

SPECIAL CONTRIBUTION

THE IMPACT OF THE SPECIAL EDUCATION SYSTEM ON THE BLACK–WHITE ACHIEVEMENT GAP: SIGNS OF HOPE FOR A UNIFIED SYSTEM OF EDUCATION

*Marcia C. Arceneaux, J.D., Ph.D.**

A Personal Reflection on Forty Years in The Field

EDITOR’S NOTE:

In this installment, the Loyola Law Review is proud to publish the personal and legal insights of Dr. Marcia Arceneaux, gathered from over forty years in the special education field. In this Article Dr. Arceneaux first examines, from an eyewitness point of view, past models in special education and their subsequent exacerbation of related civil rights issues. She then turns toward what she sees as a more hopeful future, reviewing recent federal initiatives and their impact in a case-study of post-Katrina New Orleans. Finally, she concludes with words of wisdom to those who would take up the banner of improving education for all students.

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* Marcia C. Arceneaux, J.D., Ph.D. has worked in the area of special education since 1971. Today she works as an IDEA consultant and as a contract attorney for South Louisiana Legal Services (Child in Need of Care). Special education continues to be a passion. While also discussing the broader legal aspects of federal actions, it is important to note that this Article is written from a practitioner’s point of view. In particular, experience as the IDEA Compliance Consultant in the Recovery School District of New Orleans (Post-Katrina: 1/2008-8/2011) has provided a unique perspective on the evolution of special education in this new era of national/state educational reform.

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I. INTRODUCTION

Since December of 1971, I have had the extreme good fortune of being involved in an amazing evolution: the system of special education. Although based on factual occurrences that are clearly documented in the educational and legal literature, this paper is in many ways my life story. This is a story that documents the evolution of a well-intended federal program, designed to provide a quality education to students with disabilities. However, not all students benefitted from the early phases of this program. At the end of the twentieth century, after three decades of implementation, the data clearly reflected a sobering fact—staggering disproportionality and over-representation of African-American students in an increasingly separate and stigmatizing system of special education.¹ The black–white achievement gap existed, and the outcomes of widespread approaches to education,

1. ELIZABETH B. KOZLESKI & SHELLEY ZION, U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION PROGRAMS, PREVENTING DISPROPORTIONALITY BY STRENGTHENING DISTRICT POLICIES AND PROCEDURES – AN ASSESSMENT AND STRATEGIC PLANNING PROCESS 2-5 (2006), *available at* http://www.nccrest.org/PDFs/district_rubric.pdf.

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such as the “Wait to Fail Model,” perpetuated this inequity.² Those of us who were honored to serve this population of students could clearly see the issue of civil rights; yet, special education was all that we knew. The racial disparity in the special education population seemed destined to persist—until now!

So, what is different today? In my opinion, there is a unified system of education that has emerged from the dynamic attempts to close the achievement gap. The civil rights issue of disproportionality was a fundamental catalyst in the reauthorized, consolidated federal acts and initiatives of the twenty-first century.³ The No Child Left Behind Act (NCLB),⁴ The President’s Commission on Excellence in Special Education, and the Individuals with Disabilities Improvement Act (IDEA)⁵ generated unprecedented initiatives for *all* students, grounded in: (1) scientific research-based curricula/instruction, (2) early intervening services (EIS), (3) response to intervention (RTI) processes with progress monitoring, and (4) data driven decision-making procedures.⁶ I firmly believe that as we continue to implement these modern initiatives with focus and fidelity, the

2. See Kimberly Guerin, Minority Student Achievement Network, Response to Intervention: Improving Student Achievement While Addressing Disproportionality, PowerPoint Presentation to Paradise Valley Unified Sch. Dist., Slides 3, 16, 22 (Mar. 2013), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fmsan.wceruw.org%2Fconferences%2Fminiconferencedocs%2F2013%2FMSAN%2520Breakout%2520H.pptx&ei=cM_FUb-PMozg8wT_gIGQCw&usg=AFQjCNFivsPvkHOgza6MGZpUesCTc8xnGQ&sig2=80sIhMofNc0KaXhJHBdXlg&bvm=bv.48293060,d.eWU.

3. See Carol Bergquist, *Literature Review*, in DISPROPORTIONATE REPRESENTATION OF MINORITY CHILDREN IN SPECIAL EDUCATION 1-4 (of Literature Review) (Charles Johnson et al., PUB. POLICY RESEARCH INST.), available at <http://ritter.tea.state.tx.us/special.ed/pubs/pdf/disprop.pdf>.

4. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) [hereinafter NCLB].

5. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1450 (2008)). Although the IDEA was renamed as the Individuals with Disabilities Education Improvement Act in 2004 (IDEIA), and is occasionally referred to as “IDEIA, 2004,” the acronym, IDEA, is still commonly used when discussing the statute. See Dean Traylor, *The difference between special education laws, IDEA and IDEIA*, HELIUM 1-2 (Sept. 26, 2012), <http://www.helium.com/items/2375821-comparing-ideia-with-idea> (acknowledging the name change in the statute and providing a comparison between the two statutes).

6. See generally Mary Beth Klotz & Andrea Carter, *Response to Intervention (RTI): A Primer for Parents*, NAT’L ASSOC. OF SCH. PSYCHOLOGISTS (2007), www.nasponline.org/resources/factsheets/rtiprimer.aspx (discussing the components, benefits, and the role RTI plays in special education).

black–white achievement gap will be closed as well as the correlated regular–special education achievement gap.

No longer is there an excuse for the separate and stigmatizing system of special education that challenges the fundamental principles of *Brown v. Board of Education* to continue.⁷ More recent federal initiatives, discussed below, have opened up the opportunity for a genuinely unified system of education that provides for the needs of all of America’s children with excellence, equity, and dignity, while continuing to fully provide the services and safeguards of federal and state law. Although many educators clearly acknowledge “one system” as something for which to strive, we still refer to students and programs as general or special. Without a genuinely unified system—meaning one with “No Stigma Language and Philosophy”—I fear that past discriminatory practices will continue to foster the ongoing achievement gap⁸ in our nation. Such neglect would be inexcusable.

II. THE BLACK–WHITE ACHIEVEMENT GAP: HAS THE SYSTEM OF SPECIAL EDUCATION BECOME AN ISSUE OF EQUITY AND CIVIL RIGHTS?

Is there a black–white achievement gap in America today? And will closing the gap be the greatest civil rights issue of our time? Former United States Secretary of Education, Rod Paige, certainly believes this to be the case and has recently published a research-based book, along with Dr. Elaine Witty, on this very topic.⁹ The authors detail the origins of the African-American struggle from slavery to racial equality with great insight and document the current status of this population in our educational system, including the ongoing existence of the black–white achievement gap.¹⁰

Many plausible reasons for this gap have been suggested; however, I believe that there is one major contributor to this civil rights issue that is missing from the mainstream discussion: the role of the system of special education. With a clear

7. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

8. The “achievement gap” referenced includes the black–white achievement gap and the regular–special education achievement gap.

9. ROD PAIGE & ELAINE WITTY, *THE BLACK-WHITE ACHIEVEMENT GAP: WHY CLOSING IT IS THE GREATEST CIVIL RIGHTS ISSUE OF OUR TIME* (2010).

10. *Id.*

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understanding of the dynamic evolution of this separate and often stigmatizing system, and the federal actions that followed, those leaders that are urgently called to action by Secretary Paige will be better prepared for the difficult job ahead.

Although not an African-American, I qualify as a leader in this endeavor to close the achievement gap according to Walters' and Smith's definition: "[African-American] leadership is not limited to [African-Americans,] but may and indeed does include Whites."¹¹ An additional descriptor served as the inspiration for this paper: "[L]eadership identifies and confronts barriers to African-American advancement [and] . . . acts with a moral purpose."¹²

Based on extensive research-based literature and nearly forty years of experience within the area of special education, I am certain that this system was, and continues to be, a major barrier to the advancement of African-American students who are deemed "at risk," particularly in urban districts. There is no doubt that socioeconomic factors have had a major impact on the black-white achievement gap;¹³ however, decades of educational deprivation with a genesis in the Wait to Fail Model¹⁴ of special education compounded the situation. In my opinion, with the recent federal initiatives and state-implemented consolidated program support, we now have the ability to provide the high-quality education that all children deserve in a unified system of education. However, capacity does not ensure success. Powerful leadership, without intervening political agendas, is crucial.

This paper will likely generate both strong emotions and rational debates on the necessity of special education as a placement for students with disabilities. Many parents and educators will naturally fear that a unified system would not be capable of providing the specialized instruction and services needed for identified students. However, after several decades of attempts to improve student performance and outcomes, and to merge systems of education, certain facts remain. For "at-risk" students with a high-incidence exceptionality (i.e., mild mental

11. RONALD W. WALTERS & ROBERT C. SMITH, *AFRICAN AMERICAN LEADERSHIP* 8 (1999).

12. PAIGE & WITTY, *supra* note 9, at 120-21.

13. See Mano Singham, *The Canary in the Mine*, 80 PHI DELTA KAPPAN 9, 10 (1998).

14. See *infra* note 19.

disability or emotional disturbance), the label and membership in special education is stigmatizing and detrimental to academic and social advancement.¹⁵ Anecdotally, as an IDEA attorney and educator, I have seen many school districts continue to separate students with more significant disabilities from their age-appropriate peers—in theory and practice—simply due to a lack of knowledge and understanding of each student’s unique abilities, dignity, and worth.

III. THE SYSTEM OF SPECIAL EDUCATION EXPERIENCE: WAS IT A MAJOR CATALYST FOR THE “BLACK–WHITE ACHIEVEMENT GAP”? (1970-2000)

Documenting the history of a phenomenon such as special education can be dry and scholarly. This is not my intent. When I look back on my initial years of teaching in the early 1970s, I can clearly see the origins of the black–white achievement gap as it formed over the next several decades. The civil rights movement in education, although addressed with “all deliberate speed” following *Brown*, was inseparable from my experiences within a small, rural community in south Louisiana.¹⁶

Why was this considered to be the beginning of the black–white achievement gap? Following the desegregation of schools in the late 1960s and the 1970s, African-American schools were closed, and the majority of students attended the district schools assigned to them. Although racial integration was mandated, students with “Educable Mental Retardation” continued to attend special, segregated schools whose student population was disproportionately African-American—resulting in effectively de facto segregation.¹⁷ It was evident that many of these minority

15. See Position Statement, Nat’l Assoc. of Sch. Psychologists, Rights Without Labels (2002), available at <http://www.caspsurveys.org/NEW/pdfs/nasppp4.pdf> (adopted by NASP Delegate Assembly, July 4, 2002). It should be noted that for students with a low-incidence exceptionality (i.e., moderate mental disability), the stigma might not have the same type of effect. However, the issue of “separate” surely applies.

16. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

17. See generally Lloyd M. Dunn, *Special Education for the Mildly Retarded – Is Much of It Justifiable?*, 35 COUNCIL FOR EXCEPTIONAL CHILDREN 5 (1968) (providing fundamental theories and concerns present during the 1960s and 1970s). “Educable Mental Retardation,” a term used in the 1970s, was used in the same manner as “Mild Mental Disability” is used in today’s terminology. See *id.* for more information regarding these earlier instructional strategies, see SAMUEL A. KIRK & G. ORVILLE JOHNSON, *EDUCATING THE RETARDED CHILD* (1951).

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students, generally from impoverished communities, simply did not have the fundamental academic or social skills that their middle or upper class peers possessed, as opposed to any actual disability.¹⁸ For example, students often came to school in the first grade without a functional knowledge of the alphabet or the ability to write their names. In my small community, the children came from close and loving families; however, education was not a major priority at the time. For many, coming to school was their first initiation to the formal education instruction that other, wealthier children had already received. The educational policy at that time exacerbated the problem.

A well-documented educational policy called the Wait to Fail Model,¹⁹ popular throughout the nation, contributed to this issue. Just as the name implies, students who arrived at school and were performing significantly below the norm were given the same instructional materials without the benefit of the mandated early intervening services (EIS) of today's educational system.²⁰ Therefore, several of the children who were "at-risk" simply failed the grade without any determination of whether the "failure" was caused by a mental disability or by a lack of prerequisite skills.²¹ Additional time passed while the student was formally evaluated without strategic or intensive interventions to bring him or her up to grade level. It was thought that the special placement would supply this type of instruction; however, it did not. Even the best teachers taught the students at their functioning grade level, without the goal of "pushing back into the general

18. PAIGE & WITTY, *supra* note 9, at 73-74.

19. "Wait to Fail Model" is terminology that is primarily used as a "descriptor" of the practices noted. *See generally* PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZATION SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002), available at http://www.nectac.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf [hereinafter PCESER]. *See also* *Special Education Commission Issues Report & Recommendations to Improve Special Education*, WRIGHTSLAW, <http://wrightslaw.com/news/2002/reauth.comm.report.0702.htm> (last visited June 18, 2013).

20. *See* Dunn, *supra* note 17, at 5-7 (discussing the generalized issues of the existing self-contained classrooms and strategies during the earlier programs of special education).

21. *See generally* NAT'L ASSOC. OF STATE DIRS. OF SPECIAL EDUC. & COUNCIL OF ADM'RS OF SPECIAL EDUC., RESPONSE TO INTERVENTION: NASDE AND CASE WHITE PAPER ON RTI, (2006) (discussing the problems with failing to address learning and behavioral issues before a child fails and the benefits of having an early intervention system).

system.”²² This was the special education system of the time, and it continues today in many districts.

Although the stigma of being a special education student was evident, this appeared to be the only option for parents, mainly because there was no genuine option available. If the parents wanted the special services that the child needed to address the deficits identified in a formal evaluation, a written acceptance was mandated.²³ If parents did not sign the required forms for acceptance, their children simply remained in the classroom without any recommended support services. Parents recognized the stigma attached to this separate system, but there was no choice available.²⁴

Throughout the following decades, there were many attempts to provide best practices for all students. In the late 1970s and early 1980s, mainstreaming of students from a self-contained classroom to the regular classroom for art or physical education was common.²⁵ There were attempts in the mid-to-late 1980s to provide students with disabilities (handicaps) their educational rights without the labels (Rights without Labels); however, education remained unchanged.²⁶ Terms such as “integration” were introduced, which basically added additional regular education classes such as science and social studies to a student’s schedule. All the while, the student remained a “member” of the special class, with access to the regular education classes. The separate system for students with disabilities was continuing to evolve, with negative connotations and increasing stigmatization attached.

22. See *Special Education*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Special_education.aspx (last visited June 13, 2013). Also, the term “pushing back into the general education” is a term of art used by educators referencing the inclusive practices of the special education system.

23. 20 U.S.C. § 1414(d)(1)(C)(iii) (2004).

24. This IDEA mandate of “signing” the child into special education in order to receive the appropriate education continues to this day. Contrary to what some professionals believe, there are many parents who would prefer that their children receive free and appropriate public education (FAPE) with the full protection of the IDEA, but without the label of special education. This was evident as students returned to New Orleans (Recovery School District) post Hurricane Katrina.

25. See generally *Special Education Understandings*, PROJECT IDEAL http://www.projectidealonline.org/mod2_specialEdUnderstandings.php (discussing the “paradigmatic” shift from mainstreaming to inclusion).

26. Sarah L. Triano, *Categorical Eligibility for Special Education: The Enshrinement of the Medical Model in Disability Policy*, 20 DISABILITY STUDIES QUARTERLY 1, 2, 13-14 (2000), available at <http://dsq-sds.org/article/view/263/275>.

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In the 1990s, as students with more significant disabilities were now attending their neighborhood public schools, “full inclusion” became a dominant philosophy and practice.²⁷ For some students, such as those with severe disabilities, this practice appeared to be helpful; for others, however, the success is less certain.²⁸ Often, due to the Wait to Fail Model, students were functioning years below their peers with difficulties in reading and math, making modifications in the general education classroom ineffective in remediating the large discrepancy; this further widened the achievement gap.²⁹ Although the attempts at “merging” the two systems of education were apparent, a non-unified system of education remained. In my experience, the prognosis at this time was dismal for many students in special education from difficult socioeconomic backgrounds.³⁰

**IV. WHAT A DIFFERENCE A CENTURY MAKES!
FEDERAL MANDATES AND INITIATIVES DESIGNED TO
CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2001-
PRESENT)**

Throughout the years, data was collected on the student outcomes for general and special education. “Accountability,” a core component of the Improving America’s Schools Act, provided clear documentation of the existing black–white achievement gap and Title I school-wide programs were addressing the findings.³¹ However, the data documenting the unaddressed disproportionality and over-representation of African-American students in special education was explosive.³² The most critical

27. MARY A. FALVEY, INCLUSIVE AND HETEROGENEOUS SCHOOLING: ASSESSMENT, CURRICULUM, AND INSTRUCTION, 29, 33-35 (1995).

28. Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 SPECIAL EDUC. FOR CHILDREN WITH LEARNING DISABILITIES 77, 90-91 (1996) (noting the differences in results among various groups).

29. See Treana A. Bowling & Francena D. Cummings, Research Brief, *Closing the Achievement Gap: A Tiered Approach for Supporting Students with Learning Disabilities*, APPALACHIA REG’L COMPREHENSIVE CTR. 1, 2 (2009), available at <http://sites.edvantia.org/publications/arcc/ResearchBrief2.pdf> (“A weakness of the ‘wait to fail’ approach contributes to increased academic difficulties for students in later grades and it does not help close the achievement gap.”) (citations omitted). Furthermore, the author’s educational experiences in schools and classrooms confirm the concept that students performing far below grade-level expectations have difficulty with age-appropriate curriculum (versus functioning-level).

30. See Guerin, *supra* note 2, at slides 21-23.

31. 20 U.S.C.A. §§ 6301-7714 (2002).

32. John L. Hosp & Daniel J. Reschly, *Disproportionate Representation of*

discrepancies were reported in the areas of mild mental disability, emotional disturbance, and learning disabilities, as well as the referral process more generally.³³ With the support of the Office of Civil Rights, actions were taken to address these findings. Mandates were given to close the achievement gap.³⁴ These initiatives delighted those who had experienced the evolution of these unintended discriminatory practices for years. But even with high expectations for those changes, no one could have expected just how fundamental and dynamic they would be.

The following description is not intended to be a dissertation on the federal initiatives; that can be found in the massive literature base available, addressing many aspects of the federal actions.³⁵ Instead, these brief descriptors are provided to illuminate the radical changes that are evident in the emerging practices of today, opening the discussion and providing the foundation for a genuinely unified system of education. *The key is to note the scientific research-based initiatives that are now “common” throughout federal and state initiatives and legislation.*

A. THE NO CHILD LEFT BEHIND ACT (NCLB), 2001

The No Child Left Behind Act (NCLB) was enacted as the reauthorization of the Elementary and Secondary Education Act (ESEA), which addressed general education.³⁶ A critical mandate of NCLB was to address and close the educational achievement

Minority Students in Special Education: Academic, Demographic, and Economic Predictors, 70 EXCEPTIONAL CHILDREN 185, 186 (2004) (“The disproportionate representation of minority students in special education has been a constant and consistent concern for nearly 4 decades”).

33. See Bergquist, *supra* note 3, at 2 (noting the discrepancies in areas of mild mental disabilities, emotional disturbance, and learning disabilities); see also Charles D. Johnson, *E-mail Survey Report*, in DISPROPORTIONATE REPRESENTATION OF MINORITY CHILDREN IN SPECIAL EDUCATION 8 (of E-mail Survey Report) (Charles Johnson et al., PUB. POLICY RESEARCH INST.), available at <http://ritter.tea.state.tx.us/special.ed/pubs/pdf/disprop.pdf> (noting the opinions of surveyed experts as to referral and placement issues being the “ultimate source” of the problem).

34. See generally Bergquist, *supra* note 3, at 4 (discussing some of the federal initiatives addressing the problem).

35. See generally Bergquist, *supra* note 3 (summarizing the literature base).

36. NCLB, *supra* note 4. Note that the Elementary and Secondary Education Act (ESEA), thus NCLB, reauthorization is currently due. See Barbara Michelman, *The Never-Ending Story of ESEA Reauthorization*, 18 POLICY PRIORITIES 1 (2012), available at http://www.ascd.org/publications/newsletters/policy_priorities/vol18/num01/The_Never-Ending_Story_of_ESEA_Reauthorization.aspx.

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gap that was so evident in our country.³⁷ Although there was much political debate over this initiative, implementation of the revolutionary law commenced.³⁸ The use of scientific, research-based initiatives in reading and math, universal assessments, early identification of deficits with intense interventions, and frequent progress monitoring through data collection (known as the Reading First Model), have indeed had a positive impact on addressing deficits early in a child's education.³⁹ Because NCLB was initially designed to address the needs of all students, most educators focused on the needs of the general education population, keeping students with disabilities as a separate subgroup for accountability purposes.⁴⁰ In practice, these processes have had a revolutionary impact on students in special education as well.

B. THE PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION REPORT, 2001

At the same time that NCLB was progressing with major reforms, an investigation of special education was initiated.⁴¹ Prominent individuals in the field were selected to participate in "The President's Commission on Excellence in Special Education" and tasked with submitting a report on their findings.⁴² Although there were some positive aspects of the system at the time, other findings documented major areas of concern.⁴³ Clearly, there was disproportionality and over-identification of African-American students from impoverished backgrounds,

37. KOZLESKI & ZION, *supra* note 1, at 2 (providing a synopsis of the provisions set forth in NCLB and IDEA).

38. See Debate Over the Value and Effectiveness of the NCLB, Univ. Council for Educ. Admin. (2009), <http://ucea.org/storage/convention/convention2009/session-formate/pointsample.pdf>.

39. See U.S. DEPT OF EDUC., READING FIRST IMPACT STUDY EXECUTIVE SUMMARY (Nov. 2008), available at <http://www.edpubs.gov/document/ed005062p.pdf?ck=83>. See also *An Overview of Reading First*, SCHOLASTIC.COM, <http://www.scholastic.com/teachers/article/overview-reading-first> (last visited June 20, 2013).

40. See Liz Harper, *No Child Left Behind's Impact on Specialized Education*, PBS NEWSHOUR (Aug. 21, 2005), http://www.pbs.org/newshour/indepth_coverage/education/no_child/impact.html.

41. Press Release, Kathryn J. Hayes, The White House, Office of Public Liaison, The No Child Left Behind Act: Ensuring that Students with Disabilities Receive a High-Quality Education (Mar. 20, 2002), available at <http://www2.ed.gov/policy/speced/leg/nclb-dis.html>.

42. PCESER, *supra* note 19, at 1.

43. *Id.* at 3-5.

particularly those falling into categories of mild/moderate mental disabilities, emotional disturbance, and self-contained classrooms.⁴⁴ Additionally, the Commission found that dual systems of education existed in America: general and special education.⁴⁵

The Commission also reported in detail on the need for early intervention services (EIS) for all children to immediately address identified deficits within the first years of school, rather than the Wait to Fail Model that was in place.⁴⁶ The response to intervention (RTI) process, a scientific, research-based approach for early identification of student deficits using tiered interventions with progress monitoring, was a crucial recommendation.⁴⁷ This provided the ability to identify genuine, specific learning disabilities, as opposed to only identifying failure based on lack of educational opportunities. The Commission's extensive report offered many recommendations that, in fact, largely supported the NCLB mandates of the time.⁴⁸ With the implementation of these recommendations, a new and equitable system of education for all students started to emerge, along with "best practices" that had the capacity to close the achievement gap.

C. THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT (IDEA), 2004

The Individuals with Disabilities Education Improvement Act (IDEA) and the corresponding federal regulations provide the foundation and guiding principles for school systems educating

44. See Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L.REV. 407, 413-18 (2001).

45. PCESER, *supra* note 19, at 7.

46. *Id.* at 9.

47. *Id.* at 21; *Response To Intervention (RTI)*, NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES (2012), <http://nichcy.org/schools-administrators/rti>. NICHCY, a well-known resource for special education, is an acronym for the original title, National Information Center for Handicapped Children and Youth which is currently known as the National Dissemination Center for Children with Disabilities. *About the National Dissemination Center*, NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, <http://nichcy.org/about#why> (last visited July 21, 2013).

48. See WAYNE SAILOR, PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, RESEARCH AGENDA TASK FORCE (2002), *available at* <http://www.beachcenter.org/books/fullpublications/pdf/presidentreport.pdf>.

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students with disabilities.⁴⁹ Generally referred to as the IDEA, this legislation supported and strengthened many initiatives of the existing NCLB and President's Commission on Excellence in Special Education Report.⁵⁰ The compliance monitoring of state data regarding the issues of disproportionality, as well as fundamental mandates and procedural safeguards of IDEA, have a direct correlation to improving student performance and outcomes.⁵¹ The IDEA affirmed the use of scientific, research-based initiatives, one curriculum, EIS, and RTI procedures to identify needs and to guide focused instruction in both academic and behavioral areas.⁵² Of critical importance was the replacement of the Wait to Fail Model with data-based decision-making for all students, including students identified as being in need of specialized instruction.⁵³ This removed a major catalyst for the achievement gap and replaced it with a data-driven, scientific, and research-based approach, designed to provide a "level playing field" for all of America's children.

V. AN UNEXPECTED SUCCESS: THE RECOVERY SCHOOL DISTRICT (RSD) IN NEW ORLEANS – POST-KATRINA ERA

On August 29, 2005, Hurricane Katrina devastated the entire school system of New Orleans.⁵⁴ Families were literally

49. *What is the Individuals with Disabilities Education Act?*, ACCESSSTEM, <http://www.washington.edu/doit/Stem/articles?48> (last updated Jan. 24, 2013).

50. Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1450 (2008).

51. See PCESER, *supra* note 19, at 13-14. See generally Developing and Implementing an Effective System of General Supervision: Part B, Nat'l Ctr. for Special Educ. Accountability Monitoring (Jan. 2007), <http://www.accountabilitydata.org/General%20Supervision/1%20EffectiveGeneralSupervisionfinal%201-16-07.pdf> (explaining the system of state accountability monitoring).

52. See generally Response to Intervention for Behavior IRTI(B): A Technical Assistance Paper, FLORIDA'S POSITIVE BEHAVIOR SUPPORT PROJECT (2008), http://flpbs.fmhi.usf.edu/pdfs/Response%20to%20Intervention%20for%20Behavior%20a%20Technical%20Assistance_UPDATED_010509.pdf (discussing the University of South Florida's Positive Behavioral Support practices, recognized by educators as a primary source of information and training in the field).

53. See generally Samuel L. Odom et al., *Research in Special Education: Scientific Methods and Evidence -Based Practices*, 71 EXCEPTIONAL CHILDREN 137 (2005) (providing an overview of research procedures used in special education). As noted in this paper, RTI is acknowledged to be a scientific and evidence-based practice. See *supra* note 47 and accompanying text.

54. *Katrina and Rita: What Can the United States Learn from International*

blown throughout America.⁵⁵ Following the shock and awe, many of the finest and most knowledgeable individuals in the education field—both local and out-of-state—came together to design a system of schools that continues to evolve into a recognized “world class” system of choice.⁵⁶ This paper is not intended to present a political agenda or detailed information regarding the creation of this great experiment; it simply reflects my experiences in the Recovery School District. Beginning in January 2008, as an IDEA attorney with years of experience in various areas of special education, I had the honor of working to ensure compliance with IDEA regulations and the corresponding components of NCLB. Here is where I first realized that something phenomenal was taking shape in response to such devastation. The district-wide (traditional and charter schools) educational design using the RTI process, as well as other aforementioned initiatives of NCLB and IDEA, to bring focus and unity to a seemingly impossible situation was unprecedented. Am I being too descriptive and dramatic? Absolutely not! While other districts were discussing the possible changes and strategies associated with RTI, the RSD, through sheer necessity, designed and implemented the policy and procedures of the federal/state initiatives.

Prior to Hurricane Katrina, similar to failure rates in many urban districts in America, sixty-eight of the 108 public schools in New Orleans were labeled “academically unacceptable.”⁵⁷ The State of Louisiana was in the process of taking over schools when disaster struck.⁵⁸ Many students were already performing well below the state average in reading and math,⁵⁹ and now they were going to be displaced for years. As students returned to

Experiences with Education in Displacement?, HARV. EDUC. REV. (2005), available at <http://hepg.org/her/abstract/1> [hereinafter *Katrina and Rita*].

55. *Katrina and Rita*, *supra* note 54.

56. See *Creating a World-Class Education System for All Students in Louisiana: State Academic Plan*, LA. DEP'T OF EDUC., available at www.doe.state.la.us/lde/uploads/11622.pdf (last visited June 22, 2013).

57. Kathryn G. Newmark & Veronique De Rugy, *Hope after Katrina: Will New Orleans become the new city of choice?*, 6 EDUCATIONNEXT (2006), available at <http://educationnext.org/hope-after-katrina/>. See THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: FIVE YEARS AFTER HURRICANE KATRINA, TULANE UNIV. COWEN INST. FOR PUB. EDUC. INITIATIVES 20 (July 2010) (Annual Reports following Hurricane Katrina) [hereinafter Cowen Institute].

58. Newmark & De Rugy, *supra* note 57; see Cowen Institute, *supra* note 57, at 1, 5.

59. Newmark & De Rugy, *supra* note 57.

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New Orleans, some moved into proficient and advanced levels of the state assessment.⁶⁰ However, the majority fell well below the basic skill levels of performance.⁶¹ There were astounding numbers of students, with and without identified disabilities, who were six or more years below grade level and even unable to read.⁶² And so the work began.

Most educators recognize the “typical structure” of the RTI Triangle, which indicates that the vast majority of students function at grade level, with a small percentage needing tiered interventions.⁶³ I can vividly recall the initial charts on the wall of the large meeting room, depicting the RSD’s percentages for the 2007–2008 school year. Many referred to the chart as the “upside down RTI Triangle,” with 80% of students functioning at two or more years below grade level and 5% functioning above grade level. Yet, it was here where decisions were made to: (1) design, develop, and implement “best practices” using the RTI procedures for academics and positive behavioral support (PBIS), and (2) include all students with disabilities in this data-driven, scientific, research-based initiative, while ensuring that they are in their least restrictive environment (LRE).

Obviously, it would take volumes to document the many critical issues and initiatives that were consistently on the table, all needing immediate attention. It was no wonder that these efforts were often described as “building an airplane while it is flying;”⁶⁴ however, the academic improvements documented through the state’s accountability system remained encouraging.⁶⁵ Although a challenge, the universal educational

60. See *Accountability: School Performance Scores*, LA. STATE DEPT OF EDUC. (2005-current), <http://www.louisianabelieves.com/accountability/school-performance-scores> (providing district performance scores and student performance scores for each year in a comprehensive and State-wide data base including students’ standardized tests, etc.) [hereinafter Performance Scores].

61. See *id.*

62. See *id.*

63. See *RTI: Special Education Eligibility Determination*, http://wp.crookcounty.k12.or.us/files/2012/04/rti_tier_circle2.jpg (last visited July 21, 2013) (providing graphical triangle illustrating these percentages).

64. Paul G. Pastorek, Louisiana State Superintendent of Education, Presentation: State-wide Presentations Regarding Educational Reform in New Orleans and Louisiana (2009).

65. See Performance Scores, *supra* note 60 (showing incremental improvement each year within the annual school performance data documented in the State’s Accountability System).

practices provided to all students continues to result in increased academic and social performance for many students, even as the RSD restructures to meet the challenges of the state and national reforms.

VI. CONCLUSION: EDUCATIONAL AND LEGAL INSIGHTS—WHERE WE MUST GO FROM HERE

This paper was difficult to write, though I am not certain why. Likely, it was due to a desire to describe too many details from personal experiences correlated to and supported by the literature. The Introduction speaks of “my life story.” However dramatic this statement may sound, I have had this passion since my early years of teaching. It has never diminished, because the issue of civil rights has never really diminished. The story spans forty years of marriage, five children, grandchildren, and incredible life experiences. I am thankful.

There are several concluding comments that I would like to make with the sincere desire of stirring and encouraging educated action. The black–white achievement gap, and the correlating regular–special education achievement gap, does exist, and it is the most important civil rights issue of our time. I could not agree more with former U.S. Secretary of Education, Rod Paige, and Dr. Witty. Experiences have taught me a great deal about a major cause of this achievement gap that continues to plague our country. The separate and often stigmatizing system of special education has enabled this gap to continue for a population of students that many refer to as “at-risk.” There is no surprise here. The research-based literature has been documenting this phenomenon for many years with negative outcomes such as low performance, high dropout rates, and young lives leading to the penal system or early, violent death. The crime statistics in New Orleans bear witness to this fact. However, I believe the truth is evident: prior to the twenty-first century, we did not have the knowledge or means to effectively educate this targeted population of students, particularly in urban school districts. Even though the old practices were major components in the development of an unequal playing field, they were all that we knew. With the emergence of the consolidated, data-driven decisions common in the federal legislation, as well as initiatives of NCLB and IDEA discussed in this paper, education has begun to dramatically change for all students. There is an enormous amount of hope for the future of our

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children.

However, I believe that this hope will be significantly diminished if we continue to use the outdated practices and systems that are no longer relevant. Is there a solution to this problem? Yes, I believe there is—implementing the existing federal/state initiatives documented above with fidelity and acknowledging the fact that with this implementation, there is no longer a need to function as two separate systems. All students will receive what is needed, including individualized services, within a unified system of tiered interventions based on data-driven decision-making for all students (along with the appropriate enforcement of federal/state regulatory safeguards). It is important to note that autonomy of school systems and charter schools does and will remain intact.

To address the devastating stigma that has evolved during the past forty years, we should consider using the same principles of “Person First Language” adopted years ago as a grass roots effort (i.e., “child with autism” instead of “autistic child”).⁶⁶ Here, “No Stigma Language” is the key. For example, a “special education student” becomes “a student with IDEA services.” A “homeless student” becomes a “student with McKinney-Vento services” or a “student with Title VII services.” Eventually, accurate references to the federal acts and legislation will replace stigmas with the dignity inherent in the law. Administrative convenience should not stand in the way.

Finally, I suspect many have noted the phraseology of the landmark civil rights decision in *Brown v. Board of Education* (1954, 1955): “Separate but equal” is unconstitutional, even when all tangibles are equal.⁶⁷ And, to stigmatize a child is to violate the Equal Protection Clause of the Fourteenth Amendment of our Constitution.⁶⁸ These same principles can be applied to the current discussion. In my opinion, when a student with a disability is treated differently based on his or her disability by being required to sign into a separate and stigmatizing system,

66. See *People First Language*, TEXAS COUNCIL OF DEVELOPMENTAL DISABILITIES, <http://tcdd.texas.gov/resources/people-first-language/> (last visited Aug. 18, 2013); cf. Tim, *Person-First Language – ‘autistic’ vs. ‘autism,’* BOTH HANDS AND A FLASHLIGHT, (Jan. 9, 2013), <http://www.bothhandsandafashlight.com/2013/01/09/person-first-language-autistic-vs-with-autism/>.

67. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954).

68. *Id.* at 495.

there is a constitutional issue to consider. This argument becomes more compelling when race and continued disproportionality are additional variables, and where the corrective actions (federal/state initiatives) have not been appropriately implemented.

A unified system of education, based on the consolidated, scientific, research-based initiatives of NCLB and IDEA (i.e., RTI, EIS, universal screenings, tiered interventions, data-based progress monitoring) must be appropriately implemented and monitored for compliance. In Louisiana's Office of Federal Programs Support, a part of the Louisiana Department of Education, efforts to consolidate sections of NCLB and IDEA are developing, with a focus on performance-based outcomes for *all* students. Clearly, change is happening now!

Authentic leadership is critical. We must put the child first as we address the important political issues that will certainly arise. However, as we finally begin to overcome decades of separate systems and practices that divided our children, we must not allow political agendas to slow the process. Without a doubt, we have the knowledge, research-based initiatives, and skills to educate all students within a unified system. No excuses! We must all take educated action now! The closing of the black–white and regular–special education achievement gaps are the most critical civil rights issue of our times!