions are complaints and due process hearings. The Commonwealth devotes considerable time and energy to these. Due process hearings are a quasi-judicial, adversarial procedure overseen by part-time hearing officers trained by the DOE.

Between 1992-93 and 1999-2000, 799 due process requests were filed with the DOE (see Table 1), roughly 100 a year.[5] All such requests require formal notification to the Department that the plaintiff is exercising his right to a due process hearing. Ninety-three percent of these requests were filed by parents. The remaining 7 percent were filed by school districts, usually when the district was concerned that parents were refusing to allow it to provide the services it

Table 1. Due Process Hearing Requests, Sources, and Outcomes in Virginia, 1992-2000

School Year	Due Process Hearing Requests	% Initiated by Parent	Hearings Concluded*	No. of Decisions Rendered	% Decisions Wholly Favoring LEA	% Decisions Favoring Parent in Part or in Whole
1992-93	66	97%	50	20	80% (16)	20% (4)
1993-94	102	91%	73	29	90% (26)	10% (3)
1994-95	120	90%	111	42	67% (28)	33% (14)
1995-96	96	92%	64	20	90% (18)	10% (2)
1996-97	84	Not reported	53	15	80% (12)	20% (3)
1997-98	104	Not reported	66	9	22% (2)	78% (7)
1998-99	114	Not reported	79	16	75% (12)	25% (4)
1999-00***	113	Not reported	90	26	60% (15)	28% (7)
Total	799	93%`	586	176	75% 129	25% (44)

* Actions may be concluded by settlement prior to the hearing, a hearing decision, or the withdrawal of the hearing request by the party who filed it.

** Includes spilt decisions where findings for both parties were yielded. Data reported only for cases filed and concluded in the same academic year.

*** The 1999-2000 column totals equal only 88 percent because the data include the number of cases that went forward to hearing but were dismissed (3 cases, 12 percent).

Source: Virginia Department of Education, *Annual Report for Special Education Due Process Hearings and*

deemed appropriate. These figures indicate that formal legal proceedings may be less of an issue than critics sometimes fear.

Of those 799 cases filed, 586 were resolved in the same year.[6] Of the 586, 176 (30 percent) led to decisions by a hearing officer while the rest ended through withdrawal of the complaint or settlement prior to a hearing. Of the 176 decisions rendered, three-quarters were resolved wholly in favor of the school district. The other 25 percent either favored the parent or split the difference between parent and district.

There are at least two ways to interpret these outcomes. One is that a substantial percentage of the requests actually filed lack merit. A second is that some schools respond to parental concerns only when faced with the threat of legal sanctions. A significant number of hearing requests are withdrawn after districts make concessions. As one attorney active in special education noted, "Most of the cases I deal with involve discipline. IDEA requires schools to act proactively on behalf of students with behavior problems rather than expelling them. If they do not, the law affords families a way of ensuring their children will be educated."

The larger problem of the due process system is not the number of formal complaints or their resolution, but the incentives that this legalistic mechanism creates for local educators.

Critics of the due process system have asserted that many complaints and hearing requests are produced by the same small group of disgruntled parents. As one district administrator said, "When you look at who is doing the complaining, usually you find it is the same person over and over again. One angry parent can use IDEA mechanisms to make schools look like they are much worse than they really are." However, the data do not provide evidence for this contention. In 1999-2000, for example, 113 due process hearing requests were filed in Virginia. Just four parents filed more than one request; in each case, they filed two.

The larger problem is not the number of formal complaints or their resolution, but the incentives that this legalistic mechanism creates for local educators. Presently, the desire to avoid legal sanctions and officer-ordered costs and services is the clearest incentive for schools to make extraordinary efforts to serve students with disabilities. Such efforts may cause the district to divert resources from other worthy purposes. Educators have cause to focus on what services and accommodations will forestall complaints, rather than on which are cost-effective and educationally appropriate. The result is that districts are caught between a desire to "cut corners" on special education expenditures and the impulse to provide services in order to avoid the threat of legal action. By encouraging schools and parents to adopt adversarial roles, the legalistic emphasis makes cooperative solutions more difficult and shifts the focus of decisionmaking from educational performance to the avoidance of potential liability.

The Institutional Shape of Special Education

Here we examine three key program dimensions used by the federal government to define special education and to ensure that it is delivered in an acceptable manner. These policies

address the key statutory provisions of FAPE and LRE, education funding, and special education monitoring.

FAPE and LRE

The key IDEA mandates affecting instruction and student placement are FAPE (free appropriate public education) and LRE (least restrictive environment). FAPE addresses the elements of a student's education program, although LRE addresses the integration of disabled students into the general education system. Often, the two mandates embody contradictory impulses. Legal scholar Anne Dupre has observed, "The friction between 'appropriate' education and 'appropriate' integration has baffled the courts and led to a confusing array of opinions on inclusion."[7] While educators must attend to both considerations, in Virginia it appears that the balance is tipped in favor of LRE, even at the cost of effective education. An attorney who often represents parents of children with disabilities said, "[t]he intensity of the programs offered for students with mild disabilities fell after the push for more inclusion. Now we more often have to pursue formal action to get these students the services they need."

For students with less obvious disabilities, program appropriateness ought to take into account curricular demands on the student as well as the larger educational context of the school.

The most difficult aspect of FAPE involves the meaning of "appropriate," which is clearer for some disabilities than others. Few question the need for Braille tests for students who are blind or ramps for those with limited mobility. For students with less obvious disabilities, however, program appropriateness ought to take into account curricular demands on the student as well as the larger educational context of the school.

In Virginia, the nature of appropriate services has changed dramatically with the recent institution of the state's "Standards of Learning" and accompanying assessment program. Teachers, principals, schools, and entire districts are to be judged based upon the aggregate scores attained by their students on the new state tests. One Virginia professor recalled traveling to a district to conduct training on how to support students with disabilities in general education curricula. He was introduced to the faculty by a school administrator who announced, "If your scores do not rise every year, you will most likely lose your job." It is hardly surprising, given such pressures, that general education teachers are often wary of being held responsible for students with behavior difficulties and histories of low achievement.

Although the challenge of validating the appropriateness of a given student's educational program is daunting, it is overshadowed by the problems surrounding the LRE requirement. Few areas of special education are as controversial. Much effort is invested in determining the LRE for individual students, closely watched by a group of educators and advocates who call for "full inclusion" of disabled youngsters in regular education classes.

The IDEA signals that general education settings are preferred for students with disabilities because they are the least restrictive. Indeed, at first glance a general education class may seem to meet the requirements of LRE by affording maximum contact with other children. Yet programs

conducted in such settings may fail to deliver necessary treatments with sufficient frequency or intensity to meet the needs of individual students, at least without substantial alteration.[8] There is also evidence that students with mild disabilities fare better in more specialized settings.[9]

In Virginia, as a result of the push for "inclusion," many of the services formerly available to students with mild disabilities (such as resource rooms and partial-day special education) have been cut back or eliminated. Such programs frequently have been replaced by "collaborative" or "consultative" models, in which students with special needs are enrolled full-time in general education classrooms. One result has been that a continuum of placement options has been replaced with a starker choice between intensive (for example, self-contained) classes and limited services (for example, enrollment in general education programs). This shift has left both general and special education teachers with fewer ways to respond to the needs of students, which reduces their ability to make effective professional judgments about what works for children in their schools.

The current approach to FAPE and LRE fails to resolve the tension between maximizing achievement and maximizing integration.

This change has pushed students with mild disabilities out of specialized programs and into general education classrooms, even as research suggests that some of them would be better served by more intensive programs. One member of the Virginia State Special Education Advisory Committee (SSEAC) said,

> Here's my concern with the way that LRE is interpreted. I'm thinking of one private residential facility for students with behavioral disorders. It's one of the most effective facilities I have ever seen. However, school personnel report pressure to move students out of the facility due to IDEA's emphasis on children attending the school that they would attend if not handicapped. LRE requirements have sometimes been interpreted to suggest that a general education is always least restrictive. But every environment is restrictive of something, and this particular environment is restrictive of unacceptable behavior. The students I see in this school are learning and supporting pro-social behavior among themselves. Such a program is simply not possible in a general education setting.[10]

The current approach to FAPE and LRE fails to resolve the tension between maximizing achievement and maximizing integration, leaving these competing desiderata to be worked out by administrators, teachers, and parents without clear guidelines. Yet educators are blocked from using their professional judgment in weighing these two imperatives, and are subjected to administrative or judicial review and sanction if deemed to have proceeded in an inappropriate manner. In other words, district officials are granted an ambiguous autonomy and expected to make appropriate decisions, but are prevented from relying upon their professional determinations of efficiency and efficacy in reaching those decisions. The system is faintly redolent of a star chamber in which one is not sure the criteria to which one is being held.

Funding

One of most significant impacts of FAPE is on state education funding. Because Congress has

imbued disabled children with particular rights, the state is legally required to give budgetary priority to their needs. States are legally vulnerable to charges that they have failed to provide adequately for students with special needs, while parents of general education students cannot make similar claims. The consequence is that states have a difficult time making the case against the provision of even very expensive special education services, and tend to fund these by dipping into the pool that would otherwise fund general education.

Because the rights of a child with special needs are hard to delimit, tensions also characterize efforts to distribute resources fairly within the special-needs population. Consider a pilot program in Fairfax County that serves ten preschoolers with autism. The two-year-old program offers each child 30 hours per week of one-on-one home instruction at an annual cost of $30,000 apiece. Meanwhile, Fairfax spent $8,200 on the average pupil in 1999-2000. Researchers have found the autism program promising and suggest that it may generate substantial savings in the long-term. Yet, it raises obvious issues of allocative justice. These ten children are receiving resources that could provide for full-time music or art teachers in several elementary schools or for intensive reading tutoring for hundreds of children.

Because the rights of a child with special needs are hard to delimit, tensions also characterize efforts to distribute resources fairly within the special-needs population.

The program is costly enough that Fairfax County does not even offer it to all autistic preschoolers. At least 40 children who might benefit from the program are placed in more conventional programs. This decision has provoked heated complaints. Said one bitter parent, "They're ruining children and ruining families." Meanwhile, Fairfax officials report that the ten students were selected based on the severity of their autism or other clinical factors, and the superintendent has pointed out that expanding the program would require the system to forego other expenditures. Given limited resources, the pressing question for administrators is how to ration them.[11]

Recall earlier Figure 1 illustrating how special education costs were apportioned among federal, state, and local governments from 1992 to 1999. During this period, the federal share of funding was 8 percent to 9 percent and the state share ranged between 23 percent and 29 percent. Sixty-five percent, or nearly two-thirds, of total spending incurred on behalf of special education students was borne by local districts.

The federal government gave states about $1,045 per IDEA student in 1998-99. Even this modest figure overstates the actual extent of federal support to local districts because up to 25 percent of these dollars may be retained by states to help defray the costs of IDEA-mandated monitoring and enforcement. As one local administrator working on the state special education advisory committee argued, "Here we sit doing all this work mandated by the feds, and they can't even be bothered to pay the share that they think *they* owe us."

Given that special education students attract additional federal and state funding, one might wonder whether districts over-identify children as disabled in order to obtain state revenues or whether they over-identify students for services that are reimbursed by the state at a relatively

high dollar value. Two factors render such gamesmanship unlikely.

First, selectively identifying students for less costly services is no longer a viable strategy for resource-hungry districts, due to 1997 IDEA amendments requiring that states provide "placement neutral funding."[12] These changes mandated that states fund every special education student equally. Thus states are not to use funding plans that encourage one service delivery model (for instance, self-contained classes) over another (for instance, part-day programs). States are not permitted to give schools money on the basis of how much it costs to operate a particular program but must use a standard formula that funds all special education students equally. In promoting this change, reformers reasoned that schools would be more likely to place students in more restrictive—and costlier—programs if such students were funded more generously. The state wanted to discourage such activity because it would violate the IDEA's LRE rule. If anything, therefore, there is now a financial incentive for districts to identify special-needs students for less costly services such as resource rooms or consultative support.

Selectively identifying students for less costly services is no longer a viable strategy for resource-hungry districts, due to 1997 IDEA amendments requiring that states provide "placement neutral funding."

Second, although it is theoretically possible that Virginia districts over-identify low-cost special education students so as to reap additional federal and state largesse, the actual costs involved make such a strategy unlikely, even counterproductive. In 1998-99, the typical special education student cost a Virginia district about $6,200 more than the average general education student. Meanwhile, the maximum special education funding supplied by state and federal sources totaled about $4,100 per student. In other words, the typical special education student costs districts about $2,100 above and beyond the attached state and federal aid. Thus, districts generally lose money by identifying students as eligible for special education. As one district administrator said, "We want to offer these programs to as many children as possible, but we simply cannot afford to provide them to everyone. They just place a tremendous strain on our budget." In Virginia, at least, there is little to recommend over-identification as a money-making strategy.

Monitoring Special Education

In theory, federally inspired monitoring ensures that special education programs provide an appropriate education to all eligible students. In reality, the monitoring focuses more on procedural compliance than on either the appropriateness or effectiveness of the education being delivered. Given the lack of evidence that procedural compliance equates to more effective services, it is not clear that federal monitoring is effectively promoting quality special education. Moreover, such an emphasis undermines teacher professionalism by forcing educators to invest significant time in managing procedures and documenting processes, rather than on instruction.

OSEP's policy, adopted after the 1997 IDEA amendments, monitors states predominantly by requiring them to conduct self-studies. A key problem in this process is that the reporting requirements are both complex and vague. For example, the phrase "free appropriate public

education" sounds straightforward and easily implemented, but a closer look proves otherwise.

Assuming that "free" means no cost to the parents, interpreting this part is straightforward. But, what does "appropriate" mean? In order to define this term, one must first determine the goals of the education program and ask the question, "Appropriate for what?" The IDEA is silent on that point, meaning that this question must be revisited in the case of each student. OSEP plainly is unable to monitor the "appropriateness" of a given decision in the case of a particular child. Therefore, it winds up monitoring processes and procedures—for example, the way that the decision was made. In practice, the guidelines are daunting, elaborate, and time-consuming even for many special education professionals—let alone the parents and students they are intended to protect. As one state official commented, "Monitoring used to be a part of my job, now it's all I do. Running the monitoring program has become my whole job."

The phrase "free appropriate public education" sounds straightforward and easily implemented, but a closer look proves otherwise.

Virginia's SSEAC, which is supposed to identify critical issues and advise DOE on carrying out special education programs, scrapped its entire agenda for 2000-2001 in order to concentrate on the issue of program monitoring. The state DOE has had to add additional staff to handle these responsibilities.

In early January 2001, the SSEAC met to discuss the self-study that comprises the initial stage of Virginia's federal monitoring. At the beginning of the meeting, a facilitator asked each committee member why he or she had given up the time to attend this particular meeting. The most common response was to attain closure on the process. The facilitator pointed out that the federal monitoring process, being continuous, could never result in closure.

Reports were presented regarding programs for both school-aged and preschool children. Each report was several hundred pages long. After the meeting, several parent representatives remarked that they saw little connection between the activities conducted through the federal monitoring and discernible improvements in the educational services offered to their children. The best that can be said of the self-study is that it allows parents and special educators to voice their concerns. However, there is little reason to suspect that this unfocused airing of grievances is likely to produce substantive improvements in special education. More likely, because the state officials who led the self-study procedure were diverted from their responsibilities to monitor and support local education agencies (LEAs), the federal monitoring program is likely to result in decreased attention to the problems faced by disabled children, their families, and the schools that serve them.

The Practice of Special Education

In this section, we focus on the practical impact of special education policy in Virginia, especially the role of IEPs, school discipline, and the manner in which special education interacts with Virginia's emphasis on academic standards and accountability.

IEPs

As originally conceived, IEPs were to be a flexible tool for creating specialized programs responsive to student needs as well as parental and school concerns. However, Virginia practice emphasizes *pro forma* compliance with IEPs in order to protect educators from administrative and legal actions. A typical IEP form offers 45 boxes for committees to check off before they even begin to describe the student's own education program. Rather than a flexible pedagogical tool, the IEP is often a ritualized document. As one special education administrator said, "Of course, all of our special ed students have IEPs. But how relevant are [the IEPs] to what our teachers are doing on a day-to-day basis? Not very."

Parents are not alone in their dissatisfaction. Teachers often complain that IEPs do little but absorb time and repeat platitudes. One veteran teacher who moved to special education after more than 15 years of general education teaching remarked, "The IEPs for all of my students say the same thing. The 'current level of performance' indicates that they have 'processing disorders.' There is no indication of what kind of processing disorders or what that might mean in, say, an English or a math class. The accommodations are all about test-taking, and they pretty much all say the same thing. My training tells me that [this vagueness] is bad educational practice, but my department chair tells me that it is the way we do things. Lots of little boxes appear on the placement pages, and they have been appropriately checked, so the due process stuff is evident. But that doesn't help anyone teach."

IEPs have historically reflected a given student's particular instructional regimen, rather than providing a road map for helping that child accomplish the general education goals promulgated by the school or state.

IEPs have historically reflected a given student's particular instructional regimen, rather than providing a road map for helping that child accomplish the general education goals promulgated by the school or state. A result is that they are often written with little input from general education teachers and scant regard for the standards of general education programs. Conscientious teachers who make a good-faith effort to deal with these additional burdens often find themselves marginalized in the planning process and frustrated by the demands placed upon them.

Until 1997, the IDEA did not even require regular classroom teachers to be involved in the construction of a student's IEP. The result was that, in some districts, IEP teams would design programs that demonstrated scant awareness of classroom conditions and instructional realities. One teacher explained, "If I'm part of the team, I know exactly what I need to do. I know a child's weaknesses. If not, I'm shooting in the dark."[13]

The 1997 amendments required that general education teachers be included in IEP meetings and that IEPs yield "meaningful access to the general education curriculum." Unfortunately, both changes appear to hold only limited promise. So long as special education policy is driven by rights and legalisms, inserting general education teachers into IEP planning sessions is unlikely to produce significant changes in practice. As for "meaningful access to the general education curriculum," the phrase is so nebulous as to serve no real purpose, while creating yet one more

interpretive minefield for school personnel.

The trouble with most efforts to improve IEPs is that they fail to address the contradiction at the heart of the process. On the one hand, professional educators are charged with designing flexible programs that respond to the needs of each student with disabilities. On the other hand, these plans are devised and implemented in a context shaped by compliance-based rules and marked by legal peril. The result is that IEPs cease to be useful pedagogical tools.

As for "meaningful access to the general education curriculum," the phrase is so nebulous as to serve no real purpose, while creating yet one more interpretive minefield for school personnel.

Discipline Policy

The IDEA requires the development of distinct disciplinary policies for students with disabilities. Some of these distinctions make sense. It is unreasonable to discipline a wheelchair-bound student for failing to stand during the national anthem. The IDEA prevents schools from punishing students in such situations (although we see no evidence that Virginia schools, left to their own judgment, would engage in such practices). The IDEA requires a "zero reject" model that extends special education services to *all* students with disabilities. Under this logic, schools may not interrupt or withhold services for any such students save for infractions involving guns or possession of drugs. Such interruption of services has been deemed to violate the IDEA's procedural safeguards.[14] These requirements have little direct impact at the state level—the DOE simply passes the federal regulations through to LEAs that must take responsibility for compliance—but many district educators suggest that they present significant challenges at the district level.

IDEA regulation of discipline may serve a legitimate purpose. It is well established that students with disabilities are frequently "over-punished" for behavior infractions.[15] Many parents of children with disabilities report that their children feel singled out by school officials for behavior that rarely leads to sanctions for other students. One distraught mother said, "My son is sent to detention for things that I see other kids doing. He's in trouble almost every week." School officials acknowledge that her child was frequently disciplined. However, while other students occasionally break rules, they reported that the aforementioned student was constantly provoking conflicts due to his impulsiveness and poor social judgment. Although the school had no systematic plan for teaching social behavior, officials admitted that such an effort might be useful. The IDEA regulations seek to encourage such planning and instruction.

Unfortunately, the IDEA also has a number of undesirable disciplinary consequences. School officials must determine the extent to which an act of misbehavior results from a disability. Judgments regarding the motivation of a specific act have eluded philosophers and psychologists through the ages, yet are required by the IDEA. Such deliberations are bound to yield variable results, even as they consume substantial time. Effective disciplinary procedures require that acts and consequences be closely linked in time and consistent over time if they are to have the desired effect. The IDEA's procedural mandates make such practices doubly difficult when the child has any sort of disability.

The IDEA's requirements can work against the child's interests, too. Many educators report that schools are reluctant to identify or properly classify students with behavior disorders. One teacher explained, "Because the school thinks that it can discipline LD [learning disabled] kids but not SED [seriously emotionally disturbed] kids, we call everyone LD, no matter how serious their problems are." A high school principal reported that some peers "drag their heels" when it comes to referring students with behavior problems. The principal sympathized, noting, "Once a kid is identified as SED, you can't really get rid of him, no matter what he does."

Fair or not, there is a perception among school personnel that the IDEA simply blocks discipline for any student with an IEP. One elementary principal tells of a recent case where a student receiving speech and language intervention was caught with narcotics on school grounds. The principal said, "They...determined that the drug-holding was related to disability...that the student had low self-esteem rooted in his speech and language deficits, and that the student became involved in drug use in an effort to obtain peer approval." The principal continued, "Anybody that has a little bit of social difficulty can be said to be misbehaving as a result of that problem. Under this approach, such behavior has to be accepted in school, no matter how unacceptable in the community at large."

The disparity in disciplinary approaches gives rise to concerns about a double standard and the perception that special education students are a privileged class.

The disparity in disciplinary approaches gives rise to concerns about a double standard and the perception that special education students are a privileged class. The assistant principal of a large elementary school articulated this concern, saying, "The problem arises when you have a kid with a disability who does something to a kid with no disability. Parents outside of the special education system expect the school to administer the sanctions for things like fighting, to maintain the kind of order that they recall from their childhood. If the kid who beat their kid up is suspended, they are usually satisfied. The explanation that no suspension could be made because the kid had behavior problems doesn't carry much weight with most people and creates a terrible PR problem for us."

Despite the frequent voicing of such concerns, the IDEA constraints do not actually result in many disciplinary measures being challenged or overturned in Virginia. In 1998, for example, there were just 18 complaints and three hearing decisions relating to discipline. Still, the fear of such a challenge reportedly causes many teachers and administrators to shy away from punishing students with disabilities for infractions for which others would be disciplined. One district special education director explained, "IDEA's restrictions on discipline don't come up formally very much, but that's because everyone in the schools is bending over backwards to make sure they don't. The problem is that when we've got principals who are trying to maintain order in schools with big special education populations, they feel like they can't discipline those kids, and this means that the other kids are regularly seeing misbehavior go unpunished." The perception in Virginia that the IDEA creates a class of students licensed to "terrorize schools and teachers" undermines public trust in school safety and support for special education.

State Education Standards

Special education has had a significant effect on Virginia's push for educational standards. Virginia's SOLs are a high-stakes standards, testing, and accountability regime adopted to ensure that all students master a specified body of content and set of skills before graduating. Starting in 2004, students who fail to pass the specified exams will not receive a high school diploma.

Much special education practice draws heavily on the philosophy of progressive education, emphasizing notions of personal relevance more heavily than traditional academic skills and knowledge. However, this tradition clashes with today's emphasis on "core curricula."[16] The IDEA's ethos of individualized instruction is at odds with systems of standards-based accountability that seek to improve education by requiring all students to perform at a measurably high level on a specified set of objectives.

Much special education practice draws heavily on the philosophy of progressive education, emphasizing notions of personal relevance more heavily than traditional academic skills and knowledge.

In the past, this conflict was often accommodated by exempting special education students from standardized assessments. In the 1990s, however, special educators began to assert that such policies caused disabled students to be denied effective and equitable instruction. Consequently, the 1997 IDEA amendments mandated that students with disabilities be included in testing programs to the maximum feasible extent. As a result, students with special needs now participate in Virginia's SOL testing regime.

This change places schools and districts in an awkward position, as the state simultaneously asks them to raise test results and to include students who have shown historically poor performances on standardized assessments. The IDEA requires educators to take greater responsibility for the achievement of students with disabilities. However, the law can also encourage educators to look for loopholes to relax the standards for students who are unlikely to fare well on high-stakes assessments. An example of this tendency was the SSEAC recommendation in early 2000 that the state extend the category of "developmental disabilities" up to the federal maximum age of nine so that more students would be afforded special accommodations on the SOL tests. The nature of this request suggests the fundamental tension between special education provisions and the push toward high uniform standards.

Even with such accommodations, some students with disabilities will fail to perform at an acceptable level in a high-stakes-testing regime. Given the twin desires to maintain high standards and avoid creating insuperable barriers for students with special needs, Virginia policymakers have sought an array of accommodations and alternatives for such youngsters.

In lieu of a standard diploma, schools in Virginia are empowered to issue two other kinds of documents testifying that a student has completed an education program. A "certificate of attendance" is usually issued to individuals who have left the education system because they are no longer eligible for school services due to their age or because they chose to exit the system

before completing the requirements of any specific program. An "IEP diploma" is issued to students who have completed the educational requirements established by their own IEPs but are not eligible for a regular diploma. Some districts indicate in their printed high school graduation programs which type of document is being awarded to each student. This practice formally acknowledges the kind of academic differentiation and categorization that the IDEA mandates sought to eliminate.

Such problems are exacerbated by Virginia's emphasis on test-based validation of high school credits. Large numbers of students are expected to have trouble passing Virginia's high-stakes assessment. Many of these students have disabilities. For those unable to pass the SOL test, Virginia has proposed a new "basic diploma" for students who demonstrate basic competency in reading, writing, and math. The new diploma would represent more advanced accomplishment than the "IEP diploma," but it triggers two concerns. First, it may disadvantage special-needs students as they seek employment or continue their education. Second, it may create perverse incentives in which low-performing students or their families agitate for special education identification so that the student can receive a diploma without satisfying the requirements of the SOLs. This situation presents risks for both the individual student and the integrity of the educational system.

An "IEP diploma" is issued to students who have completed the educational requirements established by their own IEPs but are not eligible for a regular diploma.

A further approach adopted by Virginia is to alter the SOL test for some students. In general, two approaches are employed for addressing students with disabilities in standardized tests: the test "accommodations" and the use of different tests. Accommodations leave the target skills (for example, explaining the origins of the American Civil War) unaltered but change the "tool skills" (for example, presenting work orally rather than in a written essay). Extended time on tests is a frequent accommodation as well. For some students, however, the content of the test is clearly inappropriate. In such cases, alternative assessments or tests of different target skills are necessary.

Sometimes accommodations lead to questions of test reliability and validity. In order to understand the potential conflict, it is important to differentiate between changes that level the playing field but leave the target skill unaltered (accommodations) and changes that alter the skill in some way. For example, if the target skill were a discussion of three causes of the American Civil War, one could reasonably argue that either a written essay or an oral presentation could tap that information. However, if the target skill were writing an essay, then an oral presentation would clearly assess a different skill. Test accommodations, done properly, do not alter the essential parts of the test. Altering the essential parts of a test actually results in a different test.

Virginia has adopted a variety of SOL accommodations. Some produce scores that are still regarded as official but carry a notation that the student received a "nonstandard accommodation." One example is that the reading comprehension test can be read aloud to some students with disabilities. Although some "nonstandard" accommodations are minor,

listening to a text obviously does not measure the ability of a student to read that text. This poses real difficulties in terms of test validity and raises the possibility that families or schools might seek to identify students as having disabilities in order to help them pass the state test.

Under the IDEA, students with disabilities must be included in state or local accountability systems, yet some students with disabilities are being taught skills and/or content that are substantially different from what the assessments measure. Virginia has also developed an alternative assessment for such students. The 2000-2001 school year marks the first time that students with disabilities in Virginia may use the alternative assessment. This option is provided to students who (1) have an IEP, (2) demonstrate significant cognitive impairments and adaptive skills deficits, and (3) need extensive direct instruction and/or intervention in a variety of settings. Rather than the paper-pencil academic test administered to students in the standard curriculum, the alternative assessment will consist of a "Collection of Evidence" (COE) that measures student progress on IEP objectives by using a variety of indicators. Still, special educators anticipate that more than 90 percent of students in special education will take the standard SOL exams with appropriate accommodations.

Perhaps the central dilemma for states pursuing high-stakes accountability is how best to serve those students with mild disabilities who find attaining acceptable levels of performance a daunting challenge.

Perhaps the central dilemma for states pursuing high-stakes accountability is how best to serve those students with mild disabilities who find attaining acceptable levels of performance a daunting challenge. On the one hand, it is sensible to hold these students and their teachers to the same high level of expectations to which we hold others. On the other hand, these students may find assessments frustrating or insurmountable and may drop out of school altogether. This bifurcation is partly a function of the Virginia SOL's focus on academic preparation. Although this emphasis is understandable, it leads to de-emphasis of programs such as vocational education that can provide other forms of useful instruction and skill-based learning for students with mild or moderate disabilities.

Conclusion

Surveying the six dimensions of policy and practice in which special education poses significant challenges, we can see that the key problems have much in common. FAPE and LRE demand that educators abide by open-ended and ill-defined directives, even as the court-enforced right of a select group of children to "free and appropriate education" prohibits measured decisions regarding the allocation of resources. The monitoring of special education relies upon documentation and paper trails, requiring much time and effort and forcing educators to base program decisions upon procedures rather than determinations of efficiency or effectiveness. IEPs intended as flexible instruments of learning have evolved into written records of compliance with formal requirements. In the area of school discipline, protections afforded to special education students have caused educators to look askance upon these children and have made it more difficult to enforce clear and uniform standards in schools. And in jurisdictions such as Virginia,

which have moved to a standards-based curriculum and a results-based accountability system, the question arises of how to track the progress of disabled students and whether they will be treated as part of the reformed education system or (reminiscent of pre-IDEA discrimination) as a separate educational world.

Reformers have sought to tackle one or another of these issues in isolation, acting in the belief that incremental policy shifts could remedy the particular problem. For example, the 1997 IDEA reforms sought to emphasize outcomes by requiring schools to test all students and enhancing schools' ability to discipline disabled students who misbehave. Such efforts have not worked very well, however, because they fail to recognize that the enumerated problems are symptomatic of a deeper tension at the heart of the federal-state relationship.

In sum, special education policy today is unwieldy, exasperating, and ripe for rethinking. Congress has demanded that states and schools provide certain services, but it has refused to pay their costs. States are obliged to deliver special education, yet lack substantive control over its objectives and policy design and the nature and shape of its services. But Washington does not actually run the program, either. Instead it tells states, albeit in ambiguous terms, what they must do, no matter whether these requirements are in the best interests of children, schools, or the larger education enterprise. Whatever the cost of compliance, states and districts are obliged to pay it, regardless of the effect on other children, programs, and priorities. The result is a hybrid reminiscent of the "push-me, pull-you" that accompanied Dr. Doolittle in Hugh Lofting's legendary children's tales. Like that mythical two-headed creature, the special education system is constantly tugged in opposite directions. To compel state cooperation with its directives, Washington relies upon a rights-based regimen of mandated procedures and voluminous records, enforced by the specter of judicial power. Yet because states and districts end up paying most of the bill for special education, Congress is hesitant to order the provision of particular services or to demand specific results. The consequence is that educators must interpret vague federal directives while operating under the shadow of legal threat.

Special education policy today is unwieldy, exasperating, and ripe for rethinking.

Arguably, this produces the worst of two very different policy regimes. If special education were an outright federal program, like the National Park Service, the Weather Bureau, or Social Security, Washington would run it directly, in uniform fashion, with all bills being paid via Congressional appropriation. If it were a state program, Congress might contribute to its costs but states would determine how best to run it. Today, however, it is neither, and the result is not working very well.

There are two obvious solutions. The first is for Congress to pay for the special education services that it wishes to provide disabled children. The second is for Washington explicitly to decentralize special education, granting substantive authority to states, districts, and schools.

Either remedy, of course, would bring its own new problems. Full federal funding, for example, may encourage local overspending. Similarly, decentralization raises the likelihood that substantial variation will occur between states.

Yet these problems are likely to be less vexing than those we now face and apt to be more amenable to solution. The intergovernmental confusion would diminish. Those setting policy would be directly in charge of those delivering services. And a shift away from today's emphasis on rights and procedures will increase flexibility and foster innovations responsive to the distinctive needs of individual students, the judgments of expert educators, the preferences of parents, and the priorities of communities. This, we believe, would be good for children. And that, we believe, is the main point.

---

[1] See Margaret J. McLaughlin and Deborah A. Verstegen, "Increasing Regulatory Flexibility of Special Education Programs: Problems and Promising Strategies," *Exceptional Children* 64 (1998): 371-384.

[2] The quote is taken from the concluding remarks presented in the videotape *Regular Lives*, produced in 1987 by Syracuse University, Syracuse, New York.

[3] Section 504 of the Rehabilitation Act reads, "No otherwise qualified individual with disabilities...shall solely by reason of his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." A person with a disability is defined in Section 504 as: "Any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Major life activities, as defined in Section 504, include the following: "Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."

[4] See Mark Kelman and Gillian Lester, *Jumping the Queue: An Inquiry Into the Legal Treatment of Students with Learning Disabilities* (Cambridge, MA: Harvard University, 1997), 114; see ibid. at 37-42 for an overview of Section 504.

[5] In addition, informal complaints are frequently lodged with the Virginia Department of Education. Officials estimate that, in the typical school, there are about twice as many informal complaints as formal hearing requests. However, because the criteria for determining what constitutes an informal complaint are vague, and because Department record-keeping on such matters is uneven, a more systematic discussion of these complaints is not possible here. Department records do suggest that "frequent complainers" may be slightly more likely to lodge informal complaints than to file multiple due process requests.

[6] The other cases either stretched over more than one year or have not yet been resolved.

[7] Anne Dupre, "Disability, Deference, and the Integrity of the Academic Enterprise," *Georgia Law Review* 32 (1998): 394-473.

[8] For discussion, see Margaret Weiss and Frederick J. Brigham, "Co-teaching and the Model of Shared Responsibility: What Does the Research Support?" in *Advances in Learning and Behavioral Disabilities*, ed. T. E. Scruggs and M. A. Mastropieri (Greenwich, CT: JAI Press, 2000); and Naomi Zigmond and Janice M. Baker, "Is the Mainstream a More Appropriate Educational Setting for Randy? A Case Study of One Student with Learning Disabilities," *Learning Disabilities Research and Practice* 9 (1994): 108-117.

[9] See Beverly R. Guterman, "The Validity of Categorical Learning Disabilities Services: The Consumer's View," *Exceptional Children* 62 (1996): 111-124.

[10] A further irony: Students with sensory disabilities, physical disabilities, or mental retardation often respond less positively to more intensive special education services. In other words, children who we might suppose would be best-served by intensive special education programs instead benefit most from inclusion. Their needs are more easily managed in the general education environment. After all, children with sensory and physical disabilities are most often learning the same curriculum, only with modifications in presentation and accommodation. Meanwhile, it is vital for children with mental retardation to learn to manage social interactions. Obviously, one is better able to learn social skills when presented with more social opportunities. There is reason to question how including these students in general education classrooms may affect the learning of their peers, but that does not negate the point regarding how best to serve these populations.

[11] See Victoria Benning, "Fairfax Autism Program Ignites Battle Over Access," *Washington Post*, 30 June 2000, sec. A, p. 1.

[12] Prior to the 1997 amendments, most states took actual program costs into account when reimbursing districts. This, of course, raised its own set of problems, particularly the concern that districts might be more likely to place children in more intensive settings because of the associated increases in funding.

[13] "What IDEA Means to You," *Virginia Journal of Education* 91 (1998): 7-10.

[14] The courts have ruled that long-term suspensions and expulsions constitute *de facto* "changes of placement" and therefore require schools to abide by IDEA procedures related to program placement.

[15] See Gretchen Butera, Holly Klien, Lynn McMullen, and Brenda Wilson, "A Statewide Study of FAPE and School Discipline Policies," *The Journal of Special Education* 32 (1998): 108-114.

[16] See Diane Ravitch, *Left Back: A Century of Failed School Reforms* (New York: Simon & Schuster, 2000) (for a discussion of accountability); and E.D. Hirsch Jr., *The Schools We Need and Why We Don't Have Them* (New York: Doubleday, 1996) (for a discussion of the concept of a core curriculum).