U.S. COMMISSION ON CIVIL RIGHTS

COMMISSION BRIEFING

MINORITIES IN SPECIAL EDUCATION

MONDAY, DECEMBER 3, 2007

The briefing convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 10:00 a.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
JENNIFER C. BRACERAS, COMMISSIONER
GAIL L. HERIOT, COMMISSIONER
PETER N. KIRSANOW, COMMISSIONER
ARLAN D. MELENDEZ, COMMISSIONER
ASHLEY L. TAYLOR, JR., COMMISSIONER
MICHAEL YAKI, COMMISSIONER (via telephone)

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel
CHRISTOPHER BYRNES, Attorney Advisor to the OSD & Acting Deputy General Counsel, OGC
DEMITRIA DEAS
PAMELA DUNSTON, Chief, ASCD
MONICA KIBLER
ROBERT LERNER, Assistant Staff Director for OCRE
EMMA MONROIG, Solicitor/Parliamentarian
KARA SILVERSTEIN
AUDREY WRIGHT
MICHELE YORKMAN
COMMISSIONER ASSISTANTS PRESENT:

DOMINIQUE LUDVIGSON
LISA NEUDER
RICHARD SCHMELCHEL
KIMBERLY SCHULD

PANEL 1:

THE HONORABLE STEPHANIE MONROE, Assistant Secretary for Civil Rights at the U.S. Department of Education
DR. MARTIN GOULD, Director of Technology and Research at the National Council on Disability
REGINALD FELTON, Director of Federal Relations at the National School Boards Association

PANEL 2:

DR. MATTHEW LADNER, Vice President of Research for the Goldwater Institute
DR. DANIEL RESCHLY, Professor of Education and Psychology in Peabody College, Vanderbilt University
HILARY O. SHELTON, Director of the Washington Bureau of the National Association of the Advancement of Colored People (NAACP)
PETER A. ZAMORA, The Washington, D.C. Regional Counsel for Mexican American Legal Defense and Educational Fund (MALDEF)
WILLIAM H. HURD, Attorney, Troutman Sanders
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CHAIRMAN REYNOLDS: Okay. On behalf of the Commission on Civil Rights, I welcome everyone to this briefing on minorities in special education.

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN REYNOLDS: At this briefing, we have a panel of experts who will discuss whether racial and ethnic – whether blacks, Hispanics, or Native Americans are misplaced in special education programs. Recent studies indicate that these students are more likely to be placed in special education classes than their white peers.

For example, a 2002 report of the National Academy of Sciences found that 2.6 percent of black students have been identified as mentally retarded compared with 1.2 percent of white students, and roughly 1.5 percent of black students are labeled as emotionally disturbed compared with .91 percent of white students.

Similarly, the American Institute for Research found that black children are approximately three times more likely than whites to be labeled mentally retarded, and approximately two times more
likely to be labeled emotionally disturbed.

Hispanic students are also statistically overrepresented in emotionally disturbed categories in New York, Connecticut, and Pennsylvania. Among the possible causes of this misidentification are 80 percent of these students identified as having specific learning disabilities are so labeled because they have not learned to read. Another cause is students with limited proficiency in English are misidentified as having a disability because of a lack of English language skills.

Current special education systems offer a bounty formula, at least some of them, and this formula unintentionally rewards the segregation of students labeled as learning disabled, poorly trained teachers, racial stereotyping, and, finally, African-American and Hispanic students arrive at school less prepared to meet academic and behavioral standards.

So this briefing will examine the nature, extent, and possible causes of any misidentification of minority students requiring special education programs, and what the Federal Government, schools, and parents can do to address the problem.

The record will be open until January 3,
2008, and the public comments should be mailed to the
U.S. Commission on Civil Rights, Office for the Staff
Director, Suite 700, at 624 Ninth Street, N.W.,
Washington, D.C. Zip is 20425. This --

COMMISSIONER YAKI: Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: The record is supposed
to close two days after the New Year. I would suggest
that we extend it a week.

CHAIRMAN REYNOLDS: Any objections?

(No response.)

Okay. Commissioner Yaki, there is no
objection to it, although this is not a -- this is a
briefing, and ordinarily we don't entertain motions,
but I don't anticipate a problem pushing it back a
week.

COMMISSIONER YAKI: I was just trying to
make it so people can enjoy the holidays.

CHAIRMAN REYNOLDS: I know. I understand,
and I agree. Okay.

VICE CHAIR THERNSTROM: Mr. Chairman, can
I make one remark on your opening comments --

CHAIRMAN REYNOLDS: Sure.

VICE CHAIR THERNSTROM: -- before we
start? The question of misidentification is open, and so, you know, are these child misidentified? And the way you summarized I think the subject here was based -- was assuming that the question of misidentification is celled, and the question is why. That's number one.

And number two, we're talking -- in terms of disparities, we're talking about the underrepresentation, allegedly, of both whites and Asians. So the Asians need to be in this picture, because there are, in fact, very few Asians in special education.

CHAIRMAN REYNOLDS: Okay. I think that those are good points.

Okay. The first panel will present views of three government -- well, the first panel will present the views of three government and school officials dealing with this topic. The participants are The Honorable Stephanie Monroe, Assistant Secretary for the Office for Civil Rights (OCR) at the U.S. Department of Education; Dr. Martin Gould, Director of Technology and Research at the National Council on Disability; and Reginald Felton, Director of the Federal Relations at the National School Board.
Association.

The first speaker will be The Honorable Stephanie Monroe. Ms. Monroe is, as I said earlier, the Assistant Secretary for OCR. Previously, she served as Chief Counsel for the Senate Committee on Health, Education, Labor, and Pensions, from 2001 through 2005. From 1989 through 2001, she served as Chief Counsel and Staff Director for the Senate Committee on Labor and Human Resources Subcommittee on Children and Families.

After Ms. Monroe, we have Dr. Gould. Dr. Gould is the -- as I said earlier, the Director of Technology and Research at the National Council on Disability (NCD). He has worked at the NCD since 2000. He previously served as the Director of Outcomes Research at an international nonprofit agency. Dr. Martin earned his Doctorate in Education and Behavioral Science Research from Johns Hopkins University.

Mr. Felton is responsible for developing and implementing comprehensive legislative strategies and representing the interests of local school boards and NSBA at the federal level on a variety of issues affecting student achievement in public education.
His program areas include No Child Left Behind, IDEA and FIFRA, labor and emerging federal issues impacting the business operations of local school boards.

Okay. On behalf of the Commission, I welcome all of you, and we will start with the Assistant Secretary.

Oh, I'm sorry, one last thing as a housekeeping matter. Okay. Please -- I have to swear you in. Please raise your right hand.

(Whereupon, the panelists were sworn.)

Okay. We will start with the Assistant Secretary.

II. SPEAKERS' PRESENTATIONS

ASST. SEC. MONROE: Thank you very much. Good morning, Commissioners. I'm very happy to represent the U.S. Department of Education, Office for Civil Rights, at this briefing to discuss two civil rights issues that have been a priority for my agency since 1993 -- that being the disproportionate representation of minorities and limited English proficient students in special education.

It's clear that greater understanding of these issues will better enable school districts to serve students more effectively in both regular
education programs and in special education programs where appropriate placement decisions have been made.

The No Child Left Behind Act of 2001 was designed to ensure that all students are appropriately assessed, included in the accountability system, and prepared to attain grade level proficiencies in reading and math.

While giving states the flexibility to use the best methods of instruction, No Child Left Behind requires that states and local education agencies establish English proficiency standards and carry out language instruction programs that are based on scientific research and implemented by highly qualified and effective teachers, the goal being to advance equal access and opportunity for all students, as required by the Brown and Lau decisions, and Title VI of the Civil Rights Act of '64.

Fifty years ago, the U.S. Supreme Court ruled in its monumental decision in Brown that the segregation of children in public schools solely on the basis of race deprives students of the minority group of equal educational opportunities. Forty years ago, Congress enacted Title VI prohibiting discrimination on the basis of race, color, or
national origin, which included discrimination on the basis of limited English proficiency.

In the landmark *Lau v. Nichols* decision 30 years ago, a unanimous Supreme Court held that there's no equality of treatment merely by providing the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful instruction.

Through these major legal developments, Congress and the courts have established that all students have a basic right to equal educational opportunities.

In 1982, the Office for Civil Rights commissioned a study by the National Academy of Sciences which resulted in a report entitled "Placing Children in Special Education: A Strategy for Equity." This study provided a number of important insights into the issue of disproportionate representation of minorities in special education, including linkages between effective instruction and placement in special education, the uses and misuses of testing and assessment for special education services, and other generally external factors which affect whether or not a child will be placed in
special education.

Later, in 1992, a nationwide survey was conducted to determine if minority students were disproportionately placed in special education programs and whether any patterns existed with regard to this placement. Thirty-five hundred schools were surveyed.

The results indicated that the disproportionate placement of minority students in special education was a nationwide issue. Reports showed that nationwide, in 1992, African-American students accounted for 16 percent of the total student population, yet African-American students accounted for 32 percent of the students in programs for mildly mentally retarded, 30 percent of students in programs for moderately mentally retarded, and 22 percent of the students in programs for serious, emotional, or behavior disorders.

In some instances, the disparities that we found were up to 74 percent. These disparities were most prevalent in the southeast. Sadly, those disparities have not changed significantly. OCR's data from more recent surveys revealed nearly identical disparities in these categories.
The National Academy of Sciences concluded that while federal regulations implementing an IDEA define mental retardation, the translation of those guidelines into assessment practices is neither direct nor uniform. Thus, the category of EMR is operationalized in different ways at different times and in different areas.

Furthermore, despite the mandates of federal law and regulations, imprecision and looseness in the referral, the assessment, and placement decisions can lead to personal bias affecting placement decisions.

In the summer of 1993, OCR held a national conference in Washington to discuss this issue. Those in attendance included parents, psychologists, special education school personnel, advocacy groups, and others. Those in attendance provided various reasons for the disproportionate placement of minority students in special education, including economics, bias of referring teachers, culture, bias of evaluative instruments, bias of the evaluators, and lack of resources.

Following this conference in 1993, OCR initiated proactive compliance activities regarding
the MINSPED issue in the same year. Since 1993, OCR has conducted hundreds of compliance reviews in this area. In 2003, OCR launched another major compliance initiative regarding the MINSPED issue. In the past five years, OCR has conducted 61 MINSPED compliance reviews and received an additional 144 complaints concerning the MINSPED issue.

Throughout these years, OCR has consistently identified the following compliance concerns: teachers referring minority students for special education testing, but not referring similarly situated white students; evaluators using different types of tests, more testing, or different interpretations of test results to determine that minority students need special education; schools placing minority special education students in self-contained classrooms while similarly situated white students are placed in regular classrooms; and delays in evaluating and placing students that affect children of all races and national origins.

OCR has addressed these concerns by investigating the practices and policies of school districts and obtaining voluntary resolution agreements. Some of the key components of those
agreements include requiring training of regular
education teachers on appropriate reasons for
referring students for special ed, requiring review of
evaluation instruments and how eligibility decisions
are made after testing is completed, and requiring the
reevaluation of students who have been affected by
discriminatory practices.

A study conducted by OCR in 1998 on the
impact of the first tier of compliance reviews
revealed that in 76 percent of the reviews that were
in monitoring for three or more years there was a
decrease in the number of minorities that were
referred and/or placed in special ed. And this
success is ongoing.

In addition, OCR has worked with numerous
state education agencies to provide technical
assistance to local agencies on employing strategies
to address the inappropriate placement of students in
special ed.

Our proactive work in this area has
yielded life-changing results for real students. Our
goal is to ensure that schools provide access to more
effective education opportunities for all students, so
that those students who legitimately need special
education services can in fact receive those services. Those students who have been inappropriately referred for services must then be provided an opportunity to participate in the regular education curriculum, and in many instances an opportunity to participate in high-level academic programs as well.

In one particular case that was recently closed, OCR monitored the implementation of the resolution agreement that called for the District to completely overhaul its practices to ensure that students were appropriately referred, evaluated, and placed in special education programs. For example, the District reevaluated 61 educable mentally disabled students, and of those only 23 continued in the EMD classification.

Sixteen were reclassified in a different disability category to better serve their needs, and 22 were determined not to have a disability at all, and, thus, not to need any special education services.

The District is also providing transition services to the 22 students now in the general education program to ensure that they have the resources they need in order to succeed. It's important to note that when OCR initiated this review
in 2004 there were a total of 242 EMD students compared to 150 in 2006 and '07.

There were 100 academic students identified as EMD in the 2006 and '07 academic year compared to 176 when OCR initiated its compliance review in the 2004 and '05 academic years.

Along with our focus on the issue of minorities in special education, OCR has focused on the issue of access by minority students to gifted and talented programs. In one major urban school district, as a result of OCR's review, the District created gifted and talented programs in traditionally underserved areas, enrichment programs and multi-source notices to parents in each community, implemented a new multiple criteria test to assess student eligibility for the programs, and established training to provide professional development for teachers in those programs.

An equally important issue for the Office for Civil Rights is the treatment and placement of children with limited English proficiency. Throughout the years, the Department of Education has worked to clarify the responsibility of recipients toward its LEP students. In May of 1970, the Department issued a
policy memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" -- and affirmed in Lau v. Nichols -- clarifying the Department's policy under Title VI on issues concerning the responsibility of school districts to provide equal educational opportunity to LEP students.

This policy memorandum states in part that school districts must take affirmative steps to remedy language barriers and may not assign students to special education services on the basis of criteria that essentially measures and evaluates English language skills.

In 1991, OCR supplemented this policy by memoranda providing that school districts must identify which of its national origin minority students have limited English proficiency (LEP), provide them with an effective language assistance program that affords them meaningful access to the District's educational services, and ensure that students are not exited from the program until it is objectively determined that they can speak, read, write, and comprehend English sufficiently to participate meaningfully in the District's educational
services.

Over the last 10 years, while the number of LEP students has increased by 61 percent, from 2.6 million to 4.2 million, the number of LEP students in special education has more than doubled from 120,000 to 248,000. In the past five years, OCR has conducted 35 SPEDLEP compliance reviews and received an additional 273 complaints regarding the SPEDLEP issue.

Our records over the last 14 years have consistently identified the following compliance concerns: lack of consistent affirmative steps to address language barriers, referrals for special education testing that did not take the LEP students' language and culture into account, special education eligibility decisions that were based on a student's limited English proficiency, and the lack of meaningful communication with parents.

Similar to MINSPED compliance reviews, OCR has addressed these concerns by obtaining voluntary resolution agreements, and our proactive work in this area has yielded life-changing results to students as well. For example, OCR recently closed the monitoring of one case where as a result of OCR's work with the District the District initiated or instituted
alternative language programs in 10 additional schools, trained school staff members and administrators through various training initiatives, and moved 26 students, nearly half of the LEP students, out of special ed because it was determined that they had been inappropriately placed in special ed.

The Brown case was the lesson that we must not rest until all students, regardless of their race or ethnicity, have an opportunity to receive a high quality education. And we think that processing cases, looking at compliance reviews, providing assistance to school districts who are endeavoring to serve students of whatever race, whatever language, really helps us to fulfill the goals of Brown.

Thank you.

CHAIRMAN REYNOLDS: Thank you, Ms. Monroe.

Dr. Gould?

DR. GOULD: The National Council on Disability would like to thank the Commission on Civil Rights for the opportunity to provide remarks at this public briefing. NCD is an independent federal agency composed of 15 members appointed by the President and confirmed by the Senate.
Our purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and empower individuals to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

Disproportionality in special ed programs in the United States has been among the most critical and enduring problems in the field of special education for many years. Although the presence of minority overrepresentation has been consistently documented, it's fair to say that the full complexity of the problem has not yet been understood, nor has a clear picture emerged at the national level concerning the causes of disproportionality or the solutions.

The 2004 Individuals with Disabilities Education Act, or IDEA, summarized the problems as: a) the disproportionate representation of children from diverse backgrounds in special ed; b) an overidentification of poor African-American students labeled with mental retardation; c) unacceptably high rates for diverse children in special ed; and d) lack of appropriate services to students of limited English
proficiency.

There are a variety of views about how to measure disproportionality, and there is also a sense that traditional approaches to documenting disproportionality through civil rights data collection can and should be improved. And while research has shown that reducing disproportionality requires a comprehensive approach that includes teacher training, culturally appropriate assessment and instruction, home and school collaboration, and effective pre-referral process, there is scant evidence based on documented solutions at the school and district level.

The problem with disproportionate representation -- the public is concerned with preventing the potential harm to a child misidentified or served inappropriately. The concern is evident in many public documents, including the equal protection clause of the 14th Amendment, Title VI of the Civil Rights Act of 1964, the procedures for evaluating children suspected of a disability under IDEA, the data collection and monitoring responsibilities of the U.S. Department of Education's Office for Civil Rights, and court decisions spanning more than 20
years.

Disproportionate representation is evident for some racial/ethnic groups across specific educational disability categories as identified in IDEA. Currently, IDEA recognizes 13 disability categories, three of which are generally referred to as judgmental disabilities, because usually there is no medical diagnosis. These three areas are emotional disturbance, mental retardation, and learning disabilities.

According to many research students and government reports, overrepresentation in special ed is not a problem for all racial and ethnic groups. While three of the five racial/ethnic groups -- African-American, American Indian/Native Alaskan, and Hispanic children -- are overrepresented in the judgmental disability areas, there is little difference between the five groups in the non-judgmental categories. Overrepresentation is not reported as an issue for white students or students of Asian-American descent. Indeed, children of Asian-American descent are actually underrepresented in special ed categories and overrepresented in gifted and talented programs.
Federal data sets -- national data on disproportionate representation links information about the racial/ethnic group of a child to categorical membership in one of the high incidence disability categories. These data are typically aggregated from buildings to districts, then to states, and finally to the federal level.

Evidence of overrepresentation most generally cites the simple proportion of a racial/ethnic group who qualified for special ed in a specific disability category of eligibility. The assumption made is that the proportion of children in any one category should be approximately equal to the proportion of that ethnic group in the school population. If these two proportions are approximately equal, then presumably no discrimination exists.

Two federal data sets are used for national monitoring of disproportionate representation on an annual basis. Research regarding the extent of the problem generally relies on the information contained in them, with both consisting of information reported annually by the local school districts and maintained by the U.S. Department of Ed.
The first data set is maintained by the Office of Civil Rights, OCR, and the second by the Office of Special Ed Programs, OSEP. Both of the databases contain information about student enrollment by category of special ed eligibility and by the racial/ethnic group. Most of the national research to date has used the OCR data, which typically monitors racial/ethnic information across the three judgmental special ed categories with which it is currently concerned.

OCR data typically do not include all districts across the country every year. It is comprised of a comprehensive sample that meets specific criteria.

Other important data, however, are also reported, such as the age of children served, the amount of time of their inclusion in general ed.

Concern about the definition in measurement of disproportionality has been voiced by researchers and policymakers for at least over the last 10 years. There are generally four major definition and measurement issues to contend with. First, there are no precise nationally agreed-on definitions that are consistent across states. IDEA
sets forth guidelines for the 13 disability areas, but there are no mandatory requirements for states to use these definitions.

Second, in terms of each child's disability, decisions are made about the category of the child's eligibility by the IEP Committee. Variability is introduced, as claimed by IEP committees, in the judgmental categories where little medical evidence is typically available to confirm or refute the eligibility decision.

Third, problems with the definition of disproportional representation occurred due to the lack of consistency in the method of measuring disproportional representation using various studies. Some studies and reports cite a composition index, some cite a risk ratio, some cites and use an odds ratio.

When trying to assess the extent of disproportionate representation, the calculation is achieved by measuring the intersect of two categorical variables: racial and ethnic group and disability category. And as researchers have pointed out, and as we've mentioned, both variables are -- both variables are saddled with measurement errors.
Fourth problem -- problems identified in defining race and ethnicity include two areas -- first, the determination of a child's race; second, the classification of bi-racial children. Unfortunately, there are also no consistent definitions for these terms used by schools, districts, and states, or at the federal level.

The debate regarding solutions to disproportionality involve several major viewpoints. If disproportion in representation results from actual higher disability rates in diverse populations, then solutions need to focus on eliminating or reducing the risk factors that are associated with the disabilities needs to be undertaken.

On the other hand, if the differences result from ineffective education programs and/or discriminatory educational practices, solutions need to address practices within the educational system itself, including system change and specific special education processes and programs.

However, if both social and educational reforms are needed, then both social and educational solutions must be implemented for change to occur. It is very difficult for us to determine where the
viewpoint is most accurate.

One of the solutions we suggest or we think is important to focus on involves monitoring technical assistance and enforcement. In its 2003 study measuring access to learning opportunities, the National Academy of Sciences examined the continued relevance and adequacy of the elementary and secondary school civil rights compliance report, or E&S survey, as a tool for enforcing civil rights laws in education.

The NAS concluded that the survey continues to play an essential role in documenting disparities. It also concluded that the survey's usefulness and access to the data should be improved. NAS made a recommendation for strengthening survey items and survey administration, for improving data quality and availability, for increasing access to and use of the survey data, and for disseminating findings to a broader range of stakeholders.

Our review of the Department of Education's website indicates that it has made good progress in consolidating and connecting the collection and maintenance of data use for program management and policy decisions. This includes civil
The Department of Ed has also established a series of effective web interfaces that allow the public ease of access to CRDC -- civil rights data collection -- and other data collection efforts. The part of the CRDC data set includes IDEA data.

Whether and how these improvements and others are being made are making a difference in their work with state and local school districts in the area of disproportionality should be explored by the U.S. Commission on Civil Rights.

The 1997 amendments to IDEA added the requirement that states collect data for the purposes of monitoring and reducing disproportionality. To meet this mandate, the Department of Ed uses 20 monitoring priorities and indicators for its Part B state performance plan and annual performance reporting system.

An October 2007 report from the Department of Education on characteristics of state's monitoring and improvement practices, based on practices in effect in schools in 2004, before the regulations for IDEA took effect, asked state respondents questions including, "During that school year, on what
compliance performance areas did states focus their monitoring efforts? And do these focus areas include the priority areas identified by IDEA 2004?"

Among the many responses from the states one in particular was of interest. Twenty-six states indicated they focused on the disproportionate representation of racial/ethnic groups in special ed, and that was prior to when the IDEA amendments took effect and they had to monitor for disproportionality.

How the remaining states and territories who didn't indicate they were already focusing on that are managing their monitoring responsibilities under IDEA should be of interest to the U.S. Commission on Civil Rights.

Concerns about future increases in the number of children receiving services, the appropriateness of those services, and the lack of reported student educational outcomes are expressed across the community. Experts agree that unless disproportionate representation is effectively addressed through systems change, then problems surrounding representation will likely increase due to the growing numbers of diverse and immigrant children, the high percentage of the children living in poverty,
insufficient early intervention, and effective proponents of a special ed process, and the lack of effectiveness in the state and results-based outcome information reported by special ed programs across the country.

Stakeholders understand the problems to a certain degree and likely know some strategies for addressing the problems. Nevertheless, disproportionate representation continues. Without proactively addressing the range of social and educational factors through system change, without carefully documenting systematic change and improvement, the disproportionate representation of diverse children in special ed will continue definitely to grow.

Thank you for listening.

CHAIRMAN REYNOLDS: Thank you, Dr. Gould.

Mr. Felton?

MR. FELTON: Good morning. The National School Boards Association representing 95,000 school board members across the nation certainly takes -- very much appreciates the opportunity to speak to you on this very important issue that's being addressed both by local school boards as well as local
communities.

You will probably hear from others regarding the extensive research that has been conducted that confirms what we all believe -- that minority students and LEP students are disproportionately represented in special education programs in our public schools.

While much of the research finds a disproportionate representation of these students, however, the research appears to be very limited regarding whether such students are in fact misrepresented. In our view, misrepresentation suggests that the students do not meet the legal eligibility requirements to be designated for special education.

The National School Boards Association agrees that there is disproportionate representation of minority and LEP students in selected categories of students with disabilities in our public schools, however, we believe that with few exceptions such students placed in special education meet the legal eligibility requirements for such services.

As the Commission is fully aware, students in poverty and their families face greater challenges,
whether it's related to access to quality housing, quality health care, appropriate early childhood education, safe and drug-free environments, adequate compensated employment, and other aspects of quality living.

Perhaps more disturbing, we know that African-American, Latino, and LEP students are disproportionately represented among students in poverty. Therefore, to simply draw conclusions regarding disproportionate representation of African-American, Latino, and LEP students in special education, without also identifying and addressing other important relevant factors, would be misleading and would, in all probability, result in the development of remedies that may have little chance of effectively eliminating the problem.

In addressing special education services in our public schools, it is important for the Commission to note that for over three decades Congress has formally acknowledged the fact that students with disabilities require additional accommodations and innovative instructional programs that are generally more costly than regular educational services. In fact, as we know, Congress
promised to support states and local communities by contributing 40 percent of that cost.

Since that time, both regular education and special education communities have drawn forces to pressure Congress to keep true on its promise. However, here we are, 30 years later, and still Congress funds less than 20 percent of these costs, leaving states and local communities shortchanged.

In practical terms what this means, is there is no financial incentive for schools to identify students for special education services, if such students do not meet the eligibility requirements. Further, the law mandates that when students are identified, such services must be provided even if the funds have to be reallocated from other educational programs.

Therefore, this notion that schools profit by placing more students in special education is simply not true, because schools are never fully funded at the level that matches the cost. However, because of this rationale that is offered by many, the National School Boards Association during the last reauthorization of the Individuals with Disabilities in Education Act was successful in securing two key
provisions that would provide greater support.

The first provision allows school districts to set aside funds to conduct evaluations of students without requiring the students to be formally designated as special education students. As a result, some evaluations may be conducted by school officials that would allow teachers, experts, and their parents to make decisions regarding learning disabilities without the labeling of students that may be very, very unnecessary.

The second provision that we were fortunate enough to secure in the new law requires states to pass their own laws or to establish memorandums of agreement to formally identify which agencies would provide responsible, specific, non-educational-related services that are necessary for so many of these students.

The benefit, of course, is that local school districts are no longer assigned costly responsibilities by default. Rather, states must consciously make decisions regarding which agencies in the state must provide which kinds of services to support the student with disability.

Another important factor for consideration
by the Commission is that the definition of students with disabilities is very comprehensive, with a full range of categories, some requiring extensive, costly support, while others only requiring minimal accommodations.

Therefore, the National School Boards Association would urge you to sponsor additional comprehensive studies regarding the representation of minorities and other -- and LEP students, among the broad range of categories, as well as the differences in per pupil level of funding needed to accommodate these students.

We believe that you will find that the representation of minorities and LEP students varies among the categories, and, in fact, such groups may be less represented among those categories requiring the greatest support systems and, therefore, the greatest costs. Local school districts across this nation continue to be committed to improving both the methodology for identifying and placing students in special education programs.

In a student -- in a study conducted by the NSBA Council of Urban Boards of Education, a number of ongoing strategies have been identified.
The most common strategies involve the use of pre-referral assessments and accommodations to address emerging behavioral and academic issues. Other efforts include effective staff training focused on both cultural and ethnic competency, special measures in identifying LEP students, and monitoring of individual schools for high referral rates.

Many school districts have reallocated staff resources to conduct independent second-level reviews of placement for appropriateness to ensure culturally and ethnically diverse and competent placement teams and to develop improved evaluation guidelines.

Further, many school districts are using various preschool assessment strategies. Commonly identified techniques include assessing preschool children upon referral, screening all children upon entry into kindergarten. Other measures include providing parents with information and training, training for the instructional staff, and providing transitional services for children entering kindergarten.

School boards will continue to provide leadership in the development of innovative ways to
improve the process for both identifying and placing these students.

Now I would like to turn your attention to an emerging concept known as "universal design for learning." Most of the discussion to date has focused on specific improvements that could be made. However, one emerging concept based in research that deserves our full consideration is UDL. In the past few years, UDL has emerged as one of the most promising research-based strategies for improving education for all learners, not just those students placed in special ed.

UDL provides flexibility for curricula and activities, in the ways information is represented, in the ways students respond or demonstrate knowledge, and in the ways students are engaged. The use of technology is also important -- an important component of UDL.

As we are aware, students come to the classroom with a variety of needs, skills, talents, and interests. Faced with an inflexible curriculum, students, teachers, and principals are expected to make extraordinary adjustments and are held accountable for making measurable progress.
UDL turns this scenario around, placing the burden to adapt on the curriculum itself rather than the student. A review of the literature on UDL developed by the Center for Applied Special Technology, CAST, suggests that educators, including curriculum and assessment designers, could improve educational outcomes for diverse learners by applying the following principles: providing multiple and flexible methods of presentation to give students with diverse learning styles various ways of acquiring information, providing multiple and flexible ways of expression to provide diverse students with alternatives for demonstrating what they have learned, and providing multiple and flexible means of engagement to tap into diverse learners' interests, challenge them appropriately, and motivate them to learn.

By incorporating supports for particular students, it is possible to improve learning experiences for everyone. For example, caption video is a great help to deaf students, but is also beneficial to students who are learning English, students who are struggling readers, and students with attention deficits, and even students working in noisy
classrooms.

    Such emerging concepts of UDL offer both regular and special education communities an opportunity to accomplish real reform in education at a time when the number of students with disabilities continues to increase, and the dropout rate among non-Asian minorities in regular education are approximately 50 percent. UDL represents one approach that simultaneously addresses instructional methods, classroom materials and assessments, through the use of technology.

    UDL may not be the all-encompassing answer, but such concepts as UDL could change the paradigm and eliminate the need to divide regular education from special education in the future, and thus ensure the delivery of high-quality educational services for all students.

    In closing, again, I would like to thank you for the opportunity to come before you, and we certainly urge the Commission to fully address the concerns that we have identified in our statement. Again, local school boards across the nation remain committed to improving student achievement for all students and preserving both equality and excellence.
in the delivery of educational services in our public schools.

    Thank you.

CHAIRMAN REYNOLDS: Thank you.

This has been a wealth of information. I want to thank everyone for carving time out of your busy schedule.

III. QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR

CHAIRMAN REYNOLDS: And at this time, I'd like to open up the floor for questions. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you. First of all, I want to commend the staff for getting a splendid panel.

    I have several questions, but I'll just pose one or two for the moment. My question is to Dr. Gould. Perhaps I missed this in your presentation, but what are the three judgmental disability factors you were talking about, the ones that, you know, there's some degree of judgment that's exercised in determining whether or not someone is going to be placed in a special educational program?

    DR. GOULD: Emotional disturbance,
learning disabilities, and mental retardation.

COMMISSIONER KIRSANOW: Okay.

DR. GOULD: It's judgmental in terms of the -- having as a basis of the -- having as a basis of the diagnosis in determination of eligibility a medical factor.

COMMISSIONER KIRSANOW: Right. Is there data out there that would indicate that controlling for income, cultural issues, resources of the school, why it is, if it is, that Asian students seem to be placed at a lower level than Hispanic, black, Native American students?

DR. GOULD: I do not know.

COMMISSIONER KIRSANOW: One of the questions that I had for I think -- I can't remember who it was now, but I believe it was Mr. Felton -- or anyone who may have this, is there any data that would show whether or not the placement of students in special educational programs is -- retards their advancement? In other words, is there a baseline that would indicate how a student would progress had they not been inappropriately placed in a special educational program?

MR. FELTON: Well, it's certainly our
perspective that any time a student is inappropriately placed in whatever educational programs exist it certainly adversely affects their performance.

COMMISSIONER KIRSANOW: But how? And what data show that specifically? I mean, it seems to be intuitive, but I'm wondering whether or not there is any baseline data that shows that the inappropriate placement of a student -- and I'm not sure what -- there may be several reasons why someone is placed in a special educational program, but is there any data that shows that that student, had they not been placed in that program, would have progressed at a faster level or more appropriate level? I'm not sure what kind of --

MR. FELTON: Right.

COMMISSIONER KIRSANOW: -- I should be using, but --

MR. FELTON: I'm not aware of any specific research on that, and perhaps my other colleagues can comment on that. But we do know from Dr. Sanders and research that we know that when students in fact are not exposed to high-qualified, effective teachers for extended periods of time, the gap can be as much as 50 percent.
So if you carry that over, you would have to assume, whether special education or regular education, if a student is actually placed in a situation where they are not -- there is not a rigorous curriculum, and they are not fully engaged, their rate of performance, of course, is in fact adversely affected. But that's the only information I can --

COMMISSIONER BRACERAS: If I could just follow up on that a little bit, I can see how that would be true particularly in the high school years and middle school years. But in the early elementary years, I'm curious about that proposition, because I find in the town that I live in, which is a wealthy, upper middle class town, that parents fight to get their kids into special ed, because it's one-on-one attention for the basics -- reading, writing, arithmetic.

And there is probably an overabundance of kids in special ed -- most of those kids are white in our town -- and the parents are fighting like cats and dogs to get kids into those programs, if their kids are in any way struggling in school, to get the kids in -- classified as special ed, and they realize they
have to jump through a series of hoops and they need to use specific terminology and phrases. And if the right words aren't said, the kids aren't going to get the special ed label. And they want it, because they get the attention that they would not otherwise get in the regular classroom.

MR. FELTON: From my experience on the local school board in the area, you're absolutely correct that in more affluent neighborhoods parents, of course, view themselves as empowered, and they follow up very closely in terms of the opportunities that their students have. In most cases, it's the two extremes. It's either the lower end, where they simply want the accommodation, so their students will perform well on standardized tests, meaning give them more time --

COMMISSIONER BRACERAS: Right.

MR. FELTON: -- and on the extreme other end it's because the services are very, very costly, and they believe that by law local school districts support that.

I think the discussion here has been that when we begin to look at the full range of categories of disabilities, there are many, as Dr. Gould
identified, where students are identified but there, one, may not be appropriate follow up; and, two, if the students are placed, no one comes back later to say, "Have we really made a difference in educating this particular child?"

COMMISSIONER BRACERAS: Right.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Okay. Like Commissioner Kirsanow, I have a whole bunch of questions, but I will -- I won't lay them all out.

To begin with, though, there is an assumption running through, it seems to me, the testimony of all three of you that proportionality of the proportional representation of racial, ethnic, and perhaps other groups, national origin, whatever, groups is the test of a system that is not discriminatory.

Now, that is a very questionable assumption. I mean, we don't have proportional representation in any corner of American life of all groups. And so the question is simply, I mean, proportionality or disproportionality is a head count. So the question is: are children being misidentified? And, if so, why?
Now, as Commissioner Braceras said -- I spent 11 years, actually, on the Massachusetts State Board of Education. As Commissioner Braceras said, parents fight to get their kids into special ed, and, in Massachusetts at least, the civil rights groups were very ambivalent about those placements, because on the one hand they worried about the numbers. On the other hand, they liked the extra attention.

So, and by the way, it just -- the state was just sinking under the costs of special ed and neglecting a lot of other educational demands. But in any case, my basic point here, that disproportionality in itself doesn't say anything about the legitimacy of the placements -- is to begin -- is my first point.

And there were several references to "culture" as a reason for disproportionality and the need to be sensitive to diverse learning styles. Well, I don't know what the word "culture" means in that context, and I don't know what the phrase "diverse learning styles" means either.

I mean, do African-American children have to learn their times tables in a distinctive way? Is there a diverse learning style here that means that arithmetic has to be taught to Latino kids different
-- let's just put aside the language question there -- differently than it has to be taught to Asian kids?

    Well, I'll stop there for the moment.

CHAIRMAN REYNOLDS: Mr. Felton?

MR. FELTON: Yes, I'd like to comment.

First of all, Commissioner, I did mention very early that we believe that disproportionality did not necessarily mean that there had been discrimination. In fact, the issue was: were these students misrepresented, and, therefore, were they in fact not eligible? Did they not meet the requirements? And, certainly, if they met --

VICE CHAIR THERNSTROM: You did. I think the other two witnesses kind of --

MR. FELTON: Okay.

VICE CHAIR THERNSTROM: -- glided over that point. You did.

MR. FELTON: Okay. I'll let them respond to that. But the other issue in terms of cultural competency and ensuring that teams understand the issue -- again, it's because of the broad range of categories among the disability -- students with disabilities.

So for those who are viewed as having an
emotional disability, very often in the absence of
cultural and ethnic competency, then an assumption is
made by a teacher that the student's behavior is such
that it doesn't fit in with the rest of the class.
Therefore, the student should be referred.

VICE CHAIR THERNSTROM: Well, it doesn't fit in with the rest of the class. Here -- I mean, I've spent a lot of time in schools. Doesn't fit in with the rest of the class means you've got a classroom of students in general -- I'm making a broad generalization here. This is obviously not true across the board.

But a classroom of students of, let's say, 18 kids and two of them are extremely disruptive and means that the other 16 aren't learning. So the teacher ends up referring those two very disruptive kids for special ed. I mean, you can say those kids are not emotionally disturbed, but the fact is that they are disrupting the learning of the other kids.

MR. FELTON: We could probably have a followup conversation, but certainly disruptive behavior doesn't necessarily mean that one has an emotional disability.

VICE CHAIR THERNSTROM: No. It just means
the teacher wants that child in some way removed such
that the other 16 children can --

MR. FELTON: Certainly. And we believe
every student has the right to an environment where
they can learn, but you don't misuse the system
because you're not sure how to deal with discipline.
And that's obviously one of the challenges.

VICE CHAIR THERNSTROM: Well, you're
perfectly right on that. There's a problem with
classroom management.

MR. FELTON: Did you want to comment on --

ASST. SEC. MONROE: Yes, I absolutely
agree to what Mr. Felton just said. And I think that,
you know, we want to make sure that teachers have a
lot of tools in their toolbox. But using special ed
as one of those tools as a way to sort of control the
classroom environment or increase learning
opportunities for people really is not the correct
tool. They're using it inappropriately.

I think you're absolutely right when you
suggest that certainly our office does not look only
at proportionality. We look at the statistics. They
give us pause to go in and dig deeper. And certainly
when we've conducted compliance reviews and have shown
up to a 74 percent disparity, when we've actually gone
out and retested those children and found that, in
fact, they don't qualify for special ed, that I think
sometimes bears out the fact that for whatever reason
they weren't placed there.

And what that means, obviously, for a
system that's struggling is that they are taking up a
slot from a child -- the Asian, whomever -- who should
have been placed in that position, but can't now
because the school is serving children who should not
have been placed in that position.

We're very hopeful that with the progress
that we're seeing through No Child Left Behind,
through the great efforts that we're seeing with our
teachers, and moving them to more of a highly
qualified status, that we're going to have an improved
educational system that is going to give teachers the
ability to serve kids legitimately in a regular
classroom setting where they are.

We also need to make sure that kids --
Commissioner Kirsanow asked a question about, you
know, whether we had statistical evidence about the
effect that spending time in special ed could have on
a student's trajectory.
And I can say that I don't know that we have really quantifiable, broad-based, random, scientifically-based research, but certainly our office has, for example, this year begun investigating situations where kids in special ed who were there because perhaps they needed a hearing aid or some other type of a service that they might get through either 504 or IDEA, they weren't being entitled to participate in other kinds of coursework -- advanced placement, for example.

There was an assumption that you either were receiving these special ed benefits or you were in one of these other programs. And so we're finding ways to let schools understand that you need to really evaluate the kids on a case-by-case basis where they are, and simply being labeled by one of these very broad categories of disability doesn't mean that you can't participate in higher level learning.

COMMISSIONER BRACERAS: That goes back -- can I just follow up quickly?

CHAIRMAN REYNOLDS: You're jumping the line, but you're entitled.

VICE CHAIR THERNSTROM: And I just -- I want to answer with one sentence something that Dr.
Monroe said, which is simply look for tools to deal with disruptive kids. The teachers don't have them in part because of the legal system.

COMMISSIONER BRACERAS: That's precisely what I was going to say, because in my experience in practice as a lawyer, but also as a parent in the public schools, is that what I often see is when a teacher tries to discipline a disruptive child, the first thing the parent of the disruptive child does is try to get them classified as special ed.

ASST. SEC. MONROE: Well, I'm also a parent of kids in public school, and I have not -- and I guess it depends on maybe regionally where you are, and what kind of a school system you have, and who the parents are. If the parents feel disengaged from the school system, they're going to use whatever tool they feel to be their child's best advocate.

One of the things that our office can do when working with parents is to let parents know that there are ways for you to access services for your child and not drain the system, not inappropriately have your child dealt with in that particular way.

A lot of us, I mean, you know, we've got great teachers out there who are dealing with some
very difficult circumstances. We've got parents who are working two, three jobs. Everyone is taxed. Everyone is trying to do what's best for these kids.

And what we need to do, which I think we are on a good trajectory to do, is really to elevate the standards that we have for all kids, including kids in special ed, also to make sure that the parents are at the table, that they are fully engaged as advocates, that they understand and that they are part of that classroom setting, that parents have access to what's going on with their kids.

And, for example, my son -- I'll tell you -- 16 years old, he had some issues with reading. He didn't need to be classified as special ed. But I worked with the school; they basically convened a Child Study Committee for him. We brought all of his teachers to the table. I was able to use the tools that they had at that school, short of putting him in a special ed environment, to get him the additional reading specialist that he needed and to get him back on the correct trajectory.

And I think those kinds of tools are available, but it involves have an engaged principal, engaged teachers, engaged parents.
COMMISSIONER BRACERAS: I think sort of two points. One is that the intersection between discipline and special ed, which I know is a tangent from what we're talking about here, it is an interesting question, because lots of times I think special ed is used inappropriately, either by teachers or parents, to deal with discipline issues. So that's one point.

The other point I'd like to make has to do with the ability to get help for a struggling child who is not actually special ed, because it has been my experience, both professionally and personally, that unless you get that label, you do not get the extra help that you need. So if you have a child who is borderline -- in other words, maybe, you know, at the low end of -- at the low end of grade level, but still grade level, the only way to get that child the attention that they need from the school system is to invoke the label of a disability.

And your experience with your son was not that, but I can tell you in the town where I live you need that label to get the attention, or those kids at the low end of grade level are off everybody's radar.

And so going back to the issue of people
who are misqualified -- miscategorized as special ed, what I wonder is, there are some kids who clearly are not special ed, should not be special ed, and are in there inappropriately. But there's probably a smaller group of kids that are borderline, maybe -- you know, where it's discretionary, and those kids -- I guess what I would ask is: what is the harm of classifying them as special ed if it gets them help, even if under some people's definition of "disability" they wouldn't qualify?

In other words, you know, if they're borderline. If that 10 percent, or whatever it is, of children who could go either way, what's the harm of putting them in?

VICE CHAIR THERNSTROM: It would cost the state a fortune, Jennifer.

COMMISSIONER BRACERAS: No, no. I mean from a discrimination -- you know, from a civil rights perspective. I understand from an economic perspective.

VICE CHAIR THERNSTROM: I mean, your kids are deprived.

COMMISSIONER BRACERAS: What's that?

VICE CHAIR THERNSTROM: Your kids get
deprived.

COMMISSIONER BRACERAS: But that's not my question.

VICE CHAIR THERNSTROM: Yes, I understand.

COMMISSIONER BRACERAS: The purposes of the Commission's analysis, does it harm a Latino or African-American student who may be borderline to misdiagnose them and put them in special ed if that means they get extra help?

MR. FELTON: I think the broader challenge is to ensure that every child has access to the services that he or she needs without the labeling.

COMMISSIONER BRACERAS: Okay.

MR. FELTON: All right? And that ought to be our goal.

COMMISSIONER BRACERAS: Yes.

MR. FELTON: And so that you don't have to be special ed labeled in order to get additional services. And as I had mentioned earlier in my statement, our law now does provide for up to 15 percent of the Title B -- Part B funding, which would allow at least the evaluations of some support services.

But, clearly, the objective of the school
is -- which is why I talked about universal design for learning, is that we can change our paradigm by the way we deliver instruction, and so theoretically every student then has a need and it is tailored.

COMMISSIONER BRACERAS: I agree with you.

It's just I don't believe that that has filtered down yet.

MR. FELTON: Well, it's very slowly --

COMMISSIONER BRACERAS: Yes.

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Okay. Commissioner Melendez?

COMMISSIONER YAKI: Mr. Chairman, I want to be in line as well.

CHAIRMAN REYNOLDS: You're next.

COMMISSIONER YAKI: Okay.

COMMISSIONER MELENDEZ: I thank you for being here also. I wanted to ask Ms. Monroe a question as far as -- it has to do with how early do we identify disabilities. What is the position of the Department of Education on universal screening proposals which would test all children for learning disabilities at an early age rather than relying mainly on teachers who may or may not let their biases
influence their judgment? And what research grants or best practices is the Department providing on universal screening?

ASST. SEC. MONROE: I'm not from the office on special ed, and so I should I think respectfully defer. I'm happy to perhaps put that response in writing to you --

COMMISSIONER MELENDEZ: Okay.

ASST. SEC. MONROE: -- to answer that question.

COMMISSIONER MELENDEZ: Anybody want to comment on that?

DR. GOULD: I'm not familiar with the phrase "university screening." I like it, just from the sound of it.

MR. FELTON: I think you're going to hear from some of the other colleagues later about universal screening. And, again, the challenge is that we use whatever instruments we have for the purposes of diagnostic measures, and that we then put in place something that will help the student.

The challenge is that we don't want to make decisions about limitations of students because of an assessment and then never follow up later. And
so those are some of the practical challenges, but I
know some of my colleagues on the next panel will talk
about that.

DR. GOULD: Some of the issues that have
gone to the heart of early diagnosis, screening, and
treatment have revolved around school systems' ability
to access Medicaid and use Medicaid resources to do
some of that early diagnosis, and that continues to be
an issue for many school districts around the country.

The Center of Medicaid and Medicare
Services, in conjunction with the Department of Ed,
have been working with school districts, but the
challenge is a lot greater than you might imagine,
because it involves, you know, some things that aren't
necessarily just instructional-based, but they may be
technology-based, computer-based, and training around
that.

CHAIRMAN REYNOLDS: Okay. Commissioners
Yaki, then Taylor.

COMMISSIONER YAKI: Yes. Thank you very
much, Mr. Chair.

The question I have for this panel, and I
also for the next panel, is I have a personal interest
in --
STAFF DIRECTOR MARCUS: Excuse me. Commissioner Yaki? For the benefit of the Court Reporter, could you try to speak a little bit more loudly?

COMMISSIONER YAKI: I'm speaking in my normal voice. Is there something wrong with your PA system?

COMMISSIONER HERIOT: Maybe there is.

STAFF DIRECTOR MARCUS: We're not aware of any problems, but we can check it later. For the time being, I want to make sure that the Court Reporter hears what you're saying.

COMMISSIONER YAKI: Well, then, how is this?

STAFF DIRECTOR MARCUS: Very clear.

COMMISSIONER YAKI: The question that I am posing to this panel, and that will interest me for the next panel as well, is that from -- I have a nephew who has been diagnosed with Asperger Syndrome, a form of autism. He's a high functioning individual, but nevertheless has some behavioral and other kinds of issues that require him to receive special training outside of the classroom.

What I found just in observing his
progress is that it seems to be one of where people can find a funding spot or a funding stream in which to place him -- scholarship grants, what have you -- for the purpose of finding the appropriate instructor who understands kids with this kind of -- this kind of syndrome, and not necessarily one who will simply say, "Well, he's special ed, he can just go in here," and what have you, what happened is that after the first year he was diagnosed, he received one-on-one tutoring and what has occurred here become more and more a cattle call with completely different learning and other disabilities in the same classroom with the same teachers who may not be qualified to deal with all -- any or all of these -- all of the different problems or challenges posed by this syndrome.

I just want to get the reactions of this panel as to whether or not it's part of the problem is one where people try and plug them into where they have money currently rather than trying to find out whether or not they need to be specific and separate or different kind of program to be created, albeit one where they would have to dip into another set of resources that may or may not be readily provided to them by their local school district.
MR. FELTON: Well, this is Reggie Felton with National School Boards Association. Autism is clearly the fastest-growing identification -- more students are being identified now in public schools than any other category.

What some states are doing, because they recognize that local school districts may be very limited in their ability to support -- provide support services is to establish special funds so that local school districts can in fact tap into those funds to ensure that the services are provided.

Clearly, the law mandates that the services be provided, and the question, as you've pointed out, very often is a particular local school district may not have the resources, and so typically they work with their states and in some cases they work with state legislatures for special state laws to be passed to address, you know, students with autism.

But certainly we can get back to you with additional information.

DR. GOULD: This is Martin Gould, Commissioner Yaki. Asperger Syndrome, as one of the categories of subgroups of autism, is a fairly unique category in that it represents people who have fairly
sophisticated skills relative to the larger group of people with autism, or students with autism, yet they still present, as you know, challenges to their families and to the instructional environment.

There are hotbeds of teacher preparation that exist at certain universities around the country. However, for the majority of teacher preparation institutions, skills and experiences at the in-service level -- I mean, at the pre-service level are typically not available to teachers in training who may ultimately work with students with Asperger Syndrome, much less students with autism.

There is typically a generic set of skills that are taught as part of teachers' pre-service preparation in colleges, but it doesn't typically include skill sets that would match up with students who have Asperger Syndrome.

Hopefully, institutions of higher ed are changing their approach and what they're including in special ed curriculum. And as Mr. Shelton pointed out, there is an increasing number of students with autism in the public schools, and so it would -- it would -- you would assume that institutions of higher ed are ramping up their curriculum.
COMMISSIONER YAKI: I guess because the -- the issue of especially Asperger Syndrome -- who aren't familiar with it, a fairly high functioning form of autism, you know, the one -- my nephew, for example, has an amazing affinity for mathematics, for numbers, not so much with -- not so much with the spoken word.

He has difficulty with too much -- with sensory overload, which of course, as we all know from any of our visits to any normal American classroom, there is nothing but sensor overload going on every day in every classroom -- at recess, at lunchtime, what have you.

And I am just wondering, though -- and I don't want to take up too much time -- but I think it goes to the question of: do we just simply create categories of funding and dump the kids into those, and then, you know, ask questions later, because that seems to me part of what seems to be -- of doing that or potentially given today from my own experience. And maybe it's not anyone's fault, but simply one of limited resources, limited ability to differentiate a diagnosis, and yet still maintain the mandates of IDEA or otherwise.
CHAIRMAN REYNOLDS: Okay. Commissioner Taylor, then Commissioner Heriot.

COMMISSIONER TAYLOR: Dr. Gould, I want to make sure -- I think that I understood your testimony. Is there an overrepresentation of minorities, save Asians, in those categories that are defined by judgmental factors?

DR. GOULD: That's what research and the government reports indicate.

COMMISSIONER TAYLOR: Now, my next question, then, is: is there an overrepresentation of minorities in those categories that are defined by objective factors -- that is, testing?

DR. GOULD: According to research and government reports, objective factors --

COMMISSIONER TAYLOR: No?

DR. GOULD: -- including testing or medical diagnosis as well?

COMMISSIONER TAYLOR: Well, is the medical diagnosis part of their -- one of the three judgmental factors?

DR. GOULD: Medical diagnosis is not part of the -- is not part of the three categories of students that are considered judgmental disability
categories. That's why they're judgmental.

COMMISSIONER TAYLOR: So setting aside the
diagnosis category, then, there is not an
overrepresentation of minorities in the non-
judgmental --

DR. GOULD: Generally, that's what
government reports using OCR data have shown, and
that's what research reports, you know, have seemed to
reflect outside of government research.

COMMISSIONER TAYLOR: Well, what --

COMMISSIONER HERIOT: Excuse me. What
fits into these categories? I'm not following you
here.

DR. GOULD: There's learning disabilities,
there's emotional disturbance, and there's mental
retardation.

COMMISSIONER HERIOT: The others -- what
I'm talking about are the ones that are not
judgmental.

DR. GOULD: The not judgmental ones are --
include the other categories of disability under IDEA.

COMMISSIONER HERIOT: Meaning?

DR. GOULD: They include autism, they
include --
MR. FELTON: Hearing impaired or --

DR. GOULD: -- hearing impairment, blindness, deaf-blindness, orthopedic impairment, other health impairment.

MR. FELTON: Medical-related.

VICE CHAIR THERNSTROM: Multiple sclerosis, whatever.

COMMISSIONER HERIOT: Autism is thought to be not judgmental in --

VICE CHAIR THERNSTROM: No, because it's a medical --

DR. GOULD: There's a medical diagnosis for that.

COMMISSIONER HERIOT: Medical diagnoses, nevertheless, require judgment. That's not --

VICE CHAIR THERNSTROM: No, no, no, no. But he's separating those out with some kind of -- that are based on some kind of objective evidence of a medical sort.

DR. GOULD: Right. Medical versus non-medical as part of the factor, and that is how it has been separated out by researchers.

COMMISSIONER TAYLOR: So what that means is that when we have objective factors or medical
evidence or medical observations, we do not see a high percentage of minorities in special ed.

DR. GOULD: That's what the research is suggesting, yes.

COMMISSIONER TAYLOR: So to your point of separating the overrepresentation question from the misrepresentation question, when you put that alongside what we have just said here with respect to objective observations and judgmental factors, what does that mean? What conclusions do you all draw when you put those two issues side by side?

VICE CHAIR THERNSTROM: And let me just add a kind of -- just a tail to that question. I mean, so what you're saying is where we have objective measures, the disproportionality does not tell us anything about discrimination. We still have disproportionality, but it -- you know, you can't -- one doesn't raise any questions. Is that part of what you're saying?

COMMISSIONER TAYLOR: On the one hand, we have -- and I will -- and I agree, I think we should distinguish between the overrepresentation question and the misrepresentation question. But then, what I hear, that when we use objective measuring tools we
don't find either overrepresentation or misrepresentation. At least we don't find an overrepresentation.

But then, when we move to the more subjective judgmental factors, we find an overrepresentation, and then we have to question whether or not there is a misrepresentation. And to me that -- those two go hand in hand.

I would have expected if we could -- if we should differentiate between the misrepresentation and the overrepresentation, that we should see the overrepresentation in both categories, and we shouldn't see a difference between objective measurements and the judgment calls that are being made.

VICE CHAIR THERNSTROM: That's why overrepresentation -- that is, it's proportionately overrepresentation in both categories.

COMMISSIONER TAYLOR: That's not true. You don't have a disproportionately high representation with objective --

DR. GOULD: Remember you have IEP committees, you know, that have different compositions in different school districts with people who have
different levels of skills and experiences who, you
know, have introduced a huge amount a variability in
the assessment and diagnosis of students. And that
has been part of the issue, and that is part of what
Congress identified during reauthorization of IDEA in
2004 as a problem.

CHAIRMAN REYNOLDS: And what about earlier
-- disruptive students, that issue was brought up, and
the desire by some teachers to take disruptive
students out of the class. That would help explain
why when you use judgmental criteria you have this
misidentification whereas it doesn't occur using more
objective standards.

And in addition to that, wouldn't this
problem that we have identified be exacerbated by
children who come from homes where there is very
little intellectual stimulation? And these children
winding up being outliers in the classroom in terms of
their ability to keep up?

It seems to me that the public school
system believes that there is certain level of work
being done in the home with parents. They expect a
certain level, a certain capacity, that the students
will have when they arrive at school. And for those
students who don't have that background, who don't hit the baseline, it appears that schools aren't set up to deal with these students.

MR. FELTON: But as I mentioned earlier, you know, disproportionality of minorities in special ed relate to the same disproportionality of minority students who have, you know, poor housing, inadequate health care, the full gamut. And there's enough research out there that suggests that there is a relationship between, again, poverty and health and nutrition and learning abilities.

Now, to say that certainly the numbers require some analysis, I would agree with you. The question is: is the system capable, once having looked at the data, to then validate whether that placement is in fact correct or not? Or does it say, because of other conditions that support that child, as raised by some of the other Commissioners, that that student ought to have the benefit of additional support systems?

Now, again, long range as we move into concepts like UDL, we approach educational delivery differently, and so the benchmarks that we use will be different, and we may find we'll have different data.
So I think the question that, you know, you are challenged with is, you know, is it discrimination, or is there valid reason that supports the need for a student to receive additional support services? And if that is true, you know, what conclusions, then, do you draw as a commission?

CHAIRMAN REYNOLDS: Okay. Ms. Monroe?

ASST. SEC. MONROE: Yes. With all due respect, I think I do have to disagree with one comment that you've made, which is about the poverty linkage between whether kids who are impoverished somehow can't learn.

MR. FELTON: No, no, I misunderstood. I said, therefore, do not have access to health care and nutrition, other things that affect --

ASST. SEC. MONROE: And that may be true, but I think in what we have seen in a number of -- and I think we are sort of engaging in some generalizations here.

MR. FELTON: Right.

ASST. SEC. MONROE: But there certainly are some very good models of schools, some of which are in the District of Columbia even. You can visit the KIPP School right up the street and see where the
hardest to serve children, coming from the most dire of circumstances, are more than excelling, probably in a -- you know, one of these schools working at about a 50 percent rate.

I would guess about half of those kids would have been labeled in need of special ed services, but, in fact, they are in a school system with highly qualified, engaged teachers, where parents are involved, where parents are volunteering in the classroom, where you have, you know, reasonable teacher-to-student ratios, nothing extraordinary, you know, 20, 25 kids to a classroom.

Those kids are excelling. These are the kids that, you know, as the President talked about the -- sort of the soft bigotry of low expectations, that we would have I think been willing to just -- to put aside over here and not assumed that these kids were really bright, and what they really needed was engaged one-on-one interactions from really good teachers. And when given that environment, they have excelled.

And so I think we just need to be really careful about assuming that, because of the place where or position where a child is born, that's going to somehow limit them in terms of what they are going
to be able to accomplish.

CHAIRMAN REYNOLDS: Well, thank you, Ms. Monroe. I assume that Vice Chair Thernstrom was about to make that very same point.

ASST. SEC. MONROE: Okay.

CHAIRMAN REYNOLDS: However, I believe that Commissioner Heriot was in the queue.

COMMISSIONER HERIOT: Okay. I wanted to -- just another note on disproportionality. What about gender? I have been told that boys are disproportionately found to be mentally retarded, and I believe that --

VICE CHAIR THERNSTROM: Of course they are. We could say it in this room.

(Laughter.)

COMMISSIONER HERIOT: -- is not the case, and when -- you know, what does that say about the general disproportionality issue and whether or not this is false or true disproportionality that we're talking about here with regard to race and --

ASST. SEC. MONROE: Well, I think that some of this we don't know -- we don't know as much as much as we should know. We don't know whether they really are mentally retarded --
COMMISSIONER HERIOT: We know that they are disproportionately diagnosed now.

ASST. SEC. MONROE: Yes, we do know that, but we don't know whether it's because they received more testing, whether the testing was accurate.

COMMISSIONER HERIOT: What about emotional disturbance, that sort of thing?

ASST. SEC. MONROE: I think for all of those reasons. I mean, I think that there is a lot of judgment in terms of -- again, I think the issue of misidentification versus, you know, correctly identifying, but having a larger proportion, there's a judgment that occurs about what kids will have access to certain testing, about how you're going to interpret that test, about who the test-giver is and how he is going to interpret the results.

A lot of the testing on some of the more judgmental disabilities is just that. It's very judgmental, very subjective, in terms of who gets it, who does it, how they interpret it, how often they get it, what the test is that they're using. And those are things that we have to work through.

COMMISSIONER HERIOT: Learning disabilities -- if I heard correctly, we started out
talking about how mental retardation and emotional disturbances -- that those are disproportionately minorities. And then, Commissioner Braceras was mentioning her experiences in her hometown.

I have been reading, at least in, you know, casual newspaper and magazine stories the notion that learning disabilities are disproportionately the other way around, that disproportionately whites are diagnosed with learning disabilities, and it's just sort of an upper middle class phenomenon.

Is there anything to that, or --

DR. GOULD: Well, if you look at the annual reports of Congress for implementation of IDEA, they have lots of data, and one of them is a table on risk ratios. And students who are white have a lower risk ratio for being identified as having specific learning disabilities than students --

COMMISSIONER HERIOT: Is this broken down into certain kinds of learning disabilities, or is it just grouped together?

DR. GOULD: Specific learning disabilities is the category that they report in, one of the 13 categories. Students who are Hispanic, students who are African-American, and students who are American
Indian/Alaska Native, have higher risk ratios for being identified with learning disabilities.

COMMISSIONER HERIOT: What kind of learning disabilities are we talking about?

DR. GOULD: Students that have either a math discrepancy in their performance that's two grades or greater, or reading discrepancies between their age and between the --

COMMISSIONER HERIOT: It's just very generic.

DR. GOULD: They're general, and it could be a combination of both. It could be a reading and math disability.

MR. FELTON: But that's the definition.

DR. GOULD: Yes.

CHAIRMAN REYNOLDS: Okay. Last question, Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: I want to go back to the question of poor housing, poor health care, etcetera, as some explanatory -- as explaining some of the placements here.

I mean, number one, we have many for instance impoverished Asians who live in poor housing, and they're not in SPED. But -- and I'm delighted
that you brought up the KIPP schools, because the
schools are -- I happen to be a big fan of KIPP. You
know, they assume you teach the kids who walk through
the door whatever their health care or history or
their housing, or whatever.

But in any case, what if inadequate access
to health care was the problem? I mean, or partly the
problem. What are the -- how -- the question is how
the schools are supposed to respond to that. The
schools cannot fix the inadequacies of American health
care, of housing, of whatever you want to name that
you believe is, you know, a problem of inequity in
this society.

So, again, going back to a school like
KIPP, the only thing that schools can do is teach the
kids who are sitting in the classrooms. And I just --
I don't see how it advances the conversation to say,
well, these kids, you know, need better health care,
they need better housing, they need whatever. That's
not the role of schools, and, in any case, I'm not
sure we know how to fix many of those problems without
unacceptable cost. I don't mean simply financial, but
in any case --

MR. FELTON: No, I agree with you. The
comment was not made as an excuse for why students are disproportionately represented. The question that I was attempting to raise is that certain groups of students, certain families, certain folks in this country, simply have a different quality of life than others, and that it ought to be the responsibility to deal with this in a comprehensive way.

Certainly, the schools are very, very limited, as you point out, limited resources. They are expected to take a student when he or she arrives at whatever level they are, and, of course, hopefully that they will progress through graduation. But if you talk to the teacher in the classroom, if you are actually in the school, what that means in practical terms is students need greater support services.

It doesn't mean that they have limited -- they do not have the ability to perform, but you cannot simply say, "I'll invest at the same dollar amount every child," because it is about equitable educational services, which means it takes more for certain students. And until we're willing to do that, I was just suggesting we will continue to have the disparity.

VICE CHAIR THERNSTROM: Well, I guess my
response to that is if I go back to my experience on the Massachusetts State Board of Education, look, you can put health care clinics in schools, which to some extent Massachusetts has done, and it is still a very high hurdle with many families to get the parents to use those health care services.

I mean, you've got a larger problem here than simply financial resources, access, you know, is Johnny has got a ear infection, the clinic has looked at him, if Johnny's mother will actually bring him to the clinic, then there's a prescription and the medication isn't taken. I mean, I've been, you know, deeply involved in this -- in this issue, and these are very complicated questions.

And I would just suggest to you that the school systems can't -- basically can't deal with them. School systems have to teach. That's what they have to do.

CHAIRMAN REYNOLDS: Okay. On that note, I'd like to thank the panelists. This has been a very interesting and enlightening exchange. Thank you.

We are going to take a five-minute break, and then we'll start with the second panel.

(Whereupon, the proceedings in the foregoing matter
went off the record at 11:24 a.m. and went
back on the record at 11:35 a.m.)

CHAIRMAN REYNOLDS: Okay, and if anyone
sees Ashley in the hallways, please let him know that
we've started.

Okay, welcome back. This is our second
panel. The lead off will be Dr. Matthew Ladner who is
the Vice President of Research for the Goldwater
Institute and author of numerous studies on school
choice, charter schools, and special education reform.

Dr. Ladner is a graduate of the University of Texas
at Austin, and he received both a master's and Ph.D.
in political science from the University of Houston.

Dr. Ladner previously served as Director of the Center
for Economic Prosperity at the Goldwater Institute and
as Vice President of Policy and Communications at
Children's First America.

Next up we will have Dr. Reschly, did I
mangle your name?

DR. RESCHLY: Reschly.

CHAIRMAN REYNOLDS: Reschly, thank you.

Dr. Reschly is Professor of Education and Psychology
at Peabody College at Vanderbilt University and former
chair of the Department of Special Education. He has
published widely on the topics of school psychology, professional practices, system reform, assessment of disabilities with minority children and youth, behavioral consultations, and legal issues in special education. He previously served on the National Academy of Sciences Panel on Special Education Overrepresentation.

Next, we'll have Hilary Shelton who serves as the Director of the National Association for the Advancement of Colored Peoples, Washington, D.C. Bureau, the organization's Federal and Legislative and National Public Policy Division. Prior to serving as the Director of the Washington Bureau, Mr. Shelton served as Federal Liaison and Assistant Director to the Government Affairs Department of the College Fund, also known as the United Negro College Fund here in Washington, D.C. He is also a Board Member of the Leadership Conference on Civil Rights, the Center for Democratic Renewal, and the Coalition to Stop Gun Violence, and finally, the Congressional Black Caucus Institute, among many other distinctions.

Then we will have Mr. Peter Zamora who is the Washington, D.C. Regional Counsel for the Mexican-American Legal Defense and Education Fund, MALDEF.
Mr. Zamora develops, implements, and manages MALDEF's federal legislative strategies regarding voter rights, federal education law and policy, immigration, and other matters. He serves as co-chair of the Hispanic Education Coalition. Prior to joining MALDEF, Mr. Zamora served as a bilingual credentialed English teacher in California public schools, a legal consultant to the District of Columbia public schools and as an attorney in a private educational law practice here in Washington, D.C.

COMMISSIONER YAKI: Any mention of where he went to university?

CHAIRMAN REYNOLDS: You want to help out with that one?

MR. ZAMORA: Proud graduate of UC/Berkeley.

VICE CHAIR THERNSTROM: He just shook his head and said yes.

COMMISSIONER YAKI: I won't go there.

CHAIRMAN REYNOLDS: Finally, we have William Hurd who is a partner with Troutman Sanders, Richmond Officer. Mr. Hurd represented parents in *Schaffer v. Weast* which addressed the burden of proof at administrative hearings under federal special
education law. He regularly represents and advises parents on legal rights involving disputes with local school divisions. In the United States Supreme Court, Mr. Hurd has appeared on brief, both party and amicus in more than 30 cases serving as principal author of the brief in more than 20 cases. He has personally argued the three cases before the U.S. Supreme Court, including two cases involving the first amendment and one involving federal special education law. Prior to joining Troutman Sanders, Mr. Hurd served as Solicitor General for the Commonwealth of Virginia.

Welcome, everyone. Let's get started.

Dr. Ladner? I'm sorry, at least I'm consistent. Please raise your right hand everyone.

(The panelists were sworn.)

Thank you.

Mr. Ladner.

DR. LADNER: Mr. Chairman, thank you very much for having me here. I very much appreciate the opportunity.

I'm Dr. Matthew Ladner. I'm Vice President of Research at the Goldwater Institute, and we're a libertarian think tank based on Phoenix, Arizona, but I've actually had the chance to study
this issue for both left of center and right of center
think tanks, and so I guess I'll bring a bit of the
sort of the perspective of think tank research on this
particular issue.

In 2001, the Progressive Policy Institute
and the Thomas B. Fordham Foundation issued a joint
collection of studies on special education called
Rethinking Special Education for a New Century. In
that volume, it was an edited volume, Dr. Christopher
Hammons and I statistically examined racial special
education rates across districts and counties from
several different states testing for independent
effects of a number of separate variables on special
education rates and particularly studying the
disproportionality question.

After controlling for school spending,
student poverty, community poverty, and a number of
other factors, the research revealed that a common
pattern of predominantly white public school districts
placing minority students into special education at
significantly higher rates than districts with higher
percentages of minorities in their student bodies.

In the year 2000, the United States
Department of Education Office of Civil Rights
surveyed all of the nation's public schools concerning their special education populations. The resulting data, known as OCR 2000 Elementary and Secondary School Survey, allowed for the exploration of the possible existence of racial bias and assignment of special education labeling, much more specifically.

OCR data confirms not only information about race and special education, but much more specifically to issues of gender, and also disability type.

In 2004, in a study for the Goldwater Institute, I utilized OCR's data for Arizona public schools. It reestablished the previously research with much more limited data. Minority students attending predominantly white public schools in Arizona are significantly more likely to be placed in special education programs than their peers.

Overall, when comparing the combined rates of children with emotionally disturbed, mentally retarded, and specific learning disability labels, the judgmental categories we discussed earlier, both American Indian and Hispanic males are labeled at a rate 64 percent higher in schools that are 75 percent or more white. Very white schools label American
Indian and Hispanic male students much higher when compared to schools that are 25 percent or less white. The interesting thing about this research is that it shows a very different pattern for Anglo students. As schools get whiter, Anglo labeling actually declines which, if you think about the relationship between poverty and disability that we discussed earlier, you would expect the exact opposite pattern for these minority students. As they get into more predominantly white and higher income school districts, they're actually labeled in much higher rates. So this, I believe is a very disturbing finding.

On the subject of what can be done about this, I broadly agree with the conclusions of the President's Commission on Excellence in Special Education a Report that was released in 2002. The Commission recommended that the elimination of perverse financial incentives in labeling. The Commission also recommended altering what is known as the "wait to fail" model by focusing on early testing and academic remediation using both general and special education funds.

The Commission also recommended greater
options for parents dissatisfied with the services provided in the public school setting. I believe that these recommendations represent solid strategies for addressing both over and under enrollment in special education programs. The key is for us to identify the students who actually do need special education services and provide those students the services they need. My review of the literature leads me to believe -- and the question was asked earlier -- that children who are enrolled in special education who, in fact, do not have a disability, are not being helped. I think there's a lot of well-meaning people in the public school system that are doing those sort of things, thinking that they're helping students, when in fact, they're not.

I also believe and concur with some of the conclusions discussed earlier, that there is a massive amount of error in these judgmental categories. I'm sure some of my fellow panelists may go on to discuss the research of Dr. Reid Lyon who indicates that 70 percent over 2 million students nationwide in the specific learning disability category have been put there inappropriately. These children simply have not been provided high quality reading instruction and in
Dr. Lyon's term and this is medical research is that these children have been teaching disabled, not learning disabled. I'm actually a proponent of the universal screening technique that she referred to earlier. The basic idea is to use prevention, rather than treatment. I think students should be tested, all students should be tested early. We should find out who is behind and we should attempt to remediate problems before they develop and can be mistaken for a special ed. program.

So although it's an ironic argument to make for someone who works for a libertarian think tank, I actually would pose the question sort of that John Rawls, the greater liberal political philosopher said -- Rawls' philosophy was based on the idea if you imagine a theoretical next life in which you don't know what your position will be, you may be born the child of a billionaire and a genius, and you may be born as a disadvantaged minority child in an urban public school, you simply don't know what your position is going to be.

Imagining that you might be born a disadvantaged child, would you want the current system to be the system that identifies you and treats, if
you actually do have a disability or not, or if you have something that might appear to be a disability, would this be the system that you would want?

My answer to that personally is clearly no. This is not the system I would want and I believe that this system isn't good enough for me in theory. It's not good enough for minority children, real minority children in practice. And I thank you.

CHAIRMAN REYNOLDS: Dr. Reschly.

DR. RESCHLY: My name is Dan Reschly. I'm a researcher in the area of minority disproportionality. I've been researching in that area since I was called by the Arizona Director of Special Education in 1971 concerning the Guadalupe case in Tempe, Arizona.

I served on the National Academy of Sciences Panel on Minority Over-representation in Special and Gifted Education. That report was issued in 2002 and it's cited as part of my written materials and I urge all of the people to take a good look at that report.

The first thing I want to do is to direct your attention, I'm going to move up to Slide 11 here and it's Slide 8 on your handout. And the first thing
I want to do is attempt to achieve clarity about the numbers.

I do this and I don't actually you actually -- well, I ask you to formulate an answer, but you don't have to tell me the answer. These are factual statistics from the Individuals With Disabilities Education Act data. African-American students constitute about 15 percent of the general population, ages 6 to 21. African-American students comprise 33 percent of the students who are classified as mentally retarded and placed in special education.

Now the puzzle. What percent of African-American students are classified as mentally retarded and placed in special education? Have you thought of an answer? I hope all of you have an answer in mind. In fact, 1.7 percent. That is under two percent of all African-American students are classified as mentally retarded and placed in special education. Does that surprise anybody? Again, I don't ask for any -- I will tell you that the vast majority of special educators, school psychologists, school administrators, public policy advocates get this wrong, get it badly wrong.

And the problem is the confusion between
the risk statistic and the composition statistic. Near the end of my written handout, I have a table that I've formulated that provides current results concerning risk which is the percentage of a group from the general population in a particular category or special ed. placement; composition which is the proportion of persons in that category or placement by race or ethnicity; and then the relative risk ratio. So I'd urge you to look at these and my other written materials. I have further explanations and give computational examples.

The problem with confusing risk and composition statistics is that it generates unfortunate stereotypes, particularly about African-American students. It generates the unfortunate stereotype that a large proportion of African-American students are classified as somehow defective and placed in special education. In fact, that is not the case. The numbers are disproportionate, but it does not involve a large proportion of African-American students.

Now on that table that I referred to earlier, I provide data on all disabilities across all 13 categories, what is the risk for the 5 groups
recognized in the U.S. Department of Education; across
the area of all disabilities, learning disabilities,
mentally retardation, emotional disturbance, and other
health impaired. In the far lower left corner of that
table, the actual population composition of persons
age 6 to 17 is provided.

Now let me move back to some specific
points. First, disproportionality is the culmination
of decisions about individuals, not groups. It's an
individual referral decision, individual child, not
referral of a group of persons by race of ethnicity.
Parental consent is required before an evaluation is
conducted. An individual evaluation is conducted by
specialists that almost always involves extensive
testing, as well as other kinds of observations. That
individual evaluation is then discussed by a multi-
disciplinary team that includes the parent that makes
decisions about eligibility, IEP, and placement. Note
that parental consent is required prior to determining
eligibility, formulating the IEP, or effecting the
placement. There's also an annual review and a
triennial re-evaluation.

So these are not by and large decisions
that are made capriciously or without considerable
deliberation.

Here's a dilemma. Special education involves the expenditures of greater resources on behalf of the education of the individual, estimated at from one and a half to three times the resources spent in general education. The problem has to do with the assumptions and the actuality of special education. The concerns are with stigma. A second concern is that special education is a place rather than a set of services brought to students. Also, special education has questionable outcomes.

Now earlier this morning we had some discussion about why is it that so many parents in the suburbs -- and I'm going to say clamoring for more special education, fighting very hard to get their students into special education placement, while at the same time school districts and states are being sued for over-representation of students in special education. And the answer that we came up with in the National Academy Panel was that special education in the suburbs and the cities or special education for the majority of white students and minority, particularly African-American students, is different. Special education for white students tends to be a
set of services that are brought to students that are struggling.

Special education for African-American students all too often is a place where there's a different curriculum and frankly, as a special educator, I will say fewer educational opportunities, particularly if children are misplaced. So that, I think, helps explain some of that dilemma of why in one community we have lots of people advocating for much greater special education, much greater access to special education, while at other communities and across many of the analyses that will be presented to this Commission, people are going to be very skeptical about special education.

Understand the numbers. Disproportionality varies by group. But before we go into the disproportionality statistics, let me emphasize again that the vast majority of all groups of students are in general education. The vast majority of all African-American, Hispanic-American, etcetera, the vast majority of those students are in general education. That's true now. It's always been true. Please don't confuse the risk with the compositional statistic. Traditionally, there are
three problematic categories. The first is mild, mental retardation.

Note that mental retardation is not -- I'm sorry, I need to go back. There are two kinds of mental retardation. One is mild, mental retardation where people do not have any kind of physical or biological basis for the deficits and behavior. For example, Down Syndrome is an example. I'm sorry, the other form of mental retardation is more severe and has biological markers, for example, Down Syndrome.

So it's not right to say broadly mental retardation is a judgmental category. Mild mental retardation is a judgmental category, but the more severe levels of mental retardation are not. I've spent a lot of my life trying to get those two separated without any success so far.

So the three problematic categories are indicated there and you can look at those at a later time.

Now, I've done studies of over-representation since the early 1970s. Generally, the minority students that are placed in special education programs have greater needs than similarly situated majority students in those programs. That is if
there's any trend in those results it takes slightly greater need for a minority student to be referred, deemed eligible, and placed in special education.

Now the Office for Civil Rights data that were presented this morning are also correct. What they do is focus only on the minority students in their studies in compliance monitoring with districts. And what you will find in the study of only the minority students, incidentally, you'll find the same thing if you studied only white students, but there a lot of flaws in the entire process, that there are many mistakes made by the multi-disciplinary teams. But those mistakes in our research, because we use both majority and minority students, we find that they occur with about equal frequency regardless of race of ethnicity.

In the National Academy Panel, we identified four broad categories of causes: biological bases, social bases, general education influences, and special education influences. I refer you to the written paper. I will say off the top that biological bases are a relatively minor factor contributing to over-representation, but again, take a look at the paper.
I'm particularly interested in general education with equitable distribution of resources and highly qualified teachers. Our best teachers are teaching the kids with the least needs, if you will. Our teachers with the fewest qualifications and least experience are teaching the kids with the most needs. No Child Left Behind has established a mandate to change that, but we're a long ways from getting there. We need to markedly improve instruction in reading. We endorse early screening, as long as early screening is followed by early intervention.

Early screening to simply say kids have problems isn't going to help the system at all. It's only early screening followed up with effective interventions and then response to interventions -- there's a response to interventions summit sponsored by the Office of Special Ed. Programs on Thursday and Friday of this week here in Washington, and I'll be returning for that Wednesday afternoon. It's one of those weeks where my wife is probably going to change the locks.

(Laughter.)

If you want to see the source of over-representation and I'm sometimes asked if you could do
one single to change representation patterns, what would you do, and I would say teach reading effectively.

These are the National Assessment of Educational Progress data on reading at the fourth grade level. These are 2007 data. Over half of African-American, half of Latino, and about half of Native American students read below basic as they go into fourth grade. And reading below basic, as you go into fourth grade, has vast significance that I discuss in the paper.

Special education needs to be changed dramatically. Special education needs to be a set of services rather than a place. We are seeing greater accountability associated with special education and we are seeing improved results, but we have a long ways to go. And rigorous accountability in special education is a relatively new phenomenon.

And the rest of it I think I've talked about.

Solutions in terms of summary, much greater emphasis on prevention, especially through teaching reading effectively. Secondly, we need rigorous special education evaluation and decision
making, greater rigor than we have today. And we need
to markedly improve special education. Minority over-
representation is a problem because, in my view, due
to over-representation minority students are more
likely to be exposed to segregated classes in which
the general education curriculum is not taught
rigorously and effectively.

Thank you.

CHAIRMAN REYNOLDS: Thank you. Okay, Mr.
Shelton.

MR. SHELTON: Thank you very much. I'm
Hilary Shelton, Director of the NAACP's Washington
Bureau. The Washington Bureau is a federally
legislated and national public policy arm of our
nation's oldest and largest grassroots based civil
rights organization. We have membership units in
every state in the United States, but also on military
bases in Italy, Germany, Korea, and Germany.

The NAACP greatly appreciates the fact
that the Commission has decided to look into the issue
of over-representation of racial and ethnic minority
students and Limited English Proficient students in
special education classes throughout the country. The
NAACP views this as a crucial civil rights and high
quality educational policy question.

As all of the data indicates, racial and ethnic minority children, and specifically African-American children, are placed into special education classes at vastly disproportionate rates. While there may be some disagreement about the precise disparity, and while the disparity may vary slightly based on region and in rural versus suburban versus urban school districts, there can be no question that this is an important problem, and that the problem exists in almost every school district around our nation.

If I may offer anecdotal evidence into the record as well, I would like to say that the misplacement of African-Americans in special education programs is one of the topics that generates significant concerns at NAACP gatherings across the country. Whenever there is an NAACP-sponsored discussion about the quality of public education, the question of children being misplaced in special education classes, and what can be done always comes from participant members. This has sadly been the case for decades and shows no sign of abating.

One especially grave concern is the over-representation of African-Americans and especially
black males in disability categories such as "educationally mentally retarded", or EMR, or "emotionally or behaviorally disordered", ED. Some mislabeled students need no special education services whatsoever. In my written testimony I've summarized several examples to illustrate the problems and responses.

Here in my oral statement, however, I will discuss less on whether or not there is a problem, most sensible people agree that there is a problem, and more on the causes of this disparity as well as the impact this disparity has on the children and the families in question as well as on whole communities, and our nation.

Let me say at this point that there is no questions the students of all racial and ethnic backgrounds who are eligible for special education may get important help such as tutoring, extra teaching attention and specialized instruction by teachers with specific training. Special education means services for children. It is not, at least in theory, a place where children are sent. It has been a long-standing goal of the NAACP to ensure that all American children have access to adequate public education, once a child
is determined eligible for special services, we then often struggle to ensure that the services they receive are appropriate and adequate.

Individuals with disabilities, in addition, are often confronted with fear, prejudice, and stigmatization. Students of color with disabilities, or who are perceived as having disabilities, are in double jeopardy of being discriminated against, on grounds of both race and national origin and disability.

Having said this, we must, unfortunately, also note that special education has historically been used as a vehicle for discrimination against minorities. Soon after the Supreme Court's 1954 decision in Brown v. Board of Education, the nation witnessed an increase in placement of minority students in separate special education classes. Since 1954, special education has been used by some teachers, school officials, and in some instances school districts as a substitute for more blatant racial segregation, to segregate some students of color.

Another cause of the problem of too many African-American children being placed in special
education which has been identified by people in
education as the criteria being set by the teachers
doing the initial referral. Too often, the teachers
are sending children with behavioral problems or who
are disruptive to be assessed for special education
needs. This would also explain the high incidence of
African-American males being placed in special
education. Often times, behavioral problems are
indicators of other issues, which may or may not be
addressed by special education classes.

Once a student has been referred for an
evaluation, they are often given a battery of tests,
most of which have been developed by middle class
educators and psychologists and are aimed at middle
class students with different life experiences than
many low-income, African-American and inner-city
students. For instance, when shown a picture of an
igloo and asked to identify it, a child in Alaska may
have no problem. A child who has spent his or her
life in inner-city Miami, though, would be much less
likely to identify the structure. Does this lack of
exposure to igloos qualify the student for special
education?

The NAACP has the same concerns about IQ
and aptitude tests as we do about the "high stakes"
tests that have gained in popularity in the last
decade. A standardized test, which assumes that all
students have had the same or similar life
experiences, is inappropriate in our nation of
diversity and cannot adequately assess intelligence or
even learning ability.

In addition to an attempt to segregate
students by race or nationality and the inadequacies
of determining who should be placed in special
education programs that I have just discussed, there
are a myriad of other reasons that school districts to
have been and continue to fail whole segments of their
students, a disparate number of whom are African-
American, by misplacing them in special education
classes. The NAACP is committed to working with
parents, local school districts, states, and the
federal government to identify and eliminate all of
these issues.

I would like to take a minute now to
address the second part of my testimony; what happens
to the children who are erroneously placed in special
education classes, and what are the implications for
families, communities, and our nation?
First of all, we all need to acknowledge and agree that it is very difficult for a child who has been placed in special education to get away from that designation. Thus, children who are misplaced in special education are essentially trained to underachieve. And when they finish school, if they finish school, they are given a certificate of attendance as opposed to a high school diploma in too many cases.

And so we have a while portion of our society, people who as children were misplaced in special education, who have been told again and again that they are different and inferior, who often times lack training and do not even have a high school diploma, entering our society. We have, by a large, condemned them to a life of menial, low income jobs and job opportunities. This, in turn, has ramifications for entire communities, communities that have historically been faced with challenges and denied opportunities. When a disproportionate number of us are misplaced on the special education track as children and it is impossible to even imagine that we as a nation are able to meet our full potential when so many are denied equal opportunity at such a young
As I said earlier in my testimony, the NAACP is committed to working with students, parents, local school districts, states, and the federal government to try to find a solution to the disparate number of African-American and limited English proficient students who are misplaced in special education classes.

The mix of solutions should include: ensuring accountability where disparities are significant; increasing federal oversight and enforcement; and ensuring that parents and students have a private right of action to seek judicial review for individuals and classes of complainants specific to racial disproportionality.

There are additional concerns, as the misdiagnosis issue is but one dimension of a larger challenge related to race and special education. As suggested earlier, some children of color do need special education services. But they are more likely than whites to be removed from regular education classrooms and put into resource rooms, substantially separate classes, or separate schools, where they commonly receive low quality services. The wrongful
classification, segregation, and poor servicing of students of color through special education denies equality of opportunity and has devastating results in communities throughout the country.

Thank you for the opportunity to share our preliminary thoughts on this important issue. We look forward to your questions as we move through this process.

CHAIRMAN REYNOLDS: Thank you, Mr. Shelton.

Mr. Zamora?

MR. ZAMORA: Thank you. On behalf of the Mexican American Legal Defense and Educational Fund, I commend the Commission for investigating the misclassification of minorities in special education programs. Founded in 1968, MALDEF is the nation's leading Latino civil rights legal organization.

My testimony today will focus upon the misclassification of English Language Learners (ELLs) in special education, in particular. MALDEF is particularly concerned with the academic outcomes of the nation's 5.5 million English Language Learners because nearly 80 percent of them are Spanish-speaking Latinos. ELLs constitute the fastest-growing subgroup
of students in U.S. public schools with an annual increase of about 10 percent and experts predicted that one quarter of our nation's K-12 student population will be made up ELLs by 2025.

Despite common assumptions to the contrary, native-born U.S. citizens predominate in the ELL student population: 76 percent of elementary school and 56 percent of secondary school ELLs are U.S. citizens, and over one half of the ELLs in secondary schools are second- and third-generation citizens. So ELLs are not recently arrive immigrants. On the contrary, they're students whose academic and linguistic needs are not being met in our public education system.

Consequently, ELLs typically under perform on nearly every measure of academic performance. On the 2005 National Assessment of Education Progress, for example, only 29 percent of ELLs scored at or above the basic level in reading, compared with 75 percent of non-ELL students. And ELLs also drop out of schools at disproportionately high rates.

The misclassification of ELLs in special education is a significant problem that impedes the academic development of this large and growing student
population. Many ELLs who require special education services are not receiving them, while others without disabilities are improperly placed in special education programs that may deny them full access to the standard academic curriculum. In 2001 to 2002, there were approximately 357,000 ELL students receiving special education services in U.S. public schools. And researchers have estimated that as many as three-fourths of these who were enrolled in special education programs were improperly placed.

Nationally, however, the percentage of ELLs in special education programs at 9 percent was smaller in 2001 to 2002 than the percentage of all students in special education. But research demonstrates patterns of both over-identification and under-identification of ELLs in special education with significant variations between states and districts. The majority of the special education ELL student population was enrolled in a relatively small number of districts. And generally, the fewer ELLs that a district serves, the more likely it is to classify ELLs as in special education programs. This may be because districts with smaller number of ELLs have less capacity to distinguish between low academic
performance caused by language barriers and that which
is caused by learning disabilities.

Teachers and school officials generally
attribute the widespread misclassification of ELLs to
the challenges faced in distinguishing between second
language acquisition and disability as the source of a
student's academic deficiencies. ELLs who struggle
academically because of language barriers may share
characteristics of students with disabilities. These
shared features may include making articulation and
pronunciation errors, being distracted and having a
short attention span, reading below grade level, with
low vocabulary and comprehension, and having low self
esteem, shyness or anxiety.

A significant shortage of teachers and
school officials with sufficient training in both
special education and English language acquisition is
a primary cause of the misclassification of ELLs.
Staff that is untrained in distinguishing between
linguistic and cognitive barriers to achievement will
likely disproportionately misclassify ELLs.
Researchers have also found that inadequate
assessments are a likely cause of the
misclassification of ELLs. Assessments used to
evaluate ELLs for disabilities often fail to identify the level of ability of the student in each language. And students with limited academic proficiency in both their first language and their second language are more likely than other students to be misclassified as disabled.

I will now discuss MALDEF's recommendations for improvement. The majority of ELLs who struggle academically do so not because of a learning disability, but because they are being taught by under-qualified teachers who employ curricula and instructional strategies that do not meet these students' particular academic needs. Significant improvements in the quality of academic services delivered to all ELLs will permit them to develop academic skills at a rate comparable to their peers and avoid the risk of inappropriate placement.

In addition, our public education system must increase its capacity to distinguish between linguistic and cognitive barriers to academic achievement. Despite the rapid growth of the ELL population nationwide, most school districts do not have policies, procedures, or mechanisms in place for linking ELL and special education data or providing
for collaboration across ELL and special education programs. And improving special education evaluation processes for ELLs is also critical to limiting their misclassification.

The U.S. Department of Education, both through the Office of Civil Rights and the Office of Special Education, has a significant role in ensuring that schools comply with federal laws requiring that public education systems take affirmative steps to help ELL students overcome language barriers. The federal government and the states must also support programs to encourage teachers and prospective teachers to develop expertise in English language development through the credentialing process or professional development. We also need increased research in ELL and special education and appropriate identification practices.

Available research does suggest that schools should implement pre-referral processes for ELLs to limit their misclassification. Under this model, schools created "teacher assistance teams" that examine the quality of instruction received by underperforming students and the validity of referral and assessment processes. These teams are comprised of
regular classroom teachers who meet to discuss problems in the evaluation process, brainstorm solutions, and develop action plans to correct problems. This process precedes the involvement of special education teachers and is under the authority of the general education system. It's primary benefit is that it identifies nondisability-related causes of academic under performance and thereby limits the over-identification of ELLs.

Another promising practice is the "Responsiveness to Intervention" (RTI) models which promotes early identification of students who may be at risk for learning difficulties. RTI requires school staff to conduct early screenings of academics and related behaviors for all students and the results of the monitoring determine which students need closer monitoring or an intervention. RTI imposes three graduated tiers of interventions and student placements are made depending upon each student's individual responsiveness. And this is a valuable model, both because it successfully identifies students with learning disabilities, while also addressing the academic success of all students.

So in conclusion, the misclassification of
ELLs in special education programs hinders the academic progress of many in this large and growing student population. Many ELLs with learning disabilities are not receiving the academic interventions necessary to allow them to succeed in school and life. Conversely, many ELLs without learning disabilities are being misidentified and may be denied access to a rigorous standard in academic curriculum.

The misclassification is caused largely by the failure to distinguish between academic deficiencies attributable to language barriers and those caused by disabilities. Significant improvements in the academic services delivered to all ELLs are necessary to permit these students to perform at the level of their peers and avoid inappropriate placement. School systems also must develop specific capacity to address the evaluation processes for special education for the ELL student subgroup.

Finally, the federal government must also enforce laws that require schools to take affirmative steps to assist ELLs in learning English and in participating fully and fairly in the U.S. public education system.
Thank you.

CHAIRMAN REYNOLDS: Thank you, Mr. Zamora.

Mr. Hurd?

MR. HURD: It's a pleasure to be here and have a chance to speak to you as a litigator in the area of special education. I devote a lot of my practice to representing parents who have disputes with their school boards. I don't represent school boards, I represent parents. I've done so in IEP meetings, in administrative hearings, federal courts, both district and appellate and the U.S. Supreme Court. And our perspective this morning may be different from some others. I do not believe that my comments will account for all of these numerical anomalies, but they may account for some.

Let me begin, if I may, by reviewing briefly how the special education system works. Parents and school systems are supposed to be equal partners in designing and Individual Education Program (IEP) or an IEP for the child. In this model, this equal partnership model is one that is obviously quite different than what public educators are accustomed to dealing with. In the majority education side, the school system pretty much says what the curriculum
will be and parents have very, very limited rights. And for at least some, and I would say many, public
school educators the special education model is not
one that they really like. The parents and the school
system employees, sometimes others, form what is
called the IEP team. That team is supposed to decide
by consensus whether the child has a disability, what
the disability is, what the goals should be, and what
the services should be.

Generally speaking, the team which is a
consensus, that consensus may mean one of several
things. It may mean there's genuine agreement between
the parents and the school. Or it may mean simply
that the parents defer. They believe the school has
the expertise and has the best interest of the child
at heart. Or it may be the parent simply acquiesce,
feeling for a variety of reasons that they have no
choice but to go along.

Of course, what the law says is that when
parents and the school system reach an impasse, then
the parents have the right to ask for a hearing before
a supposedly neutral hearing officer, where they can
try to convince the hearing officer that the school's
program is inappropriate and that what the parents
will be and parents have very, very limited rights. And for at least some, and I would say many, public
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Of course, what the law says is that when parents and the school system reach an impasse, then the parents have the right to ask for a hearing before a supposedly neutral hearing officer, where they can try to convince the hearing officer that the school's program is inappropriate and that what the parents
propose is appropriate. These due process hearings are supposed to be relatively informal. But as Pete White, one of the leading special education attorneys in the country has remarked, they often involve all the emotional turmoil of a domestic relations dispute and the battle of experts of a medical malpractice case. The parents, if they win, can ask for reimbursement for their attorney's fees, but not for their expert witness fees. And so, even if they win, they're going to wind up having to pay. And there are appeals that lie ahead in Federal District Court, Federal Circuit Court sometimes, even up to the U.S. Supreme Court.

Now, what does all this mean for minorities? What does it mean particularly in light of the fact that Americans of African and Hispanic ancestry compose a disproportionate number of persons with lower socio-economic status and resources. Based on my experience it means that as a group, minorities are at a disadvantage at every step in this process. For example, minority parents are less likely to have their own independent medical, psychological, or educational evaluations, and therefore more likely to depend upon evaluations conducted by the school
system. Minority parents are less likely to have the economic resources to retain the lawyers and experts necessary to make a credible challenge to the school system, either at the IEP meeting or in a due process hearing. Minority parents are less likely to be members of parental support groups where information can be exchanged and guidance obtained on how best to deal with the school system.

The Commission may wish to look into the percentage of due process hearings sought by minorities compared to the percentage of minorities in special education. I've not seen any such studies. What I have seen, however, is a study by the General Accounting Office that reported in 2003 a "significant relationship" between household income and hearing requests. Not surprisingly, households with lower income are far less likely to seek a due process hearing than households with higher income. And when those income differences are correlated statistically with race, the result is going to be, in my judgment, a substantial under-representation of minorities in the due process arena.

Now that effect has consequences earlier in the pipeline. When a school system sits down with
parents across the table in an IEP meeting, the school system tries to figure out pretty quickly if these parents are going to be compliant and take what they are given or if they're going to cause problems and if so, how far they will push. If the school system thinks that the parents are not going to push very hard, very far, then they will offer less.

Now to understand the dynamics of this process, it is important in my judgment to realize that school systems sometimes do not fully embrace their duties under the IDEA. This is to some extent continuation of the old attitude that the education of children with disabilities is simply not the job of the public school system. It is to some extent the resistance that those in government often show when called upon to share power with others. And it is to a very large extent resentment over the fact that the federal government has imposed special education mandates, but has not provided very much in the way of special education funding.

School officials will be quick to you that when the law was passed 30 years ago, Congress promised to fund 40 percent of the cost, but that federal funding today is closer to 18 percent. State
and local funding makes up the balance and inevitably, 
paying those costs cuts into the ability of the public 
school system to offer programs designed for the 
majority of the students.

Special education advocates are concerned 
that school officials often cut corners and often give 
them less than what the law requires in order to 
comply with their budgetary limits. Let me quote to 
you what one Court has said, the Sixth Circuit: "Left 
to its own devices, a school system is likely to 
choose the educational option that will help it 
balance its budget, even if the end result of the 
system's indifference to a child's individual 
potential is a greater expense to society as a whole."

In other words, there is an inevitable institutional 
incentive for school districts to reduce costs by 
minimizing a child's individual needs.

Minimizing a child's individual needs can 
have a direct effect on the disability classification 
given to the child and on the kind and intensity of 
services that are provided. In my experience, for 
example, some school systems resist classifying a 
child as having autism and instead prefer to treat the 
child as mentally retarded or as emotionally
disturbed. Programs for the mentally retarded and emotionally disturbed children are typically less expensive than children having autism, their programs.

Similarly, school systems often resist providing one-on-one services and summer services and, when they do provide those services, they often offer fewer hours than they would be willing to provide if parents challenged them. Fewer hours of services means less progress, and less progress means the child will spend more years in special education. And as the child grows older, the presence of unresolved special education needs creates the risk the child will lose self esteem, will suffer teasing and bullying from peers with resulting emotional problems that may also become disability issues.

In a nutshell, special education works best when two things occur in combination: when parents actually have the ability to assert themselves and advocate for their child; and when school systems recognize that parents have those abilities. Now tying this race, let me offer three final observations.

One, to the extent that minority children receive less favorable treatment in special education
than their white counterparts, it is not clear how much of a difference is attributable to racial attitudes and how much is attributable to those socio-economic factors that are closely correlated with race and that may affect the ability of parents to assert themselves and advocate effectively for their child.

Secondly, to ascertain how much of the difference is attributable to racial attitudes, there would need to be a fairly detailed regression analysis that factors out socio-economic factors and also accounts for regional differences urban-suburban-rural differences and other factors as well.

Third, to the extent that racial attitudes can be isolated and quantified, it may not be racial animus so much as a reflexive racial stereotyping. Since a major goal in special education is to keep cost to a minimum and another major goal is to accommodate the convenience of school employees, the school system when it sits down across the table at an IEP meeting, if they are dealing with an African-American family, for example, may make the assumption, consciously or not, that the parents are less likely to present a problem than white parents. Believing that the black family would be willing to accept less,
the school system starts out by offering less and unless that family has the experience, the expertise of the lawyers to assert themselves, they are likely to wind up with less. And that fact pattern, multiplied many times over, can result in some of the disparate treatment that we have seen in the numbers.

Thank you.

CHAIRMAN REYNOLDS: Okay, gentlemen, thank you.

Mr. Kirsanow?

COMMISSIONER KIRSANOW: Yes, thanks very much. This is an exceptional panel. Thank you all for your testimony.

I'd like to just jump on the last comment made by Mr. Hurd and see if I can relate it to something that Dr. Ladner talked about.

To the extent that there may be a disparity in the use of the due process mechanisms in assigning someone to a special educational class, have you, Dr. Ladner, found that -- strike that.

In addition to that, I think Mr. Hurd testified that some school districts, whether consciously or not, may simply look at compliant appearance and figure for lack of a better term, we
can roll them. Not that they're doing it with any degree of malevolence, but look, we've had incidence here that we're concerned with here.

    Have you seen in any data that you've been able to adduce, whether or not -- you indicated there was a greater proportion of minority students that are assigned to special education classes, the higher the proportion of majority is in that particular school district.

    DR. LADNER: Right.

    COMMISSIONER KIRSANOW: Have you been able to disaggregate that by specific racial or ethnic group to determine whether or not, for example, this also pertains to Asian students and further, whether or not it is a function also of income regardless of race of ethnicity, again, going to Mr. Hurd's point of using the due process mechanisms?

    DR. LADNER: Yes, this is a very interesting question. The short answer is yes, the patterns are different. They're opposite for Anglos and for minority students. Anglo students who are in predominantly white districts actually have -- their disability rates go down. Although it is true that you do see this suburban high income gaming of the
vessel D levels. There's multiple things going on all at the same time and it's very complex.

    The pattern is opposite for minorities. So minorities in leafy suburbs are more likely to be labeled than minorities living in inner cities. I think that Mr. Hurd's testimony on the use of due process is also very interesting. There are profound equity issues throughout this entire system and nationwide, about two percent of special education students actually attend private schools at public expense. They are the ones who are able to avail themselves to expert witnesses and to specialized attorneys.

    And I think, actually, a very interesting program that the Commission should study carefully is called the McKay Scholarship Program in Florida because what it does is actually instead of saying if you're profoundly dissatisfied with the services in your public school delivering to you as a special ed. student, rather than hiring these expert witnesses and suing and going through all that to get out, what you can do is simply take the money that is given to you in the form of a scholarship and actually go to another public or private school of your choice. This
basically democratizes the opportunity where you don't
have to this really high income to be able to do this.
And also it turns the funding argument on its head
because public schools for decades have argued they
don't get enough money for special education students.
If that's true, then therefore they cannot complain
if those same students leave with their presumably
inadequate funding.

A study was done by the Manhattan Institute by Dr. Jay Greene who found there were
18,000 students participating in this program in
Florida now and their parents are profoundly satisfied
with the education they're getting in the program.
They're less likely to be bullied in the schools
they've transferred to, they feel they're in smaller
classes. There's a whole variety of measures. So I
think it's a very interesting way to approach these
problems. These degradations are very large and very
real.

COMMISSIONER KIRSANOW: Professor Reschly,
I was struck by the NAEP data that you put up there
and it strikes me that the NAEP data may correlate to
some extent with the identification of students for
special educational classes. I think you indicated
that one of the interventions that might be most useful is or at least one of the factors that permit you to identify whether or not someone is likely to be placed in special educational classes, whether or not they've got the ability to read.

Does anyone on the panel have an opinion as to the degree to which the factor of being able to read versus say due process issues are more likely to place someone in a special educational class?

DR. RESCHLY: Well, reading is implicated as either the first or second reason in at least 80 percent of all special educational referrals. If you study referral behavior, you find that children who read well have fewer behavior problems, are much less likely to be referred.

You also find that it's extremely rare for a referral or a student to be placed in special education capriciously. Whether these students are quote really disabled or not is a matter of I think argument and whether special education is the best place for them. I would definitely question, but the overwhelming majority, 99.5 percent of all students who are placed in special education have significant, chronic achievement problems, and about two thirds of
them have challenging behaviors that complicate their performance in general education classrooms. Reading is a huge factor.

DR. LADNER: If I could add to that real quick, I mean the overall picture here, general relationship between general ed. and special ed. is very complex and very profound. If you look at things like the average academic progress for low income students in urban public school districts, they come in a little bit below the average to start with. I mean it's a little bit, maybe more than a little bit, but the problem is is that in the early grades, they simply don't, way far too often, learn basic reading skills. By the fourth grade, what the literacy research indicates is it's very hard to remediate not learning after a certain point in life. And these children fall, if you imagine this sort of being the national average, they fall further and further behind with each passing grade level. By the time they get to middle school they're academically frustrated. They don't imagine themselves going to college or university. They see no point in being in the school any more and they begin dropping out in large numbers.

As a part of that overall study, along the
way some of these children are mislabeled as having a
disability, a neurological condition which is what
specific learning disability is supposed to be. Along
the way, some of them are labeled as being disabled
incorrectly, you know. And so improvement of the
general education system is absolutely key to
resolving some of these problems, but at the same time
we could be a lot more scientific about how we
identify kids for special ed.

COMMISSIONER KIRSANOW: In addition to
that, family structure may have something very
profound in terms of its effect, in terms of it's
highly unlikely or more likely that someone coming
from a poor and/or single-family home would get the
type of pre-school reading instruction and in addition
to that coming from a poor and/or single-family home
most likely -- less likely to invoke the kind of due
process protections talked about by Mr. Hurd.

DR. LADNER: I would agree with that,
although the errors compound over time.

MR. ZAMORA: I would like to jump in just
for a moment to address the reading issue because
that's a particularly prevalent concern for English
Language Learners. ELLs are less likely to have books
in the home, less likely to have parents reading and may not be getting high quality instruction in either English or in the native language. So sometimes, especially Spanish-speaking students are given assessments in Spanish, but aren't being given instruction in Spanish, so that doesn't become an accurate measure of reading. And then especially in English immersion programs that aren't the most effective for ELLs, an English language assessment won't tell you whether they can read or not either. So that's a particularly problematic area for ELLs.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I want to follow up, among other things, on this question of reading in the value of kids to learn to read by third grade as being responsible for a lot of SPED placements.

Mr. Ladner, you come from a libertarian think tank despite I thought your disturbing use of John Rawls, but in any case, so how come these kids aren't learning to read by third grade? Where do you put the responsibility here and specifically, would you say that the misguided use by schools of whole language reading instruction is, in part, responsible here? And if so, we're into the whole educational
culture and that is extremely difficult to address.

DR. LADNER: Yes, I agree with you. I'm very interested by the research of Dr. William Sanders on teacher quality and what his research shows is that individual teachers make a profound difference in academic outcomes, so much so that I've seen Dr. Sanders present and he'll show you a chart with the top 20 percent of teachers and we're talking about analysis on a value-added basis, not just did they pass a test or not, but where did they come in and where did they end up at the end of the year.

What you find out is that some teachers add a tremendous amount of value and a lot of teachers are in the middle, and then there's a bottom 20 percent. The difference between having a top 20 percent teacher three years in a row and a bottom 20 percent teacher three years in a row is 50 percent, 5-0, okay? And we're talking about that in terms of early childhood literacy, you are literally talking about the difference between illiteracy and literacy.

It's very difficult to catch up. So I think the answer to your question is I think you suggested earlier, if we did have every kid going to a KIP school I think that these problems would be very much
diminished. I think we need to increase the capacity of the system, the existing public system.

I do think the curricular issues that you referred to are very, very important and I think we need to do -- push the envelope further on mechanisms for parental choice in order to have people out there trying new things like the KIP model in order to address these problems.

VICE CHAIR THERNSTROM: So as a spokesman for a libertarian think tank, you would put a lot of emphasis on increasing choice in education in order to gain access for parents and children to higher quality schooling?

DR. LADNER: Absolutely. We talked earlier about the universal screening model and my colleague to the right is absolutely correct. Universal screening is of no use unless you actually remediate the problems you have, but then that runs you right back into capacity issues, right?

Do these schools have the capacity to remediate? And you have parents in the system who are profoundly dissatisfied. In fact, I interviewed a Hispanic mother one time with a child who had been mislabeled and she described her very difficult
process of trying to get out of the special ed. system
as a circle that you just can never get out of.

VICE CHAIR THERNSTROM: Right, right.

DR. LADNER: And that's why I do believe
that choice elements are crucial.

VICE CHAIR THERNSTROM: Mr. Hurd, I have a
question for you. You stressed very heavily, well, not heavily, but you did mention the budget balancing
concerns of people, I believe it was you.

MR. HURD: Yes.

VICE CHAIR THERNSTROM: Of people who are
pushing back on the SPED spending. Again, as a former
member of a State Board of Education, I mean I have to
tell you -- you can't say that's a trivial concern
because it is just amazing how much special education
costs distort the whole funding of public education.
I don't know what the solution is and a lot of those
SPED costs are due to a small number of students who
are sent to very expensive private schools at taxpayer expense, but I don't think that you can kind of
dismiss the concern with the impact on school budgets
of those who have to try to allocate funds fairly.

MR. HURD: Certainly at some level it is
an important policy concern and certainly it would be
a lot better if more money were available. But where
I sit with the parent across the table from school
system employees, it really makes no difference at all
to me or my client. The law doesn't say that they
have an appropriate education if the school system can
afford it or wants to pay for it or wants to give them
some services as opposed to giving computers to all
the other students. It says they're entitled to an
appropriate education.

And my point really is and you can take it
for better or worse, understandable or not, that when
the school system sits down at an IEP meeting in my
judgment the top two things on their mind more often
than not are money and the convenience of their staff.

VICE CHAIR THERNSTROM: What does
convenience mean in that sense?

MR. HURD: Convenience means in that sense
--

COMMISSIONER BRACERAS: Don't ask them to
do more.

MR. HURD: Yes, things like are we going
to have this child in the general education classroom
or are we going to have the child put away in a
special education classroom? Are we going to require
the reading teacher to follow a prescribed reading
course, Wilson Reading or Orton Gillingham, or are we
going to let them make up their mind as they go along
and do whatever they want, just as examples.

And another thing that I'll mention that I
see so often in sitting down in these IEP meetings and
I don't know that it can be addressed in any sort of a
macro level, but this is not a situation where all the
professionals come to the table with independent
judgment, free to speak their own mind, and make a
decision. This is more often than not, a situation
where all the school employees are either know in
advance what it is they're supposed to say, or they
know in advance who it is at the table they're
supposed to follow. Maybe it's the principal. Maybe
it's the central office, special education
representative, but they know they're supposed to
follow somebody's lead. And they know if they get out
of line that their jobs will be in danger. That's the
truth of the matter.

VICE CHAIR THERNSTROM: Tenure. They've
got tenure.

MR. HURD: In some systems they may and
others they don't.
COMMISSIONER BRACERAS: It doesn’t matter, Abby, they all fall in line with the principal. I’ve sat in those meetings.

DR. LADNER: And in fact, 20/20 actually filmed an IEP meeting recently last year and even though there was a camera in the room it was really eye opening. The principal asked the person who was assigned to this particular child if he met with him and the person who is a football catch said well, no, I’ve got to admit actually no, I haven’t and the child’s mother was complaining that he wasn’t making academic progress and the principal just completely dismissed her concerns. The whole process sounds very scientific when you read it on paper, but the reality of it, I think, leaves a lot to be desired.

VICE CHAIR THERNSTROM: Well, that could be said of every aspect of most public schools.

MR. HURD: Which is why in the KIP program in Florida, it really is such a good idea. We tried it in Virginia, that is to say we tried to get it through the General Assembly in Virginia. It passed one house. It was killed in the other house and was killed by the school systems.

VICE CHAIR THERNSTROM: Yes.
MR. HURD: Who bring up the V words, this is a voucher by some other name.

VICE CHAIR THERNSTROM: Right.

MR. HURD: Of course, that terrifies them. But that too is a form of parental choice.

VICE CHAIR THERNSTROM: Of course.

CHAIRMAN REYNOLDS: Dr. Ladner, you spoke about the importance of having high quality effective teachers. I believe someone else, it may have been you, mentioned that the teachers least prepared to deal with these hard cases are the ones teaching them.

Would you agree that in order to reshuffle, reallocate, reconfigure the school system so you have your most qualified teachers assigned to the kids that have the biggest challenges, that that would entail a different approach to the collective bargaining agreement?

DR. LADNER: Yes, but I actually think we've got to go much further than that. I think if you look at the big picture, what you see is we have some very bright, very talented, very dedicated people working in the public school system. But those going into teaching we know from empirical, verifiable
research that we're not on average getting the best
and the brightest students into our schools of
education. Of those that do go into the teaching
profession, many quickly become frustrated. They are
compensated according to a formulaic method that has
nothing to do with merit, more often than not. Many
of them wind up going into administration to make more
money or leaving the profession entirely, so your
supply of really highly effective teachers keeps going
down all the time. And then amongst those you still
have left, they do have some control over their
working conditions, not their salary. They're getting
paid, you know, but they're staying there until 7:30
each night. They're getting paid the same as someone
that tears out at 3:30. So they gravitate off to the
leafy suburbs. Of course, they do. Why would they
not? Right? No one is offering them combat pay.

I don't think combat pay, per se, which is
sort of the nickname for what you're describing, is in
and of itself a solution because basically what it is
proposing which I don't necessarily pose is
reshuffling the highly effective teachers, take them
away from other places and put them into the high need
areas. What we need to do is increase the overall
supply of high quality teachers in addition to doing some of those things that you suggest.

I think this can be done, but we're going to have to fundamentally change some of our practices in the public school system. Dr. Sanders' research actually indicates, for instance, that the influence of teacher quality is 20 times larger than that of the impact of class size. Okay? And in our national obsession with small classes, what we have actually done is we've eliminated the amount of money we can pay teachers and we've cut off access to high quality teachers for a lot of students. I mean 20 times is a mind-boggling figure and Dr. Sanders' research also shows exactly what I described earlier, that there's a profound difference in effectiveness on a value-added basis between the high-quality teachers being out with the easiest to educate kids.

So we're just kind of starting to take the very first steps towards this. We've only recently started to measure teacher quality on a value-added basis. It's very revealing. It's revealing a lot of profound equity issues, but overall, we're going to have to increase the supply of highly qualified teachers and that is going to absolutely necessitate
us treating teachers as professionals and that has got to -- I'm talking about merit pay. It has to happen. If you want highly competent, ambitious, hard-working people, you have to offer them a profession that is going to reward them according to their own accomplishments.

CHAIRMAN REYNOLDS: A follow-up question. Assessment tools. Our ability to measure on value-added basis teacher skills. Is that easy to do? Is there a software program that any institution can use or must you have a bunch of social scientists descend upon the classroom and measure this?

DR. LADNER: Luckily, the answer to that is no, nor would you want that.

And in the shape of things to come, there are some very exciting things going on, just along the lines you suggest. I've spoken to, for instance, some people who develop just these kind of data management systems that really allow principals and teachers to use a diagnostic value of testing in a way that it is just really exciting.

I talked to a public school principal from Virginia who had helped develop this kind of a data management -- it's all web-based. All the tests are
done on line. All the data is there for everyone to look at. They developed this in partnership, this particular product, there are others, in partnership with Northrop Grumman, and he described to me how it was used at one point. It was -- he basically -- his teachers actually develop assessment items based on state standards. Okay. They're in control of what these monthly assessments, just what they're doing to judge themselves on a value-added basis. And he told me a story about hiring a bad math teacher. How does he know he's a bad math teacher because the system identifies one month here. Here is the average or the math department. Here's my highest performer. Here's this particular teacher. It offers him the opportunity to begin trying to remediate this bad teacher right off from the beginning. The teacher in this particular case did not respond to that sort of remediation. So he kept working with him, but eventually towards the end of the semester he said look, you know, this is a right to work state. I can't have you miseducating my students. So you either need to do better or you need to find a different professional career. This is a hugely controversial idea of course, but I'll throw it out
there.

The person's union representative came in.

This principal was able to say let's take the data out and look at it. Here it is. It's all documented. Over the course of the Christmas break, he made a change. He then brought in a new teacher. The new teacher was able to go into the system like it was medical charting, called all up this data, know exactly what those students knew and what they didn't know down to the item level. They know this, but they don't know that. By simply using the first five minutes of each class to remediate the things that they hadn't learned in the first semester, this new teacher was able to get them back up to the school average by the end of the year.

There are some things going on with technology that are very exciting. They make me feel like the public school that I went to was sort of a cave man school in a lot of ways. But the first step is to start measuring. We have to know who our rock star teachers are and we need to treat them appropriately and likewise when we have under-performers, we need to either remediate them or get people in there that will do the job.
CHAIRMAN REYNOLDS: How do teachers feel, how do they respond to being assessed?

DR. LADNER: The teachers in these schools have actually completely bought into it because they're in control of it. These gentlemen actually did tell me that a lot of these products, the problem with them is they want to sell a test bank and the teachers resist that. They don't feel that the items are fair, but allowing teachers to develop their own assessment items as a part of the professional learning community seems to be an effective way to get buy in and ultimately this is a very promising way to improve education for the kids which is what our focus ought to be.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Mr. Hurd, you described a somewhat adversarial process in terms of the challenge by a parent to the determination that someone should be placed into a SPED program and that a parent would have to come up with their own resources, hire an attorney possibly, or someone. Low income families would have a difficult time doing that, affording an attorney.

Do you have any recommendations for how
possibly that entire process might be reformed to make it more accessible by low-income parents or anyone else who wanted to utilize the process? Or should there even be such a process?

MR. HURD: Well, I think there must be such a process. I think leaving it to the school systems to decide these things unilaterally is recipe for failure.

We have seen in Virginia some activity by Legal Services groups in this area. But frankly, there's not enough of it. Those folks have their plates filled with many other things as well. But if there were some way to redirect their focus more towards special education needs I think it would pay off in the long run for these parents and children.

MR. SHELTON: Just to add to that, a Legal Services formulated approach to providing some advocacy support for parents is a fantastic idea in an awful lot of ways.

We've seen the support of Legal Services. If we could find a way to actually add that to the menu of options and support it on the federal government level to the Legal Services Corporation, it could prove to be extremely helpful in creating an
education unit for those sections across the country.

It would be a very helpful move.

COMMISSIONER KIRSANOW: Mr. Shelton, you remind me that -- this is unrelated -- that there are certain deficits that in order to introduce, we're placing into special education programs. About 40 years ago, Bill Cosby had a whole routine about special ed. and the stigma that attaches, but I'm wondering, are there any -- does anyone have any information about any longitudinal studies that exist that would show what, if any, detriments occur to those individuals who were placed in special educational programs vis-a-vis those who may be similarly situated, but are not. I know that would be difficult to do, but --

MR. SHELTON: I'm not aware of any longitudinal studies along those lines. Everything I know is purely anecdotal beginning with my personal experiences. I grew up in St. Louis, Missouri. Went to an all African-American elementary school at that time from kindergarten through 12. Special education was a class that was set up actually right off of the boy's bathroom. As a matter of fact to get to that classroom for the special education students, you
actually had to cut through the boys bathroom and there was a little partition that separated the door from the special education class.

Even the stigma of students having to attend those classes in there was insurmountable in so many ways. But moving beyond that, certainly the stigma that I think many of us carry when we think about who was in special ed. as it was stated in a couple of our testimonies this afternoon is it becomes a place instead of a series of services that should be provided to provide assistance to students.

I can also say as someone who has been fortunate enough to make the kind of living that I can forego my retirement and educate my children in private school right now, indeed, when my children have challenges, a team is assembled with all their teachers along with counselors to take a look and describe whatever that particular problem is at that particular moment. And indeed, we sit down as parents with them to discuss how we can address those concerns, what kind of resources that school provides as well as what kind of resources are willing to bring to bear; what kind of additional testing we'll have to pay for out of our pockets that most parents can't
afford to pay for. And we're talking about the African-American community, you're talking about a community where 60 percent of our children are from families at or below the poverty line, so we have a real problem in our communities providing those kind of services.

So again, I'm not as familiar with -- I would love to see some longitudinal studies. I don't know if you're aware of those. I would love to hear about those, but the anecdotes are overwhelming.

DR. RESCHLY: Let me just comment on that. Generally what I can tell you is that the outcomes for students who arrive at fifth or sixth grade with very low reading skills and some associated behavior issues, I'm not talking about being emotionally disturbed or even behavior disordered, but behavior issues. Those outcomes, regardless of whether they go into special ed. or not aren't very good.

Now the question is does placing them in special education lead to better outcomes than if they simply stayed in general education? And the answer about that is that there are good special ed. outcomes associated with high school work preparation programs.

COMMISSIONER KIRSANOW: Vocational?
DR. RESCHLY: Vocational training, vocational experience in high school. The K through 12 special ed. programs in terms of academic achievement, it forces students in the disability categories that we've been referring to, it's really hard to show advantages and achievement from having been in special ed. That's the status of the data.

Now let me add one more thing. You guys have been beating up special educators a lot. The fact of the matter is something on the order of over 95 percent of all parents of students in special education regard those programs very positively. That's fact.

If we had a school board's attorney here and I certainly sympathize with the conditions you're talking about. There are lots and lots of cases like that, but if we had a school board's attorney here, he or she would be telling you about some of the outrageous interactions they've had with parents. I've been a due process hearing officer and I've seen both extremely intransigent, unresponsive school officials. I've also seen parents that are absolutely unrealistic in their expectations of the school.

There's a tendency for the law to be
shaped by the extremes, unfortunately. In fact, there's a whole lot in the middle. And it's not fair to say that special educators or school administrators are only looking at what's the least amount of cost and the least amount of trouble. There are literally tens of thousands of administrators and special educators that do a really good job.

CHAIRMAN REYNOLDS: VICE CHAIR Thernstrom?

VICE CHAIR THERNSTROM: Well, I'm very glad you said that. Just one more sentence on that. In my experience, at least, in one state, SPED parents are extremely well organized. So that the pressures are enormous.

DR. RESCHLY: Well, as a group, they're very well organized, but if you look at what proportion of SPED parents are active in disability advocacy groups and I think you'll find it's a relatively small percentage.

VICE CHAIR THERNSTROM: Right.

DR. RESCHLY: Who are really active, and the vast majority of students, parents of students in special education are not real active or necessarily very able to advance the interest of their children.

VICE CHAIR THERNSTROM: Absolutely, but if
you have a lot of pressure --

   DR. RESCHLY:  Very strong advocacy groups.

   Absolutely.

   COMMISSIONER BRACERAS:  I think what happens is you have a lot of repeat players who are activists and put a lot of pressure on the school systems. Then when the other individuals come along, I think as Mr. Hurd said, the schools immediately know that they're not part of that group and therefore they can get away with providing less because they're not the people who are going to push. And sometimes those parents are --

   VICE CHAIR THERNSTROM:  Well, I must tell you that at the state board level, at least when we dealt with a lot of funding issues and regulatory issues and so forth, I mean those advocacy groups had an enormous impact and there are other categories of kids without such advocacy groups.

   COMMISSIONER BRACERAS:  But the individual parents who go in to either advocate for their child to get increased services or to advocate for their child to be taken out of special ed. and mainstreamed, those average parents are not the activists and are easier to ignore when the school system is looking at
cost issues and inconvenience issues.

VICE CHAIR THERNSTROM: Right.

DR. LADNER: Mr. Hurd is absolutely correct. The school systems are very, very skilled at figuring out who they can push around and who they can't.

VICE CHAIR THERNSTROM: Right.

DR. LADNER: And to answer the Commissioner's question, my view of this is that we have to -- the fundamental thing we have to understand is that special ed. is not remedial ed. A lot of people kind of try to use it that way, but if you kind of evaluate it on those terms, it's extraordinarily expensive and not terribly effective.

VICE CHAIR THERNSTROM: Right.

COMMISSIONER KIRSANOW: In terms of pushing people around, there are a number of issues to be addressed by the Civil Rights Commission with disability, but also race.

You've testified that there's an inverse relationship to the percentage of mainly black students in majority white schools and their representation in a special ed. course. Have you been able to divine from any studies whether or not
schools, school districts, boards of education view
certain races, again, controlling for income and all
other variables, as more -- to use Mr. Hurd's term,
compliant than others? In other words, are certain
races being steamrolled?

COMMISSIONER BRACERAS: It might be
difficult, my opinion, in some cases to control for
income because lots of times when you have minority
students in a predominantly white area, they're there
because of a METGO program in Massachusetts or a
voluntary integration program. So they're coming, the
majority, not all, the majority of African-American
students in Massachusetts, suburban, primarily white
schools come from inner city Boston through the METGO
program. They don't live in the community. So you
wouldn't be able to separate out economics, for
example, at Concord-Carlisle High School, you get down
to a pool of four kids.

VICE CHAIR THERNSTROM: Well, you step
right out the free lunch kids. It's a lousy
measurement.

COMMISSIONER BRACERAS: I'm saying it
wouldn't answer his question because once you separate
it out, the free lunch kids or the kids that come from
economically disadvantaged neighborhoods, you're not looking at any African-American students. Unfortunately, Massachusetts is a segregated -- I don't want to use the word segregated, but a racially isolated -- there are racially isolated schools.

DR. LADNER: Even more fundamentally, I mean social science cannot discern what the motivations of people are. We can have highly suggestive evidence to say financial incentives play a role here. I firmly believe that, and there's research to show that. One of the gigantic problems is that these judgmental categories are wide open to abuse and then the evidence seems to suggest that they are being abused and if we want to change that, for instance, we can change -- half the kids in special ed. are SLD. And Dr. Reid Lyon's research indicates that 30 percent of those designations are actually legitimate. They have an actual neurological condition that when you subject it to medical testing that it is real.

So one thing we obviously need to do is to move SLD from being a category that is judgmental to one that is much more scientifically based. And it's really the kids that lose most in this misdiagnosing
process in some ways are the kids who actually do have disabilities.

CHAIRMAN REYNOLDS: One follow up, SLD, what is that?

DR. LADNER: Specific learning disability.

COMMISSIONER KIRSANOW: Regardless, it's very difficult to divine intent, obviously. But is there any data to show that, for example, in majority school districts, black students are more likely to be placed in SPED courses versus Hispanic students versus Native American students versus Asian students?

DR. LADNER: Asian student rates are kind of flat and low across the board. For the others, Native Americans, Hispanics, and African-Americans, they're higher.

COMMISSIONER KIRSANOW: Is there any data that would suggest a reason for why the Asian students are flat, as you say, versus the other three minority groups?

DR. LADNER: That's a good question and I can't answer that.

DR. RESCHLY: I've tried to get research funding to do that, but nobody is interested frankly.

VICE CHAIR THERNSTROM: Because they know
DR. RESCHLY: Do they know the answer?

CHAIRMAN REYNOLDS: Well, if you were to speculate on what that answer was --

VICE CHAIR THERNSTROM: I mean the College Board has done work on this. A lot of people have done work on this. Whatever, let's go on.

COMMISSIONER KIRSANOW: Mr. Zamora, maybe you have some data on in terms of the ELL students, is there a difference between say Spanish speakers and any other speakers that may be LEP or ELL courses?

MR. ZAMORA: That's a very good question and what we found is that the data on the correlation between special education and ELL is very limited. And in fact, I think the most authoritative report was submitted to the Department of Education in 2003 and they had gone to districts and to states and had asked them for their number of special education ELL students and one of the officials didn't have that data on hand and had to crunch numbers and so generally the data isn't all that effective, but I do work a lot with the Asian American Justice Center some, and they found that in presenting issues of Asian education that they confront this model minority
stereotype essentially where -- and I think there is
research that I don't have currently available to back
that up, but that again, getting into attitudes and
subconscious or conscious bias in the subjective
processes that there's less likelihood to attribute
any sort of academic defect to disability for this
particular model minority.

COMMISSIONER KIRSANOW: Mr. Hurd, do you
encounter in your practice a greater percentage of say
Asian parents utilizing the due process system versus
other minority parents?

MR. HURD: No, in my practice we have
dealt almost exclusively with white parents. We've
had African-American clients, but not nearly in the
numbers that you would expect to have.

COMMISSIONER BRACERAS: And in your
practice, those clients are primarily trying to get
services or trying to get out?

MR. HURD: Some of each.

COMMISSIONER BRACERAS: Some of each. But
the white parents I've represented have to a single
case are trying to obtain more services or better
services than the school is willing to offer.

COMMISSIONER YAKI: Is this a pro bono
program that your firm has?

MR. HURD: We do some of that. We do both pro bono cases and fee-paid cases.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: No questions.

VICE CHAIR THERNSTROM: Lunch

VICE CHAIR THERNSTROM: All right, Commissioner Yaki, do you have additional questions?

COMMISSIONER YAKI: I have a question for Mr. Ladner. I just wonder to what extent does any No Child Left Behind has had an impact on the number of referrals to special ed. over the past four years?

DR. LADNER: I would say if anything it's been a positive development because one of the problems used to be that the states would exempt special ed. students from state testing and it provided a perverse incentive to label kids and to some extent that No Child Left Behind has mitigated that.

MR. ZAMORA: And I think I would generally concur with the parallel to the exclusion of the English Language Learners prior to NCLB from accountability systems and so I think we have seen increased transparency and increased accountability.
So there is an increased awareness now as to the problem in terms of whether it's solved many of these problems, I think we have a ways to go, certainly.

DR. LADNER: It's very important to maintain that during the reauthorization.

MR. ZAMORA: Exactly.

CHAIRMAN REYNOLDS: Commission Melendez?

COMMISSIONER MELENDEZ: Yes, just one question. The Individual With Disabilities Education Act is going to expire in 2010. I was just wondering, is there anything that you would suggest that we could address as that comes up as far as any studies we need to do or what would be a recommendation as the debate closes on 2010, the issues that we're talking about?

DR. RESCHLY: One thing I'd suggest as a strong influence toward making special education a set of services brought to kids in general ed. rather than a place. And to continue the very strong emphasis on accountability in special education. The states for the first time in 2006 had to report on a variety of general outcome indicators. In 2006, and now 2007, the Office of Special Ed. Programs is now ranking states and there's -- accountability is relatively new to special education. And it's very important that
that accountability pressure continue for the betterment of kids.

DR. LADNER: I think I heard a consensus across the panel that getting the diagnostic process correct is a very important thing and it's something the President's Commission emphasized and it is extremely important.

MR. SHELTON: I'd say too that the data collected is very well desegregated.

CHAIRMAN REYNOLDS: I'm sorry.

MR. ZAMORA: Well, I would just very quickly add the 2004 Reauthorization actually has some significant improvements, both in that it allows for the response to the intervention model, but then also that it has strong language about the misclassification of English language learners, that language shouldn't be a cause of identification, but it's really more implementation issues that we're dealing with now.

CHAIRMAN REYNOLDS: Well, Mr. Zamora, you had the last word.

Gentlemen, thank you very much. This has been outstanding. We'll put together a dynamite report with the wealth of information that you've
provided.

VICE CHAIR THERNSTROM: Thank you very much.

(Whereupon, at 1:13 p.m., the briefing was concluded.)