
PLUGGING AN IMPORTANT HOLE IN AMERICA'S ECONOMIC DIKE:

*Preserving financial resources for a
troubled future by educating the disabled.*

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The Gestalt of humanity is indisputable. Nothing we do as a species exists in a vacuum and, one way or another, everything impacts everything else. As much as people attempt to segment the issues we all face into isolated “special interests,” the reality is that all topics of heated debate dovetail into each other, though often not very harmoniously, and there really is no such segmentation in the practical course of affairs. Such breaking of things into smaller pieces is a human artifice crafted to make day-to-day life more mentally digestible.

It is theoretically prudent of us to divide the problem-solving duties of our kind into manageable bites and delegate different responsibilities to different people. Unfortunately, this fuels the tendency to subdivide these varying areas of concern into “special interests,” which ends up subdividing our populace along political lines rather than necessarily organizing our collective efforts to preserve it.

It is out of this bizarre aspect of human nature that special education has become regarded by many as a relatively minor social concern worthy of the label “special interest” with which the average American fails to identify, much to the detriment of the nation’s economic survival and, thus, its continued ability to maintain itself among the other nations of the world. This is so woeful because the provision of a Free and Appropriate Public Education (FAPE) to all eligible children as promised by the Individuals with Disabilities Education Act (IDEA) is necessary in order to shore up our future work force and have as many people paying into the tax base as possible.

Eric Cohen gave excellent, though disturbing, information in June 2006’s *COMMENTARY* (“Why Have Children?”) that truly illustrates some important realities. Due to an averaged failure of our population overall to reproduce at replacement rate, the United States is “... heading toward a mass geriatric society, with more elderly dependents and fewer grown children to care for them or grandchildren to replace them.” He noted a 2004 study by the Rand Corporation, commissioned by the European Union, which determined that fewer workers combined with more retirees spells out a

fiscal crisis for the European welfare state, which Cohen finds strikingly similar to conditions in the United States.

Cohen goes on to state that such conditions create less innovative and entrepreneurial populations without the necessary consumer power to drive national economies. Taxing the young to support the old will make it less economically feasible for the young to produce families of their own, resulting in even greater increases in elderly dependents versus young taxpayers. Cohen's words were: "... a vicious cycle of economic stagnation, a graying of society on the way to decline or extinction."

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These predictions are based on measurable facts. This is where the issue of special education enters the picture with additional facts that have to be taken into consideration.

In October 2001, President George W. Bush created the Commission on Excellence in Special Education. The idea was to prepare for the reauthorization of the IDEA in 2004 in light of the aggressive promises made by the No Child Left Behind (NCLB) Act. Clearly, if America has decided not to leave *any* children behind, it has to include those children challenged by handicapping conditions.

The Commission determined that students with disabilities dropped out of school at twice the rate of their non-disabled peers; enrollment rates in higher education of those with disabilities were half those of their non-disabled peers; most public educators felt poorly prepared to work with students with disabilities; the number of children being served as having a Specific Learning Disability (SLD) had grown by 300% since 1976; of those identified as SLD, many were so identified simply because they had never been taught to read; and that minority children were over-represented in

some eligibility categories with African-American children being twice as likely to be identified as Mentally Retarded (MR) than white children and also more likely to be classified as Severely Emotionally Disturbed (SED).

Then we have the unprecedented increase in the rate of autism across America. With the national average now estimated at 1 in 144 births, there is also evidence to support that specific geographic locations have much higher incident rates leading researchers to examine the possibility of

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causative contaminants found in the immediate vicinities. The pervasive theory at the moment regarding the probable cause of autism is that there is likely a genetic predisposition or weakness that is triggered by some environmental element. Research continues to explore the connection between vaccines as well as substances commonly used to produce electronics and other household goods and the increase in autism rates.

Regardless of its cause or causes, autism is growing at an epidemic rate. Until we can find a way to stop it, it will continue to take more and more of the few children we are having.

Plus, 83 million Baby Boomers are approaching retirement. Based on data from the Social Security Administration and the U.S. Department of Labor, those over 50 currently have a combined annual income of almost \$2 trillion a year and control over \$7 trillion in wealth. This population represents over 50 percent of all discretionary spending in the United States and owns 77 percent of all financial assets in America. Entire markets are developing around recreational and leisure opportunities for these well financed older Americans who are still healthy enough to actually enjoy their retirement.

There are thousands of companies gearing up to sell them beautiful new retirement proper-

ties, handy gadgets for the home, and darling travel packages. Having worked hard all their lives, the Boomers will want to enjoy the fruits of their labors. Many will be youthful and well-financed enough at the beginning of their retirements to jump at the opportunity to spend their money on fun and comfort.

Many older Americans are enjoying the fact that medical science is keeping them healthier and alive longer. But, towards the end of their days, medical science is also preserving them in an infirmed state for a longer period of time before they finally expire. The costs of keeping them so preserved are hideously high – currently about \$6000 per month for the average home healthcare scenario; a bit more for nursing home care. According to the Employ Benefit Research Institute, a couple retiring today, both aged 65, who live to the average life expectancies will be expected to pay \$295,000 in health insurance premiums and out-of-pocket healthcare expenses between now and their ultimate demise. If they live to 95, they could need as much as \$550,000.

While Baby Boomers account for 77 percent of the nation's financial assets, the money isn't evenly distributed among this cohort. In 2002, over 20% of all single women in the United States over the age of 65 lived in poverty. Over 40% of all black and Hispanic single women 65 and older lived in poverty in 2002. Single elderly women now are all but guaranteed to be stripped of their financial resources as they age, being left with no choice but to access public assistance as they get older.

Low-income single women would have to save 25% of their annual incomes in order to fund their basic living expenses in retirement, which is impossible when you consider how little that would leave them to live on now. Even with public assistance, these women will not have all they need to survive when they become elderly.

Because many elderly single women never entered the work force, or least not to the same degree as their male counterparts, they did not personally amass the resources necessary to secure their futures. Those that cared for their husbands at private expense through a lengthy illness only

to be left widowed watched their nest eggs dwindle to nothing as they paid off medical bills for their ailing spouses, leaving nothing for themselves.

So, with the literal number of young people entering tomorrow's job market shrinking in general due to reduced birth rates, and an ever-growing body of elderly requiring public resources to sustain them, the impact of the number of our children who are unemployable by the time they reach adulthood bears serious significance for us all. The already troubling formula becomes even more top-heavy with dependent seniors accompanied by dependent handicapped young people, all sitting on the shoulders of a smaller work force that has been additionally reduced by those of its own numbers who are sitting on its shoulders.

According to the U.S. Department of Education, in 2004 there were 6,824,051 children served under the IDEA in America's schools. The President's Commission acknowledged that "... thousands of children are misidentified every year while many others are not identified early enough or at all." Ultimately, the Commission found that there was generally too much emphasis in the schools on procedural compliance at a bureaucratic level and not enough emphasis on the actual results being produced, namely the education of children with disabilities.

Personally, working as a special education advocate for over 15 years and going into local education agencies on behalf of children with special needs and their families, I've seen as little heed taken towards procedural compliance as towards ensuring that children with disabilities are adequately taught the things they need to know to function as independently as possible in adulthood. The procedural violations tend to result in substantive violations, though not always. And, my observations agree with the Commission in that just because an administrative process was followed, that doesn't mean an education agency's special education students have received a FAPE.

From an enforcement standpoint, though, it is virtually impossible to legally pursue improvements in the substance of a child's special education program via the available mechanisms unless there are technical, procedural violations of the law taking place. The Commission's recommenda-

tions have only trickled down to the level of administrative remedies in part, from what I've personally observed, and the system is still failing far too many of these children.

Specifically, the case law states that just because a procedural violation took place, unless parents can prove that it resulted in substantive harm to their children, it doesn't matter. It is at this point that the administrative hearing process and federal appeal courts have agreed with the Commission that the emphasis should not be placed on procedural violations but rather on whether there has been a substantive denial of a FAPE.

In California (at least), where I work as a lay advocate and paralegal to special education attorneys, what I'm seeing is that efforts to improve the substance of children's Individualized Education Plans (IEPs) largely fails at the administrative hearing level because we now have Administrative Law Judges with little to no background in special education – in accordance with the Commission's interesting recommendations to find hearing officers and mediators with backgrounds in settlement negotiations rather than special education, where making gross compromises for the purpose of ending a dispute takes priority over the magnitude of the issues at hand – and who, therefore, are not familiar enough with what is supposed to be educationally accomplished to render sound decisions or facilitate reasonable settlements.

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As a result, when teachers testify (accurately or not) that a child did experience *some* educational benefit, which was the previous standard prior to the new requirements imposed by NCLB and the 2004 reauthorization of IDEA, Administrative Law Judges are deciding that the schools met their duty to these children. And, I'm talking about children with above-average IQs who cannot read, write, or perform basic mathematical calculations due to their specific disabilities but who could oth-

erwise be taught these things with proper instruction.

In California, we are seeing more cases now going to federal appeal because of poor administrative hearing decisions, which only drives up the costs further. However, federal Judges are no more specifically knowledgeable of special education practices and special education law than the new body of Administrative Law Judges hearing these cases at the administrative level in the first place. The Supreme Court can't agree on whether or not parents can recover expert witness fees in due process, either, and has now made parents largely bear the burden of persuasion in hearing even though the schools hold all the evidence – which they frequently and conveniently fail to provide in full upon request in violation of the Family Education Records Privacy Act (FERPA), but which is also the parents' burden to prove. The entire system is a mess.

The Commission did listen to parents and acknowledged that parents don't have adequate recourse and feel like there is nothing they can do when the system fails them. In reality, the only method by which the provision of a FAPE under the IDEA can usually be enforced is if parents litigate against their public schools, in which case the offending education agencies must pay the parents' legal fees if the parents prevail. Though states are supposed to be monitoring their local schools, they actually don't, leaving litigation the only means by which parents can pursue a FAPE for their children. More often, these children simply pass through our schools unserved or inadequately served throughout their academic careers. It is a gross minority of parents who pursue their children's rights under the IDEA.

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Nonetheless, an entire industry has been created around special education litigation in which law firms representing the schools have much to gain by counseling their clients in such a way as to

keep them largely uninformed of their obligations and then bill them by the hour to bail them out when they get caught breaking the law by a persistent enough parent. In other instances, in an effort to avoid paying their lawyers for on-going consulting fees, school districts will fail to consult with their counsel to ensure that their practices are compliant only to have to call their attorneys to bail them out after getting caught breaking the law by a persistent enough parent. Either way, that's taxpayer dollars going to litigation expenses rather than the classroom.

That isn't to say that there aren't parents out there barking up the wrong tree and wasting judicial resources, but they are far out-numbered by the parents who won't file for hearing because they are intimidated by the process and/or can't afford a lawyer, and the parents who do work up the courage to pursue appropriate remedies only to be shot down by a dysfunctional judicial system. The judiciary constantly produces conflicting Court decisions as Judges attempt to interpret the vaguer language of the IDEA through lenses colored by their own personal perspectives and politics, the impact of which is being felt all the way down to the classroom.

As a lay advocate, I attempt to facilitate resolution before things go so far as to require litigation. Mostly, I'm successful at achieving a local resolution. But, it never ceases to amaze me how many public school administrators let their egos and personal agendas influence them to make million dollar decisions to push things towards litigation rather than admit they, or their departments, did something wrong.

What this means for Americans is tax dollars that should be spent in the classroom are, instead, being spent on lawyers. And, all the while almost 7 million of our youth (based on the 2004 numbers) are at extreme risk of failing to grow up to be tax-paying citizens. That's 12.83% of all the children in the United States between the ages of 5 and 18 in 2004. That's too large of a number to ignore. In fact, not only will a great many of these children not pay taxes, they will be dependent upon our public resources – the same public resources we intend to commit to our growing elderly population.

So, as the number of those elderly and infirmed increases, and the size of our workforce decreases due to reduced reproduction rates, we are also seeing a large number of young people with disabilities burden our welfare system when a great many of them could instead be funding it. Further, we have to take into account the number of young people with disabilities who, lacking an adequate education, manage to end up in the juvenile justice system and incarcerated as adults.

The Council for Exceptional Children notes that children with disabilities are over-represented in the juvenile justice system. It found that "... youth may be more vulnerable to involvement in the juvenile or criminal justice system when poorly developed reasoning ability, inappropriate affect, and inattention are misinterpreted by professionals as hostility, lack of cooperation, and other inappropriate responses." In essence, the symptoms of their disorders are often misinterpreted as willful acts of disobedience or malice for which poorly trained law enforcement officers and juvenile court Judges believe these children need to be punished. Unfortunately, punishing disabled children for manifesting their symptoms doesn't cure them of their handicapping conditions.

According to the National Center for Educational Statistics, in a 1992 National Assessment of Adult Literacy, it was determined that prison inmates had significantly reduced literacy rates and were more likely to be disabled than the non-incarcerated population. Inmates with learning disabilities performed far more poorly than non-incarcerated people with learning disabilities. Where only 3% of the general population sample reported having learning disabilities, 11% of the inmate population sample was found to have them.

White inmates outperformed black inmates, who outperformed Hispanic inmates, which is important when we consider Cohen's report that the only segment of our population reproducing at replacement rate is the Hispanic community. Hispanics are statistically more likely to live in poverty, meaning that a disproportionately large number of new births are taking place into low-income families. Blacks and Hispanics are also disproportionately represented in our prison populations, which resembles their disproportionate representation in special education. Children with disabilities are

more likely to come from poor families than not.

Academic failure in childhood sets up a cycle of low self-esteem and the development of self-fulfilling prophecy in which these youngsters come to believe that they don't fit into society. Without job and social skills to make them productive people, and with flawed thought processes that, unmitigated, can lead them to some very erroneous conclusions, these young people grow up to be the inmates of our growing prison system. A frighteningly huge number of them develop drug and alcohol problems.

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Sadly, at some point, many really do become lost causes who are not receptive to efforts to “reform” them and they remain dangerous to themselves and others for the rest of their lives. At that point, we have no choice but to incarcerate or institutionalize them – at public expense.

The economic horror is in the details. The more granular the examination, the more apparent are the short-comings of our public resources and our ineffectiveness so far at planning for our collective future as a nation. Americans place such a tremendous emphasis on individual independence and self-determination that we are not generally willing to acknowledge our interdependence among ourselves as a species. We are a life form and product of nature first and a nation of sentient individuals secondly. When our politics and personal agendas begin to threaten the survival of our species, we need to step back and examine the course we are taking and adjust accordingly.

A great many of today's children with disabilities have something to offer for tomorrow. Some of the most brilliant minds in history were learning disabled: Hans Christian Anderson and Alexander Graham Bell were both dyslexics. The economic reality is that it is far less costly to provide appropriate special education to children with disabilities than to provide for them – via welfare or prison – for the rest of their lives once they grow up.

With tomorrow being compromised by the inadvertent outcome of demographic shifts, we have to plug as many holes as possible to minimize the damage. As Cohen stated, “No matter what we do, some amount of short-term economic pain is almost inevitable.” It does us no good to plug some of the holes if one as big as the failure to aggressively provide special education services to our disabled children is left a gaping maw waiting to consume what little there is to feed it in a single gulp.

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