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Revisiting Congress' New IDEA in Special Education

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COMMENT: REVISITING CONGRESS' NEW IDEA IN SPECIAL EDUCATION

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I write in response to Christopher Dean Greenwood's article, "Congress' New IDEA in Special Education," appearing in the inaugural issue of BYU's Journal of Law and Education.[1] Although the author raises a legitimate question as to whether some of the costs associated with Part B of the Individuals with Disabilities Education Act (IDEA-B) are unduly burdensome to the public education system, the article itself does not illuminate the answer. Because the author misreports and apparently misunderstands some of the statutory requirements, his thesis is undermined.

My intent in this comment is to place Part B of the Individuals with Disabilities Education Act in a broader context than does Greenwood and to illuminate why his arguments are inadequate. I begin with a description setting forth the basic components of the statute—by way of expansion and clarification of Greenwood's brief overview. I then address the major problems with his article, as I see them.

I. STATUTORY BACKGROUND

Originally enacted in 1975 as Public Law 94-142 (the Education for All Handicapped Children Act),[2] IDEA-B requires states accepting federal funds under the statute to assure that a "free appropriate public education" is available to eligible students with disabilities.[3] As Greenwood notes, at the time of its passage many states continued to engage in a long-standing pattern of excluding students with disabilities, particularly intellectual and emotional disabilities, from the public school system. This discriminatory exclusion was in spite of the fact that these children were educable and in need of

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1. *B.Y.U. L. and Educ. J.*, Spring 1992, 49-73 (formerly *B.Y.U. J.L. and Educ.*).

2. P.L. 94-142 was Part B of the more-encompassing Education of the Handicapped Act (EHA). The 1990 Amendments to EHA renamed the entire statute the Individuals with Disabilities Education Act. It is Part B that was the subject of Greenwood's article and is the subject of this Comment.

3. *See* 20 U.S.C. § 1412(2)(B).

education services.[4] The statute is a remedial statute, intended to bring unserved or underserved students fully into the education system and to help states pay for the added costs of educating them.[5] It is a money grant to states conditioned on state acceptance of federal standards. In case the reader was confused, Greenwood's various references to the Education of the Handicapped Act, the Education for all Handicapped Children Act, and the IDEA are to the same basic special education statute, as amended over time. The regulations implementing the statute flesh out the standards for receipt of the federal money and are mandates, not "guidelines" as Greenwood frequently refers to them.

IDEA-B requires school districts to locate and identify all children within their jurisdiction who may be eligible for special education.[6] The federal regulations require that, prior to receipt of special education services, a student must receive a multidisciplinary evaluation for eligibility.[7] Eligible students must receive specially designed instruction directed by an individualized education program (IEP) that is meant to be developed and written jointly by school professionals and the parents.[8] The instruction and related services needed for these students to benefit from special education must be delivered "to the maximum extent appropriate" in settings with students who are not disabled.[9] Where appropriate education cannot be accomplished in a "mainstream" (regular school or regular class) setting, it may be provided in a segregated setting.[10]

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4. For background information about the educability of the children with disabilities who were being excluded from the public schools, *see* the landmark cases of *Mills v. Board of Educ. of the Dist. of Columbia*, 349 F. Supp. 866 (D.D.C. 1972) and *PARC v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

5. *See* 20 U.S.C. § 1400(b)(c).

6. 20 U.S.C. § 1412(2)(C).

7. 34 C.F.R. §300.532.

8. 20 U.S.C. § 1401(20); 34 C.F.R. § 300.344 and Appendix C.

9. 20 U.S.C. § 1412(a)(5).

10. *See* 34 C.F.R. § 300.550-552.

To protect students with disabilities[11] from arbitrary and ill-conceived school decision-making, parents are given a number of procedural rights to exercise on behalf of their children. Among them are the right to notification, written consent prior to initial evaluation and initial placement, access to their child's educational records, an independent educational evaluation under certain circumstances, participation in the development of the IEP, and the right to a hearing to contest proposed school actions with respect to identification, evaluation, placement, and delivery of a free appropriate public education.[12] Only when these procedural rights have failed to protect a child's educational rights will the due process hearing of which Greenwood speaks come into play.

II. GREENWOOD'S ARGUMENTS

Greenwood's major thesis seems to be that 1986 and 1990 amendments to IDEA-B, or judicial interpretation of them, have unduly burdened the public school system by: (1) increasing the numbers of students served and the difficulty of identifying them, (2) allowing injudicious awards of attorneys' fees to parents, (3) allowing awards of "monetary damages" against school districts failing to provide students with the mandated free appropriate public education, and (4) removing state immunity from suit. A secondary thesis appears to be that federal special education regulations are vague and difficult for educators to comprehend, thereby creating difficulty implementing them.

Greenwood's thesis that IDEA-B may create undue financial burden on schools is not the subject of my criticism; rather, it is the logic and documentation upon which his thesis depends. I will address each of the above points and indicate why, in my view, they are inadequately supported.

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11. The 1990 Amendments made an important shift in terminology, deleting all statutory references to "handicap" and substituting the term "disability." Advocates for students with disabilities had argued that the term disability was less stigmatizing than handicap. Moreover they successfully argued that the adjective form of the term disability (i.e., disabled) should not be used to characterize special education students. Therefore, the statute refers to "children with disabilities," not to disabled children, reflecting the view that persons with disabilities are ordinary persons first, whose disability is secondary to their personhood. The field of special education has adopted the statutory terminology.

12. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500-514.

A. Burdens on Teachers

Greenwood mistakenly asserts that in 1990 IDEA-B broadened "the scope of disabilities to include, among others, children with serious emotional disturbance, traumatic brain injury, and specific learning disabilities" (p. 59). Greenwood apparently is unaware that from its inception in 1975, IDEA-B included as eligible disabilities both specific learning disabilities and serious emotional disturbances—the first and fourth largest categories of eligible students.[13] And the 1990 addition of traumatic brain injury as a discrete disability category is not likely to increase teachers' workloads substantially. Instead it brings political visibility to brain injured students with learning problems who had previously been eligible for services under the label of "Specific Learning Disability."[14]

Additionally, Greenwood imprecisely concludes that "elusive conditions such as attention deficit disorder, hyperactivity, and impulsivity" are also newly covered disabilities under the category of "Other Health Impaired" (p. 59). This statement reveals a misunderstanding of the debate over whether to extend coverage to students with Attention Deficit Disorder and Attention Deficit/Hyperactivity Disorder (ADD/ADHD). First of all, hyperactivity and impulsivity are not conditions that alone make one eligible as a student with a health impairment. Instead they are merely components of

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13. Pub. L. No. 94-142, 89 Stat. 773 (1975) § 4(a) added specific learning disabilities to Section 602 of the Education of the Handicapped Act (EHA) (defining children with disabilities). Serious emotional disturbance had been included in the original EHA, Pub. L. No. 91-230, Sec. 602, 84 Stat. 175 (1970). The Twelfth Annual Report to Congress on the Implementation of the EHA (1990, p. A-50) estimated that 5 percent of school-age students were served as learning disabled during the 1988-89 school year, and 1 percent of students as seriously emotionally disturbed.

14. 34 C.F.R. §300.5(9) (1984). Greenwood did not address the problem of identifying and serving students with traumatic brain injuries. Although these children could be served in the past as learning disabled, advocates asserted that the numbers of students with TBI had increased to the point that their erratic, puzzling, and unpredictable neurological behaviors demanded recognition as a separate category. To the extent that schools can less easily ignore the very real and unusual needs of children with TBI, they may identify more of them than before. Whether, or by how much, the numbers will escalate remains to be seen.

Autism was the other disability given separate status in the 1990 Amendments. The workload implications are negligible because students with autism had been served for years under the category of "Other Health Impaired." *See* 34 C.F.R. § 330.5(7) (1984).

ADHD, as is distractibility.[15] Second, ADD/ADHD was specifically excluded as a new disability category in the 1990 Amendments. In a memo explaining the denial of coverage, federal officials noted that students with ADD/ADHD could be eligible for IDEA-B coverage if, in addition to ADD, they had a covered disability such as a learning disability, or a health impairment that produced a severe enough reduction in alertness so as to require special education services.[16] Such a determination would have to be made on a case by case basis. Although it is possible that IDEA-B coverage may be extended to some previously excluded ADD/ADHD students as a result of the federal memo, it is more likely that regular education classrooms will be expected to make the necessary modifications to meet the educational needs of these students. In any event, the cap of 12% on the number of students toward whose excess costs the federal government will contribute has remained the same since 1975.[17]

Greenwood notes the serious shortage of special education teachers in this country and the stretched public school budgets. These are realities that have plagued special education for years. The refusal to create a new category of ADD/ADHD students to be served under IDEA-B was, in part, a response to this reality. The problem is serious but more a reflection of the failure to allocate resources to education than of recent federal expansion of eligibility categories. Greenwood's argument that the 1990 Amendments increased the number of disabled children, thereby increasing teacher workloads and "aggravating deficiencies" (p. 59) is a flawed one.

Greenwood accurately notes the technical nature of government regulations. The suggestion, however, that the federal regulations implementing IDEA-B are inaccessible and largely incomprehensible to teachers and administrators (p. 60) is an overstatement. The federal regulations have been in place since 1977, with occasional revisions since. Each state's special education rules must parallel and reflect the federal regulations, and special education administrators are required to be thoroughly grounded in the state rules. Furthermore,

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15. *See, e.g.*, Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), 1987. Basically, ADD simply refers to the presence of various symptoms of distractibility (inattentiveness) and impulsivity without hyperactivity. ADHD adds the hyperactivity symptoms.

16. 18 IDELR 116 (OSERS, OSEP, OCR 1991).

17. *See* 20 U.S.C. § 1411(a)(5)(A).

every special education teacher should either possess or have ready access to a personal copy of the state rules, even if they do not have a personal copy of the federal regulations. Access should not be an issue. As for their "legalese" (p. 60) (a problem common to all federal regulations), the reformatting of the regulations in the state rules does much to facilitate their readability. In my experience, to the extent that special educators do not understand their basic legal obligations under state and federal law, it is usually a failure of pre-service and in-service training rather than the "legalese" of the rules.

To illustrate his belief that the regulations are difficult to interpret, Greenwood quotes the definition of serious emotional disturbance (SED), and then inexplicably equates ADD with SED (p. 61). The two are not and have never been synonymous. Attention deficit disorder, as already mentioned, has its own set of characteristics and is not even a special education disability, while serious emotional disturbance is a long standing one. Greenwood accurately notes the difficulty distinguishing social maladjustment from some of the characteristics of what he calls ADD but what is in actuality serious emotional disturbance. He complains that the "average teacher cannot reasonably be expected to discriminate among her students so as to make any sure determination of disability without the aid of a trained professional" (p. 61). This latter statement is correct, but it is not clear why he complains about it. It would be inappropriate and improper for a regular educator to decide alone that a student has a disability. The implications of disability status are serious for the student, involving potential stigma and treatment that in many instances isolates the student from peers. Classification as disabled should be made ONLY with the aid of trained personnel. And although at times it is difficult for trained personnel to be certain whether a student is socially maladjusted rather than seriously emotionally disturbed, Greenwood's conclusion that professional determinations may be "ad hoc, given the over-inclusive and vague definitions [of serious emotional disturbance]" (p. 62) is speculative. Given the exclusion of ADD and social maladjustment from the definition, it is unclear why the definition is over-inclusive. Furthermore, his conclusion ignores the extensive requirements for

multidisciplinary, nondiscriminatory, multi-faceted eligibility procedures.[18]

When Greenwood discusses the IEP, he again demonstrates his lack of understanding of IDEA-B. His most serious error is to state that "all discussions and suggestions among professional educators and administrators regarding the child, along with parent-teacher conferences or other formal and informal proceedings, must be recorded in the IEP" (p. 62). The implication is that the IEP is an unwieldy and bulky record of numerous meetings. Instead, it is a short document developed at an IEP meeting. It includes the student's current levels of performance, annual goals and objectives, amount of regular and special education and related support services, and criteria for measuring progress toward the attainment of the specified objectives. In Utah, for instance, most IEPs are one to two pages in length. Although proper development of an IEP can take time, the process at its best brings the key players (parents, teachers, support personnel, sometimes the student) together to design a program that meets the unique needs of a given student.

Although the high expectations of IDEA-B, coupled with relatively modest federal financial support for state and local funding efforts, make it vulnerable to legitimate criticism, Greenwood's criticisms are not well bolstered. His inaccuracies do not help him make his case that the burdens on teachers are increasing.

B. Administrative Hearing Costs

When a conflict arises between the home and the school over the identification, evaluation, placement, or provision of a free appropriate public education, either the school or the parent may seek resolution of the conflict at an impartial, administrative hearing.[19] Greenwood does not inform the reader that the hearing mechanism was inserted in the statute to avoid the need for long, drawn-out litigation. Congress hoped that it would save money and emotional trauma for all concerned. Nonetheless, Greenwood is quite correct in pointing out that most of the costs of these hearings must be paid for by education agencies. In fact, their usefulness has not met

18. *See* 34 C.F.R. §§ 300.530-542.
19. 20 U.S.C. § 1415(b)(1)(E) & (b)(2); 34 C.F.R. §300.506.

original expectations, and their costs—in time, money, and emotional strain—have proved to be a significant burden to both parties to the dispute.[20]

C. Remedies for Noncompliance with IDEA-B

Greenwood is careless in referring to the remedies for noncompliance with IDEA-B as "damage" remedies (pages 50, 66, 71, 72, 73), while elsewhere (p. 64) referring to the remedies as "the practical equivalent" of damages. As of yet, no compensatory damages for pain and suffering have been awarded under the statute. As Greenwood observes, where an education agency has failed to provide a free appropriate public education, the courts have awarded two types of relief that bring increased financial burdens for the education agency: (1) tuition reimbursement for parents who have withdrawn their children from inappropriate programs and placed them properly in private school, and (2) compensatory education (usually education extending past the mandatory school age) for children whose parents did not withdraw them from public school but who were denied appropriate education for significant periods of time. Although these remedies do indeed result in financial cost to the districts, the courts typically are careful to distinguish them from "damage awards" and to characterize them instead as a means of requiring an education agency to provide the instruction it should have been providing all along. In fact, the courts make a point of stating that they are not awarding "damages" for the school's omissions.[21]

Earlier in the article Greenwood describes as remedies "injunctions such as a stay of educational placement during administrative proceedings, or a reimbursement of private tuition while the proceedings are pending" (p. 58). Both examples mislead the reader. First, although injunctions

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20. *See, e.g.*, Steven S. Goldberg, *The Failure of Legalization in Education: Alternative Dispute Resolution and the Education for all Handicapped Children Act of 1975*, 18 JOURNAL OF LAW AND EDUCATION 441 (1989).

21. *See, e.g., Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-71 (1985) (tuition reimbursement is not "damages" but "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP"). *See also Waterman v. Marquette-Alger Intermed. School Dist.*, 739 F. Supp. 361 (W.D. Mich. 1990) (monetary damages not recoverable under EHA); *Puffer v. Raynolds*, 761 F. Supp. 838, 853 (D.Mass. 1988) (request for monetary damages denied; remedial education instead will correct any damage done).

against the school district are indeed a common form of relief, a "stay of educational placement" is not an injunction. What Greenwood is referring to is the fact that IDEA-B includes a so-called "stay-put provision," requiring a child to remain in the current educational placement pending the outcome of administrative proceedings.[22] An injunction is not necessary to invoke the stay-put provision. In fact, the opposite is true; the stay-put provision applies UNLESS a school district can get an injunction to remove a student from the current placement without the need for parental permission or an administrative hearing decision.[23] Second, reimbursement is not available while proceedings are pending. Greenwood is alluding to the fact that, although the stay-put provision applies to school districts, it does not prevent parents from placing their child unilaterally in a private placement pending the outcome of the proceedings. The parents, however, do not have a right to reimbursement "while the proceedings are pending"; rather parents may be reimbursed only if the OUTCOME of the proceedings is a determination that the education agency was denying the student a free, appropriate public education and the parental placement was proper.[24]

D. Attorneys' Fee Awards

Greenwood is not alone in his concern about the 1986 Amendment to IDEA-B making reasonable attorneys' fees available to parents who prevail in administrative hearings or in court; other critics have questioned the wisdom of allowing prevailing parents to be reimbursed by school districts for their attorneys' fees. His language is inflammatory, however, because he concludes—without adequate documentation—that courts can make an education agency pay for trivial, "de minimis" results favoring the parent and for an "inadvertent procedural flaw or delay" (p. 67). The U.S. Supreme Court standard for determining that a party has prevailed is that a significant or material change in the party's legal status is a result of the proceeding,[25] not exactly a "de minimis" result.

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22. 20 U.S.C. § 1415(e)(3).

23. *See Honig v. Doe*, 484 U.S. 305 (1988).

24. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359 (1985).

25. *See, e.g., Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("where

And after more than fifteen years' experience with the statute, education agencies are not in a good position to reasonably argue that their procedural flaws or delays are inadvertent.[26]

E. Abrogation of State Immunity

Of special concern to Greenwood is the fact that the 1990 Amendments clarified that IDEA abrogates state immunity from suit under the Eleventh Amendment. He asserts, imprecisely, that "the Eleventh Amendment has long prevented suits against states for money damages where such awards were to be paid from public funds in the treasury" (p. 68). In actuality, the Eleventh Amendment prevents suits IN FEDERAL COURT against states but has never prevented such suits in state court.[27] Perhaps his misstatement is simply careless, because in other parts of his article, he appears to acknowledge the correct standard; in any event, his imprecision creates a problem for the reader.

Similarly, Greenwood errs in stating that *Dellmuth v. Muth* evidences that the Supreme Court "did not believe Congress intended to grant an enforceable right to education to children with handicaps . . . " (p. 69). It is absolutely clear under the initial version of IDEA-B in 1975 and all its amended versions that Congress granted an enforceable private right of action to children with disabilities.[28] For fifteen years, aggrieved students have been suing education agencies in both state and federal court for violation of the statute. What was

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the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained").

26. Moreover, courts in general distinguish between harmless procedural errors that do not deprive students of significant rights (e.g. oral notice of desired changes in IEP instead of written notice), and serious procedural errors (failure to notify parents of their legal rights, failure to involve them in the development of the IEP) that have the effect of denying their child the right to a free appropriate public education. Only the latter will affect the outcome of the case and the determination of whether the parent was a prevailing party.

27. The text of the Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." For over a hundred years, the Amendment has been construed judicially to also preclude suit in federal court against a state by citizens of that same state. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

28. 20 U.S.C. § 1415(e)(2) has continuously provided that "any party aggrieved by the findings and decision [of the final administrative hearing] shall have the right to bring a civil action with respect to the complaint presented . . . ."

not clear at first was whether the remedies extended to financial awards (in contrast to injunctions and declaratory relief). The answer with respect to local education agencies was settled in the affirmative by the Supreme Court's decision in *Burlington School Committee v. Massachusetts Department of Education*.[29] Several years later, the Supreme Court in *Dellmuth v. Muth*[30] concluded that, absent an unequivocal pronouncement in the text of IDEA that state education agencies accepting federal money under IDEA-B waived their immunity from suit in federal court, state immunity was not waived. The decision had no applicability to local education agencies. Fast on the heels of this decision, Congress explicitly established its unequivocal intent to waive state immunity.[31]

The primary rationale for abrogating immunity is found in older IDEA-B language charging the state education agency with the responsibility for assuring that other governmental agencies meet their obligations under the statute;[32] in other words, the state education agency is the entity intended to be held accountable when a local school district defaults. Another situation leading to a need to sue the state is when a state-operated program, such as a state school for the deaf, itself is allegedly denying appropriate special education services to a student. The number of local and intermediate education agencies defaulting on their financial obligations under IDEA-B has not been high to date, and suits for financial awards against ANY education agency, whether state or local, constitute a minority of suits against education agencies under IDEA-B.[33]

Finally, Greenwood asserts that abrogation of state immunity may have the effect of making each state's immunity statute "determinative of a state agency's liability under the

29. 471 U.S. 359 (1985).
30. 491 U.S. 223 (1989).
31. 20 U.S.C. § 1403(a)-(b).
32. 20 U.S.C. §1412(6); *see also* 20 U.S.C. § 1414(d).
33. Suits for or against various changes in evaluation, placement, and programming constitute a larger group of cases. Of course, decisions in these kinds of disputes also can have significant financial implications, e.g., the cost of expensive related services needed to enable a student to benefit from special education. The most expensive related service is the cost of the non-medical care (including board and room) in a residential facility, in the rare situation when a student needs such a facility to receive a free appropriate public education. *See* Dixie S. Huefner, *Special Education Residential Placements under the Education for All Handicapped Children Act*, 18 JOURNAL OF LAW AND EDUCATION 411 (1989).

IDEA" (p. 70). This is an erroneous conclusion and one that contradicts his own recognition on the previous page that federal law is supreme over conflicting state law. The 1990 IDEA-B amendment abrogating state immunity from suit in federal court also states (and Greenwood quotes it on p. 69) that remedies against a state are available "to the same extent as such remedies are available . . . against any public entity other than a State."[34] In effect, this provision abrogates state sovereign immunity statutes, making them irrelevant in either federal or state court, since state courts must enforce the provisions of overriding federal law.

III. CONCLUSION

The dominant question Greenwood intended to raise appears to be whether the costs of tuition reimbursement, compensatory education, administrative hearings, and attorneys' fees are so disproportionate to the benefits achieved as to deserve a radical rethinking. Although many school districts insure themselves against the costs of the parents' attorney's fees, hearing costs and financial awards typically must be paid for out of special education budgets and in a sense are "robbing from Peter to pay Paul." Greenwood's question is a legitimate one. Without a great deal of empirical data, however, we are not in a position to ascertain whether the hearing costs and the investment in the small numbers of students receiving compensatory education and tuition reimbursements are helping or harming special education (and, by extension, regular education) in the long run. Among questions that deserve to be investigated but are not addressed in Greenwood's article are the following:

1. How many awards of compensatory education and tuition reimbursement have been made since 1978 (when IDEA-B standards became enforceable in court) against local school districts? Against state education agencies? What percent of the special education population does this represent?

2. What has been the actual financial cost to education agencies of these awards? What services to other special education students have been cut as a result of these costs?

3. Is there evidence that awards of compensatory education and tuition reimbursement have declined with time in the

34. 20 U.S.C. §1403(b).

affected school districts? In other words, is there evidence that these remedies may be having the beneficial effect of reducing the extent of a school district's noncompliance with IDEA-B?

4. What is the cost to education agencies of awarding attorneys' fees? Will insurance companies continue to protect education agencies against this kind of liability?

5. What percent of the special education population seeks an administrative hearing in any given year? Does the hearing save money in the long run if it assures that special education students receive an appropriate education that will increase their self-sufficiency and independence after they leave school? In other words, is it a cost-effective investment for society?

6. Would a cap on the amount of reimbursement that education agencies could pay for court-approved private placements better balance the needs of all special education students?

7. Are there data suggesting that regular education is being harmed by the relief being awarded by courts to ensure that education agencies comply with IDEA-B?

Greenwood reveals his conclusion in his introduction when he states that federal legislation "directs exceptional attention to a single class of children at the expense of the majority" (p. 50). He reiterates that viewpoint in his final sentence. Neither his scholarship, his understanding of school finance, nor his representation of the federal special education statute creates confidence in his conclusion. Although there is genuine reason for concern about the financial costs of noncompliance with IDEA-B, the Greenwood article does not contribute to our understanding of whether the costs are excessive or of who may be more hurt by these costs—special education students or regular education students.