

Chapter 18

New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement

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Introduction

Special education is intended to support and serve children with disabilities, not to be primarily a separate place to send students who need help in order to learn to their full potential. In theory, eligible students are to receive specialized instruction by teachers with specific training, tutoring, and extra attention from teachers, counselors, and other professional support staff. While for many students with disabilities this ideal has approached reality, historically, many others have experienced unnecessary isolation and been confronted with fear, prejudice, and stigmatization.

Furthermore, placement *in* special education has too often been a vehicle for segregating minority students. For example, research shows that black students are especially likely to be overrepresented in special education and less likely to be mainstreamed than similarly situated white students.² In 1998, approximately 1.5 million minority children were identified as having mental retardation, emotional disturbance, or a specific learning disability.³ Over 876,000 of these were black or Native American. When the Individuals with Disabilities Education Amendments Act of 1997 (IDEA 1997) was passed,⁴ Congress found that minorities are 2.3 times more likely to be so labeled when compared to whites nationally.⁵ And to make matters worse,

minority children who *do* need special education often receive low-quality services and watered-down curriculum instead of effective support to help them learn.

IDEA 1997 states that: "Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."⁶ To the extent that minority students are misclassified, segregated, or inadequately served, special education, which is meant to help, can instead contribute to a denial of equality of opportunity, with devastating results in communities throughout the nation.

Many education researchers believe that multiple and systemic reforms of both special and regular education need to take hold on both the state and local level because the concerns about overrepresentation and underservicing are regarded as rooted in both the regular and special education classroom.⁷ Significant improvements will thus depend, in part, upon better coordinated, better targeted, and more transparent federal oversight, combined with improvements in the collection and dissemination of disaggregated data describing the condition of regular and special education of minority children. Also considered, therefore, are improvements to Title I of the Elementary and Secondary Education Act, meant to ensure that minority students and students with disabilities

are given *meaningful opportunities* to meet high standards.

For parents seeking direct recourse, the IDEA contains strong language and numerous requirements that, if better understood by parents and more effectively implemented by school authorities, could reduce minority overrepresentation significantly. Chief among these are requirements for parental consent for the initial special education evaluation,⁸ and parental rights to seek better services or re-evaluate their child's individualized educational plan (IEP), even after they have consented to a placement.⁹ Along these lines, the federal government could have a greater impact by better enforcement of rules designed to ensure that parents receive complete information regarding the exercise of their legal rights.¹⁰ Better informed minority parents would be better able to resist misdiagnosis, challenge inappropriate placements, or gain higher quality special education services, as the situation may warrant.

In addition, the federal government can do much to further systemic reform efforts. It can create more resources targeted at providing proven-effective programs and supports for minorities, economically disadvantaged students, and students with disabilities — such as the community parent resource centers; and it can facilitate working partnerships between school districts, parents, and advocates representing poor and minority parents and their children.

Finally, many of the problems highlighted call for focused attention through serious civil rights enforcement by federal agencies. Enforcement should include, if necessary, temporary cutoffs of funding to individual school districts that are unwilling to address gross racial disparities in identification and placement.

I. Background

Historically, enforcement of IDEA requirements has relied heavily on parents' pursuit of administrative complaints. Because the weight of enforcement has fallen on individual litigants, many poor and minority parents, who often can't afford to shoulder the burdens involved in claiming their delineated rights,¹¹ do not reap the benefits that accrue to middle-class suburbanites armed with experienced lawyers.

In 1997, after unusual bipartisan congressional negotiations, Congress reauthorized IDEA with added emphasis on the requirement that *all* students be held to high standards. In one new provision Congress required monitoring and enforcement to address *both the overrepresentation of minorities in identification for special education, and their placement in overly restrictive educational environments*. The provision further required "the revision of policies, procedures and practices used in such identification and placement" to ensure compliance.¹² Despite these legislative improvements, research suggests that the new provisions did not have much of an immediate impact.

New studies, presented at the Conference on Minority Issues in Special Education at Harvard University, Fall 2000, highlighted the persistence of dramatic disparities in identification and placement, as well as important gaps in information gathering on minority and English language learner (ELL) students with disabilities.¹³ The research presented also examined federal enforcement achievements and shortcomings and shed new light on problems within the current system of federal oversight and enforcement. Conclusions drawn from the Harvard conference, combined with other sources, form the basis for the recommendations at the end of this chapter.

Following a congressional briefing on these research findings in March of 2001, many politicians made misleading assertions and misrepresentations regarding these findings to bolster their arguments against guaranteed funding of the Individuals with Disabilities Education Act. The studies described in this chapter lend no support whatsoever to an argument that either guaranteeing or fully funding the Individuals with Disabilities Education Act would exacerbate the problems highlighted by our research, or that minority students would reap any benefit by limiting increases to federal special education expenditures. Use of this research to oppose federal special education funding guarantees or increases is a clear distortion of the findings. In fact, one can logically infer from this independent research that a substantial infusion of funds is needed to strengthen federal enforcement to ensure proper IDEA implementation and protection of civil rights.

II. Key Education Research Findings with Implications for Federal Policy

A. Research Findings

I. Subjectivity of Assessment Confounds “Neutral” and “Objective” Determinations of Special Education Eligibility

The IDEA 1997 Act specifically requires that the identification of students for special education eligibility be based on multiple measures, i.e., not just one test score, and that the analysis must rule out the effect of poverty and multicultural differences. Many states and school districts still rely heavily on IQ and other tests because they regard

the reported results as objective, scientific measures.¹⁴ This faith in testing reportedly drives the decisions of too many educators in determining special education eligibility and placement, subverting the intention of the IDEA.¹⁵

New research by Dr. Beth Harry and others reveals how reliance on test scores is very often inappropriate. The special education eligibility evaluation process is frequently regarded as a set of discrete decisions based on scientific analysis and assessment. In reality, the evaluative decisions are more subjective, with many interdependent variables, including school politics, teacher perspectives on disability, and cultural bias. Harry’s new research describes how subjectivity creeps into elements of the testing *process*. These include deciding whom to test, what test to use, when to use alternative tests, discretion in interpreting student responses, and determining what weight to give results from specific tests.

A host of other nontesting factors such as the quality of regular education, the classroom management skills of the referring teacher, and the power imbalance between the parents and the school personnel on the evaluation team are equally important, yet often go unrecognized.¹⁶

Although Dr. Harry concludes that the analysis of test results provides very important information, her qualitative research sheds considerable doubt on the objectivity of test use in special education decision-making because *even decisions that are test driven are inescapably subjective in nature*. Dr. Harry’s research suggests that we must acknowledge that *even the best evaluations are filled with subjectivity*, and that systemic disproportionate outcomes reflect deeper problems, requiring deeper systemic reforms.

2. Race/Ethnicity and Gender Account for Significant Overrepresentation of Minority Students, Even After Accounting for the Effect of Poverty

Poverty and other socio-economic factors correlate highly with the incidence of disability, but once socio-economic factors are accounted for, the effect of gender and race remains significant.¹⁷ In the most profound example, contrary to expectations, as factors associated with wealth and better schooling increase, black males are at greater risk of being disproportionately labeled “mentally retarded.”¹⁸

Research on national trends, and conforming data on the state and local levels, indicate that minority students are significantly more likely than similarly situated white students to be placed in restrictive special education environments, segregated from their nondisabled peers.¹⁹ This persistent pattern has lasted for well over 20 years,²⁰ and holds true for most minority groups across nearly all disability categories.

Recent demographic studies have revealed more alarming patterns. Latino students, who as a group often appear underrepresented in state and national aggregated data, are increasingly likely to be overrepresented in special education as their proportion of a given state’s minority student body increases.²¹ Another study revealed that *the likelihood of mainstreaming with regular education peers, for African American, Latino, Native American, and Asian children decreases as the percentage of each minority subgroup’s population increases.*²² Lastly, preliminary research on school districts in California suggests that English language learners who are immersed in English language classrooms are more likely to be identified for special education and placed in restrictive special education classrooms than students in bilingual programs.²³

3. Under-Servicing of Minority Students Increases the Likelihood of Discipline Problems, School Failure, and Dropping Out

The lower quality special education that minority students often receive has dire consequences. One is that they are more vulnerable to being subjected to unnecessarily harsh new zero-tolerance discipline policies sweeping the country. For example, according to new research by Osher, Woodruff, and Sims, minority students are less likely than their white counterparts to receive counseling and psychological supports when they first exhibit signs of emotional turmoil and often go without adequate services once identified. According to this research, the lack of early intervention and support helps explain why minority school-aged children are overrepresented in the juvenile justice system.²⁴ Furthermore, in a study by Oswald, Coutinho, and Best, within three to five years of leaving high school, arrest rates for African Americans with disabilities is 40% compared with 27% for whites with disabilities.²⁵

4. High Stakes Accountability Can Contribute to Serious Problems for Minority Students with Disabilities

Although the relative benefits of high-stakes testing is a heated education reform issue, educators on all sides of the debate acknowledge problems with the way these tests are administered in many states and local school districts.²⁶ The high-stakes tests referred to in this analysis employ diploma denial or score-based retention to hold students accountable, *regardless of whether they have been afforded an opportunity to learn the material tested.* Unfortunately, the increasing imposition of high stakes on students poses a host of problems for children with special needs.²⁷ Further, the

detrimental impact of high stakes on students implicates possible violations of the IDEA and Title VI, as well as some state laws.

a. Incentives to Exclude Students from Assessments

Historically, students with disabilities have been excluded from district and state-wide assessments. The fact that there has been so little accountability for their rate of achievement explains, in part, how special education has become synonymous in many places with low expectations and watered-down curriculum. One goal of standards-based reform, incorporated into IDEA 97 and the newly reauthorized Elementary and Secondary Education Act, is to ensure that the achievement rates of the overwhelming majority of students with disabilities are considered when schools are evaluated for performance.²⁸

IDEA 1997 already requires states to report the number of students with disabilities participating in state and district assessments. Despite this requirement, according to the National Center on Education Outcomes 1999 Report (NCEO), only 23 states reported these numbers. NCEO used state-provided numbers of students participating in assessments, in conjunction with child count data, to calculate the percentage participation rates. For example, in Texas, fewer than 42% of students with disabilities took a statewide high-stakes achievement test in grade 10.²⁹ And in only five states did more than 90% participate in statewide assessments, regardless of stakes.³⁰ Title I reporting is also quite low, with numerous states failing to report student performance by race or disability and many inappropriately exempting students with disabilities from state tests.³¹ With test participation rates so low, the achievement levels of students with

disabilities remain hard to ascertain and their programs of instruction hard to evaluate. Moreover, the existence of a high number of students with disabilities who do not take the tests runs counter to two federal requirements: (1) Title I, which requires that students with disabilities be assessed in accordance with the state's high standards, and that scores for students with disabilities be reported in disaggregated form,³² and (2) IDEA 1997, which requires that students with disabilities be included in state assessments for both IDEA reporting and accountability purposes.³³

b. High-Stakes Tests Increase the Likelihood of Exclusion

*According to research of the National Center on Education Outcomes, adding high stakes to standards-based assessments appears to be driving much higher rates of test exclusion than ever before.*³⁴ For example, in Texas, where according to the NCEO 1999 Report, 42% or fewer students with disabilities participated in the Texas Assessment of Academic Skills (TAAS), the number of special education students has blossomed since high stakes were added to statewide assessments.³⁵

Historically, the same accountability failure applies to ELLs, and ELL students with disabilities. By creating even greater incentives to mask the low achievement of students with disabilities, some argue that high stakes are undermining standards-based reform.³⁶ Large numbers of ELLs are not tested with statewide assessments.³⁷ The scant data on ELLs suggest that those students who are tested are often not provided with the appropriate test accommodations. English language learners with disabilities are even less likely to be identified, assessed, or given appropriate accommodations for testing.³⁸

c. Using Tests for Invalid Purposes, or Using Invalid Tests, Exacerbates Educational Injustice

When students with disabilities are required to take high school diploma tests, or tests used for grade promotion, they fail at a much higher rate than their non-disabled peers. This pattern is likely even more pronounced for minority students with disabilities given that data show each group, viewed separately, is at a very high risk. Evidence suggests that many students deemed eligible for special education are not provided with the opportunities to learn the tested material and not provided with the accommodations they are entitled to legally.³⁹ Moreover, minorities with disabilities are much less likely to receive or request test accommodations than whites.⁴⁰

Furthermore, to the extent that minority students with disabilities are more likely to be restricted in their placement, and thereby access to the tested curriculum, they are more likely to be either excluded entirely or tested without having received adequate opportunities to learn. The new education law, which mandates testing at grades 3-8, will likely exacerbate these problems, especially in states placing the high stakes on students.

5. Some State Funding Mechanisms Appear To Increase Minority Overrepresentation in Special Education

Where state funding is weighted to spend more money in relation to the degree of disability, black students often face a greater chance of being labeled “retarded” and placed in restrictive programs. Moreover, such programs receive less money per student than in states where the funding is not weighted by severity of disability.⁴¹ The federal government is charged with re-

viewing state formulas. Federal formulas, which were restructured in 1997 to reduce restrictive placements, carry only a small percentage of the special education funds. State formulas often contain no explicit restriction. This research is pertinent to federal enforcement because the U.S. Department of Education’s Office of Special Education Programs (OSEP) can review state funding formulas that interfere with proper implementation of the IDEA.

B. Findings on Anti-Discrimination and IDEA Enforcement

I. The Legal Landscape

Before IDEA 1997, the few systemic checks on widespread overrepresentation resulted primarily from either desegregation related litigation or compliance reviews conducted by the U.S. Department of Education’s Office for Civil Rights (OCR) pursuant to Title VI of the Civil Rights Act of 1964 (Title VI) and the Equal Protection Clause. Legal challenges to minority overrepresentation in special education are still most often raised in these two contexts. Where the Department of Justice (DOJ) is a party to a desegregation action, the overrepresentation issue falls within DOJ’s jurisdiction. Because OSEP implements IDEA, this agency also plays a critical enforcement role.

In addition to the anti-discrimination provisions of Title VI and its implementing regulations,⁴² there are three laws in play with regard to the problematic overrepresentation and underservicing of minority youth in special education. Section 504 of the Rehabilitation Act of 1973 (section 504), Title II of the Americans with Disabilities Act (Title II), and the IDEA provide procedural and substantive protection for students who have been misclassified and/or placed in overly restrictive settings. Section 504⁴³ and

Title II⁴⁴ are federal anti-discrimination laws that prohibit discrimination based on disability and are applicable in public schools. Section 504 can be assumed to cover Title II as well, due to parallel language and interpretations of the laws.⁴⁵

a. FAPE and LRE

By law, all students with disabilities are entitled to be educated with their regular education peers to the maximum extent appropriate given each student's special education needs.⁴⁶ This ensures exposure to the same curriculum, the same high academic standards, and the same opportunities for socialization.⁴⁷ The shorthand version of this concept is taken from language in the IDEA: a Free Appropriate Public Education (FAPE)⁴⁸ in the Least Restrictive Environment (LRE).⁴⁹ The concept of LRE is subsumed under the definition of "appropriate" in FAPE.⁵⁰

Individually, some students undoubtedly benefit from educational settings apart from the regular classroom. Accordingly, IDEA authorizes student placements based on individual needs, rather than based on disability type such as "educationally mentally retarded." The right to an individual eligibility determination and subsequent IEP, along with the right to be educated with regular education peers to the "maximum extent appropriate,"⁵¹ lie at the heart of the FAPE and LRE provisions.

The 1997 IDEA amendments reemphasized the Act's 25-year-old preference that students with disabilities be taught in the regular education classroom.⁵² The Act's congressional findings noted that IDEA's successful implementation "has been impeded by low expectations" and acknowledged substantial concerns about segregated classrooms⁵³ because isolated students are usually worse off in comparison to similarly situated mainstreamed students.⁵⁴

b. Differences Between IDEA and Section 504

There are important differences between the legal requirements of 504 and IDEA relevant to overrepresentation and underservicing concerns. For instance, the IDEA applies only to students who, because of their disability, need special education and related services.⁵⁵ Section 504's protections, on the other hand, include all students covered by IDEA as well as students whose disabilities substantially impair one or more major life activities.⁵⁶ A student in need of counseling outside of the classroom would not be covered under IDEA but could be covered under section 504.⁵⁷ Most protected individuals under 504 are entitled to a "free appropriate public education" in much the same way that students with qualifying disabilities are entitled to FAPE under IDEA.⁵⁸

If a minority student were identified as educationally mentally retarded but did not, in fact, have a disability, that student would not need special education services and have no direct recourse under IDEA to remedy the harm suffered. Such a student would not be entitled to a FAPE under the IDEA.⁵⁹ But such a student, if harmed by the wrongful placement, could be eligible for FAPE under section 504.⁶⁰

At a minimum, misidentified students are protected from discrimination that resulted from "having a record of" or being "regarded as" having a disability. The regulations, for example, state that a *nondisabled individual* is covered because, "Has a record of such an impairment means *has a history of*, or *has been misclassified as having*, a mental or physical impairment that substantially limits one or more major life activities."⁶¹ Accordingly, such nondisabled students are specifically covered under section 504's definition of "qualified handicapped person."⁶²

Furthermore, OCR regards failure to provide FAPE as a form of disability discrimination under section 504.⁶³ OCR has jurisdiction over many discrimination complaints that fall under section 504. The legislative and enforcement regime thus implicates, in some situations of FAPE denial, two different laws and two different federal agencies for enforcement.

2. OCR Enforcement

a. Theory

By design, the Office for Civil Rights seeks to ensure voluntary compliance with federal civil rights acts. Its investigations typically emphasize either “different treatment” or “disparate impact” analysis under Title VI. The critical legal issue is that under the regulations the first requires proof of intent while “disparate impact” does not. Specifically, *the Title VI regulations describe an “effects test” prohibiting the use of “criteria or methods of administration which have the effect of subjecting individuals to discrimination or have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the educational program.”*⁶⁴ As an enforcement agency, OCR looks for evidence of intent that can support a different treatment analysis or bolster a disparate impact case.⁶⁵

In other words, the department’s regulations under Title VI allow complainants and investigators to rely on statistical evidence of discrimination in determining non-compliance. School districts may violate Title VI “disparate impact” regulations if a neutral school policy disproportionately burdens a protected minority group even though the district did not intend to discriminate.

OCR conducts the following three-pronged analysis, borrowed from case law, to determine whether the effects of a school

district’s policy or program violate the Title VI regulation.⁶⁶ First, the agency asks whether a criterion or method of administration has both a negative and disparate impact on a protected class.⁶⁷ If so, the school district must demonstrate that the policy or practice at issue is an educational necessity. Upon such proof, OCR explores whether there is a less discriminatory alternative that can reasonably meet the district’s “educationally necessary” goals.⁶⁸

OCR does not generally have jurisdiction over individual IDEA cases, but it does have enforcement jurisdiction in numerous disability-related cases under section 504 and the ADA. In fact, disability related complaints account for more than half of OCR’s complaint caseload.⁶⁹ These include all cases in which students with disabilities are not legally protected by IDEA but can include FAPE-based complaints — where exhaustion at the state administrative level is either not required or has been completed.⁷⁰ To the extent that a state fails to respond to systemic complaints about either the isolation of minority students with disabilities or significant inequalities in services caused by a district’s IDEA violation, state inaction alone may constitute a violation of Title VI.⁷¹ Moreover, the agency can explore both Title VI and section 504 legal issues as they arise in the same case and combine the two for investigation and analysis.⁷²

In fact, OCR has actively sought to deter unjustifiable disproportionate identification of minority students for special education, often in overly restrictive settings. But OCR intervention is most likely to have a meaningful impact if it also prompts a combination of voluntary compliance and intervention by the state in similar cases. The agency responds to complaints, but the agency also provides guidance on law and policy, including “technical assistance” to potential complainants.

To further encourage compliance, the agency regularly requests data for enforcement purposes.⁷³ The agency then selects schools and school districts whose data depict troubling patterns for closer investigation called “compliance reviews.”

With thousands of district data to review, the whole scheme to encourage compliance on a national scale rests heavily on a deterrence theory. An integral part of such a deterrence model is that the public at large will become aware of civil rights laws, and can initiate political, legal, and administrative action on the state and local level where noncompliance is evident.

b. Practice

As a matter of enforcement policy, OCR seeks to resolve concerns about potentially unlawful discrimination through a “partnership process” without issuing a letter of violation against the school district.⁷⁴ Consequently, the agency rarely issues findings of violation, instead reaching negotiated agreements with the districts. Although there are clear benefits to this approach, the partnership approach may seriously undermine any potential deterrence effect if it is relied upon too heavily.

Faced with staggering statistics indicating that the overrepresentation of minorities is widespread, the agency has conducted 171 compliance reviews, an average of approximately 23 school districts each year since 1993.⁷⁵ Although this number seems small, before 1994, little attention was paid to this issue despite well-documented and deeply disturbing evidence of a problem from the National Academy of Sciences in 1982 and other indices dating back even earlier.⁷⁶

c. OCR’s Enforcement Flaws in Strategy and Implementation

i. Theoretical Disconnect

One obvious problem is that for school districts, the threat of being found “in violation” of a law barring discrimination is much more serious than having to enter a resolution agreement, where no acknowledgement of unlawful activity is required. Only three of OCR’s interventions in these types of cases resulted in “letters of violation” since 1994 and none in the last few years. Despite the punitive ring to “letter of violation,” these letters are only one rung in an incrementally adversarial range of enforcement options. For example, the Department can follow a violation by withholding federal funds, but there is a great deal of discretion about when to withhold. Further, the issuance of a letter of violation does not preclude negotiated settlement and does not carry the same punitive stigma as a fully litigated court decision against the school district. Moreover, by issuing violations, OCR more clearly identifies unlawful policies and sends a straightforward compliance message to onlookers.

ii. Information Gap

A more serious flaw in OCR’s current enforcement is the lack of information the agency provides to school districts and the public at large on its enforcement efforts, along with the absence of clear and official guidance on how states should determine when disproportionality is significant.⁷⁷ This flaw is especially problematic given the agency’s reliance on deterrence and partnerships to reach compliance. Simply put, school districts, and the public, rarely know about OCR’s interventions, leaving both school officials and advocates guessing as to OCR’s interpretation of its own

regulations. Furthermore, despite the creation of an interagency national task force, there is no nationally linked system for reporting and recording the full text of minority special education cases within the agency.⁷⁸ This makes agency evaluation especially difficult for outsiders as well as internally.

iii. Internal Constraints

OCR is subject to bureaucratic and political pressures that limit the effectiveness of its enforcement activities. The impact of bureaucratic pressures can be seen in a July 6, 1995, internal memorandum from former Assistant Secretary of Education Norma Cantu to all OCR staff entitled, "Minority Students and Special Education."⁷⁹ This memo offers a detailed outline of how to investigate for possible violations of Title VI and section 504.⁸⁰ These combined approaches would, as a general rule, involve more intensive investigations and more comprehensive remedies. After introducing this prospect, however, the OCR memorandum recommends that the "approach . . . should be used only in selected cases" where preliminary data do not permit the investigation to be narrowed.⁸¹ Accordingly, OCR has stated that when it receives complaints concerning minority issues in special education, the agency rarely investigates beyond the specific issues raised by the complainant.⁸² OCR enforcement will unlikely have a broad impact if the agency continues to take this conservative investigatory approach.

iv. Inconsistencies and Weak Monitoring

The agency's lack of clarity has apparently resulted in a high degree of enforcement inconsistency. A review of OCR resolution agreements, plus discussions with attorneys who have filed complaints with the agency, suggests that agency enforcement is weak

in three ways. First, OCR's methods of investigation vary substantially from case to case.⁸³ Second, and related to the first, there is inconsistency in terms of the comprehensiveness of the remedy sought by the OCR when districts have entered into resolution agreements.⁸⁴ Third, OCR's rigor in subsequent monitoring also appears to be weak. This last concern has been acknowledged by the agency, and OCR spokespersons have stated that significant changes have been implemented. Unfortunately, because the agency is under-staffed⁸⁵ any shift in policy toward better monitoring is likely to decrease its capacity to investigate complaints, conduct new compliance reviews, or provide technical assistance. Despite a steady stream of complaints that raise both race and disability, data on OCR-initiated reviews of minority overrepresentation in special education dropped considerably between 1995 and 2000.⁸⁶

3. OSEP Enforcement

OSEP is charged with monitoring IDEA implementation at the state level to ensure proper enforcement by state administrative authorities. OSEP reviews state plans for implementation and approves or disapproves of funding. Monitoring includes state enforcement efforts with regard to local districts. OSEP also issues detailed reports of noncompliance, provides technical assistance to states, and can take a range of enforcement actions when states fail to comply.⁸⁷

IDEA requires extensive reporting and monitoring of its provisions by state governments. Similar state obligations are incurred through receiving Title I funding.⁸⁸ Among the many IDEA provisions are those requiring states to:

- Monitor school districts for potential discrimination in suspensions and expulsions of children with disabilities;⁸⁹

- Establish performance goals, using indicators such as performance on assessments, dropout rates, and high school completion;
- When the state's indicators point to ineffective progress for students with disabilities, the state must adjust its improvement plan accordingly;⁹⁰ and
- Intervene by revising policies, procedures and practices, where significant racial disproportionality exists in special education identification and placement.⁹¹

a. Enforcement History

In January 2000, the federal government's independent National Council on Disabilities (NCD), charged with evaluating OSEP's effectiveness, recognized recent and substantial improvements but nonetheless issued a scathing report detailing serious and persistent enforcement failures over the preceding 10 years.⁹²

The disability categories most prone to restrictive placements are "Emotionally Disturbed" and "Mentally Retarded."⁹³ Therefore, OSEP's failure to enforce LRE requirements, whereby 72% of states were out of compliance according to the NCD Report, is most disconcerting given the potentially adverse impact on minority students from widespread noncompliance. The report also highlights OSEP's failure, in approximately 78% of all states, to ensure compliance with procedural safeguards. These include the failures to insure that schools receive informed parental consent before a child is evaluated and/or placed, and that parents be provided information about their rights in a manner and language they can understand. The failure to provide this important legal information may indirectly contribute to racial disproportionality.

Furthermore, the latest statistical evidence, presented at Harvard's conference, suggests that neither state nor federal governments have put adequate mechanisms in place for collecting and reviewing data, or effectively intervened where data have strongly suggested that disproportionality should be a concern. This inference is supported by the NCD report, which indicates that at least 35 states (70%) are out of compliance with monitoring requirements of IDEA, generally.⁹⁴

b. OSEP Enforcement Options

According to Dr. Thomas Hehir, OSEP could be more effective, generally, in the way it combines its role as grantor and enforcement agent.⁹⁵ Dr. Hehir points out that enforcement options to IDEA in 1997 varied the enforcement palette of OSEP and in so doing strengthened the agency's ability to ensure compliance.⁹⁶ Most important, the new options enable OSEP to exercise its prerogative to withhold funding more often, because of the addition of *partial withholding* as an option. Previously, when faced with noncompliance, the agency had to either withhold the entire grant to a state or pursue actions that had no effect on the flow of grant money. By employing a measured approach, OSEP can now bring focused pressure on state education agencies (SEAs) to be more aggressive in their own monitoring and would rarely need to recommend denying all funding outright.⁹⁷ According to Dr. Hehir, incremental withholding would likely be more effective, in part, because the agency could avoid the high degree of confrontation and intense political backlash that threats of wholesale withdrawal of federal funding have triggered in the past.⁹⁸

Despite the availability of these new options, the NCD Report states that OSEP has failed to utilize them and that "There appear to be no clear-cut, objective criteria

for determining which enforcement options ought to be applied and when to enforce in situations of substantial and persistent noncompliance.”⁹⁹

c. OSEP Enforcement and Dropouts

Currently the IDEA requires that states examine “at a minimum” the performance of students with disabilities on statewide assessments, dropout rates, and high school completion in determining adequate implementation.¹⁰⁰ Research recently commissioned by Achieve Inc., and The Civil Rights Project at Harvard University¹⁰¹ show that nationally the dropout problem is relatively acute in 300 inner-city schools with rates greater than 50%, and that most of these schools have student bodies that are more than 90% minority. But these new studies also showed that dropout rates are usually underreported.

Most important, completion rates alone often distort the level of school success by combining those students who earn a GED or alternative certificate of completion with those who earn a bona fide high school diploma. Given these astonishing figures, which likely encompass a disproportionate number of minority students with disabilities, OSEP should intensify efforts to pressure states to improve dropout rates as required. The IDEA could also be improved upon substantially through legislation that required the reporting of “graduation rates” by race with disability status.

In Title I of the newly reauthorized Elementary and Secondary Education Act, graduation rates, defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years, must be reported publicly and used to determine whether schools are making adequate yearly progress.¹⁰² If IDEA’s existing requirements for evaluating implementation were made to conform with this graduation rate standard,

revealing data would be available, and pressure to meet a more meaningful barometer of success would be applied. Further disaggregation of graduation rate disability data by race would help ascertain where minority students with disabilities were receiving inadequate supports and services.

4. Systemic Intervention by Justice Department

The DOJ has been engaged in school desegregation lawsuits for over 25 years. In some cases, an entire state may be impacted by a court order. Present-day minority overrepresentation in special education in a given school district may evidence the continuing impact of a prior dual system in that district (as well as a veiled continuation of that system). This argument has successfully prompted courts to modify desegregation orders, requiring school districts to address racial disparities in special education.¹⁰³

In one recent example, Alabama District Court Judge Myron Thompson consolidated the issue of unitary status and reviewed eleven school districts pursuant to *Lee v. Macon County*.¹⁰⁴ On August 30, 2000, the District Court issued a revised consent decree in all 11 cases addressing the state’s persistent problem of minority student overrepresentation in special education.¹⁰⁵ The decrees are comprehensive, including remedies for overrepresentation in the categories of “emotionally conflicted,” specific learning disability, and mental retardation. Alabama, which previously had one of the worst track records of any state in terms of statistical overrepresentation of African Americans,¹⁰⁶ agreed to extensive corrective measures, which included: awareness and prereferral training; monitoring the agreement, including yearly status conferences; changes to the Alabama Code including to require prereferral inter-

vention for six weeks, in most cases, before a child can be referred for special education; revamping the assessment to include home behavior assessments and other contextual evaluations; providing culturally sensitive psychometrics and training; funding to accomplish the decree's goals using a state improvement grant; and reevaluation of all borderline MR students.

5. Changes in the Legal Landscape

The Supreme Court recently ruled in *Alexander v. Sandoval* that there is no "implied right of action" to enforce the Title VI disparate impact regulations in court. However, Justice Stevens, dissenting, stated that it was "likely" that plaintiffs could still enforce the disparate impact regulations in court under a civil rights statute called "Section 1983." This important legal distinction means that court actions against public schools might still be viable, despite the *Sandoval* ruling. Even if court actions invoking the disparate impact regulations prove untenable, the ruling in *Sandoval* does not change the fact that a public school district can be challenged on disparate impact grounds in a complaint made to OCR, or in an investigation initiated by the agency.

III. Recommendations for Improving Federal Implementation and Enforcement Efforts for Minority Students

A. Research-Based Policy Recommendations

- Improvements in the quality of instruction and curriculum for minority students, in both regular and special education, should be top priorities if the patterns of minority overrepresentation in special education are to be remedied.¹⁰⁷ Perhaps the best way to measure whether quality has improved is by using graduation rates for accountability purposes under the IDEA along with test scores reported by race and disability under Title I.
- Until there is a sound basis to believe that potential test takers, including students with disabilities, have had meaningful opportunity to learn the tested material and receive appropriate accommodations when tested, the attachment of high student stakes such as diploma denial or grade retention should be put on hold.¹⁰⁸
- Greater support to meet the specific educational and emotional needs of minority students, through improved research, early intervention, and sustained services, is needed to stem the dangerous flow of minority school children into the juvenile justice system.¹⁰⁹
- Pursuant to the IDEA's provisions on racial disproportionality, OSEP and OCR should work together with states to gather and disseminate school and

district data on minority identification and placement rates.

B. Enforcement Recommendations

In general, the persistent and disturbing pattern of overrepresentation and underservicing calls for stepped up enforcement and oversight activity by the federal government. Yet the important potential enforcement ripple effect is severely mitigated by OCR's preference for investigation and identification of particular violations over more systemic ones, combined with the preference for negotiated settlements and its failure to proactively disseminate those agreements and other information about outcomes, monitoring, and enforcement policy to the public. To encourage more widespread compliance, OCR should aggressively disseminate information on its enforcement activities and maintain an easily accessible database documenting its activities. OSEP, for their part, should make better use of the new enforcement options, especially the partial withholding of funds to target specific compliance. Both agencies should bring intensive pressure to bear on states for failure to monitor and intervene in the face of persistent and significant overrepresentation.

I. Comprehensive Systemic Reform

Because the process of identification and placement for special education is fundamentally a subjective one, state and federal enforcement agents, who respond to disproportionality, should not be swayed from intervention simply because school districts appear to rely on so-called "objective" testing and are in procedural compliance with the IDEA. Rather than seeking to "fix" the test or other discrete aspects of the process, school districts with significant disproportionality should be

required to pursue multiple measures that address effectively the needs of minority students in both regular and special education, as measured by *outcomes as well as inputs*.

Solving the problems of overrepresentation and underservicing of minority students, therefore, will require a comprehensive systemic approach. This suggests that state and federal agents who intervene should provide technical assistance and supports that consider the needs of students and teachers in regular education classrooms and not simply seek to correct numerical disparities in special education.

2. Data-Driven Intervention

Federal oversight can ensure that uniform and quality data on identification and placement by race and ethnicity, already required for state collection and analysis by IDEA, are actually collected and reviewed rigorously each year. Compliance reports specific to these issues should be disseminated to all school districts, with guidance on best practices for data collection and guidance on how to address significant overrepresentation. Technical assistance should be made readily available to those districts acknowledging problematic racial disproportionality.

C. Remedies and Partnerships — Collaboration Stimulated by Federal Enforcement

I. Utilizing Models for Proactive Measures

Two recent settlements, brought on behalf of primarily minority students in Chicago, suggest that school districts and states will be found liable if they fail to take the

requirements under IDEA and section 504 seriously. Specifically, plaintiffs in the *Corey H.* case settled with the Board of Education for Chicago and the State of Illinois (but litigated through the liability stage with the State) won substantive improvements in teacher training, scrutiny of special education referrals, evaluations, and performance goals for students with disabilities.¹¹⁰ The settlement also resulted in a multi-million-dollar infusion of funds for measures designed to increase access to the regular education classroom and curriculum. OCR and OSEP can help states reduce minority overrepresentation and generate more effective special education services for minorities by observing carefully the court-ordered remedies for these problems in Illinois and Alabama and by helping other states that are out of compliance adapt the most effective of these measures.

2. Input Remedies

Enforcement agents should seek remedies that research suggests improve both regular and special education. These include higher-quality, experienced teachers, more teacher training in what is popularly called “classroom management,” training for special and regular education teachers in academics; smaller class sizes and the use of programs of instruction that are proven effective; more inclusive, heterogeneous classrooms; teacher practica in inclusive and multicultural settings; certification requirements that reflect IDEA mandates; time for regular and special education teacher collaboration and problem solving; more pervasive and effective student supports and services (and corresponding additional resources); and incentive programs to attract and keep talented, multilingual special educators.

3. Output Remedies

When the government does intervene, it should include incentives to improve outcome measures that focus on achievement of students with disabilities and those who have been misidentified and need to be transitioned back into regular education classrooms. Remedies must ensure that the above-listed inputs are evaluated and refined. Federal enforcement agents, working together with state and local authorities, can anchor measures of effectiveness by using the states’ own Title I mechanisms for determining adequate progress. Parties to OCR resolution agreements and OSEP compliance agreements can sit down together, as did the Parties in *Corey H.*, to hammer out realistic numeric goals and create multiyear plans to ensure the necessary inputs are employed and outcomes measured accurately. To this end, education researchers should be better utilized to assist attorneys and school officials in analyzing which inputs are most effective in improving regular and special education.

4. Remedies That Focus on Race and Ethnicity

The new provisions in Title I that require improved graduation rates,¹¹¹ as well as steady progress of minority groups and students with disabilities on assessments, can ensure that remedies educators *believe* will help relieve the disproportionalities actually *do so*. Moreover, when inadequate reading and math instruction is one of the causes of overrepresentation in special education (regardless of race), remedies that are focused on misidentified minority students can seek significant improvements in curriculum and teacher quality in those subject areas, and target classrooms serving minority students.¹¹²

Additionally, useful data for monitoring compliance by disaggregating data on outputs by race and ethnicity along with disability classification are needed. These additional data linking race and disability data could help monitors judge the efficacy of input remedies that seek to reduce rates of minority special education referrals, such as teacher training in classroom management and multicultural education for both regular and special education teachers. Given the many (nonracial) compliance issues facing states, there is little incentive for states to focus on racial inequities in special education without specific pressure from the federal government on this issue.

IV. Conclusion

Motivation, Partnerships, Transparency, Informed Consent, and High Standards: These recommendations emphasize the federal government's role in generating problem-solving partnerships, providing

useful information for evaluating and improving intervention by state and local government, and making problems easier to identify and analyze. By suggesting enhanced federal oversight and enforcement these recommendations should not be misconstrued as favoring heavy-handed federal intervention. Court orders and withholding of funds are absolutely necessary, especially when poor and minority students are confronted with obstinate school authorities in charge of failing systems. But most public school officials respond to a combination of redirection and an infusion of supports. To remedy the problems described above, therefore, school administrators, teachers, parents, advocates, and community leaders must receive far more concrete support in understanding their rights and responsibilities, and be provided the resources to set and meet high standards for minority children and children with disabilities.

Endnotes

¹ This chapter is based primarily on the executive summary of The Civil Rights Project at Harvard University's (CRP) Conference on Minority Issues in Special Education (Nov. 17, 2000). The conference research papers cited in these notes are all in draft form and on file with the author. Many of the papers cited are expected to be published by the Harvard Education Publishing Group in a forthcoming book. Some portions of this chapter, not cited, were taken from *Systemic Challenges: Comprehensive Legal Responses to Inappropriate and Inadequate Special Education Services for Minority Children*, by Daniel J. Losen and Kevin G. Welner. The author would like to thank the Spencer Foundation for their support for the research commissioned and the conference that followed.

² The data are less consistent for other minority groups, often indicating underrepresentation for non-black minority students. However, data from California show the percentage of every racial and ethnic subgroup that received services in a mainstreamed regular education classroom was lower than that for white students. See Tom Parrish, *Disparities in the Identification, Funding and Provision of Special Education*, at 25 (Table 6) ("Parrish"). See also Edward G. Fierros and James W. Conroy, *An Examination of Restrictiveness in Special Education* ("Examination").

³ These figures are all based on the Office for Civil Rights (OCR) 1998 *Elementary and Secondary School Civil Rights Compliance Report Projected Values for the Nation* (1999).

⁴ 20 U.S.C. § 1400 *et seq.*; Individuals with Disabilities Education Act Amendments of 1997; Public Law 105-17. IDEA was originally enacted in 1975 as the "Education for All Handicapped Children Act of 1975" (Public Law 94-142).

⁵ 20 U.S.C. § 1401 (c)(8)(C).

⁶ 20 U.S.C. § 1401 (c)(8)(A).

⁷ See, e.g., Dr. Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Strategies for Change* (CRP Conference) ("Hehir"); Sharon Soltman and Donald Moore, *Ending Illegal Segregation of Chicago's Students with Disabilities: Strategy, Implementation, and Implications of the Corey H. Lawsuit* ("Soltman and Moore").

⁸ 34 C.F. R. § 300.504, 505; 20 U.S.C. § 1414, 1415.

⁹ 20 U.S.C. § 1414, 1415.

¹⁰ See National Council on Disabilities Report, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* (Jan. 25, 2000) ("NCD Report").

¹¹ See *Id.* at 12.

¹² 20 U.S.C. § 1418.

¹³ The preferred term, English language learner (ELL) is used instead of the term used in the law, “limited English proficient” (LEP). Both refer to students acquiring English as a second language.

¹⁴ National Research Council, *High Stakes Testing for Tracking, Promotion and Graduation*, at 93 (National Academy Press 2000).

¹⁵ See Beth Harry, Janette Kingner, Keith M. Sturges, and Robert Moore, *Of Rocks and Soft Places: Using Qualitative Methods to Investigate the Processes that Result in Disproportionality* (“Rocks and Soft Places”); see also National Research Council, *High Stakes Testing for Tracking, Promotion and Graduation*, at 93 (National Academy Press 2000) (“High Stakes”).

¹⁶ See *Rocks and Soft Places*.

¹⁷ See Donald P. Oswald, Martha J. Coutinho, and Al M. Best, *Community and School Predictors of Over Representation of Minority Children in Special Education*, slated for publication by the Harvard Education Publishing Group (“Predictors”).

¹⁸ *Id.* See Parrish. See also *Examination*.

¹⁹ See, e.g., U.S. Department of Education, *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1998).

²⁰ See Parrish; *Predictors*; *Examination*.

²¹ See *Predictors*; see also Alfredo Artiles, Robert Rueda et al., *Factors Associated with English Learner Representation in Special Education: Emerging Evidence from Urban School Districts in California* (“Factors Associated”).

²² *Examination*.

²³ *Factors Associated*.

²⁴ David Osher, Darren Woodruff, and Anthony Sims, *Exploring Relationships Between Inappropriate and Ineffective Special Education Services for African American Children and Youth and their Overrepresentation in the Juvenile Justice System* (“Exploring Relationships”).

²⁵ See *Predictors*.

²⁶ Jay Heubert, “High States Testing: Opportunities and Risks for Students of Color, English-Language Learners, and Students with Disabilities” (forthcoming as a chapter in *The Continuing Challenge: Moving the Youth Agenda Forward* (M. Pines ed.) *Policy Issues Monograph* 00-02, Sar Levitan Center for Social Policy Studies (Baltimore, MD: Johns Hopkins University Press) [on file with author] (“High Stakes”).

²⁷ See William Taylor, “Standards, Tests and Civil Rights,” *Education Week* (Nov. 15, 2000).

²⁸ 20 U.S.C. § 1412 (a)(16), (17); 20 U.S.C. § 6311(b)(3)(I), 6314 (b)(2).

²⁹ National Center on Educational Outcomes, *1999 State Special Education Outcomes: A Report on State Activities at the End of the Century* (Dec. 1999), available at <<http://www.coled.umn.edu/nceo/OnlinePubs/99StateReport.html>> (“NCEO Report”).

³⁰ *Id.*

³¹ See Julie Miller, “Five More States Ordered to Negotiate Compliance Agreements on Assessment,” *Title I Report*, at 11 (July 2001).

³² 20 U.S.C. § 6311(b)(3)(I); 20 U.S.C. § 1412 (a)(16), (17).

³³ Not currently required for accountability purposes under Title I.

³⁴ NCEO Report.

³⁵ According to data available on the website of the Texas Education Agency (TEA), more than 12% of all Texas children are eligible for special education services. Based on a review of data from previous years, this percentage represents a significant increase of nearly 100,000 students between 1993–1994 and 1999–2000 - a change from 10.7% of those enrolled to 12.1%.

Total enrollment grew during the same period by nearly 350,000 students. <<http://www.edweek.org/context/states/tx-facts.htm>>.

³⁶ See Scott Thompson, "The Authentic Standards Movement and Its Evil Twin," *Phi Delta Kappan* (2001).

³⁷ Martha Thurlow and Kristen Liu, *State and District Assessments as an Avenue to Equity and Excellence for English Language Learners with Disabilities* (paper presented at CRP Conference, on file with author).

³⁸ *Id.*

³⁹ High Stakes.

⁴⁰ Hehir.

⁴¹ Parrish.

⁴² 42 U.S.C. § 2000(d)(1)-(4) (1994).

⁴³ 29 U.S.C. § 794.

⁴⁴ 42 U.S.C. § 12101 *et seq.* (1994). Title II of the Americans with Disabilities Act (ADA) prohibits discrimination because of a person's disability in all services, programs, and activities made available by any public entity. *Id.* at § 12132.

⁴⁵ Important differences do exist, but they are not relevant to this discussion. See, e.g., U.S. Commission on Civil Rights, III, Equal Education Opportunity Project Series 89 (1997) ("EEOP Volume III").

⁴⁶ 20 U.S.C. § 1412.

⁴⁷ See, e.g., 20 U.S.C. § 1401(8); 1414 (b-d); 34 C.F.R. § 300.26 (b)(3), 300.344(a)(2), (4)(ii), 300.347, 300.532(b), 300.533(a)(2)(ii), §300.550-554; see also *Devries v. Fairfax Count School Board*, 882 Federal Reporter 2d 876, 878 (4th Circuit 1989).

⁴⁸ 20 U.S.C. § 1412(a)(1).

⁴⁹ 20 U.S.C. § 1412(a)(5).

⁵⁰ There is some disagreement as to whether the LRE entitlement is a right wholly subsumed by FAPE or a separate right. Courts tend to seek a balance when the two are in tension. See, e.g., *Oberti v. Board of Education of the Borough of Clementon School District*, 995 Federal Reporter 2d 1204 (3rd Circuit 1993); *Daniel R.R. v. State Board of Education*, 874 Federal Reporter 2d 1036 (5th Circuit 1989).

⁵¹ In *Oberti*, the 3rd Circuit Court held that the school district has the burden of proving compliance with LRE requirement, regardless of which party brought the claim in court. See *Oberti v. Board of Education of the Borough of Clementon School District*, 995 Federal Reporter 2d 1204 (3rd Circuit 1993).

⁵² 20 U.S.C. § 1412(a)(5). Specifically, the law states: "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

⁵³ 20 U.S.C. § 1401(c)(4).

⁵⁴ 20 U.S.C. § 1401(c)(5).

⁵⁵ Public Law No. 105-17, § 602(A)-(B) (1997) (eligible categories of disability are listed in the law).

⁵⁶ See 42 Federal Register 22, 685 (1977).

⁵⁷ 29 U.S.C. § 705(20)(B), 794; 34 C.F.R. §104.3 (j).

⁵⁸ 29 U.S.C. § 794. However, courts have been split with regard to legal claims based on FAPE.

⁵⁹ Certain procedural protections would still apply, however. Moreover, IDEA requires districts to ensure the use of assessments that are neither racially nor culturally biased. 20 U.S.C. § 1414 (b)(3)(A)(i).

⁶⁰ Imagine a misidentified student who suffered psychological harm and was denied access to the regular education curriculum for years in an inappropriate isolated placement. In some cases these new needs may qualify thus harmed students for FAPE under the broader, non-categorical section 504 disability definition, such as “otherwise health impaired.” For more information on the differences, see U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, at 98, EEOP Volume II (Sept. 1997).

⁶¹ See 34 C.F.R. § 104.3(j)(2)(iii) (emphasis added).

⁶² 34 C.F.R. § 104.3(j) (1996).

⁶³ See Memorandum from Assistant Secretary of Education Norma Cantu, *Minority Students and Special Education* (July 6, 1995) (on file with author). See also EEOP volume III.

⁶⁴ 34 C.F.R. § 100.3(b)(2). Title VI, section 602, “authorizes and directs” federal departments and agencies that extend federal financial assistance to particular programs or activities “to effectuate the provisions of section 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability” (42 U.S.C. § 2000d-1). Similar “effects test” regulations exist with regard to discrimination on the basis of disability (section 504), 34 C.F.R. § 104.4(b)(4) and gender (Title IX) 34 C.F.R. § 106.1, *et seq.* These gender and disability protections may also be germane to a minority overrepresentation case under “disparate impact” legal theory. Title IX, for instance, could be violated where males are disparately impacted by a school district’s referral, evaluation, and placement policy.

⁶⁵ Telephone Interview with Barbra Shannon, OCR Senior Attorney (May 15, 2000).

⁶⁶ See, e.g., *Powell v. Ridge*, 189 Federal Reporter 3d 387 (3d Circuit 1999); *Elston v. Talladega County Board of Education*, 997 Federal Reporter 2d 1394, 1407 (11th Circuit), *rehearing denied*, 7 Federal Reporter 3d 242 (11th Circuit 1993).

⁶⁷ *Id.*

⁶⁸ See, e.g., *GI Forum v. Texas Education Agency*, 87 Federal Supplement 2d 667 (W.D. Texas 2000).

⁶⁹ NCD Report at 48.

⁷⁰ See EEOP Volume III at 98-109.

⁷¹ See *Ceasar v. Pataki*, 2000 WL 1154318, (S.D.N.Y. 2000) (upholding claim that state’s failure to act in accordance with legal enforcement mandates if such inaction has disparate impact on minorities was actionable offense under Title VI regulations).

⁷² For 2000, compliance data was collected from nearly every school district in the U.S.

⁷³ Unlike the Title VI analysis, OCR’s section 504 analysis is typically *not* a disparate impact analysis. In part, this is because failures to follow numerous legal procedures delineated in disability law are considered *per se* discrimination and are relatively easy to establish. See EEOP Series, U.S. Commission on Civil Rights.

⁷⁴ See U.S. Commission on Civil Rights, 1 Equal Educational Opportunity Project Series, at 209-213 (1996).

⁷⁵ See U.S. Department of Education, Office for Civil Rights, *Enforcement and Other Activities in the Area of Over-representation of Minorities in Special Education*, outline of presentation for The Conference on Minority Issues in Special Education, by Tim Blanchard, OCR National Minorities and Special Education Network Co-Facilitator (Nov. 17, 2000). During

this same period, 1993-2000, the agency reports receiving 309 complaints “with MinSPED allegations.”

⁷⁶ See Theresa Glennon, *OCR and the Misplacement of African American Students in Special Education: Conceptual, Structural, Strategic and Administrative Barriers to Effective Enforcement* (CRP Conference) (“Glennon”).

⁷⁷ *Id.*

⁷⁸ Based on several discussions with Timothy Blanchard and Algis Tamosciunus, the co-facilitators of the OCR’s “MinSPED” task force on the overrepresentation of minorities in special education..

⁷⁹ Memorandum from Norma Cantu on Minority Students and Special Education to all staff, at 19 (July 6, 1995).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Telephone Interview with Timothy Blanchard (Sep. 25, 2000).

⁸³ Glennon.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Glennon.

⁸⁷ For a clear and more complete description of the IDEA enforcement scheme see NCD Report at 37 (Table 1).

⁸⁸ Most notable was Congress’ bipartisan reauthorization and amendment of the Elementary and Secondary Education Act, calling it “The Improving America’s Schools Act” (Title I of this Act is hereinafter referred to simply as Title I). The 1994 Act emphasized maximum access to regular education for all students. It required that states align their curriculum and assessment with high academic standards and test all children practicable. Most important, Title I required states report data to the public, disaggregated by race, ethnicity, and gender, and compare the achievement of students with disabilities with their nondisabled peers. 20 U.S.C. § 6301 *et seq.*

⁸⁹ See 34 C.F.R. § 300.146 (a)-(b); 20 U.S.C. § 1412(a)(22).

⁹⁰ 20 U.S.C. § 1412(a)(16)(c) (1997); 34 § 300.755 (1999).

⁹¹ See 20 U.S.C. § 1418(c); 34 C.F.R. § 300.755.34; C.F.R. § 300.519; 20 U.S.C. § 1415(k). This responsibility could alternatively fall to the Secretary of the Interior, “as the case may be.” *Id.*, § 1418(c)(2).

⁹² See generally NCD Report. The report looks at more than two decades of federal monitoring and enforcement of compliance with Part B of IDEA.

⁹³ See *Examination*.

⁹⁴ NCD Report at 113. The Report goes on to say that 70% noncompliance is probably too low, based on its independent review of OSEP noncompliance determinations. *Id.* at 118.

⁹⁵ Hehir.

⁹⁶ For more information on OSEP’s monitoring visit the following website: <<http://www.dssc.org/frc/monitor.htm>>.

⁹⁷ Hehir.

⁹⁸ 20 U.S.C. § 1234(c)(a)(3) Compliance Agreement; 34 C.F.R. § 80.12 Special Conditions; 20 U.S.C. § 1416, 1234(a)(1), (d) Withholding (1416 includes power to withhold funds from particular local education authorities); 20 U.S.C. § 1416 Referral to Department of Justice; 20 U.S.C. § 1234 (c)(a)(2), (e) Cease and Desist Order.

⁹⁹ NCD Report at 9,53.

¹⁰⁰ 20 U.S.C. § 1412(a)(16)(B).

¹⁰¹ No Child Left Behind Act of 2001, Public Law No. 107-110, § 1111(b)(2)(C)(vi) (“ESEA 2001”).

¹⁰² Presented at the Harvard Graduate School of Education in Jan. 2001.

¹⁰³ See, e.g., *Yonkers v. Board of Education*, 624 Federal Supplement 1276 (S.D.N.Y. 1985).

¹⁰⁴ The consent decrees consist of two documents in each case: (1) an order approving the consent decree on statewide special education issues, *Lee v. Phoenix Board of Education*, C.A. No. 70-T-854 (M.D. Alabama 2000); and (2) the consent decree itself, *Lee v. Phoenix Board of Education* (M.D. Alabama 2000).

¹⁰⁵ The decrees, taken together, apply to the entire state.

¹⁰⁶ Jeremy D. Finn, *Patterns in Special Education Placement as Revealed by the OCR Surveys* (1982).

¹⁰⁷ *Rocks and Soft Places*.

¹⁰⁸ Hehir.

¹⁰⁹ *Exploring Relationships*.

¹¹⁰ *Corey H. v. The Board of Education of Chicago et al.*, 21 IDELR 713 (N.D. Illinois 1998). See also Soltman and Moore.

¹¹¹ ESEA 2001.

¹¹² To the extent that IDEA and 504 require race neutral evaluation and placement, there may be a basis for seeking remedial measures that specifically redress racial overrepresentation in special education.