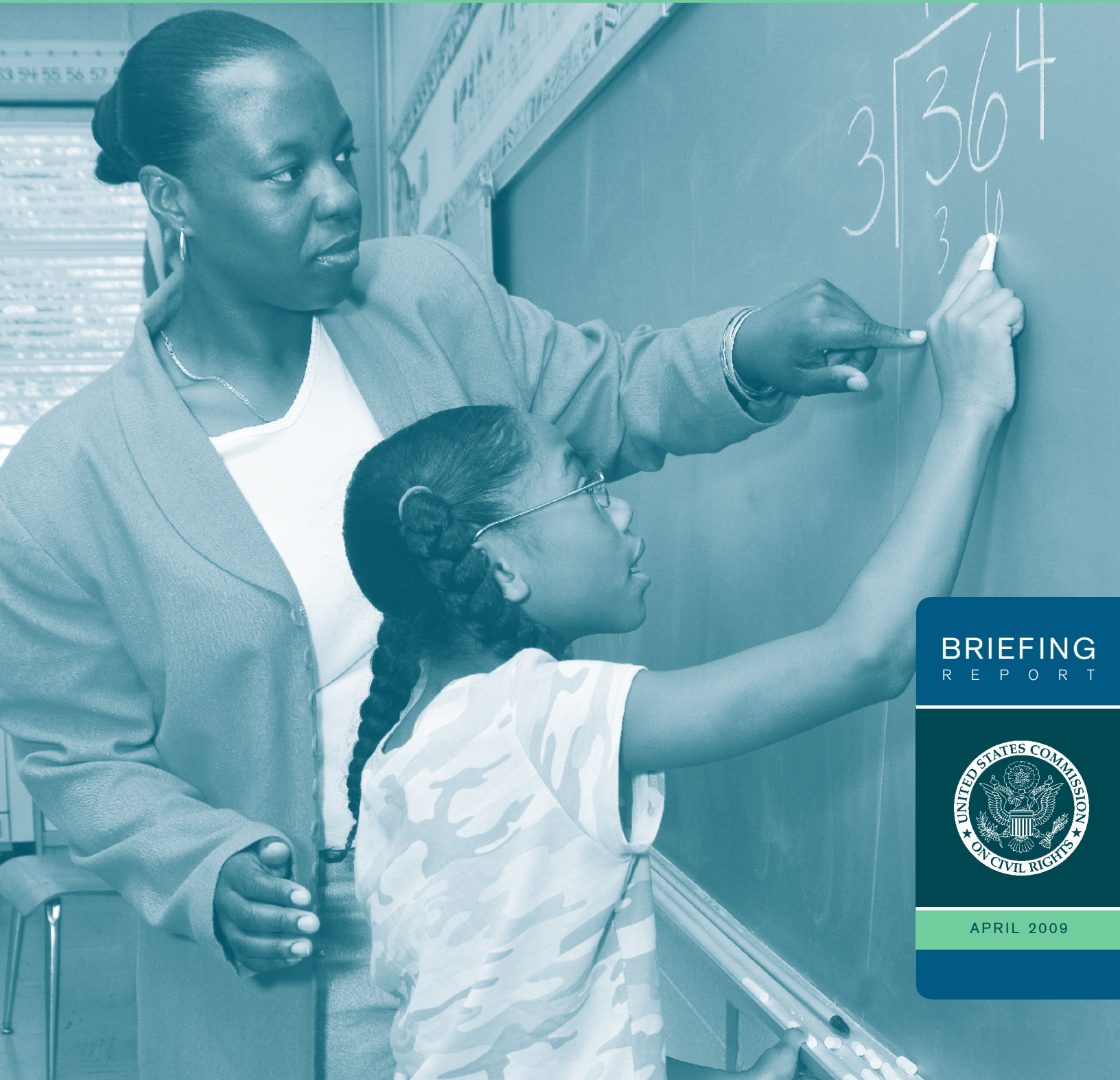


# MINORITIES IN SPECIAL EDUCATION



BRIEFING  
REPORT



APRIL 2009

## U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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# **Minorities in Special Education**

A Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, DC, December 3, 2007

Briefing Report



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## Introduction

On December 3, 2007, eight experts briefed members of the U.S. Commission on Civil Rights on whether blacks, Hispanics, Native Americans, and Limited English Proficient (LEP) students are misplaced in special education programs more often as a proportion of the general education student population, than their white, Asian, or non-LEP peers; and the nature, extent, and possible causes of any misplacement. In addition, the panelists were asked to give their views on what the federal government, schools, and parents could do to address the issue.

A transcript of this briefing is available on the Commission's Web site ([www.usccr.gov](http://www.usccr.gov)), and by request from the Publications Office, U.S. Commission on Civil Rights, 624 Ninth Street, NW, Room 600, Washington, DC 20425, (202) 376-8128, [publications@usccr.gov](mailto:publications@usccr.gov).

The experts, on two panels, were

- Ms. Stephanie Monroe, Assistant Secretary, Office for Civil Rights (OCR), U.S. Department of Education.
- Dr. Martin Gould, Director of Technology and Research at the National Council on Disability.
- Mr. Reginald Felton, Director of Federal Relations at the National School Board Association.
- Dr. Matthew Ladner, Vice President of Research for the Goldwater Institute.
- Dr. Daniel Reschly, Professor of Education and Psychology at Peabody College, Vanderbilt University.
- Mr. Hilary Shelton, Director of the NAACP, Washington, D.C. Bureau.
- Mr. Peter Zamora, Washington, D.C. Regional Counsel for the Mexican American Legal Defense and Education Fund.
- Mr. William Hurd, Partner, Troutman Sanders, Richmond Office.





## Executive Summary

The first panelist, Assistant Secretary Monroe, asserted that a 1982 nationwide survey conducted by the National Academy of Sciences found that certain minorities were overrepresented in special education programs nationally,<sup>1</sup> and that more recent surveys had resulted in similar findings. Since 1993, OCR has conducted hundreds of compliance reviews on minorities in special education, and launched another major initiative in 2003. In addition, since 2003, Ms. Monroe recounted, OCR has conducted 61 compliance reviews and received 144 related complaints. As a result of these reviews, OCR has identified compliance concerns such as teachers referring minority but not white students despite apparent similarities in circumstance; the use of different tests for minority and white students; and the placement of minority students in separate classes while white students are placed in regular classrooms. She stated that after OCR's completion of the first tier of such compliance reviews, there was a decrease in the number of minorities referred for special education. Ms. Monroe also stated that OCR has succeeded in improving access to gifted programs for minority and LEP students.

The next panelist, Dr. Gould, noted that according to many government reports, when subjective rather than objective criteria are used, overrepresentation in special education is concentrated among three minority groups. The three groups are blacks, Hispanics, and American Indian and Native Alaskans. He reported that Asian American children are underrepresented in special education. He agreed with Assistant Secretary Monroe in viewing the use of subjective criteria as leading to inaccuracies, and recommended the use of more objective assessments. In addition, he suggested that it is important for the Department of Education to continue to collect, publish, and monitor data, surveys, and/or reports to support the effective enforcement of civil rights laws in education.

Mr. Reginald Felton agreed that minority and LEP students are disproportionately represented in special education programs. He disagreed, however, with the view that minorities were misidentified more than non-minorities. He found it disturbing that some minorities were disproportionately very low-income, and expressed the belief that disregarding factors such as income and other sociological data would result in ineffective remedies for minorities in educational settings. He argued, however, that overrepresentation alone does not imply misidentification, and that the majority of identified students meet the legal definitions for eligibility. He also disagreed that schools had an incentive to place students in special education, since such services are costly and not adequately funded by the federal government.

Dr. Matthew Ladner also agreed that certain minorities were disproportionately represented in special education. He offered findings drawn from his studies on special education for the Thomas B. Fordham Foundation, which found, after controlling for school spending, poverty, and other such factors, that minority students were placed into special education at higher rates in majority white public school districts, compared to districts with higher percentages

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<sup>1</sup> K. A. Heller, W. H. Holtzman, S. Messick (eds.), "Placing Children in Special Education: A Strategy for Equity," (Washington, DC: National Academy Press, 1982).

of minority students. He recommended adoption of the conclusions of the President's Commission on Excellence in Special Education,<sup>2</sup> which suggested screening of students even before any signs of academic or other difficulties arise, and the provision of greater options for parents dissatisfied with public school services.<sup>3</sup>

Dr. Reschly offered statistics from Individuals with Disabilities Education Act (IDEA)<sup>4</sup> data, showing that only a very small proportion of black students (under two percent), are classified as mentally retarded. He expressed the belief that teachers and others have drawn incorrect and unfortunate stereotypes about black students because school officials and others interpret this data incorrectly. He explained that educators and policy makers confuse risk statistics (the probability that a certain ethnic group will be classified a certain way), with composition statistics (ethnic composition within a certain classification). He also observed that stigmas may be associated with special education in low-income areas, but not suburban areas. He asserted that mild mental retardation is subjectively determined, but that severe levels of mental retardation are objectively determined, and that all these categories are problematic for schools.

Mr. Shelton noted his concern that special education has historically been used as a vehicle for discrimination against minorities. He countered Mr. Felton's statement that most minorities are appropriately placed in special education, arguing that the disproportionate numbers of minorities in special education are the result of inappropriate placements. He further contended that special education in predominantly minority schools is often a distinct place within the school where there is little learning, not a set of carefully tailored and appropriate services. He recommended increasing federal oversight and enforcement, and giving parents and students a private right of action for complaints specific to racial overrepresentation.

Mr. Zamora offered an analysis of disproportionality from the point of view of English Language Learners (ELL). He spoke of the misclassification of ELLs as special education students and noted that ELLs are the fastest growing subgroup of students in U.S. public schools, increasing ten percent annually. He argued that the primary reason for inappropriate student placements in special education is that teachers lack sufficient training in both special education and English language acquisition. He suggested that districts implement a pre-referral process and support continuing teacher education programs to better equip teachers to deal with such students.

Mr. Hurd expressed the belief that minorities are at a disadvantage at every step of a placement appeal because of fewer economic resources and non-participation in parental support groups relevant to the issues. He expressed the belief that a solution to misidentification would be the greater involvement of parents in their children's education, and undertaking statistical studies that identified specific correlations with socioeconomic

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<sup>2</sup> U.S. Department of Education Office of Special Education and Rehabilitative Services, *A New Era: Revitalizing Special Education for Children and Their Families*, Washington, DC, 2002, <http://www.ed.gov/inits/commissionsboards/whspecialeducation/reports/index.html> (accessed Jan. 30, 2009)

<sup>3</sup> Ibid.

<sup>4</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.*

factors. He reviewed the workings of the special education placement process, stating that in theory the parents and the school system are supposed to work as equal partners creating an Individualized Education Program (IEP) for the student. He expressed the belief that in practice parents are not fully equal partners, although the law authorizes parents to appeal a child's placement if they think it is inappropriate. However, he contended that because these appeals are often costly and because minorities often have less income, minority parents disproportionately do not challenge their children's placements. As a result, he argued, schools often offer minority students fewer and sometimes ineffective services because school officials assume these placements will go unchallenged. He stated that if parents had greater control over their child's education they would feel more involved and, as a result, their child's education would improve.

During the question and answer period, the panelists fielded questions from the Commissioners dealing with several issues:

- The effect of inappropriate placement in special education on student progress
- Reasons for a larger percentage of students being placed in special education in lower income school districts as compared to middle income districts
- The role of behavioral problems as a contributing factor in minority placements in special education
- The necessity of using the special education label to improve academic performance
- The extent to which funding availability influences the effectiveness of local special education programs
- The effectiveness of Individualized Education Program (IEP) meetings
- Special education referral, determination, and evaluation factors
- Parental involvement in the special education referral process—compliance versus non-compliance
- The relationship between family structure, early reading ability, and special education placements
- The effects of the No Child Left Behind Act of 2001 (NCLB)<sup>5</sup> and the Individuals with Disabilities in Education Act (IDEA)<sup>6</sup>

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<sup>5</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et. seq.*

<sup>6</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.*



## Summary of Proceedings

### Panel One

#### Stephanie Monroe

Assistant Secretary Stephanie Monroe addressed the disproportionate representation of minorities and limited English proficient students in special education. She asserted that NCLB was designed to ensure that all students are appropriately assessed and educated according to the requirements she viewed as set forth in *Brown v. Board of Education*,<sup>1</sup> *Lau v. Nichols*,<sup>2</sup> and Title VI of the Civil Rights Act of 1964.<sup>3</sup> The goal of NCLB is to provide all students with the basic right to equal educational opportunities.

Ms. Monroe suggested that the disproportionate representation of minorities in special education was a nationwide issue,<sup>4</sup> noting that minority students constitute a majority of students in special education programs. She further stated that there are disparities in the implementation of special education between minorities and non-minority students. For example, minority special education students are often placed in self-contained classrooms while similarly situated non-minority students are educated in regular classrooms.<sup>5</sup> In addition, she stated that over the last ten years, while the number of LEP students has increased by 61 percent, the number of LEP students in special education has more than doubled.<sup>6</sup>

Monroe stated that to address these disparities, OCR instituted a more rigorous review of teacher referral and student assessment standards.<sup>7</sup> Through this commitment, Monroe expressed the belief there have been life-changing results.<sup>8</sup> She also stated that special education services are now assigned more efficiently, in that they are targeting only those who legitimately need special education services while decreasing the number of inappropriate referrals.<sup>9</sup>

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<sup>1</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>2</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>3</sup> 42 U.S.C. § 2000d.

<sup>4</sup> Stephanie Monroe, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 12 (hereafter cited as Monroe Testimony, Briefing Transcript).

<sup>5</sup> Monroe Testimony, Briefing Transcript, p. 14.

<sup>6</sup> *Ibid.*, p. 19.

<sup>7</sup> *Ibid.*, p. 16.

<sup>8</sup> *Ibid.*, p. 19.

<sup>9</sup> *Ibid.*, p. 18.

## **Martin Gould**

Dr. Martin Gould noted that the problem of minority overrepresentation in special education has been consistently well-documented, but not well understood.<sup>10</sup> He focused on three of the thirteen recognized disabilities in the IDEA: emotional disturbance, mental retardation, and learning disability. He considered them subjectively determined categories, which he referred to as “judgmental” disabilities.<sup>11</sup>

Dr. Gould identified three racial and ethnic groups that are traditionally overrepresented in special education: African American, American Indian/Native Alaskan, and Hispanics. He noted that the other two groups—white and Asian American students—are not overrepresented. According to Dr. Gould, Asian American students were actually underrepresented in special education and overrepresented in gifted and talented programs.<sup>12</sup>

Dr. Gould asserted that there are four problems in the proper measurement of disproportionality.<sup>13</sup> First, he expressed the belief that there is no national consensus on a precise definition of measurement, and further, while there are guidelines, there are no mandated requirements for the states to follow. Second, he expressed the belief that little medical evidence is typically available to confirm or refute an eligibility decision, creating variability. Third, he expressed the belief that there is no consistent measurement method, creating much difficulty in assessing the extent of the disproportionality. Finally, he stated that there is inconsistency of definition among the school districts in terms of determining a student’s race, including bi-racial students.<sup>14</sup>

Dr. Gould’s recommendation to the Commission was that schools focus on monitoring data in various reports, such as a civil rights compliance report,<sup>15</sup> using surveys and/or reports as a tool to gather data and for enforcing civil rights laws in education. He also recommended that the Commission explore the effectiveness of these methods at the state and local levels.<sup>16</sup> Finally, he maintained that without addressing the persistent factors causing disproportionality among minorities in special education, the problem will continue to grow.

## **Reginald Felton**

Mr. Reginald Felton agreed that minorities were overrepresented in special education in public schools compared to their proportions in the general student population. Dispelling the

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<sup>10</sup> Martin Gould, testimony, Briefing before the U.S. Commission on Civil Rights, *Minorities in Special Education*, Washington, DC, Dec. 3, 2007, transcript, p. 21 (hereafter cited as Gould Testimony, Briefing Transcript).

<sup>11</sup> Gould Testimony, Briefing Transcript, p. 23.

<sup>12</sup> *Ibid.*, p. 23.

<sup>13</sup> *Ibid.*, p. 25.

<sup>14</sup> *Ibid.*, p. 27.

<sup>15</sup> *Ibid.*, p. 28.

<sup>16</sup> *Ibid.*, p. 31.

common claim that these students are improperly placed, however, he suggested that the majority of these students do meet the legal definitions for such eligibility.<sup>17</sup>

He stated that students in poverty face greater challenges of many kinds, and that minority students are disproportionately in poverty.<sup>18</sup> They may, therefore, disproportionately qualify for special education. Furthermore, he suggested that proposing solutions for the disproportionality without also addressing these underlying problems would be ineffective. He also expressed the view that Congress provides school districts insufficient funds to implement effective special education programs.<sup>19</sup>

He noted the addition of two new provisions during IDEA's most recent reauthorization in 2004 that provide schools with greater support.<sup>20</sup> The first provision allows school districts to set aside funding for student evaluations but does not require students to be formally designated as special education students. He felt that this potentially could result in allowing teachers to grant needed services to students without the stigma of labeling. He expressed the belief that the second new provision could be more beneficial, which relieves local districts of the cost of providing certain special education resources to students by shifting the cost of non-education resources for special education students from local jurisdictions to statewide agencies.

Mr. Felton further urged that additional studies be undertaken regarding LEP students. He recommended that by assessing and identifying LEP students using specific eligibility standards unique to them, rather than using the broader standards applicable to students with disabilities, schools could provide better outcomes.<sup>21</sup>

Finally, he urged implementation of a program called "universal design learning." He stated that this program would benefit all students—not only those in special education—because of its flexible approach both to curriculum and presentation of information. This program accommodates the many learning needs and styles by adapting the curriculum to the student rather than the student to the curriculum. Lastly, he stated that, while not a panacea, incorporating non-traditional methods of presentation of information and assessment promises to engage all types of learners. This approach could potentially reduce the increasing dropout rates among non-Asian minorities, he suggested.<sup>22</sup>

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<sup>17</sup> Reginald Felton, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 32 (hereafter cited as Felton Testimony, Briefing Transcript).

<sup>18</sup> Felton Testimony, Briefing Transcript, p. 33.

<sup>19</sup> *Ibid.*, p. 34.

<sup>20</sup> *Ibid.*, p. 35.

<sup>21</sup> *Ibid.*, p. 36.

<sup>22</sup> *Ibid.*, p. 40.

## **Discussion**

Commissioner Kirsanow asked Mr. Felton whether there were any data that showed how an inappropriate placement in special education adversely affected student progress. Mr. Felton cited research stating that when students are ineffectively taught for extended periods, the disparity in academic performance and advancement between these students and other better-placed students can widen by as much as 50 percent.<sup>23</sup>

Commissioner Braceras observed that in affluent districts, parents often seek to have their children placed in special education programs, even if it is inappropriate, because special education students are afforded more one-on-one attention in areas of reading, writing, and arithmetic. Mr. Felton agreed, but added that in all special education there needs to be appropriate follow-up, assessment of progress, and reevaluation of goals.<sup>24</sup>

Vice Chair Thernstrom stated that disproportionality alone is not evidence of discriminatory placements in special education. She also stated, and Mr. Felton agreed, that often students are misplaced in special education because of behavioral problems. Teachers unable to cope with such problems may refer problematic students to special education classes rather than adjusting their teaching methods.<sup>25</sup>

Assistant Secretary Monroe agreed with Mr. Felton on this point, and noted that inappropriate placements not only do a disservice to the inappropriately placed students, but also to the students that need the services but cannot get them due to space limitations. Ms. Monroe pointed to OCR-conducted compliance reviews that indicated a 74 percent disparity in proportion, which OCR investigated for misplacements. In many of these, the children were re-tested and found not to qualify for special education programs. Ms. Monroe noted that NCLB will generate more accountability, and thus more legitimate placements.<sup>26</sup>

Commenting on Commissioner Braceras's contention that an affluent parent of a disruptive child immediately tries to get him or her into special education, Ms. Monroe acknowledged that parents understandably use whatever tools are at hand to help their child. She observed, however, that such actions may indicate that the parents feel disengaged from the school. She argued that if parents are informed of the entire range of services, not just the ones that inappropriately drain the school system of funds, there can be a much more effective resolution that is specifically tailored to the child.<sup>27</sup>

Commissioner Braceras responded by suggesting that certain districts often will not address a child's problems unless he is labeled "special ed." Accordingly, Commissioner Braceras asked if there was any harm with placing students in special education inappropriately if the

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<sup>23</sup> Briefing before the U.S. Commission on Civil Rights, *Minorities in Special Education*, Washington, DC, Dec. 3, 2007, transcript, p. 43 (hereafter cited as *Minorities in Special Education, Briefing Transcript*).

<sup>24</sup> *Minorities in Special Education, Briefing Transcript*, p. 46.

<sup>25</sup> *Ibid.*, p. 50.

<sup>26</sup> *Ibid.*, p. 51.

<sup>27</sup> *Ibid.*, p. 53.



placements benefit the students. Mr. Felton responded that the broader challenge is to ensure that all children get essential education services without the necessity of labeling.<sup>28</sup>

Commissioner Melendez asked whether the Department of Education had any position on universal screening processes that tested all children at an early age for learning disabilities rather than basing placements on teacher recommendations. He further inquired as to whether the department was providing research grants or identifying best practices in the area of universal screening. Ms. Monroe stated that she did not know, but deferred to the department's Office of Special Education Programs.<sup>29</sup>

Mr. Felton responded by reasserting his earlier point that the ultimate goal is to implement something that will help the student. He stated that whatever the student evaluation process is, appropriate assessment and follow-up is essential to its effectiveness. Dr. Gould also responded to Commissioner Melendez's early screening inquiry, stating that early screening often is predicated on a school's ability to secure Medicaid resources.<sup>30</sup>

Commissioner Yaki asked whether students are placed into programs that are already well-funded, or if students are placed in programs specific to their needs regardless of current funding.<sup>31</sup> Mr. Felton suggested that due to insufficient funding, school districts can provide very limited support, but that the law mandates that certain services be provided. Thus, to secure these services, local districts often need to work with state legislatures.<sup>32</sup> Dr. Gould added that he hoped universities would address the increase in the number of students in public schools with special needs, such as autism. He stated that universities should include special education as part of their curriculums.<sup>33</sup>

Commissioner Taylor asked Dr. Gould if there was an overrepresentation of non-Asian minorities in those special education categories defined by subjective factors.<sup>34</sup> Dr. Gould responded that the research and government reports indicate that they are overrepresented. Commissioner Taylor then asked if there was an overrepresentation of non-Asian minorities in those special education categories defined by objective factors such as testing.<sup>35</sup> Dr. Gould responded that government reports using OCR data and research reports outside of government research do not so indicate. Commissioner Taylor suggested that, when the determinations are based solely on objective factors, there is no overrepresentation of minorities in special education.<sup>36</sup> He then argued that minority overrepresentation and misrepresentation in special education are related because of the inherent subjectivity in the placement process. Dr. Gould responded that it is hard to draw conclusions because of the

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<sup>28</sup> Ibid., p. 57.

<sup>29</sup> Ibid., p. 59.

<sup>30</sup> Ibid., p. 60.

<sup>31</sup> Ibid., p. 62.

<sup>32</sup> Ibid., p. 63.

<sup>33</sup> Ibid., p. 64.

<sup>34</sup> Ibid., p. 66.

<sup>35</sup> Ibid., p. 66.

<sup>36</sup> Ibid., p. 67.

inevitable variability that results from the different make-up of each IEP committee, which he stated is mandated by IDEA.<sup>37</sup>

Chairman Reynolds then asked if the subjective decision to take disruptive students out of class helped explain misidentification in special education. He also asked whether this problem was exacerbated when dealing with children from impoverished homes with little support and intellectual stimulation. Those students, he said, are often disengaged from and uninterested in the classroom discussion, which results in their becoming disruptive. Mr. Felton agreed, stating that there is sufficient research to suggest a relationship between poverty, health, and classroom performance. He urged the Commission to determine whether the special education evaluation system discriminates against disruptive students or whether there are valid reasons for providing the students the additional support services.<sup>38</sup>

Assistant Secretary Monroe disagreed, stating that it is incorrect to generalize the existence of a link between poverty and the ability to learn. She pointed out that there are many examples of success coming from schools such as the KIPP Academy in which the majority of the students are impoverished and, indeed, live in the most dire circumstances. The key to such success, she asserted, was a combination of highly qualified, engaged teachers, involved parents, and reasonable student-teacher ratios.<sup>39</sup>

Commissioner Heriot asked whether there was disproportionality in special education placements in terms of gender and, if so, whether this casts doubt on the racial disproportionality in special education. She noted that boys are disproportionately diagnosed as requiring special education. Ms. Monroe stated that more gender-based research needs to be done to determine the cause of the disproportionality because the tests are currently highly subjective.<sup>40</sup>

Commissioner Heriot then asked whether disproportionality in learning disabilities was actually an exclusively white, upper-middle class phenomenon. Dr. Gould responded that learning disabilities are not overwhelmingly prevalent in majority white schools. Instead, in those schools, non-Asian minorities are at a higher risk for being identified with learning disabilities, specifically math and/or reading disabilities.<sup>41</sup>

Finally, Vice Chair Thernstrom addressed the many outside circumstances that minority students often face—poor housing, little at-home support, and lack of high-quality health care. The Vice Chair stated that while these problems need to be addressed; they are not issues that the school systems can or should address. She stated that a school's sole objective is to provide a high quality education. Mr. Felton agreed, but added that educational services

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<sup>37</sup> *Ibid.*, p. 68. *See also* 20 U.S.C. § 1400 *et. seq.*

<sup>38</sup> *Minorities in Special Education*, Briefing Transcript, pp. 67–68.

<sup>39</sup> *Ibid.*, p. 74.

<sup>40</sup> *Ibid.*, pp. 75–76.

<sup>41</sup> *Ibid.*, p. 78.

need to be provided in an equitable manner, meaning that certain schools will require a greater investment than others.<sup>42</sup>

## **Panel Two**

### **Matthew Ladner**

Dr. Matthew Ladner compared the disparities in minority special education between majority white and non-white schools. He cited various works, including a joint study by the Progressive Policy Institute and the Thomas B. Fordham Foundation titled “Rethinking Special Education for a New Century,” which found that minority students in predominantly white schools are placed in special education at much higher rates than minorities in predominantly minority schools. Specifically, Dr. Ladner noted an inverse relationship in which as a school’s minority numbers diminish, minority representation in special education increases.<sup>43</sup>

Dr. Ladner recommended—per the President’s Commission on Excellence in Special Education—the elimination of the financial incentives to label students as special education.<sup>44</sup> He also said that the focus should be on early testing and constant, consistent academic remediation, rather than continuing the current “wait to fail” approach. Student, teacher, and administrator accountability should be increased so as to limit resources to only those who actually need them. He stated further that placement into categories must be objectively, not subjectively, determined. Finally, he expressed the view that parents’ roles should be increased, with more options placed at their disposal.<sup>45</sup>

### **Daniel J. Reschly**

Dr. Dan Reschly first addressed statistics based on IDEA data.<sup>46</sup> He reported that African American students constitute 33 percent of students classified as mentally retarded who are placed in special education, despite the fact that African American students only comprise fifteen percent of the general student population, ages six to twenty-one. At the same time, he indicated that the overall percentage of black students classified as mentally retarded was less than two percent (1.7 percent) of all African American students attending school.<sup>47</sup>

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<sup>42</sup> Ibid., p. 80.

<sup>43</sup> Matthew Ladner, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 86 (hereafter cited as Ladner Testimony, Briefing Transcript).

<sup>44</sup> See U.S. Department of Education Office of Special Education and Rehabilitative Services, *A New Era: Revitalizing Special Education for Children and Their Families*, Washington, DC, 2002, <http://www.ed.gov/inits/commissionsboards/whspecialeducation/reports/three.html> (accessed on Jan. 30, 2009).

<sup>45</sup> Ladner Testimony, Briefing Transcript, p. 89.

<sup>46</sup> See 20 U.S.C. § 1418 (b) and (d).

<sup>47</sup> Daniel J. Reschly, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 92 (hereafter cited as Reschly Testimony, Briefing Transcript).

He stated that these contrasting numbers surprise educators and policy makers because risk statistics are often confused with composition statistics. Risk statistics provide the probability that a certain student will be classified a certain way within his or her respective group. Composition statistics identify the probability that a certain student within a certain classification—e.g., mentally retarded—will be of a certain race or ethnicity. He claimed that this confusion leads to the unfortunate stereotype that a very large proportion of African Americans are in special education. This is not the case, he suggested, as the majority of African Americans are in general education.<sup>48</sup> Another statistical calculation that Dr. Reschly finds useful is the relative risk ratio, which compares the relative risks of different ethnic or racial groups.

Dr. Reschly also pointed to the problem of stigma associated with special education, which stems from certain societal assumptions. One assumption is that special education is a distinct and ineffective place—physically separating students—rather than supplying a student with a specific set of services. He stated that this assumption is rooted in the discrepancy between special education programs in majority-minority schools versus those in majority white and Asian schools. Special education in the minority schools will often be a distinct learning environment with a separate curriculum that offers few opportunities.<sup>49</sup> In majority white and Asian schools, however, special education services more successfully meet students' needs. Dr. Reschly contended that this disparity accounts for the reason parents in majority white and majority Asian districts push very hard for their children to receive special education services, while parents in majority-minority districts try very hard not to have their children placed in special education.<sup>50</sup>

Dr. Reschly further stated that many errors are made by the IEP committees to the same extent regardless of racial and ethnic status, since the subjective nature of much of the process makes it subject to many errors.<sup>51</sup>

He proposed an equitable distribution of educational resources to alleviate minority disproportionality in special education. He stated that low income school districts often have the least qualified teachers with the least resources at their disposal teaching students with the most needs and conversely, the best teachers teaching the students with the least needs.

In conclusion, Dr. Reschly recommended greater emphasis on prevention of incorrect referrals through teaching reading effectively; and greater rigor in evaluation and improvement of special education.<sup>52</sup>

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<sup>48</sup> Reschly Testimony, Briefing Transcript, p. 93.

<sup>49</sup> *Ibid.*, p. 95.

<sup>50</sup> *Ibid.*, p. 96.

<sup>51</sup> *Ibid.*, p. 98.

<sup>52</sup> *Ibid.*, p. 100.

## Hilary Shelton

Mr. Hilary Shelton argued that the disproportionate number of minorities in special education is the result of the use of inappropriate criteria. He maintained that the traditional practice of using special education as a means to segregate minority students from the class at large, in some instances, still continues. He offered another explanation for the disproportion—a high frequency of behavioral difficulties coupled with poor classroom management that is common in lower income, minority schools. These behavioral problems often lead to special education referrals and placements, he contended. He questioned the validity of standardized tests used to make placement decisions, based on his view that students with different life experiences can't be adequately tested using such standards. His view is that these assessments fail to account for student diversity of experiences, and are therefore inappropriate and inaccurate.<sup>53</sup>

Mr. Shelton stated that once a student is placed in special education, it is very difficult for him/her to be reclassified in general education. Further, students who are inappropriately placed receive ineffective education that is continually reinforced if they are not removed from special education. Therefore, students often graduate without even minimal proficiency and, in some cases, are led to believe this minimal level is sufficient. The result, he stated, is that these students have few prospects even for menial, low-income jobs.<sup>54</sup>

Mr. Shelton suggested that there be general accountability in special education to reduce the disproportion and that there be an increase in local and federal oversight wherever there are substantial disparities. Additionally, he expressed the belief that parents and students should have the right to seek judicial review of complaints specific to racial disproportionality.<sup>55</sup>

## Peter Zamora

Mr. Peter Zamora addressed the misclassification of ELLs in special education. He noted that ELLs are the fastest growing subgroup of students in U.S. public schools, increasing ten percent annually. He countered the common assumption that the majority of ELLs are foreign-born, citing studies that show that native-born ELLs make up 76 and 56 percent of elementary and secondary school populations respectively. Further, he noted that over half of the ELLs in secondary schools are second- and third-generation citizens.<sup>56</sup>

He suggested that misclassification of ELLs into special education is a significant problem. Mr. Zamora argued that statistics show that in the 2001–02 school year, up to three-fourths of ELL special education students were improperly placed. He stated that while research showed varying results between states and districts, generally, it appeared that ELLs are

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<sup>53</sup> Hilary Shelton, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 105 (hereafter cited as Shelton Testimony, Briefing Transcript).

<sup>54</sup> Shelton Testimony, Briefing Transcript, p. 107.

<sup>55</sup> *Ibid.*, 108.

<sup>56</sup> Peter Zamora, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 110 (hereafter cited as Zamora Testimony, Briefing Transcript).

more likely to be placed in special education in districts that serve a smaller number of such students. He suggested a possible reason for this is that school districts with fewer ELLs may be less able to distinguish between low achievement due to language difficulty versus a learning disability. Moreover, he expressed the belief that the primary reason for the misclassification of ELLs is that teachers often lack sufficient training in both special education and English language acquisition that would allow them to distinguish between the two.<sup>57</sup>

Mr. Zamora suggested that continuing teacher education as well as a pre-referral process should be implemented to improve ELL services. He also suggested that the state and federal government should be supportive of programs that encourage teachers and prospective teachers to develop expertise in English language development. This would increase the likelihood that students would not be inappropriately placed in special education.

In terms of the pre-referral processes, he suggested that school-created “teacher assistance teams” should be implemented. These teams would consist of classroom teachers who would examine whether underperforming students were receiving high quality instruction. The team would meet to discuss the evaluation process and develop action plans to correct apparent problems. As this process should precede student involvement in special education, its primary benefit would be to identify non-disability-related causes of academic underperformance, thereby reducing inappropriate placement of ELLs in special education.

Lastly, in addition to the “teacher assistance teams,” he recommended that school staff conduct early screening of all students to determine which students need closer monitoring or intervention. The objective of these programs would be to identify students with, or at risk for, learning disabilities early in their education.<sup>58</sup>

### **William Hurd**

Mr. William Hurd began by describing the way the special education system works in practice. He stated that, in theory, the parents and the school system are supposed to work as equal partners in creating an IEP for the student; however, he suggested that this is often not the case. Typically, the school controls the process while the parents are passive participants. Nevertheless, this partnership is supposed to decide, through consensus, how the services should be administered. If there is a disagreement between the parents and the school system during this process, the law provides the parents the right to a neutral due process hearing where they can challenge the school’s placement on grounds that it is inappropriate, and propose an appropriate alternative.<sup>59</sup>

Mr. Hurd asserted that, in practice, the problems resulting from this process become apparent when comparing special education programs in lower income schools from those in wealthier

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<sup>57</sup> Zamora Testimony, Briefing Transcript, p. 112.

<sup>58</sup> *Ibid.*, p. 114.

<sup>59</sup> William Hurd, testimony, Briefing before the U.S. Commission on Civil Rights, Minorities in Special Education, Washington, DC, Dec. 3, 2007, transcript, p. 118 (hereafter cited as Hurd Testimony, Briefing Transcript).

districts. The due process hearings are often costly because even if the parents win, they are only reimbursed for their attorney's fees, not for their expert witness fees. These costs often deter parents in lower socio-economic classes from challenging their child's special education placement. Further, because a disproportionate number of blacks and Hispanics belong to lower socio-economic classes, this deterrent effect disproportionately affects them. Mr. Hurd stated that a study by the General Accounting Office (GAO) that looked at household income and number of hearing requests in the year 2003 substantiates this claim. The GAO study reported that there was a significant positive correlation between household income and frequency of hearing requests, and concluded that households with lower income are far less likely to seek due process hearings than households with higher income.<sup>60</sup>

Mr. Hurd described the forces that contribute to inappropriate identification of low-income students, including budgetary constraints brought about by inadequate federal funding that, although initially set at 40 percent of special education costs, is now down to about 18 percent. Such budgetary constraints provide a considerable incentive for school officials to assess in an initial IEP meeting how compliant parents will be in the special education process. The end result, he suggested, is that districts offer more compliant parents fewer special education services, and if compliant parents are disproportionately minority, may reflect "reflexive racial stereotyping,"<sup>61</sup> and unintentionally disparate treatment.

Mr. Hurd recommended that the Commission look into statistics to compare the numbers of due process hearings sought by minorities to the number of minorities in special education. He also suggested that the Commission do a detailed regression analysis to determine the amount of minority disproportionality that is race-related and how much is socio-economically related.

Finally, he expressed the belief that for special education to work the way it should, parents must assert themselves and become involved in the process, advocating for their children. He expressed the belief that by including more parents in the process, special education would become more effective overall.

## **Discussion**

Commissioner Kirsanow opened the discussion by asking Dr. Ladner whether he was able to find any data demonstrating that a greater proportion of minority students are assigned to special education classes in majority white school districts. He also asked Dr. Ladner whether there were any data that substantiated Mr. Hurd's point that in the initial IEP meetings, minority parents are more compliant.<sup>62</sup>

Dr. Ladner responded that the data substantiated the view that minority students in suburban districts are more likely to be labeled as special education than minority students in inner-cities with larger proportions of minority students. He then recommended that the

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<sup>60</sup> Hurd Testimony, Briefing Transcript, p. 120.

<sup>61</sup> *Ibid.*, p. 124.

<sup>62</sup> Minorities in Special Education, Briefing Transcript, pp. 125–26.

Commissioner review a study entitled the “McKay Scholarship Program”<sup>63</sup> in Florida for possible solutions to these inequities. He stated that this program allows the parents to receive money that would otherwise be used for their child’s special education and use it in another public or private school as they see fit. Mr. Ladner pointed to a Manhattan Institute study by Jay Greene,<sup>64</sup> which he characterized as finding that the parents of the 18,000 students who participated in this program were satisfied because this program provided them with some responsibility for and leverage over their children’s education.<sup>65</sup>

Commissioner Kirsanow then asked the panel whether they had an opinion as to how much students’ reading abilities factor in to their placement in special education programs as compared to disincentives built into a due process hearing. Dr. Reschly responded that reading ability is either the first or second reason for the placement 80 percent of the time. He added that the data support the correlation between fewer behavioral problems and increased reading skills.

Dr. Ladner stated that, while reading ability often determines a child’s special education placement, students’ inability to read proficiently is often the result of inadequate schools and teaching. He suggested that the solution is to place significant emphasis on a high quality reading education in the early grades, particularly before fourth grade. Minority students in urban minority schools often begin their education with fewer reading skills than their suburban counterparts; therefore, Dr. Ladner recommended that there be a much greater emphasis on early reading education. If students who do not read proficiently are nevertheless promoted each year, their difficulties are compounded yearly and often result in inappropriate placements in special education. He stated that this is especially problematic because it reduces places for students that truly need these services.<sup>66</sup>

Commissioner Kirsanow then asked to what extent family structure contributes to student difficulty. Dr. Ladner agreed that family structure is highly influential in students’ overall performance in school. Mr. Zamora stated that the problem is that Spanish-speaking ELLs are often less likely to have books in their homes, or live in homes where they are encouraged to read. Thus, these students are often unable to read in their native language, so that when they take tests in their native language, Mr. Zamora continued, the tests are often inaccurate measurements of their ability.<sup>67</sup>

Vice Chair Thernstrom asked Dr. Ladner why these children were not learning to read by third grade and specifically whether the misguided use of whole language reading instruction was, in part, responsible. She stated that if we impugn the entire education system it becomes too complicated to address in any meaningful way. Dr. Ladner disagreed, asserting that

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<sup>63</sup> See Florida Dept. of Education, Office of Independent Education & Parental Choice, McKay Scholarship Program, <http://www.floridaschoolchoice.org/Information/McKay> (accessed Jan. 30, 2009).

<sup>64</sup> See Jay P. Greene, Marcus A. Winters, “The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida’s McKay Scholarship Program,” Manhattan Institute for Policy Research, Civic Report, No. 52, April 2008, [http://www.manhattan-institute.org/html/cr\\_52.htm](http://www.manhattan-institute.org/html/cr_52.htm) (accessed Jan. 30, 2009).

<sup>65</sup> Minorities in Special Education, Briefing Transcript, p. 128.

<sup>66</sup> *Ibid.*, pp. 131–32.

<sup>67</sup> *Ibid.*, p. 132.



overall teacher quality heavily influences early student literacy. He suggested that if students had the power to choose where they were taught, there would be significantly fewer problems. He also argued that schools should develop an increased capacity to remediate these problems.

Vice Chair Thernstrom expressed the concern that the fiscal impact of providing special education was not a trivial concern for school districts. Mr. Hurd agreed, stating that special education would improve dramatically if its funding increased. Another problem, Mr. Hurd suggested, was that members of the IEP committee have often been instructed by the principal prior to the meeting to put forth certain recommendations even if they are not the most appropriate for the child. Mr. Hurd stated that the two factors motivating a school system are money and the convenience or freedom of their staff to adapt the evaluation plan to teachers' own time constraints.<sup>68</sup>

Chairman Reynolds asked Dr. Ladner whether reconfiguring the school system to ensure that the most qualified teachers are assigned to the students facing the biggest challenges would entail a different approach to the collective bargaining agreement. Dr. Ladner responded that it would, but further argued that merit pay would provide incentives for better teachers to teach in less desirable districts. He stated that this would create incentives for hard work and creativity and help maintain a high-quality teacher presence, rather than the current high rate of turnover that is particularly apparent in the neediest schools. He cited research<sup>69</sup> by Dr. William L. Sanders<sup>70</sup> which indicated that the influence of teacher quality is twenty times larger than that of the impact of class size on students' academic performance.<sup>71</sup>

Chairman Reynolds questioned whether there were effective research-based assessment tools for assessing teacher quality. Dr. Ladner said there were not, nor would that be desirable. He suggested that there should be an intra-district accessible online database of teaching methods, which would make it easy for administrators to compare teachers in the district. He also suggested that other teachers could use this as a learning tool to improve their own methods.<sup>72</sup>

Commissioner Kirsanow asked Mr. Hurd how the special education hearings process could be made more accessible to low-income parents and whether there should be such a process. Mr. Hurd responded that there is a need for such a process to ensure that parents have a role, but that assistance from entities such as Legal Services in Virginia could reduce the cost of

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<sup>68</sup> *Ibid.*, p. 136.

<sup>69</sup> See William L. Sanders, June C. Rivers, Research Progress Report: "Cumulative and Residual Effects of Teachers on Future Student Academic Achievement," University of Tennessee Value-Added Research and Assessment Center, November 1996, [www.mccsc.edu/~curriculum/cumulative%20and%20residual%20effects%20of%20teachers.pdf](http://www.mccsc.edu/~curriculum/cumulative%20and%20residual%20effects%20of%20teachers.pdf) (accessed Jan. 30, 2009).

<sup>70</sup> Dr. Sanders is a senior research fellow in the University of North Carolina System, and a senior manager of value-added assessment and research for the SAS Institute Inc. in Cary, NC. See [http://www.sas.com/govedu/edu/bio\\_sanders.html](http://www.sas.com/govedu/edu/bio_sanders.html) (accessed Apr. 14, 2009).

<sup>71</sup> Minorities in Special Education, Briefing Transcript, p. 141.

<sup>72</sup> *Ibid.*, p. 143.

the appeals process. Mr. Shelton agreed that utilizing entities such as Legal Services or something at the federal level such as the Legal Services Corporation would be helpful if they developed expertise in special education.<sup>73</sup>

Commissioner Kirsanow asked Mr. Shelton if he knew of any longitudinal studies that demonstrate any adverse impact on students placed in special education vis-à-vis similarly situated students not placed in special education. Mr. Shelton was not aware of any such studies, but offered anecdotal experience of the stigma attached to special education programs.<sup>74</sup>

Dr. Reschly commented that the outcomes for students arriving at fifth or sixth grade with low reading skills and associated behavior problems were generally not positive. He offered, however, that there were positive special education outcomes associated with high school work preparation programs. He added that vocational education did not, by contrast, show advantages and achievement at the K–12 level as a result of special education placement. However, he stated that more than 95 percent of all parents of students in special education view the programs favorably, and that this hearing was focusing on the extremes rather than the middle, where tens of thousands of educators do a really good job.

Vice Chair Thernstrom drew attention to pressure from advocacy groups, and Dr. Reschly agreed that such pressure was a factor in persuading school systems to provide services. Dr. Reschly posited that such advocacy groups also pressure local school boards into advancing their special education programs, whereas schools tend to ignore average parents. Commissioner Bracerias agreed that advocacy groups often cannot advance specific parents' needs.<sup>75</sup>

Commissioner Kirsanow asked the panelists that if income is controlled, then would school districts, schools, and boards of education view members of some races as more compliant in the special education placement and hearing process than others.

Dr. Ladner suggested that reviewing subjective special education placements for discrimination or other inappropriate or illegal factors, poses the most difficulty, since determining motivation is beyond the reach of social science. According to Dr. Ladner, half the students in special education are labeled as having a Specific Learning Disability (SLD) while research shows that 30 percent objectively fit that neurological category. Further, black and Hispanic students are often more likely to be classified as SLD than their Asian and white counterparts. To correct this misclassification, he suggested that SLD be moved from a subjective to a medically diagnosed category.<sup>76</sup>

Commissioner Kirsanow asked if there were any data showing that, in majority white school districts, African American students are more likely to be placed in special education courses

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<sup>73</sup> Ibid., p. 146.

<sup>74</sup> Ibid., p. 148.

<sup>75</sup> Ibid., p. 152.

<sup>76</sup> Ibid., p. 155.

than Hispanic, Native American, or Asian students. Dr. Ladner responded that the proportion of Asian students in special education is flat and low across the board, and that the proportions for African Americans, Hispanics, and Native Americans are higher. Commissioner Kirsanow asked if there was any research available examining this disparity, and Dr. Reschly responded that there is little interest in funding this kind of research.

Commissioner Kirsanow then asked Mr. Zamora if he had any data showing a difference in special education placement rates between Spanish-speaking ELL students and ELL students speaking another language. Mr. Zamora replied that the data on the correlation between special education and ELL were very limited. However, he indicated that the most authoritative report was submitted to the Department of Education in 2003. He added that, based on his work with the Asian American Justice Center, Asian students seem to face the “model minority” stereotype.<sup>77</sup>

Commissioner Kirsanow asked Mr. Hurd whether he had encountered a greater percentage of Asian parents utilizing the special education due process system compared to parents of other ethnic backgrounds. Mr. Hurd answered that, in his practice, he had dealt almost exclusively with white parents and some African American parents. Commissioner Bracerias added that, in her experience, the white parents were more likely to be seeking a special education placement for their child to obtain additional services.<sup>78</sup>

Commissioner Yaki asked Dr. Ladner what effect NCLB has had on the number of special education referrals in the last four years. Dr. Ladner stated that generally NCLB has been positive because it mitigated the perverse incentive of labeling students so as to exempt them from state testing. Mr. Zamora concurred in general with Dr. Ladner’s statement, and said that NCLB has increased transparency and accountability with respect to ELL students.<sup>79</sup>

Commissioner Melendez concluded by asking how the Commission could address these issues as IDEA nears expiration in 2010. Dr. Reschly answered that increasing accountability is crucial and that special education must be a set of services rather than a holding place. Mr. Zamora concluded by stating that in IDEA’s reauthorization in 2004, language was added, in his view, to limit misclassification resulting from poor language skills, but he thought that the provision has not yet been satisfactorily implemented.<sup>80</sup>

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<sup>77</sup> Ibid., pp. 157–58.

<sup>78</sup> Ibid., p. 158.

<sup>79</sup> Ibid., p. 159.

<sup>80</sup> Ibid., p. 160.



## Statements

[Note: Statements are unedited.]

### **Stephanie Monroe: “Minorities and Limited English Proficient Students in Special Education”**

#### **Introduction**

Good morning. I am 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: the disproportionate representation of minorities and limited English proficient students in special education. It is clear that greater understanding of these issues will better enable school districts to serve students more effectively in both the regular education program 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 proficiency 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 1964*.

More than fifty years ago, the U.S. Supreme Court ruled in its monumental decision in *Brown v. Board of Education*: “*Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities...[In] the field of public education, the doctrine of “separate but equal” has no place.*” More than forty years ago, Congress enacted Title VI, prohibiting discrimination on the basis of race, color or national origin that included discrimination on the basis of limited-English proficiency by recipients of federal financial assistance. In the landmark *Lau v. Nichols* decision over 30 years ago, a unanimous Supreme Court held “*There is 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.

#### **The Minorities and Special Education (MinSpEd) Issue**

##### **Background**

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 1) the linkages between effective instruction and placement in special education programs; 2) the uses and misuses of testing and assessment for special education services; and 3) other, generally external factors which affect whether a child would be labeled mentally retarded.

Later, in 1992, nationwide survey was conducted to determine if minority students were disproportionately placed in special education programs; and, whether any patterns existed with regard to the disproportionate placement; 3500 schools were surveyed. The results indicated that the disproportionate placement of minority students in special education was a nationwide issue. The report showed that nationwide in 1992, African-American students accounted for 16 % of the total student population, yet African-American students accounted for 32 % of the students in programs for the mildly mentally retarded, 30 % of the students in programs for the moderately mentally retarded, and 22 % of the students in programs for the seriously emotional or behavior disordered. In some instances, disparities of up to 74 % were found. These disparities were most prevalent in the Southeast. Sadly, those disparities have not changed significantly to date; OCR's data from more recent surveys reveal nearly identical disparities in these categories.

The NAS concluded that while federal regulations implementing the Individuals with Disabilities Act define mental retardation, the translation of these 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, assessment and placement systems 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 1) economic reasons; 2) bias of referring teachers; 3) culture; 4) bias of evaluation instruments; 5) bias of evaluators; and, 6) lack of resources.

Following this conference in 1993, OCR initiated its 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 regarding the MinSpEd issue.

Throughout the past 14 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 services.

- Schools placing minority special education students in self-contained classrooms, while similarly situated white students are placed in regular classrooms.
- 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 education testing.
- Requiring review of evaluation instruments, and of how eligibility decisions are made after testing is completed.
- •Requiring re-evaluation of students affected by discriminatory practices.

A study conducted by OCR in 1998, on the impact of the first tier of the compliance reviews, revealed that in 76 % of the reviews in monitoring for three or more years, there was a decrease in the number of minorities referred and/or placed in special education. This success is ongoing on a case-by case basis as OCR continues its proactive efforts in this area. In addition, OCR has worked with numerous state education agencies on employing strategies to address the inappropriate placement of students in special education.

### **Results for Real Students**

OCR's 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 educational opportunities for all students so that 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 closely 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 re-evaluated 61 Educable Mentally Disabled (EMD) students and of those, only 23 students continued in the EMD classification; 16 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 also is providing transition services to those 22 students now in the general education program to ensure that they have the resources they need in order to succeed. It is important to note that when OCR initiated this review in 2004, there were a total of 242 EMD students compared to 150 in the 2006–07 academic years. There were 100 African-American students identified as EMD in the 2006–07 academic year compared to 176 when OCR initiated its compliance review in the 2004–05 academic year.

Along with our focus on the issue of minorities in special education, OCR has also 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 communities, 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 in special education programs.

### **The Limited English Proficient Student and Special Education (SpEdLEP) Issue**

#### **Background**

Throughout the years, the Department of Education has worked to clarify the responsibilities of recipients towards national origin minority, limited English proficient (LEP) students.

- In May 1970, the Department issued a policy memorandum, entitled “Identification of Discrimination and Denial of Services on the Basis of National Origin” (35 Federal Register 11,595) (May 1970 Memo) 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. The 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 measure and evaluate English language skills.
- In 1991, OCR supplemented this policy by a memorandum providing that school districts must 1) identify which of its national origin minority students have limited English proficiency; 2) provide them with an effective language assistance program that affords them meaningful access to the district’s educational services; 3) 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; and 4) modify the program for LEP students when that program is not working.

#### **Key Findings of SpEdLEP Compliance Reviews**

Over the last ten years, while the number of LEP students has increased by 61% 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 reviews 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 student’s language and culture into account
- Special education eligibility decisions were based on a student’s limited English proficiency
- Lack of meaningful communication with parents



Similar to the MinSpEd compliance reviews, OCR has addressed these concerns by obtaining voluntary resolution agreements from school districts to address these areas. Also, it is important to note, that when OCR conducts these reviews to examine whether appropriate services are being provided to LEP students, OCR also looks at whether LEP students are being provided the opportunity to participate in high-level academic programs such as gifted and talented programs. In the majority of cases where OCR investigates access by LEP students to gifted and talented programs, OCR's finds compliance issues and is able to secure remedies that promote high academic achievement for all students.

### **Results for Real Students**

OCR's proactive work in this area has also yielded life-changing results for real students. For example, OCR recently closed the monitoring of one case where, as a result of OCR's work with the district, the district 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 that had been receiving special education services, out of special education because it determined that they had been inappropriately placed in special education, that is, based solely on their lack of English skills. In a similar case, involving a district in a different state, about 40 LEP students were taken out of special education after the district's procedures to ensure that LEP students are not placed in special education on the basis of language were correctly followed. Additionally, that district saw a considerable increase in the number of LEP students participating in gifted and talented programs and the graduation rate of formerly LEP students increased to an all time high of 80 %.

### **Conclusion**

*Brown v. Board of Education* is a lesson that we must not rest until all children, regardless of their race or ethnicity, regardless of their mastery of the English language, regardless to the presence of a disability, have access and an opportunity to benefit from a high-quality education. Only by eliminating all of the vestiges of discrimination, regardless of their form or origin, can we fully ensure that every student has an opportunity to succeed. By focusing on this issue, our hope is that recipients will re-evaluate their policies and practices in this area, increase compliance with these requirements, and improve access to educational benefits and services for all students.

## **Martin Gould: National Council on Disability Written Remarks**

The National Council on Disability (NCD) would like to thank the U.S. Commission on Civil Rights (USCCR) for this opportunity to provide remarks in support of this public briefing on the possible misplacement of culturally diverse and limited English proficient students in special education.

NCD is an independent federal agency, composed of 15 members appointed by the President and confirmed by the Senate. NCD's 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 to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

### **Introduction**

Disproportionately in special education programs in the United States has been among the most critical and enduring problems in the field of special education for many years.<sup>1</sup> Although the presence of overrepresentation has been consistently documented, it is 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.<sup>2</sup>

There is a diversity of viewpoints about how to measure disproportionality,<sup>3</sup> as well as a sense that traditional approaches to documenting disproportionality through civil rights data collection can and must be improved.<sup>4</sup> And while research has shown that reducing disproportionality requires a comprehensive approach (e.g., that includes teacher training, culturally appropriate assessment and instruction, home and school collaboration, and an effective pre-referral process), there is a poor evidence base of documented community solutions.

### **IDEA Data and Measurement**

To address the issue of disproportionate placement of diverse students, the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA) stressed the importance of efforts to “prevent the intensification of problems connected with mislabeling and high dropout rates among diverse children with disabilities.” The 1997 amendments to IDEA (P.L. 105–17) also added the requirement that states collect data for the purposes of

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<sup>1</sup> National Council on Disability 1993 report, *Serving the Nation's Students with Disabilities: Progress and Prospects*; U.S. Commission on Civil Rights 2002 briefing report, *Making a Good IDEA Better: The Reauthorization of the Individuals with Disabilities Education Act*; (c) National Academies'—National Research Council 2002 report, *Minority Students in Gifted and Special Education*; (d) Congressional Findings in the 1997 reauthorization of P.L. 105–17, the Individuals with Disabilities Education Act (IDEA) which states, “Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.”

<sup>2</sup> National Research Council (2002). *Minority Students in Gifted and Special Education*

<sup>3</sup> Coutinho, M.J. and Oswald, D.P. (2006). *Disproportionate Representation of Culturally and Linguistically Diverse Students in Special Education: Measuring the Problem*. NCCREST.

<sup>4</sup> Hawley, W.D. and Ready, T. (2003). *Measuring Access to Learning Opportunities*. National Academy of Sciences.

monitoring and reducing disproportionality. Congress found the need to be particularly urgent because the number of children from diverse backgrounds in the nation's schools was increasing steadily.

To meet this IDEA mandate, the U.S. Department of Education uses 20 monitoring priorities and indicators for its Part B State Performance Plan (SPP) and Annual Performance Report (APR) reporting system. An October 2007 report on *Characteristics of States' Monitoring and Improvement Practices* based on practices in 2004–05, asked state respondents questions including: a) In 2004–05, on what compliance/performance areas did states focus their monitoring efforts?; and b) Did these focus areas include the priority areas identified by IDEA 2004? Some of the priority areas mandated by IDEA 2004 were identified by fewer than 27 states. Twenty-six states indicated they focused on the disproportionate representation of racial/ethnic groups in special education. How the remaining states and territories are managing their monitoring responsibilities under IDEA 2004 should be of interest to the USCCR.

The following information in tabular and graphic form is from the most recent 27th Annual Report to Congress on the implementation of the IDEA (2007). These national level data represent a small portion of the required data from States for the purposes of monitoring and reducing proportionality.

*Are students from different racial/ethnic groups receiving special education and related services for similar disabilities?*

**Table 1**

**Disability distribution, by race/ethnicity, of students ages 6 through 21 receiving special education and related services (Fall 2003)**

Disability	American Indian/ Alaska Native	Asian/ Pacific Islander	African American	Hispanic	White (not Hispanic)
	<b>Percent</b>				
Specific learning disabilities	54.5	39.5	44.9	57.3	45.6
Speech/language impairments	16.0	26.0	14.3	18.3	20.1
Mental retardation	7.5	8.9	16.1	8.1	7.9
Emotional disturbance	8.0	4.6	11.2	4.9	7.9
Multiple disabilities	2.0	2.7	2.2	1.9	2.3
Hearing impairments	1.0	2.8	1.0	1.5	1.1
Orthopedic impairments	0.7	1.7	0.8	1.2	1.2
Other health impairments	5.7	5.3	5.9	4.1	9.1
Visual impairments	0.4	0.8	0.4	0.5	0.4
Autism	1.1	5.7	1.8	1.5	2.7
Deaf-blindness	0.0	0.1	0.0	0.0	0.0
Traumatic brain injury	0.4	0.4	0.3	0.3	0.4
Developmental delay	2.6	1.4	1.2	0.6	1.2
<b>All disabilities</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

In 2003, for all racial/ethnic groups, the largest disability category was specific learning disabilities.

Specific learning disabilities, speech or language impairments, mental retardation and *other health impairments* were among the five largest disability categories for all racial/ethnic groups. Emotional disturbance was also among the five largest disabilities for all racial/ethnic groups except Asian/Pacific Islander. Autism appeared in the top 5 disability categories only for the Asian/Pacific Islander racial/ethnic group.

*For each racial/ethnic group, how does the proportion of students receiving special education and related services compare to the proportion of all other students combined?*

Risk ratios compare the proportion of a particular racial/ethnic group served under Part B to the proportion so served among the other racial/ethnic groups combined. For example, in the table below, the risk ratio of 3.0 for African American students with mental retardation indicates that African American students are three times as likely to receive services for mental retardation under IDEA Part B as are their age peers from the other racial/ethnic groups combined.

Table 2

Risk ratios for students ages 6 through 21 receiving special education and related services, by race/ethnicity and disability category (Fall 2003)

Disability	American Indian/Alaska Native	Asian/Pacific Islander	African American (not Hispanic)	Hispanic	White (not Hispanic)
Specific learning disabilities	1.8	0.4	1.4	1.1	0.8
Speech/language impairments	1.3	0.7	1.1	0.9	1.1
Mental retardation	1.2	0.5	3.0	0.7	0.6
Emotional disturbance	1.5	0.3	2.3	0.5	0.8
Multiple disabilities	1.4	0.6	1.4	0.7	1.0
Hearing impairments	1.3	1.2	1.1	1.2	0.8
Orthopedic impairments	0.9	0.8	1.0	1.0	1.1
Other health impairments	1.2	0.4	1.1	0.4	1.6
Visual impairments	1.3	1.0	1.2	0.9	0.9
Autism	0.7	1.2	1.1	0.5	1.3
Deaf-blindness	2.5	1.2	0.9	1.0	0.9
Traumatic brain injury	1.4	0.6	1.2	0.6	1.2
Developmental delay	3.6	0.6	1.6	0.5	1.0
<b>All disabilities</b>	<b>1.5</b>	<b>0.5</b>	<b>1.5</b>	<b>0.9</b>	<b>0.9</b>

Note: Risk ratios were calculated by dividing the risk index for the racial/ethnic group by the risk index for all other racial/ethnic groups combined and rounding the result to one decimal place.

In 2003, African American and American Indian/Alaska Native students were more likely to be served under Part B than all other racial/ethnic groups combined (1.5 times more likely); Asian/Pacific Islander, Hispanic and white students were less likely to be served under Part B than all other racial/ethnic groups combined (0.5, 0.9 and 0.9, respectively).

American Indian/Alaska Native students were 1.8 times more likely to receive special education and related services for specific learning disabilities and 3.6 times more likely to receive special education and related services for developmental delay than all other racial/ethnic groups combined.

Asian/Pacific Islander students were 1.2 times more likely to receive special education and related services for hearing impairments, autism and deaf-blindness than all other racial/ethnic groups combined.

African American students were 3.0 times more likely to receive special education and related services for mental retardation and 2.3 times more likely to receive special education and related services for emotional disturbance than all other racial/ethnic groups combined.

Hispanic students were 1.2 times more likely to receive special education and related services for hearing impairments and 1.1 times more likely to receive special education and related services for specific learning disabilities than all other racial/ethnic groups combined.

White (not Hispanic) students were 1.6 times more likely to receive special education and related services for ‘other health impairments’ than all other racial/ethnic groups combined.

*To what extent are students with disabilities of different racial/ethnic groups educated with their peers without disabilities?*

**Table 3**  
**Percentage of students ages 6 through 21 with disabilities receiving special education and related services in different environments, by race/ethnicity: Fall 2003**

Race/Ethnicity	Placement			
	<21% of the day outside the regular classroom	21-60% of the day outside the regular classroom	>60% of the day outside the regular classroom	Separate environments
American Indian/Alaska Native	50.2	33.2	13.6	3.0
Asian/Pacific Islander	48.9	23.6	23.5	4.1
African American (not Hispanic)	38.6	28.1	28.1	5.2
Hispanic	46.3	27.3	22.9	3.4
White (not Hispanic)	54.7	27.6	14.0	3.6

In 2003, for all racial/ethnic groups, the largest percentage of students with disabilities were educated in the regular classroom for most of the school day (that is, *outside the regular classroom less than 21 percent of the day*). However, the percentage of students in this environment varied for different racial/ethnic groups.

Compared to students with disabilities from other racial/ethnic groups, African American students with disabilities were the least likely to be educated in the regular classroom for most of the school day (38.6 percent). White students with disabilities were the most likely to be educated in the regular classroom for most of the school day (54.7 percent).

African American students with disabilities were more likely than students with disabilities from other racial/ethnic groups to be educated *outside the regular classroom more than 60 percent of the day* (28.1 percent). They were also more likely to be educated in *separate environments* (5.2 percent).

*Do graduation and dropout rates vary for students with disabilities in different racial/ethnic groups?*

**Table 4**  
**Students ages 14 and older with disabilities who graduated or dropped out, by race/ethnicity (2002–2003)**

Race/ethnicity	Graduated with a regular diploma		Dropped out	
	Number	Percentage	Number	Percentage
American Indian/Alaska Native	2,496	43.3	2,791	48.4
Asian/Pacific Islander	3,875	63.6	1,481	24.3
African American	28,456	36.2	32,772	41.7
Hispanic	21,995	44.2	19,331	38.9
White (not Hispanic)	137,588	59.1	69,562	29.9

In 2002–03, the graduation rate was highest for Asian/Pacific Islander (63.6 percent) and white (59.1 percent) students with disabilities. The graduation rate for all students with disabilities was 51.9 percent.

The graduation rate was lowest for African American students with disabilities (36.2 percent). The dropout rate was lowest for Asian/Pacific Islander (24.3 percent) and white (29.9 percent) students with disabilities. The dropout rate for all students with disabilities was 33.6 percent.

The dropout rate was highest for American Indian/Alaska Native students with disabilities (48.4 percent).

African American (41.7 percent) and Hispanic (38.9 percent) students with disabilities had the second and third highest dropout rates.

**Civil Rights Data Collection**

The CRDC is a legislatively mandated survey that the U.S. Department of Education’s Office of Civil Rights (OCR) has used to collect data from a sample of school districts biennially since 1968—CRDC was formerly called the Elementary and Secondary School Civil Rights Compliance Report, or E&S survey for short. In addition to the original Title VI (prohibiting discrimination based on race, color, national origin, and language) survey items, over the years items were added to the CRDC regarding Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex) and Section 504 of the Rehabilitation Act of 1972 (prohibiting discrimination against persons with disabilities).

In its 2003 study, *Measuring Access To Learning Opportunities*, the National Academy of Sciences (NAS) examined the continued relevance and adequacy of the Elementary and Secondary School Civil Rights Compliance Report (E&S Survey) as a tool for enforcing civil rights laws in education, monitoring quality of access to learning opportunities, and research on other current issues of educational policy and practice. The Committee on Improving

Measures of Access to Equal Educational Opportunity was formed to study the E&S Survey and its uses. The Committee commissioned five papers based on E&S Survey data and oversaw a basic analysis of data from the 2000 E&S Survey.

Among the findings in its 2003 study, the National Academy of Sciences (NAS) indicated that

...more emphasis historically has been placed on the collection of data from schools and districts regarding their compliance with these laws than on routine analyses and dissemination of findings. Information from the E&S survey usually represents a first but important step in the process of determining whether culturally diverse students, students with disabilities, students with limited English proficiency, ...are affected by policies and practices that limit access to learning opportunities or resources.

OCR reports that the survey has long been underutilized. Although some OCR enforcement staff reportedly use the data, most do not. No training is provided to OCR staff regarding technical issues in accessing and analyzing E&S survey data or potential uses of the data in enforcement.

With some modification and closer coordination with other Education Department databases...E&S survey data could play a more prominent role than they have in the past in informing contemporary policy and research questions-especially the identification of possible unintended inequitable outcomes of various educational policies and practices.

The Committee concluded that the E&S Survey continues to play an essential role in documenting disparities and providing information that is useful both in guiding efforts to protect students' civil rights and for informing educational policy and practice. It also concluded that the Survey's usefulness and access to the survey data could be improved. Recommendations for survey items and survey administration, improving data quality and availability, increasing access to and use of the data, and disseminating survey findings to a range of stakeholders, are included.

A review of DoED's Annual Report to Congress of the Office for Civil Rights—Fiscal Year 2006 (July, 2007) reflects an awareness and attention to its role in compliance reviews, civil rights enforcement and related assistance activities. Similarly, a review of the Department's web site indicates that it has made good progress in consolidate and connecting the collection and maintenance of data used for program management and policy decisions. This includes CRDC data sets for 2004, 2002, and 2000. Furthermore, the Department has established a series of web interfaces that allow the public ease of access to CRDC and other data collection efforts. A part of the CRDC data set includes IDEA data such as those displayed above.

The Civil Rights Data Collection (CRDC), collected information on School Year 2005–06 and School Year 2006–07 was completed the first week of July 2007, with an unprecedented 100 percent of schools and districts in the sample responding with complete surveys and the earliest completion date for the survey as a whole. The sample included 5,929 districts and more than 60,000 schools. Work is presently underway to make the School Year 2006 and prior years' data available via ED Facts and to develop state and national projections for



School Year 2006 based on the responses from the sampled schools and districts. What the findings of this most recent CRDC should be of immense interest to the USCCR.

### **Impact of Special Education Identification and Placement**

Special education confers *many benefits* on students and thus can be seen as having a positive impact on students and families. Among these benefits are access to specialized services; specially designed, individualized and small group instruction; and, individualized curriculum. There may also be some *negative consequences* conferred on individual students as a result of special education identification and placement associated with having a disability. Among these are a) lowered expectations on the part of teachers and family members; b) restricted access to the general K–12 education program; and c) restricted access to higher education and post-high school employment.

For students who have disabilities, the benefits of special education outweigh the negative impact. For other students, who perhaps are not academically successful but who do not have a disability, special education may be a short-term solution with long-term negative consequences. Special education placement has an impact upon individual students and their families.

Disproportional placement has a net impact upon the educational system as a whole as indicated by the following: a) rising child count and case loads; b) rising costs and shifting costs in special education; c) need for recruitment of professionals from diverse cultures; d) need for preservice and in-service staff development to better equip staff to work with diverse students; e) need for improved assessment tools and instructional practices; and f) vulnerability to legal challenges through due process procedures and through the Office for Civil Rights.

### **Responding to Disproportionality**

Disproportionality is a multi-faceted problem that can be geographically unique. For example, some districts' problems stem from disproportionate placement of limited English proficient students, whereas other districts' problems may deal with disproportionate representation of African American males in special education. Although there are some commonalities for dealing with these issues, the approaches that are used to address the underlying problems associated with each will most likely differ.

Research suggests that reducing disproportionality requires a comprehensive approach that includes teacher training, culturally appropriate assessment and instruction, cultural sensitivity, home and school collaboration, and an effective pre-referral process. In schools where disproportionality has been determined, stakeholders must work through a problem-solving process that includes, but is not limited to, analyzing the problem, identifying existing resources, allocating and using resources, and correcting current practices. Evidence of successful responses in identified cases of, or with suspected practices that result in, disproportionality appear to be scarce. This may be due to both the complexity of the circumstances, the difficulty in measuring and documenting the “interventions,” and the chronic nature of the problem. To the degree that documentation of effective school-level

and/or district level approaches to what works in addressing disproportionality exists, it is important to place that evidence into the public commons if it is not there already.

### **Conclusions**

Disproportionality, and its impact on student outcomes, continues to be a critical educational problem. The data displayed above from the recent 27th Annual Report to Congress on the implementation of the IDEA (2007) suggests that disproportionality at the national level continues. Information from the Department of Education indicates that major efforts to monitor, measure and address disproportionality in special education are under way at the federal level.

The recommendations of the National Academy of Sciences (2003) for improving the CRDC (E&S survey), the quality of its data, the access to its data, the administration of the survey, and the dissemination of its findings to interested parties stand as a roadmap for improvement. At the same time, the Department's implementation of its IDEA 2004 monitoring and improvement practices may fill a critical gap in understanding how state and local school districts' operations and practices can be (re)designed to address overrepresentation of diverse students in special education. The USCCR may want to consider hearing directly from key DoED personnel on how the various pieces of Title VI, Section 504, and IDEA practices work, individually and together, to affect student outcomes. Thank you for listening.

**Reginald M. Felton: “Minorities and Limited English Proficient (LEP) Students in Special Education”**

The National School Boards Association (NSBA), representing over 95,000 local school board members across the nation, would like to thank you for the opportunity to testify today before the United States Commission on Civil Rights on this important issue being addressed by local school boards and local communities.

You will hear from others regarding the extensive research that has been conducted that confirms what we all believe: that minority students and Limited English Proficient (LEP) students are disproportionately represented in special education programs in our public schools. While much of the research affirms the disproportionate representation of these student groups, 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 services. The National School Boards Association (NSBA) agrees that there is disproportionate representation of non-Asian minority and LEP students in selected categories of students with disabilities in our public schools. However, we believe with few exceptions such students placed in special education meet the legal eligibility requirements for such services.

As the United States Commission on Civil Rights is fully aware, students in poverty and their families face far greater challenges whether related to access to quality housing, quality healthcare, appropriate early childhood education and development opportunities, safe and drug-free environments, adequately 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 and 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.

**Federal Funding and Policy**

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, Congress promised to support states and local communities by contributing 40 percent of the cost. Since that time, regular education and special education groups have joined forces to pressure Congress to keep true on its promise. However, here we are over 30 years later and still, Congress funds less than 20 percent of these costs, leaving states and local communities short-changed.

In practical terms, what this means is that 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 for special education services, such services must be provided even if funds for other educational services must be re-allocated. Therefore, this notion that schools profit by placing more students in special education is simply not true because schools are never fully funded at a level that matches the costs.

However, because this rationale had been offered by a number of special interest groups, NSBA, during the last reauthorization of the Individuals with Disabilities in Education Act (IDEA) was successful in securing two new provisions in the law that would provide greater support to our local schools and students with disabilities.

The first provision allows local 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 parents to make decisions regarding learning abilities without the “labeling” of students that may be unnecessary.

The second new provision requires states to pass laws or to establish formal memorandums of agreement to formally identify which agencies would be responsible for providing specific related non-educational services that are necessary for so many students with disabilities to ensure the desired educational outcomes. The benefit, of course, is that local school districts are no longer assigned such costly responsibilities by default. Rather, states must consciously make decisions as to which agencies should be responsible for what specific services, and hopefully state legislatures will also provide the necessary funding, thus taking some of the pressure off local school districts that may not have the necessary resources within their own budgets.

### **Defining Disability and Eligibility for Special Education**

Another important issue for consideration by the Commission is that the definition of students with disabilities is very comprehensive with a full range of categories and conditions; 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 LEP students among the broad range of categories as well as the differences in the per pupil level of funding needed to accommodate the students within these various categories. 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 cost.

### **Local School District Preventive and Corrective Strategies**

Local school districts across the nation continue to be committed to improving the methodology for identifying and placing minority and LEP students in special education programs. In a study conducted by the NSBA Council of Urban Boards of Education (CUBE), a number of on-going strategies have been identified. The most common strategies involve the use of pre-referral assessments and accommodations to address emerging behavioral and/or academic issues. Pre-referral efforts include parent conferences, classroom

observation, developing and monitoring of corrective plans, curriculum-based assessments, adjustments to instructions, and expanded options for accommodations.

Other efforts include more effective staff training focusing on cultural and ethnic competency, special measures in identifying LEP students, and monitoring of individual schools for high referral rates. Additionally, many school districts have re-allocated staff resources to conduct independent second-level reviews of placements for appropriateness, ensure culturally and ethnically diverse and competent placement teams, and to develop improved evaluation guidelines.

Further, many local school districts are using various preschool assessment strategies. Commonly identified techniques include child find activities, assessing preschool children upon referral, screening all children upon entry into kindergarten, collaborating with community agencies including Head Start, childcare providers and hospitals, and providing special and regular education services directly to preschool children, depending on state and local law. Other measures include providing parents with information and training, training for instructional staff, and providing transitional services for children entering kindergarten.

School boards across the nation will continue to provide leadership in the development of innovative ways to improve the processes for identifying and placing students to achieve the desired educational outcomes.

### **Universal Design for Learning—an Emerging Concept**

Now I would like to turn your attention to an emerging concept known as universal design for learning (UDL). Most of the discussions to date have focused on specific improvements that could be made within our existing framework and systems to deliver educational services. 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 education programs. UDL provides curricular flexibility in 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 an important component of UDL.

As we are aware, students come to the classroom with a variety of needs, skills, talents, and interests. For many learners, the typical curriculum—which includes goals, instructional methods, classroom materials, and assessments—has many barriers and roadblocks, while additional innovative supports are relatively few. 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 to the development of goals, instructional methods, classroom materials and assessments:

- Provide multiple and flexible methods of presentation to give students with diverse learning styles various ways of acquiring information and knowledge.
- Provide multiple and flexible means of expression to provide diverse students with alternatives for demonstrating what they have learned, and
- Provide multiple and flexible means of engagement to tap into diverse learners' interests, challenge them appropriately, and motivate them to learn.

The term “universal design” is borrowed from the movement in architecture and product development that calls for curb cuts, automatic doors, video captioning, speakerphones, and other features to accommodate a vast variety of users, including those with disabilities. Experience shows that all such flexible designs are less expensive and cumbersome than costly retrofits, and that, in fact, everyone benefits from universal design features, as anyone who has watched video with captions in a busy gym or airport can attest.

Students differ from one another in many ways and present unique learning needs in the classroom setting, yet high standards are important for all students. By incorporating supports for particular students, it is possible to improve learning experiences for everyone, without the need for specialized adaptations down the line. For example, captioned video is of great help to deaf students—but is also beneficial to students who are learning English, students who are struggling readers, students with attention deficits, and even students working in a noisy classroom.

The advent of digital multimedia, adaptive technologies, the World Wide Web, and other advancements make it possible on a broad scale to individualize education for individual students. Developers and practitioners of UDL apply the inherent flexibility of digital media to individualize educational goals, classroom materials, instructional methods and assessments. Thus, each student has an appropriate point-of-entry into the curriculum – and a pathway towards attainment of educational goals.

Such emerging concepts as UDL offer both regular and special education communities an opportunity to accomplish real reform in education at a time when the numbers of students with disabilities continues to increase and the drop-out rates 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. The potential exists for UDL to provide teachers with unlimited ways to present materials to students with diverse learning styles, allow for multiple means of expression in demonstrating what students have learned, and offer multiple means of engagement.

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 to all students.

**Summary**

In closing, the National School Boards Association again thanks you for the opportunity to testify and urges the Commission to fully address those concerns that we have identified in our statement. We remain committed to improving student achievement for all students and preserving both equity and excellence in the delivery of educational services in our public schools.

Questions regarding this statement may be directed to Reginald M. Felton, director of federal relations, at (703) 838-6782, or by e-mail at [rfelton@nsba.org](mailto:rfelton@nsba.org).

## **Matthew Ladner: “Minority Children and Special Education: Evidence of Racial Bias and Strategies to Avoid Misdiagnosis”<sup>1</sup>**

### **Special Education Bias: Evidence from The Office of Civil Rights**

Researchers have known for some time that minority students in public schools are over-represented in a number of special education categories. For example, while African-American students account for only 16 percent of the U.S. student population, they represent nearly a third (32 percent) of all students in programs for mild mental retardation.<sup>2</sup> Equally alarming are the recent findings of a growing body of research that indicates affluent districts label minority students as mentally retarded at higher rates than White students. A 2002 Harvard Civil Rights Project study, for instance, found not only are there startlingly large racial disparities in special education overall, African-American students are *three times* more likely to be labeled as mentally retarded than White students.<sup>3</sup>

In 2001, the Progressive Policy Institute and the Fordham Foundation issued a joint collection of studies on special education policy entitled *Rethinking Special Education for a New Century*. A study in this volume, “Special but Equal: Race and Special Education,” statistically examined racial special education rates across districts and counties from several states, testing for the independent effects of a number of separate variables including student poverty, school spending, average class size, and racial makeup of the district.<sup>4</sup> The paper examined county-level data from California, Colorado, Florida, Georgia, Maryland, New York, Oregon, Texas, Wisconsin, and district level data from Texas, Florida, and Maryland. After controlling for school spending, student poverty, community poverty, and other factors, the research revealed 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 2003, the Goldwater Institute released a study on race and special education in Arizona using data from the Arizona Department of Education and the United States Department of Education Common Core of Data. The Goldwater study demonstrated that minority special education rates are significantly higher in predominantly White Arizona public school

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<sup>1</sup> This paper represents an updated and revised version of an earlier publication from the same author, “Race to the Bottom: Minority Children and Special Education in Arizona Public Schools.” The earlier report is available on the internet at <http://www.goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=442>

<sup>2</sup> See P. Robertson and M. Kushner, *et al.*, “An update of Participation of Culturally and Linguistically Diverse Students in Special Education: The Need for a Research and Policy Agenda,” *The Bilingual Special Education Perspective* 14 (1994): 3–9.

<sup>3</sup> Dan Losen and Gary Orfield. *Racial Inequity in Special Education*. (Boston, Mass: Harvard University Press, 2002), <http://gseweb.harvard.edu/%7Ehepg/introduction.html>.

<sup>4</sup> Matthew Ladner and Christopher Hammons, “Special But Unequal: Race and Special Education,” in Chester Finn *et al.* (eds.) *Rethinking Special Education for a New Century for a New Century* (Washington D.C.: Thomas B. Fordham Foundation, 2001): 85-111, [http://www.edexcellence.net/foundation/topic/topic.cfm?topic\\_id=15](http://www.edexcellence.net/foundation/topic/topic.cfm?topic_id=15)



districts, despite the fact that disability labels for White students are substantially lower.<sup>5</sup> In October of 2003, the Goldwater Institute released a policy brief identifying 40 Arizona school districts and charter schools with Hispanic disability rates 40 percent or more above the average statewide placement rate for Hispanic students. The study also noted that Arizona charter schools that are predominantly White do not display the same tendency to over-enroll Hispanic children.<sup>6</sup>

These findings turn conventional wisdom about the contributing causes of learning disabilities on its head. Presumably, poverty and the attendants of poverty, such as poor prenatal care and poor nutrition, are the primary causes of many disabilities. Why then should minority special education rates be substantially higher in predominantly White districts, where average family incomes for minority students are likely to be higher than in inner city school districts?

The Goldwater Institute study of Arizona special education rates considered three broad possible causes. The first culprit was the possible existence of financial incentives that encourage placing children in special education programs. District officials manipulating standardized accountability test scores represent another broad possibility. Another broad possible culprit was far more direct if impossible to prove: simple racism. The possible use of special education programs to segregate minority children out of regular classrooms is entirely consistent with the findings of previous research.<sup>7</sup>

Concerning financial motives, a growing body of research now indicates that financial incentives play a pernicious role in special education rates. For example, in their most recent study on the subject, Manhattan Institute scholars Jay P. Greene and Greg Forster interviewed state officials who referred to the special education funding system used in most states as “the bounty system.”<sup>8</sup> Under the bounty system, state governments compensate school districts for each additional student classified as disabled. The economics of special education are complex, and school districts claim that many disability types are net drains on the finances of school districts even after receiving compensation. Nevertheless, as Greene demonstrates elsewhere, only the percentage of students classified as learning disabled has significantly increased since 1976. The rates for disabilities that typically warrant heavy district spending have remained relatively flat.<sup>9</sup> Obviously, such starkly contrasting trends raise serious concerns.

Congress ended the “bounty system” funding in 1997 and now distributes federal funds to the states in a lump sum based on a demographic profile, not the number of children identified as

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<sup>5</sup> Matthew Ladner, “Race and Disability: Racial Bias in Arizona Special Education,” Goldwater Institute Policy Report #178, March 31, 2003, <http://www.goldwaterinstitute.org/article.php/251.html>.

<sup>6</sup> Matthew Ladner. “No Exit, No Voice: Hispanic Disability Rates in Arizona Schools.” Goldwater Institute Policy Brief, Oct. 23, 2003, <http://www.goldwaterinstitute.org/pdf/materials/363.pdf>.

<sup>7</sup> Matthew Ladner, “Race and Disability: Racial Bias in Arizona Special Education,” Goldwater Institute Policy Report #178, Mar. 31, 2003, <http://www.goldwaterinstitute.org/article.php/251.html>.

<sup>8</sup> Jay P. Greene and Greg Forster, “Effects of Funding Incentives on Special Education Enrollment,” Manhattan Institute for Policy Research, December 2002, [http://www.manhattan-institute.org/html/cr\\_32.htm](http://www.manhattan-institute.org/html/cr_32.htm).

<sup>9</sup> Jay Greene, “The Myth of the Special Education Burden,” *Education Week*, June 12, 2002.

disabled. In so doing, Congress attempted to remove the financial incentive for districts to label children disabled in order to qualify for increased funding. Sixteen states have followed suit and switched their own funding mechanisms for districts to a similar formulaic “lump sum” method to remove perverse financial motivation.

Greene and Forster theorized that the bounty system provides a perverse financial incentive for schools to label more students as disabled. Greene and Forster compared the rates of growth in special education enrollment in states with and without the bounty funding system. Based on this analysis, the authors attribute 62 percent of the increase in special education to these financial incentives in bounty system states. Greene and Forster estimate that disability labels attributable to the bounty system translate into roughly 390,000 extra students placed in special education, resulting in additional total spending of over \$2.3 billion per year.<sup>10</sup> In Arizona, Greene and Forster estimate the total resulting additional spending to be \$50 million per year.<sup>11</sup> Predominantly White districts may identify additional minority children in response to financial incentives under two circumstances: first, if district officials consider minority children closer to the “borderline” of being disabled, or second, if they are motivated by racial prejudice or stereotypes or a desire to remove children from the regular classroom setting.

Manipulation of standardized testing results by schools and districts represents another possible incentive to label children as disabled. The No Child Left Behind act, following the model developed in Texas, requires high-stakes testing and disaggregates the results by race. Under such a system, schools and districts are judged not only by their overall scores, but also upon the scores of student subsets, such as African-American, Hispanic, or economically disadvantaged students. The advantage of such a system is that predominantly Anglo school systems are not able to hide the poor performance of minority students. A possible disadvantage of such a system may be the creation of an incentive to label low-performing minority children as disabled, thus exempting them from normal testing while increasing the average performance of the student’s subset. The goal of such manipulation could be to exclude students deemed unlikely to pass from the “accountability subset” upon which schools and districts are evaluated.<sup>12</sup>

This latter perverse incentive seems to be a greater problem in stand-alone state accountability systems than under NCLB. NCLB includes special education students as an accountability subset. Under NCLB, therefore, special education students must be tested and school performance will be judged according in part to the academic progress of students with disabilities. Public school administrators have put a great deal of pressure on Congress and the Department of Education to water down this requirement, both administratively and

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<sup>10</sup> Jay Greene and Greg Forster, “Effects of Funding Incentives on Special Education Enrollment,” The Manhattan Institute for Policy Research, December 2002, [http://www.manhattan-institute.org/html/cr\\_32.htm](http://www.manhattan-institute.org/html/cr_32.htm).

<sup>11</sup> Matthew Ladner, “Race and Disability: Racial Bias in Arizona Special Education,” Goldwater Institute Policy Report #178, Mar. 31, 2003, <http://www.goldwaterinstitute.org/article.php/251.html>.

<sup>12</sup> The possibility of districts labeling minority students in reaction to state accountability exams remains speculative at this point and deserves further study.

legally.<sup>13</sup> Even with NCLB's requirement in place, many states have separate accountability systems in which excluding students from subsets could influence rankings.

While the exact motivations of predominantly White school districts for enrolling higher percentages of their students in special education is not entirely clear, evidence of the practice is evident. Even after controlling for school spending, student poverty, community poverty, and other factors, research uncovered a pattern of predominantly White public school districts placing minority students into special education at significantly higher rates than more racially integrated districts. For example, districts with 75 percent or more White student body were found to have Hispanic special education rates 47 percent higher than in school districts that were predominantly minority (with student bodies 75 percent or more minority).<sup>14</sup>

### **Minorities and Disabilities in Arizona Public Schools**

The previous Goldwater Institute studies on race and special education used school district level data provided by the Arizona Department of Education and the United States Department of Education Common Core of Data. While informative, this data was limited to overall district averages for children with disabilities by racial group. A new source of data allows for a closer examination. The 2000 Office for Civil Rights Elementary and Secondary School Survey gathered data on race and special education from all of the nation's public schools. The Office of Civil Rights (OCR) distributes this non-suppressed data for the exclusive use of individuals conducting research who have signed an application for use of the data and who meet with the individual approval of the United States Office of Civil Rights.<sup>15</sup>

The advantage of this new data is twofold. First, it allows for the examination of individual school level data rather than broad district averages. The previous research in Arizona and elsewhere found that districts with more predominantly White student bodies label significantly higher percentages of their minority students as disabled. If the relationship between race and disability labeling is robust, it should be possible to find the same pattern at the level of individual schools as well as at the school district level. The Office of Civil Rights (henceforth OCR) data therefore serves as an alternative test of the phenomenon in question.

Second, the OCR data permits the exploration of individual disability type by race and gender, something not possible with previous data. The previous data only allowed for the exploration of total disability rates by race, not individual disability categories. Researchers do not suspect all disability categories equally in terms of suspected abuse. Some types of disabilities, for example, blindness, or hearing impairment, rely upon objective medical diagnosis. Disabilities such as Specific Learning Disability (SLD), however, are famously

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<sup>13</sup> See Mark Jewell "No Child Left Behind:" Implications for Special Education Students and Students with Limited English Proficiency on the internet at <http://www.newhorizons.org/spneeds/improvement/jewell.htm>

<sup>14</sup> Matthew Ladner, "Race and Disability: Racial Bias in Arizona Special Education." Goldwater Institute Policy Report #178, Mar. 31, 2003, <http://www.goldwaterinstitute.org/article.php/251.html>.

<sup>15</sup> Anyone wishing to examine these data for themselves can apply to the federal Office of Civil Rights in the United States Department of Education, as the author is prohibited from sharing the data by standard agreement with the Office of Civil Rights. The Office of Civil Rights can be contacted by email at [ocrdata@ed.gov](mailto:ocrdata@ed.gov).

vague, defined by a perceived difference between ability and tested performance. Recent medical evidence points to the fact that public schools often mistakenly label children as having a specific learning disability when in fact they have simply received poor early reading instruction. Research by Dr. Reid Lyon of the National Institutes for Health and his colleagues estimates that approximately 70 percent of children labeled with a specific learning disability could have avoided placement into special education with intensive early remedial reading intervention- preferably beginning in kindergarten and first grade for students with poor reading skills. In the absence of such intervention, school districts inappropriately place many into special education.<sup>16</sup>

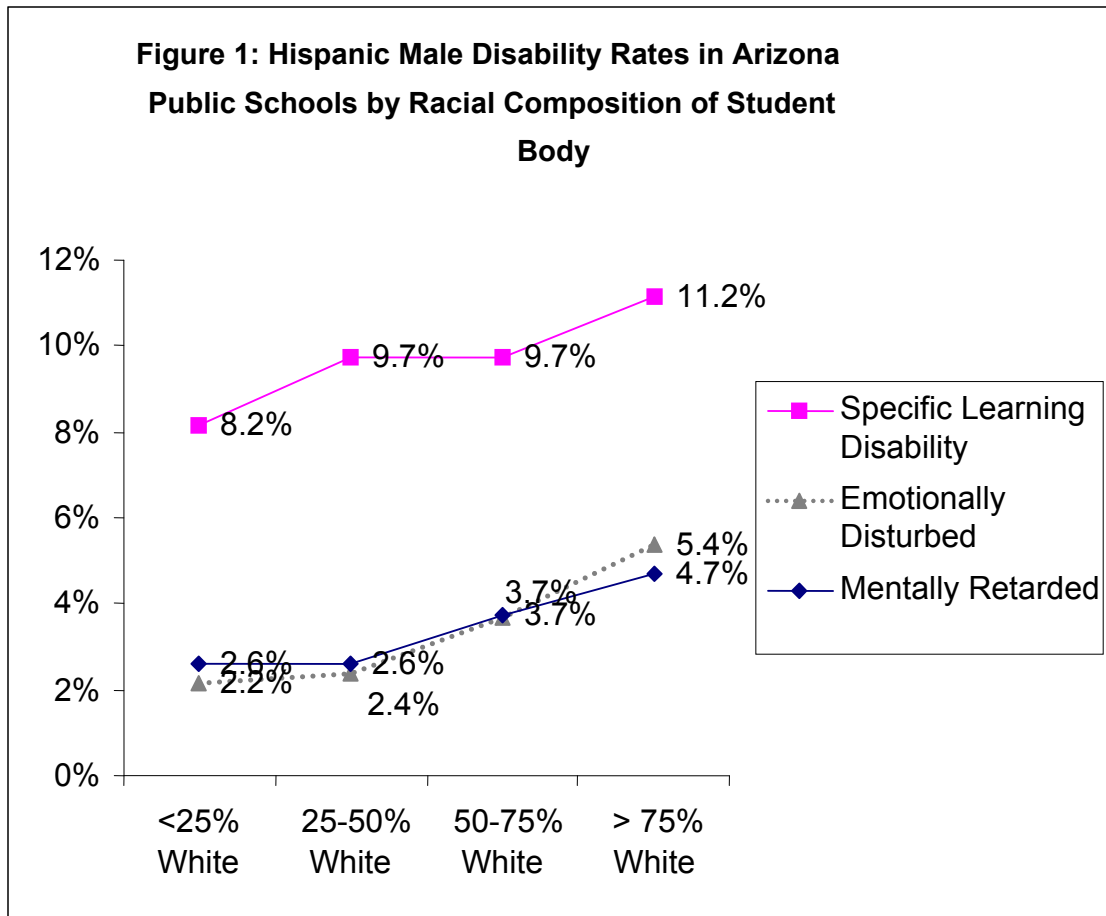
The OCR data allows us to examine disability labeling by type and gender. The data focus on males because male students constitute 66 percent of disabled public school children, and are the most likely students to be from mislabeled. All data presented below are from Arizona traditional public schools grades K–12. Figure 1 below presents the disability rates for Hispanic male students according to the racial balance of the student bodies of the individual schools. The analysis divides Arizona traditional public schools into four separate categories: those with 25 percent or fewer White students, those with 26 percent to 50 percent White students, those with between 51 percent and 75 percent White students, and those with more than 75 percent of students White. The disability categories charted are the more subjective categories of disability: specific learning disabilities (SLD), emotionally disturbed (ED), and mental retardation (MR).<sup>17</sup> If the pattern demonstrated in previous studies holds, we expect to find that significantly higher percentages of Hispanic male students labeled in these categories in predominantly White districts compared to other districts.<sup>18</sup>

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<sup>16</sup> See G. Reid Lyon, Jack M. Fletcher, Sally E. Shaywitz, Bennett A. Saywitz, Joseph K. Torgesen, Frank B. Wood, Anne Schulte, and Richard Olson, “Rethinking Learning Disabilities,” in Chester Finn et al. (eds.) *Rethinking Special Education for a New Century for a New Century*. (Washington D.C.: Thomas B. Fordham Foundation, 2001): 259-288.

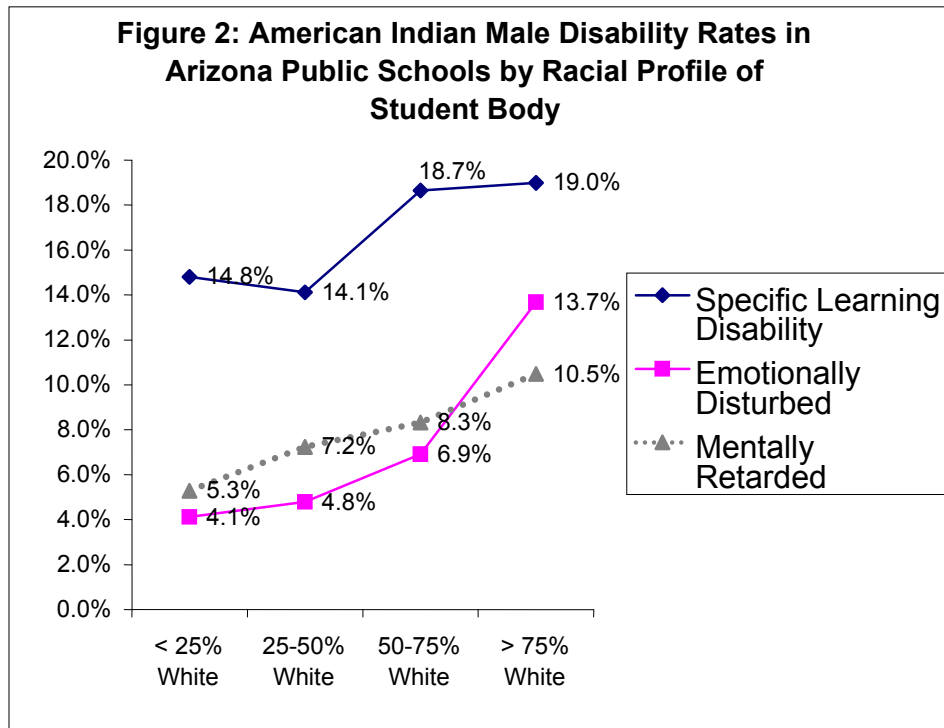
<sup>17</sup> The Mental Retardation label is usually thought of as a relatively objective diagnosis. An IQ score of less than 70 qualifies someone as Mentally Retarded. The condition is diagnosed with a respected test and involves a clear cut-off point. Subjectivity, however, can be introduced into the process by test administration. For examples, students near the cut-off can be retested until they fall below the cutoff point. The diagnosis usually relies on a single score rather than an average.

<sup>18</sup> The OCR data contains missing information for some schools, which were excluded from the analysis. Schools were included in this analysis for a given racial/ethnic group if there were 10 or more total students of the respective group, and if the school in question had students with the respective disability enrolled. The cases were chosen in this fashion to avoid including cases where an extremely small number of students in these respective ethnic groups where a single disability diagnosis would result in an extremely high percentage of students labeled as disabled. For example, a school with only two Hispanic children, one of whom has a disability label would register as having a Hispanic disability rate of 50 percent. Additionally, there are a number of schools which either have no students of particular ethnic racial groups at all, or else none enrolled in special education. Such schools were excluded from the analysis as well. The averages therefore represent statewide averages for those public schools enrolling students from the respective racial/ethnic groups in special education programs, with exclusions for missing data and small ethnic/racial sample sizes.



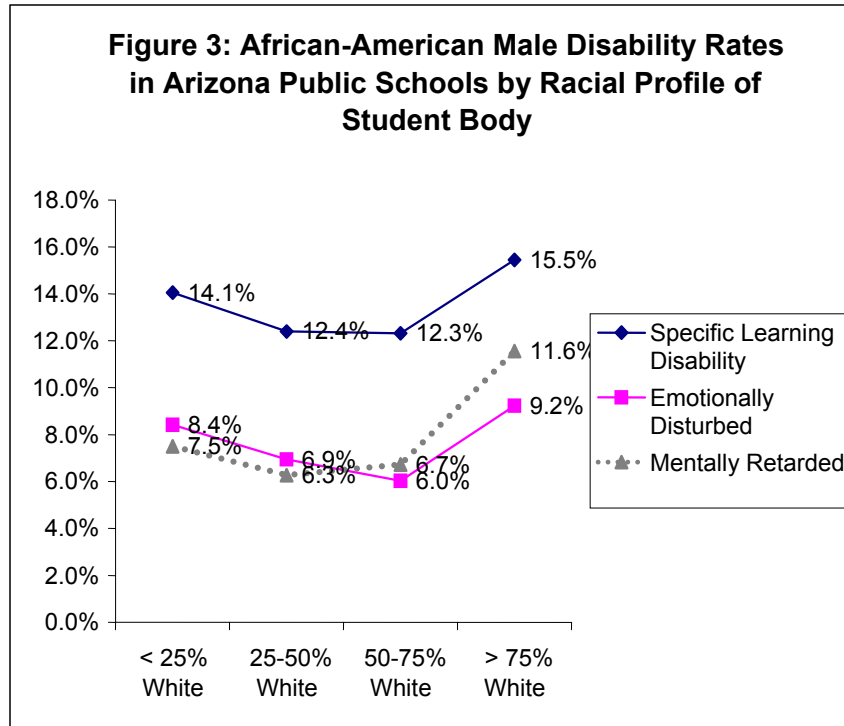
The OCR data follows the same general pattern found in previous research: Hispanic males are labeled at higher rates in predominantly White school districts (75 percent or more White) in the specific learning disabilities, emotional disturbance, and mentally retarded categories. Predominantly White school districts label more than twice as many Hispanic males as emotionally disturbed (from 2.2 percent of Hispanic males to 5.4 percent) as do predominantly minority schools (75 percent or more minority). Predominantly White districts classify 80 percent more Hispanic males as mentally retarded on a percentage basis, and the increase in the Specific Learning Disability Label category is more than 42 percent.

Figure 2 below presents the equivalent figures for American Indians male students in Arizona public schools. Again, the same pattern appears: SLD, ED and MR rates are substantially higher in predominantly White school districts. Figure 3 presents the OCR figures for African American students.



The OCR data show that American Indian males attending predominantly White Arizona public schools are profoundly more likely to receive disability labels when compared to their peers in more integrated schools. The rate of children labeled as Emotionally Disturbed more than triples (from 4.1 percent to 13.7 percent) between predominantly minority and predominantly White schools. The percentage of American Indian males labeled as mentally retarded nearly doubles, while the percentage of such students labeled with Specific Learning Disabilities increases by 28 percent.

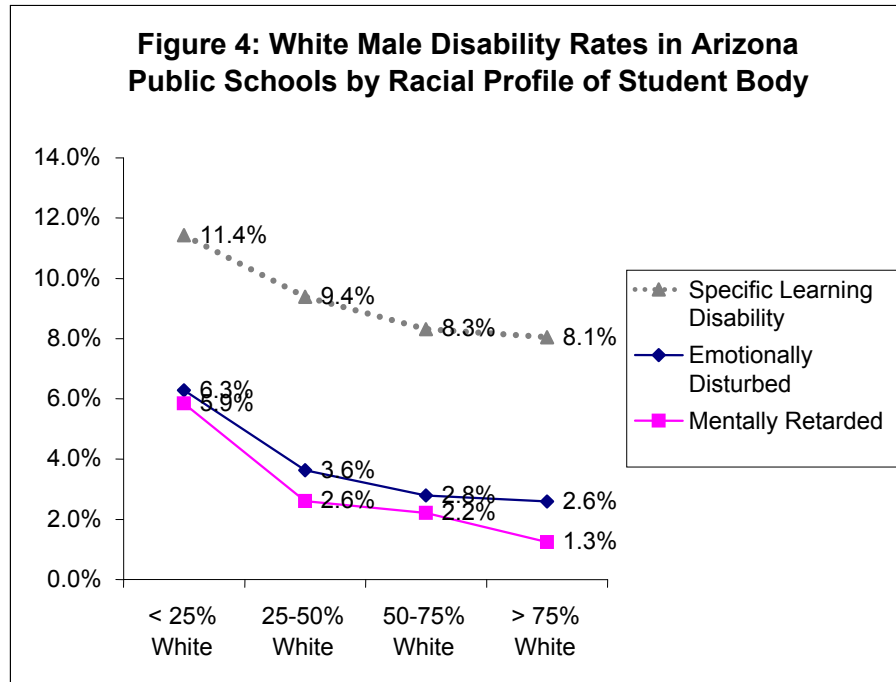
The trends for African American males show that the percentage of students labeled as Mentally Retarded increases by nearly 55 percent between predominantly minority and predominantly White districts. Trends for African American males labeled with a Specific Learning Disability or Emotionally Disturbed are relatively flat.



The same general trend is evident across ethnic groups and disability types. Predominantly White schools label higher percentages of their minority students. Previous research demonstrated a pattern whereby White disability rates were substantially *lower* in predominantly White school districts than they had been in more racially mixed school districts. Figure 4 below demonstrates that the same pattern holds true using the school-level OCR data as well.<sup>19</sup>

Similar to the district-level trends, the percentage of White students in special education declines sharply in schools with higher percentages of Whites. The percentage of White males labeled as ED declines by 58 percent between predominantly minority and predominantly White schools. Predominantly White schools label 28 percent fewer White male students as having a specific learning disability, and 77 percent fewer as mentally retarded when compared to schools where Whites represent less than 25 percent of the student body.

<sup>19</sup> Matthew Ladner, “Race and Disability: Racial Bias in Arizona Special Education,” Goldwater Institute Policy Report #178, March 31, 2003, <http://www.goldwaterinstitute.org/article.php/251.html>.



As discussed in previous research, one would expect some decline in White disability rates in more predominantly White schools and/or districts due to the role of poverty in disability labels. Due to the relationship between housing segregation and wealth, fewer children in predominantly White schools and districts will be growing up in poverty. However, the same should be true, for minority students.<sup>20</sup> Alternatively, one could interpret the trends in White rates to show a general pattern across ethnic and racial groups by which racially isolated student groups receive disability labels at higher rates. The OCR data demonstrates the same pattern: rather than declining like White student rates, minority rates substantially increase in predominantly White schools.

Figure 5 below demonstrates the extent of this increase. Figure 5 combines the Emotionally Disturbed, Mentally Retarded, and Specific Learning Disabled rates and compares the predominantly minority districts (25 percent or less White) to the predominantly White districts (75 percent or more White).<sup>21</sup> The data show the total percentage increase for American Indian Males, Hispanic Males, African American Males, and the total decline for White males.

[Figure 5 was not received by the Commission.]

Overall, the OCR school-level data track the general trends found in district level data strongly. Minority students in predominantly White district schools suffer a substantially higher incidence of inclusion in special education programs when compared to their peers in

<sup>20</sup> Minority family incomes are likely to be higher in Scottsdale than in Tucson, for example.

<sup>21</sup> The formula for this calculation was as follows: Predominantly White rate- Predominantly Minority rate/Predominantly Minority Rate.



racially mixed schools. The question therefore moves from the extent of the problem to what to do about it.

### **The Failure of the Regulatory Approach to Preventing Discrimination**

If the above school-level data represent evidence of widespread racial bias in public school special education programs, one must note that it is occurring in Arizona and in other states despite the long existence of large government agencies with responsibility to combat discrimination in public education. Of course, these agencies begin with the public school districts themselves, whose officials are bound by multiple laws prohibiting discrimination based on race or color. In addition, both state and federal education regulatory bodies are legally bound to prevent racial discrimination in schools.

The nature or existence of disabilities in children is inherently subject to dispute. Either parents or school district officials can initiate the process of labeling a child as disabled. Districts must secure a parent's permission before evaluating a child for a disability, and parents have the legal right to an outside evaluation. A group of district officials and the parents then review the evaluation, and if this group decides that the child has a disability, the process of drawing up an individualized education plan (known as an IEP) for the child begins.

While parents are included in the identification process, they often defer to school district officials. When school officials assert that a child has a disability and tell the child's parents that special education services will improve their child's education, many parents believe that district officials are experts in their fields and have their children's best interests at heart. Wealthy and knowledgeable parents sometimes employ attorneys and outside evaluators with specialized knowledge of special education law, paperwork, and procedure. However, parents with fewer financial resources rarely benefit from such expertise.

The legally well-defined process requires a large amount of paperwork for each step. The emphasis of both state and federal oversight, and even litigation between parents and school districts, lies in the area of process compliance. The "compliance model" used by the special education system, emphasizing procedure and forms over educational achievement, largely explains the relatively ineffectual nature of the regulatory apparatus. Critics of the system have noted that the "compliance model" has in fact failed to ensure widespread compliance with special education laws, while generating a number of perverse outcomes.<sup>22</sup>

Congress passed the Education for All Handicapped Children Act (EAHCA) in 1975, later renamed the Individuals with Disabilities Education Act (IDEA). IDEA serves as the foundation of special education law, requiring public schools to provide a free appropriate public education for all children with disabilities. Subchapter II, Section 1418 of IDEA requires states and territories to collect data regarding the racial makeup of students in special education programs and the placement of students. In the case of a determination of

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<sup>22</sup> Patrick J. Wolf and Bryan Hassel, "Effectiveness and Accountability (Part 1): The Compliance Model," in Chester Finn *et al.* (eds.), *Rethinking Special Education for a New Century for a New Century*. (Washington, D.C.: Thomas B. Fordham Foundation, 2001): 53–76.

significant disproportionality the law calls for the state or territory “shall provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this Act.”<sup>23</sup> While it seems obvious why Congress created this language, it does not seem clear that it has in fact had the intended effect. Racial disproportionality in special education has existed for decades, and the problem still exists and regulatory approaches have not prevented the problem.

### Lessons from Pennsylvania

The policies, procedures, and practices in Arizona special education warrant both review and revision. What actions would remedy the problem? While the possible causes of minority over-enrollment are complex, the initial Goldwater Institute study made two broad recommendations: ending the “bounty” funding formula providing additional funds on a per-student basis, and instituting a voucher program for disabled students modeled after Florida’s McKay Scholarship Program. Lawmakers should replace the bounty system with a placement-neutral funding formula to eliminate perverse financial incentives to enroll students in special education. The logic behind this recommendation is simple: the sources of general over-enrollment are likely to be at least partially responsible for the over-enrollment of minority students. Andrew J. Rotherham and Sara Mead of the Progressive Policy Institute in fact argue against school choice programs for disabled children in part because they believe that such a system could complicate efforts to move states to placement-neutral funding formulas.<sup>24</sup>

Recently, however, evidence has become known that raises questions about the adequacy of a placement-neutral funding formula to address the problem of the over-enrollment of minority students. In February of 2004, the Commonwealth Foundation released *Racial Bias in Pennsylvania Special Education*, which examined minority special education rates in Pennsylvania.<sup>25</sup>

Pennsylvania represents an extremely interesting case for exploring the existence of racial imbalances in special education because it has *neither* a bounty funding system nor high-stakes testing. Pennsylvania was a pioneer in switching from the bounty system to a lump-sum formula in 1992. Pennsylvania provides special education funding to school districts based upon a neutral formula, and it does not provide increased special education funding with each new special education label. In addition, the state’s accountability system contains no sanctions for low-performance but actually instead financially rewards low-performing school districts with additional state funds.

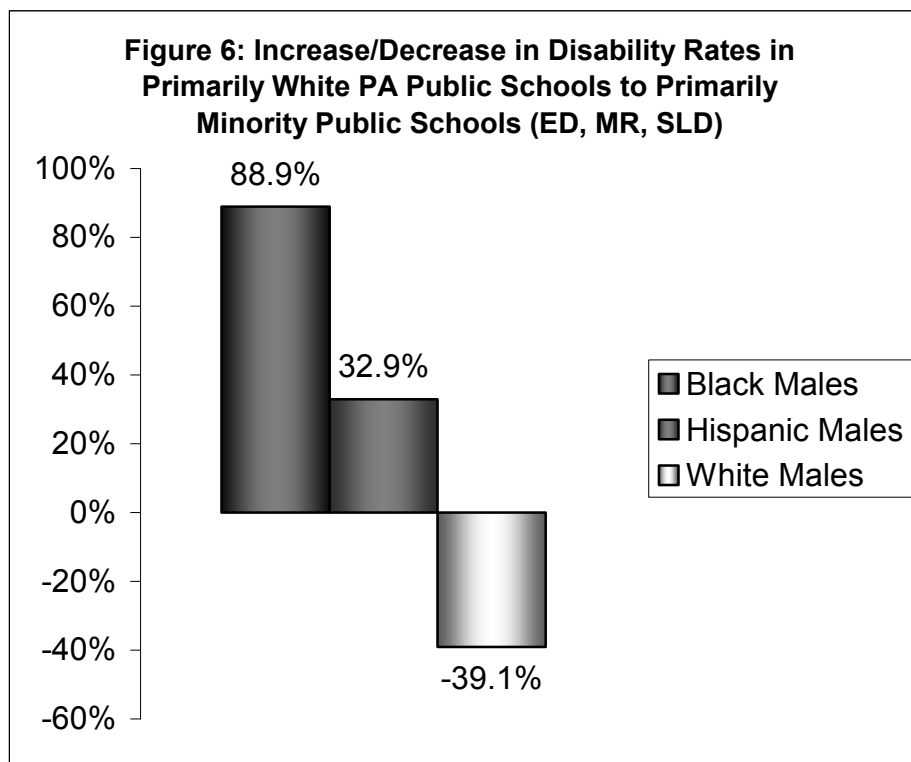
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<sup>23</sup> The relevant sections of the Individuals with Disabilities Education Act are available at <http://www.edlaw.net/service/20us1418.html>.

<sup>24</sup> Andrew J. Rotherham and Sara Mead, “Think Twice: Special Education Vouchers are not Alright.” Publication of the Progressive Policy Institute, June 25, 2003, [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810).

<sup>25</sup> Matthew Ladner, “Racial Bias in Pennsylvania Special Education.” Policy Brief of the Commonwealth Foundation, February 2004, <http://www.commonwealthfoundation.org/education/nr20040211.shtml>.

Despite the lack of financial or testing incentives to place students in Pennsylvania districts, substantial racial disparities were evident from the Pennsylvania data. Figure 6 below shows disability rates by ethnic group for Pennsylvania public schools. The data, from the United States Department of Education’s Office of Civil Rights 2000 Elementary and Secondary School Survey, presents school- level findings broken out by race and disability type for the broad categories of Emotionally Disturbed (ED), Mentally Retarded (MR) and Specific Learning Disability (SLD). The data represents school-level information and averages from schools with at least 10 members of the respective ethnic group. The trends among Whites and minority students move in opposite directions. The numbers show that African American males have higher disability rates in these three categories, which are 88 percent higher in predominantly White districts than in predominantly minority districts. White male disability rates were 39 percent lower in the predominantly White districts.



While placement-neutral funding represents a good practice, and the racial imbalances in Pennsylvania might have been even worse without it, the results raise serious doubts as to whether neutral placement funding alone could address the racial imbalances seen in Arizona. It is entirely possible that placement neutral funding puts a brake on over-enrollment over time, without ultimately reversing racial imbalances.

Other research points to the possibility of improved screening techniques in order to reduce the misidentified children. Amanda VanDerHeyden, Joseph Witt and Gale Naquin from the Louisiana State University Health Science Center, Louisiana State University and the University of New Orleans, respectively, have conducted research indicating that the public

school officials can substantially improve the accuracy of the diagnosis process.<sup>26</sup> The research indicates that teacher referrals to special education are unreliable, both in misidentifying students as having disabilities and in failing to recognize children with disabilities. An alternative screening technique, known as universal screening, shows significant promise reducing misidentification by testing all students at an early age and then providing remedial sessions to all students below grade level.

The available evidence strongly suggests that simply changing the funding formula will not be enough to prevent school districts from using special education in a racially biased fashion. Although lawmakers around the country should alter the funding formula, Arizona policymakers would not be pleased if they took the same action as Pennsylvania lawmakers took more than a decade ago and found themselves with the sort of racial imbalances evident in Pennsylvania schools today. Further steps, such as diversifying and increasing the suppliers of special education services as well as the introduction of new screening techniques should be vigorously explored.

### **Parental Satisfaction with The McKay Scholarship Program**

Florida has taken the lead in special education reform with the launch of the McKay Scholarship Program. Launched in 1999, the program allows parents who are dissatisfied with the quality of their children's education to seek other public and private options without having to resort to court action. The program equalizes opportunity for students of varying economic backgrounds, not just those whose parents can afford the cost of litigation.

More than 18,000 students enrolled in the McKay program for the 2006–07 school year. Of 811 private schools that applied to accept McKay Scholarship children, 308 are nonreligious and 503 are religiously affiliated schools. The disability profiles of students exercising choice through the program closely matches the population of disabled students in the Florida public school system, meaning private schools are serving children with a full spectrum of disabilities. Scholarship amounts vary between \$5,039 at the low end to \$21,907 at the high end, and average \$7,206.<sup>27</sup>

A recent survey demonstrates extremely strong support for the McKay Scholarship program from the parents of disabled children. Manhattan Institute scholars Jay P. Greene and Greg Forster recently released the first empirical study of the McKay program. The Manhattan scholars conducted a parental satisfaction survey of both parents who had used the program to transfer out of public school and parents who had used a McKay scholarship to transfer but had subsequently returned to a public school.<sup>28</sup>

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<sup>26</sup> Matthew Ladner, personal interview with Amanda M. VanDerHeyden. Supporting study, Amanda C. VanDerHeyden, Joseph C. Witt and Gale Naquin. "Development and Validation of a Process for Screening Referrals to Special Education" is available from the author at [avande@comcast.net](mailto:avande@comcast.net).

<sup>27</sup> See Florida Department of Education "Fast Facts on McKay Scholarships" at [http://www.floridaschoolchoice.org/Information/McKay/files/Fast\\_Facts\\_McKay.pdf](http://www.floridaschoolchoice.org/Information/McKay/files/Fast_Facts_McKay.pdf).

<sup>28</sup> Jay P. Greene and Greg Forster, "Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program," Manhattan Institute, June, 2003, [http://www.manhattan-institute.org/cr\\_38.pdf](http://www.manhattan-institute.org/cr_38.pdf).

The results of the survey demonstrate that parents strongly favor the program. For example, 92.7 percent of current McKay participants are satisfied or very satisfied with their McKay schools while only 32.7 percent were similarly satisfied with their public schools. McKay parents found that their child's class size dropped dramatically, from an average of 25.1 students per class in public schools to 12.8 students per class in McKay schools. In public schools, 46.8 percent of disabled students were bothered often and 24.7 percent were physically assaulted, while in McKay schools only 5.3 percent were bothered often and 6.0 percent were assaulted. Perhaps most telling of all, over 90 percent of parents who had withdrawn their children from the program believe it should continue to be available to those who wish to use it.

Andrew J. Rotherham and Sara Mead raise concerns about the McKay Scholarship route to reform, including the concern that the creation of such a program would create a perverse incentive for parents to seek disability labels for their children in order to access private schools.<sup>29</sup> Anecdotal evidence points to instances of affluent parents seeking Specific Learning Disability labels for their children so they can receive extra time on college entrance examinations or other perceived advantages. While there can be no doubt that the vast majority of IEPs are initiated at the behest of school district officials, especially for low-income children, a counter-trend of parent-initiated labels could indeed exist simultaneously in the complex world of special education. If parents are willing to go to such lengths simply for extra time on the Scholastic Aptitude Test, what would they do for the chance to send their children to a private school setting?

The only parents likely to see their way through the complex process of having their children inaccurately labeled are those arming themselves with legal expertise and outside evaluations. It is crucial to note, however, that such parents are already accessing private schools by resorting to the legal system, often winning judgments far exceeding the cost of educating the child in the public system. The route to a private placement under current practice is first to seek a label from the district (with little incentive for the district to resist under the current bounty funding system). Next, parents could sue the district for failing to provide a Free and Appropriate Public Education (which can be proven by as little as paperwork errors on the part of district officials).

Looming large in Rotherham and Mead's concern is the fact that the current IEP process itself is so inherently open to error. Universal screening procedures identifying and remediate early learning difficulties would greatly ameliorate concerns over false labeling- including the provision of scholarships to undeserving students. Implementation of universal screening would still require a gaming-minded parent to seek a label from the district, but every case of successful remediation would remove a student from the potential grey areas and from the potential pool of litigants. Anyone seeking to game the system would still be required to force a label onto their child over any objections from the district, with the district standing on much firmer ground with improved accuracy in identification. Finally, those choosing to exercise choice under a McKay Scholarship would be limited to the amount of funding

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<sup>29</sup> Andrew J. Rotherham and Sara Mead, "Think Twice: Special Education Vouchers are not Alright," Progressive Policy Institute, June 25, 2003, [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810).

already spent on their child in the public system, with no possibility of winning a “Cadillac placement” through the courts. The reforms considered here, in short, would do little increase the incentives for litigation while lowering the potential payoff from suits.

For example, Arizona already has a program for private school placements for special needs students. According to the Arizona Department of Education, 1,170 special education students were attending private schools at public expense as of December 1, 2001. These students were attending private school at public expense either because their IEP committees had agreed to place them in a private institution, or as the result of a successful lawsuit against a school district for failure to provide and free and appropriate public education under the provisions of IDEA. In either case, such placements skew towards families who can afford legal counsel and outside evaluation expertise. The McKay Scholarship program equalizes opportunity by giving all dissatisfied parents the opportunity to choose a new provider for their child’s education needs without complication.

Finally, any potential gaming activities of parents pale in comparison to those currently undertaken by school district officials. The vast majority of mislabeled children have been placed in special education not at the behest of parents, but rather at the initiative of schools officials. Regardless of the myriad motivations (ethical or otherwise) of school officials, the current system produces results best described as institutional racism. The current situation therefore represents a much greater injustice than anything that could result from the reforms discussed here.

A true “individualized education plan” for a disabled child means that the child’s parents should have input not only about what the plan will be, but also in which service providers will execute the plan. An individualized plan can be entirely meaningless if the school district does not provide the proper resources, staff and effort called for in the plan. As a monopoly provider of services, any or all of these things are often lacking in public schools. The Manhattan Institute study demonstrates that when provided choice, the parents of special needs parents believe that their children are much better served.

### **Conclusion: Strong Action Required to Fix Special Education**

Lawmakers should vigorously pursue remedies to the over-enrollment of students in special education. The possible causes of misidentification include perverse financial incentives, the avoidance of standardized testing, the misuse of special education as remedial education, and segregationist impulses. It is clear that the problem is a deep-seated feature of public education. A program like the McKay Scholarship Program in Florida, making every disabled child in the state eligible to take the entirety of the funds spent on their education to a public or private school of their choice, would have two beneficial effects. First, Arizona’s disabled children would be far closer to enjoying the benefits of an “individualized education plan” by having the opportunity to choose the provider of their educational services. Second, public school administrators would have a powerful incentive to improve the accuracy of the disability assessment process, and to address the inadequacies of the regular education process often leading to incorrect diagnoses. Public school officials commonly complain about not having enough money to educate special needs children, so it seems unlikely that

they could complain about parents taking their children and their (inadequate) funding elsewhere.

Three possible remedies exist: changing the state's special education funding formula, instituting universal screening for the identification process, and creating a parental choice program for children with disabilities. These options do not represent mutually exclusive courses. In fact, lawmakers should be implementing all of them.<sup>30</sup>

Consider the improvement such a system would represent. Today, the vast majority of special education students remain in public schools often unresponsive to their needs and desires. The legal expenses of suits by parents strain district budgets. A recent study described current special education system is a complex maze in which districts spend more time filing paperwork to avoid lawsuits than providing the services children need.<sup>31</sup>

Today's system uses vague definitions for certain disabilities applied in a racially biased fashion. A system of universal screening would test all students at an early age and attempt to remediate reading deficiencies before they develop into conditions easily mistaken for a disability.<sup>32</sup> Such a program of intervention could make a profound difference in the academic careers and lives of Arizona children. It could also save Arizona school districts millions of dollars in compliance costs- especially for children labeled as having a specific learning disability. Although a program of universal screening would require the reallocation of district resources, the medical research strongly suggests that such reallocation would pay large dividends in the form of getting children out of the special education track (inappropriate for many) and into general curriculum classrooms.

Finally, children in public school special education programs deserve options in determining who will provide the educational services their children need. The current system focuses too much on the needs of service providers in a variety of ways. In the struggle to protect themselves from lawsuits, raise standardized test scores, and gain additional resources for the school system, school officials all too often lose sight of the interests of children.

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<sup>30</sup> Rotherham and Mead suggest that both moving to a neutral placement funding formula and establishing a per-student funding amount for a McKay Scholarship could be administratively cumbersome. For states already employing a per-pupil funding arraignment (including Arizona and 34 other states) however, it would be feasible to keep the current formulas for determining the value of individual McKay Scholarships while moving to a lump-sum approach for the funding of school districts. Children transferring under the McKay Program would have a value assigned to their voucher according to the severity of their disability, and state officials could deduct the appropriate amount from funds provided to of school district. See Andrew J. Rotherham and Sara Mead, "Think Twice: Special Education Vouchers are not Alright," Progressive Policy Institute, June 25, 2003, [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=110&subsecID=900030&contentID=251810).

<sup>31</sup> Marie Gryphon and David Salisbury. "Escaping IDEA: Freeing Parents, Teachers and Students through Deregulation and Choice," Cato Institute, July 2002, [www.cato.org/pubs/pas/pa444.pdf](http://www.cato.org/pubs/pas/pa444.pdf).

<sup>32</sup> See G. Reid Lyon, Jack M. Fletcher, Sally E. Shaywitz, Bennett A. Saywitz, Joesph K. Torgesen, Frank B. Wood, Anne Schulte, and Richard Olson. "Rethinking Learning Disabilities," in Chester Finn et al. (eds.), *Rethinking Special Education for a New Century for a New Century*, (Washington D.C.: Thomas B. Fordham Foundation, 2001): 259-288.

A program like Florida's McKay Scholarship Program improves the bargaining position of parents with disabled children. Parents can ensure that their children are being properly served seek services elsewhere. School districts would undoubtedly become more responsive to the needs of special education children. Arizona lawmakers created such a program in 2006. At the time of this writing, it remains in the early stages of adoption and implementation. Arizona lawmakers have yet to take action on changing the special education funding formula, or in requiring universal screening and remediation.

Regardless of what motivates school officials to place students inappropriately in special education- whether the mistaken attempt to use special education as a remedial program, standardized test gaming, financial incentives, segregationist impulses, the bigotry of low expectations—Arizona's public school students deserve much better. School officials should put a possibly life-altering label on a child only based on solid scientific evidence. School districts should be clearly notify parents of their right to an outside evaluation, and parents with children receiving special education services should have as much choice as possible concerning who provides the service. Such reforms would require profound changes in the operating procedures of many Arizona school districts, but Arizona's children- particularly Arizona's minority children- would benefit enormously.

IDEA remains a landmark piece of civil rights legislation, effectively abolishing the formerly widespread practice by public schools of refusing to serve children with disabilities. In 1973, estimates hold that public schools denied as many as one million students access to public schools due to disability.<sup>33</sup> Such discrimination offends basic notions of equality and lawmakers have deservedly cast it onto the ash-heap of history- where it must remain.

We cannot however continue to tolerate a profoundly unscientific and biased system of special education identification and delivery. Both the federal and state governments can and should do more to improve the scientific rigor of the diagnosis process. Both the federal and state governments can do more to remove perverse incentives to label children. Lawmakers across the country should pursue such reforms with dispatch.

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<sup>33</sup> Hearings before the Select Subcommittee on Education of the Committee on Education and Labor, 93d Cong., 1st sess., 1973. Cited in Wade F. Horn and Douglas Tynan, "Time to Make Special Education 'Special' Again," in Chester E. Finn, Jr., Andrew J. Rotherham and Charles Hokanson (eds.) *Rethinking Special Education for a New Century*. Publication of the Thomas B. Fordham Foundation and the Progressive Policy Institute, available on the internet at [http://www.edexcellence.net/foundation/topic/topic.cfm?topic\\_id=15](http://www.edexcellence.net/foundation/topic/topic.cfm?topic_id=15).



### **Daniel J. Reschly: “Minority Special Education Disproportionality: Findings and Misconceptions”**

Several misconceptions undermine accurate analyses of minority representation in special education. Solutions depend on accurate analyses of the disproportionality phenomena. In this testimony I will attempt to present as efficiently as possible critical facts concerning disproportionality and, on the basis of those facts, recommend solutions with varying degrees of potential effectiveness.

Before presenting what I consider to be disproportionality misconceptions and facts, let me be very clear that I believe that the current levels of disproportionality should be addressed and improved. To make a long argument very short, inappropriate special education participation harms students and diminishes educational attainment and career opportunities.

#### **NRC Panel on Minority Representation (Donovan & Cross, 2002)**

Disproportionate representation does not have a simple cause or a simple solution. The National Research Council Panel on *Minority Students in Special and Gifted Education* (Donovan & Cross, 2002) concluded that multiple causative factors are implicated in over-representation. The causative factors were grouped into four broad areas, Biological, Social, School, and Special Education. Examples of each are described below.

**Biological Bases:** A wide variety of subtle and not so subtle conditions and factors produce greater risk for disability identification in economically disadvantaged minority children and youth. I stress that the major influence is poverty, not minority status as such.

These factors and conditions are largely related to poverty circumstances. Some of the influences with known deleterious effects are greater likelihood of poor prenatal health care, pregnancies and births at very young ages, premature birth, low birth weight for gestational age, exposure to toxins during pregnancy such as tobacco, alcohol, and drugs, poor pre- and post-natal nutrition, exposure to environmental toxins such as lead, preventable childhood diseases, and physical abuse and neglect.

In most cases mild or temporary exposure to any single factor has little identifiable effect. Serious effects are associated with high levels of exposure to single factors such as alcohol, chronic exposure, and exposure to multiple factors simultaneously.

It is important to note that these risk factors increase the likelihood of disability status during childhood and adult years. They do not, with a few exceptions, directly cause disabilities for most persons who experience one or more risk factors. It is crucial to remember that the vast majority of persons from poverty circumstances have no identifiable biological disorders predictive of disability status.

**Social Bases:** A variety of poverty-related social factors increase risk for disabilities among children and youth. These factors probably, but arguably, constitute the largest

influence on differential disability identification across US racial-ethnic groups. The social factors include the intellectual stimulation in the home, language models, intellectual and behavioral preparation for schooling, parenting resources and quality of child care.

**General Education Influences:** The NRC Panel identified several potential poverty-related general education influences on disability identification including greater likelihood of inadequate resources, teachers with fewer qualifications and experience, poor instruction in basic reading and math, inadequate classroom organization and behavior management, and peer pressure to not excel academically.

**Special Education Influences:** Current policies and practices in special education also contribute to minority over-representation. Some of the practices implicated by the NRC Panel were non-functional eligibility evaluations that are not closely related to the reasons for referral or to the development of effective special education treatments, greater identification of minority students in special education categories with greater stigma (mental retardation and emotional disturbance), excessive placement of minority students in largely segregated special education classes with little or ineffective presentation of the general education curriculum, and little emphasis in special education on intense instruction and exiting programs.

### **NRC Panel Recommendations**

The NRC Panel forwarded recommendations for changes in policies and practices relevant to each of the four broad bases or influences on minority over-representation in special education. A brief summary of these recommendations follows.

1. Improve the availability and quality of health and nutrition for families in poverty along with intensified public campaigns to discourage behaviors related to risk status (e.g., alcohol).
2. Increase pre-school support for families in poverty circumstances with targeted health, cognitive, and behavior interventions for the most vulnerable children and families. Early interventions have a documented positive effect on reducing poverty-related minority over-representation in special education.
3. Establish early universal screening for academic and behavior problems coupled with intense early interventions in academics and behavior. Specifically, schools must ensure implementation of scientifically-based reading instruction and effective classroom organization and behavior management for all children and youth. States and school districts must do more to ensure that the best teachers are assigned to the students with the greatest needs, reversing current patterns of teacher distribution.
4. Implement what has become to be known as response to intervention to ensure that all children and youth experience the benefits of more intense instruction and behavioral interventions prior to consideration for referral for special education.
5. Change special education from a disability-based placement system to a set of services delivered in natural environments to support students with difficulties in meeting the general education curriculum and school behavioral requirements.

6. Focus special education services as a resource to general education, based on scientifically-based interventions delivered through the problem solving steps of defining concerns behaviorally, gathering baseline data, analyzing conditions related to the problem (including prior knowledge), selecting interventions matched to the problem and conditions, implementing the interventions with good fidelity, and progress monitoring with changes in interventions that are not achieving goals. A large body of scientific literature confirms the effectiveness of problem solving and response to intervention processes with minority and majority children.

As noted by a former Director of the US Department of Education Office for Civil Rights, “The more special education becomes **not** a place, but an educational process, the less interested we will be from a civil rights perspective. In many places special education has become a segregated setting, without access to quality, high standards education. Our interest will fade when special education and regular education have gotten together, and are all about the same thing, which is high standards education.” (Pelan, 1995, p. 6)

### **Misconceptions and Facts in Minority Over-representation**

1. **Misconception:** All minority group students are over-represented in special education.

**Fact:** Special education representation varies significantly by group. Some groups are overrepresented (American Indian and African-American), one group markedly underrepresented (Asian/Pacific Islander), and two groups approximately proportionally represented (Hispanic and white) (See Table 1). Although the IDEA (2004) statute refers to *disproportionality*, in fact, little or not attention is paid to under-representation. The degree of Asian-Pacific Islander under-representation is actually greater than the over-representation of any group.

2. **Misconception:** Disproportionality statistics are simple and easily interpreted.

**Fact:** Disproportionality statistics are frequently misinterpreted. Consider this true example.

- African-American students constitute 14.9% of the general population age 6-21, however,
- 33% of the students diagnosed in the category of mental retardation are African-American.
- Given these facts, what per cent of African-American students are diagnosed as mentally retarded and placed in special education
  - 1%
  - 2%
  - 4%
  - 8%
  - 16%
  - 32%
- The actual per cent of African American students diagnosed with mental retardation and placed in special education is 1.7%

- The preferred statistics for disproportionality analyses are the risk, risk ratio and, with small numbers in comparison groups, the weighted and alternative risk ratios. (Bollmer, Bethel, Garrison-Mogren, & Braun, 2007; Westat Task Force, 2004).
- Risk refers to the proportion of the overall population that is in special education. The risk of mental retardation (MR) and special education placement is found by
  - See data in Table 1:
 

<u>167,357</u>	The number of African Americans in the MR category
9,828,925	The total number of African Americans age 6-21 in population
- MR Risk for African-American students is 1.70%, meaning that 1.7% of all African Americans age 6-21 are classified in MR and placed in special education.
- The Risk and Composition statistics are often confused. Composition refers to the make-up of some category or population.
  - For example, in the general US population age 6-21 of 65,902,976 persons, there are 9,828,925 persons of African origin. African Americans constitute 14.91 percent of the general population of persons age 6-21, so the composition of the US population in this age group is about 15% African-American.
  - The composition of special education in the category of mental retardation is determined by
 

<u>167,357</u>	Total number of African-American students in MR
511,041	Total number of all students in the category of MR
= 32.75%	
  - That is, of the persons age 6-21 in MR, about one-third are African-American. It doe NOT mean that about one-third of African Americans age 6-21 are in MR.
  - Unfortunately, many persons including most professionals in education and psychology confuse the risk and composition statistics leading to entirely erroneous stereotypes suggesting that large proportions of minority students are in special education. For example, many persons assume that the composition statistic is the actual risk leading them to believe that one-third of African-American students are classified as MR and placed in special education when, in fact, the actual proportion is 1.7%.
  - African-Americans **are significantly over-represented** in the special education category of MR, but only a small proportion of African-Americans age 6-21 are in special education in the category of MR.

3. **Misconception:** Large proportions of minority students are in special education.

**Fact:** The overwhelming proportion of all minority and majority groups are in general education programs. Specifically, the proportions of each group in general education are, American Indian/Alaskan Native (85%), Asian-Pacific Islander (95%), African-American (87%), Hispanic (91%) and white (91%).

- Representation varies significantly by group (please refer to the risk column for each group in the tables reflecting representation across all 13 disabilities recognized in IDEA, Learning Disabilities, Mental Retardation, Emotional Disturbance, and Other Health Impaired).

4. **Misconception:** Accurate generalizations to states and districts can be made from national representation data.

**Fact:** Representation patterns vary significantly between states and between districts within states. National disproportionality statistics like those in the attached table cannot be generalized to states and local school districts (Donovan & Cross, 2002).

5. **Misconception:** Equal special education representation across groups should be expected.

**Fact:** Equal representation is almost impossible to attain for a variety of reasons. A more reasonable standard is reducing over-representation due to low achievement and behavioral problems through prevention and effective interventions and ensuring that educational programs produce significant positive results.

6. **Misconception:** The IDEA statute requires equal representation by group in special education categories and placements.

**Fact:** The IDEA statute requires, *“policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in Section 602(3). [612(a)(24)”*

- The statute emphasizes inappropriate identification and requires reporting of representation data by group by disability and placement option. Placement option is the amount of time each day outside of the general education classroom.
- The IDEA statute requires revisions of policies and procedures if “significant” disproportionality exists. As noted earlier, the legal concern to date has been with over-representation, not disproportionality per se or with under-representation.
  - No definition of “significant” appears in the IDEA statute or regulations.
  - The states can determine at their discretion the statistical method to analyze representation statistics and the criteria for “significant” disproportionality. States were first required to report this information to the U. S. Office of Special Education Programs (OSEP) in 2006.
  - OSEP does not have the authority to direct states toward a specific method to analyze disproportionality statistics or a criterion(ia) for what level of disproportionality would be “significant.”

- States use a wide range of statistical methods to analyze disproportionality, some clearly superior to others.
- States generally have adopted what I consider to be excessively lenient criteria to define significant disproportionality. The state criteria reported to OSEP in 2006 varied from a risk ratio of 1.5 to over 3.0. The most frequently adopted criterion was 3.0, meaning that a group would have to be represented at three or more times the rate for other groups in order for the state to regard the disproportionality as “significant.”
- The current IDEA provisions regarding disproportionality are likely to have little effect UNLESS greater rigor and consistency is established in determining significant disproportionality.

7. **Misconception:** Discrimination in special education referral and eligibility evaluations accounts for minority disproportionality in special education.

**Fact:** Little evidence of discrimination in special education referral and evaluation procedures has been identified in studies involving direct comparisons of race/ethnic groups (Hosp & Reschly, 2002; Reschly & Kicklighter, 1985; Reschly, Kicklighter, & McKee, 1988a, 1988b, 1988c; Reschly & Ward, 1991).

- Quantitative studies involving direct comparisons of minority and majority student referrals, evaluations, individualized educational programs, and placement decisions find little or not evidence of discrimination.
  - The clear trend in these studies is that minority students at the same stages of the special education process, from referral to placement, have greater needs than comparable majority students at the same stages. For example, the level of failure in general education to prompt a teacher appears to be greater for minority than majority students.
- Qualitative studies focusing on a single case or a small number of cases involving only minority students in the special education process generally report questionable and sometimes clearly inappropriate practices (add cites).
  - No comparison with a majority student control group is conducted in the qualitative studies making the results difficult to interpret. Specifically, for the poor practices to be regarded as discriminatory on a race or ethnic basis they would have to occur more frequently with the minority than majority group. If poor practices occur with equal frequency in minority-majority comparisons, then there is no discrimination as such, only poor practices. The latter appears to be the case in studies with comparison groups (Reschly et al., 1988b; Reschly & Ward, 1991).
  - Qualitative studies of minority participation in special education produce equivocal results regarding the existence of discrimination.

8. **Misconception:** The minority students who are placed in special education were doing adequately in general education prior to an inappropriate referral.

**Fact:** Studies of the general education performance of minority students referred for and placed in special education indicate significant educational achievement problems, often aggravated by challenging behaviors that existed for two or more years prior to referral.

- Studies cited previously indicate greater, not lesser need for minority than majority students referred, evaluated, and placed in special education.
  - Special education eligibility evaluations likely *reduce* rather than increase minority special education identification and placement (Hosp & Reschly, 2003).
  - Several general education interventions typically are attempted prior to referral, equally for minority and majority students.
  - Many of these interventions are not grounded in best practices and few are rigorously implemented and evaluated.
9. **Misconception:** Changes in special education policy and practices have the greatest potential for prevention of minority over-representation.

**Fact:** Special education referral, eligibility evaluation, and placement are the culminations of several years of failure in general education. Prevention must focus on improving general education outcomes for minority students, particularly for American Indians/Alaskan Natives, African-Americans, and Hispanics.

- Low achievement levels especially in reading contribute to minority representation in special education. From 70% to 89% of all referrals to special education implicate poor reading as a first or second reason for the referral. Data in Figure 1 show reading levels by group at the 4th grade level.
- Reading levels at the 4th grade level vary significantly by group (See Figure 1). The proportions of students reading below the basic level in 4th grade are African-American (54%), Hispanic (51%), American Indian/Alaskan Native (49%).
- Reading is increasingly important in 4th grade and beyond as the school curriculum increasingly requires students to read to learn.
- Reading at a below basic level at 4th grade and beyond is predictive of school failure in subjects requiring reading, special education referral, non-completion of high school and post-secondary education, and poor career attainment.
- Reading instruction in US schools needs to be improved significantly to produce better educational outcomes for all groups, particularly for several minority groups (Snow, Burns, & Griffin, 1998; National Reading Panel, 2000).

10. **Misconception:** Little is known about prevention over-representation in special education.

**Fact:** The National Research Council Panel on *Minority Representation in Special and Gifted Education* (Donovan & Cross) stressed a range of interventions that have proven effects or are likely to reduce minority special education representation.

- The strongest conclusion of the panel was, *There is substantial evidence with regard to both behavior and achievement that early identification and intervention is more effective than later identification and intervention.*”

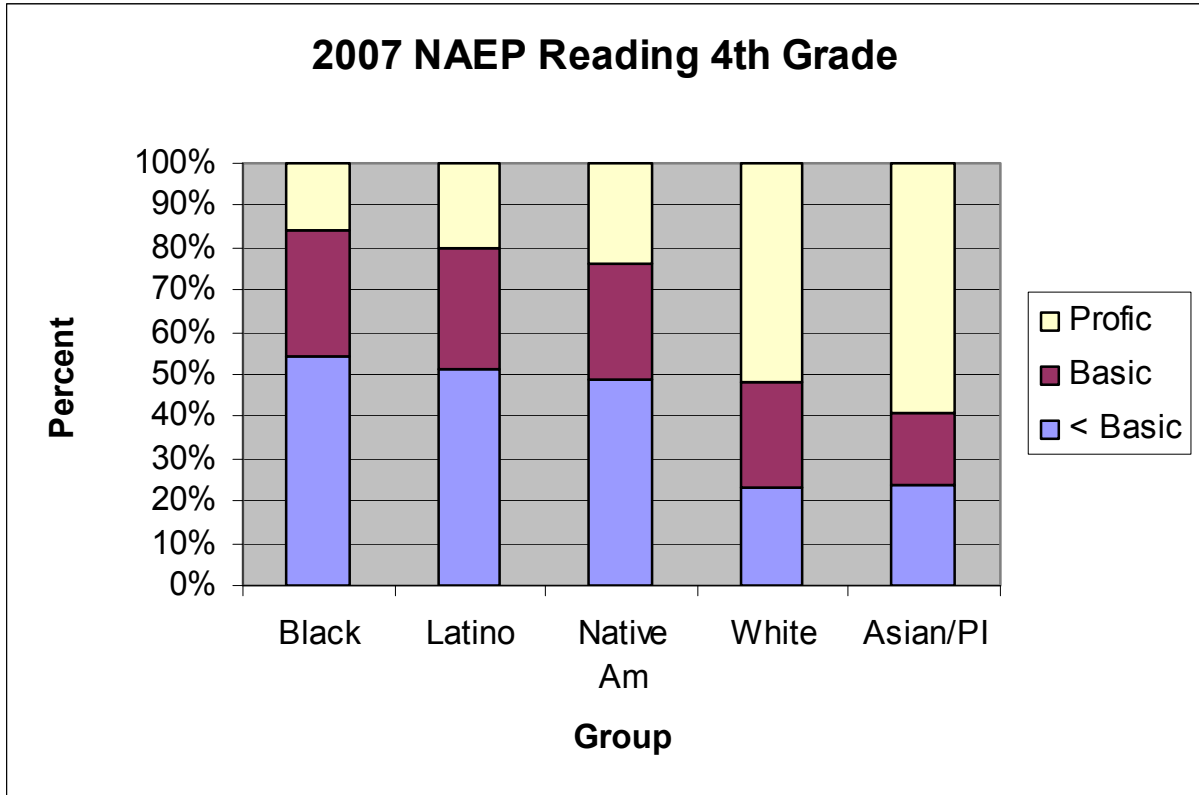
More to follow

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Figure 1  
The Nation's Report Card: Reading 2007. NAEP, US Dept of Education, Table A-9, pp. 54-55



	2006 Age 6-21 All Disabilities By Group			
	N	Risk	Rel Risk	Comp
Am/Ind	91,492	14.35%	1.59	1.53%
A-PI	131,099	4.74%	0.51	2.19%
Black	1,231,922	12.53%	1.48	20.60%
Hispanic	1,034,137	8.48%	0.92	17.27%
White	3,498,007	8.64%	1.13	58.43%
Total	5,986,657	9.08%		100.02%

	2006 Age 6-21 Learning Disabilities By Group			
	N	Risk	Rel Risk	Comp
Am/Ind	46,093	7.23%	1.81	1.74%
A-PI	45,065	1.63%	0.39	1.70%
Black	544,761	5.54%	1.47	20.52%
Hispanic	563,382	4.62%	1.19	21.22%
White	1,455,378	3.60%	0.76	54.82%
Total	2,654,679	4.03%		100.00%

	2006 Age 6-21 Mental Retardation By Group			
	MR	MR	MR	MR
	N	Risk	Rel Risk	Comp
Am/Ind	6,530	1.02%	1.32	1.28%
A-PI	10,758	0.39%	0.49	2.10%
Black	167,357	1.70%	2.78	32.75%
Hispanic	71,956	0.59%	0.72	14.08%
White	254,440	0.63%	0.62	49.79%
Total	511,041	0.77%		100.00%

	2006 Age 6-21 Emotional Disturbance By Group			
	ED	ED	ED	ED
	N	Risk	Rel Risk	Comp
Am/Ind	7,159	1.12%	1.62	1.56%
A-PI	5,128	0.19%	0.26	1.12%
Black	131,773	1.34%	2.31	28.79%
Hispanic	50,756	0.42%	0.55	11.09%
White	262,917	0.65%	0.85	57.44%
Total	457,733	0.70%		100.00%

Group	2006 Estimated Population	
	Population Age 6-21 by Group	
	N	Per Cent
Am Ind	637,687	0.97
A-PI	2,766,281	4.2
Black	9,828,925	14.91
Hispanic	12,196,634	18.51
White	40,473,449	61.41
Total	65,902,976	100

Group	2006 Age 6-21 Other Health Impaired By Group			
	OHI	OHI	OHI	OHI
	N	Risk	Rel Risk	Comp
Am Ind	7,426	1.12%	1.29	1.25%
A-PI	8,862	0.32%	0.34	1.49%
Black	103,456	1.05%	1.2	17.38%
Hispanic	58,631	0.48%	0.48	9.85%
White	416,698	1.03%	1.47	70.02%
Total	595,073	0.90%		99.99%

**Daniel J. Reschly: "Minority Special Education Disproportionality: Findings and Misconceptions" PowerPoint Presentation**

## Special Education Disproportionality Prevention and Early Intervention

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## Disproportionality: Old Reactions

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- Here no evil, see no evil
- Ignore the problem by not knowing
- OR

When in Danger  
When in Doubt  
Run in Circles  
Yell and Shout

## Legal Requirements

- ❑ Statute
- ❑ Regulations
- ❑ Litigation
- ❑ Interaction between litigation and legislation
- ❑ Education of the Handicapped Act ([EHA] 1975, 1977)
- ❑ IDEA (1991, 1997, 1999, 2004)

## IDEA 1997, 1999, 2004 re: Disproportionate Representation

- ❑ §300.755 Disproportionality.
- ❑ (a) **General.** *Each **State** ..... shall provide for the collection and examination of data to determine if significant disproportionality based on race is occurring in the State .....-*
- ❑ (1) *The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a **particular impairment** described in section 602(3) of the Act; and **THAT IS, CATEGORY***
- ❑ (2) *The placement in particular educational settings of these children. **THAT IS, LRE Profile***

## IDEA 1997, 1999, 2004 re: Disproportionate Representation

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- (b) **Review and revision of policies, practices, and procedures.** *In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children,....., the **State** ..... shall provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of Part B of the Act.*

## IDEA 2004 Statute: Additional Disproportionality Requirements

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- Require any LEA identified under Section 618(d)(1) to reserve the maximum amount of funds under Section 613(f) to provide comprehensive coordinated early intervening services to serve children in the **LEA**, particularly children in those groups that were significantly overidentified under Section 618(d)(1); and
- Require the **LEA** to publicly report on the revision of policies, practices, and procedures described under Section 618(d)(1)(A).
- Focused monitoring---Disproportionality listed as one of a small number of areas

## Question: What Constitutes "Significant" Disproportionality

- No definition in statute or regulations
- OSEP cannot provide guidance to states
- State discretion
- 2006 Reports:
  - Wide variations
  - Excessively lenient criteria

## Facts: Current Disproportionality

- African-Am students constitute about 15% of the general population age 6-21
- Af-Am students comprise 33% of the students in MR in Sp Ed
- What per cent of Af-Am in MR/Sp Ed
  - 1%                      2%
  - 4%                      8%
  - 16%                     32%
- Choose the best answer.

## What Statistic for Disproportionality?

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- Risk: Percent of total group in sp ed category
  - 100 white in MR out of 2000 white students in the student population,  $100 \div 2000 = 5\%$
  - Risk = 5%
- Composition: Percent of sp ed category by each group
  - Total of 150 students in MR
  - White composition of MR,  $100 \div 150 = 67\%$

## Illustration of Risk and Composition

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- Consider gender and teaching
- Composition of educators by gender is heavily female, >80%
- "Risk" of being an educator for women is <1%
- Likewise with racial/ethnic group and special education representation
  - Composition sometimes appears large
  - Risk is relatively small

## Comparing Risk Statistics Across Groups

- Relative Risk, ratio of two risk indices
- Useful for determining the severity of disproportionality
- Two methods
  - Risk of minority group to risk of white group
  - Risk of each group compared to the combined risk of the other groups

## Disproportionality Data and Facts

### **2006 All Disabilities, age 6-21 US**

<u>Group</u>	<u>%-sch age</u>	<u>Rel. Risk</u>
Native Am. Indian	14.3%	1.6 times
African-American	12.5%	1.5 times
White	8.6%	1.1 times
Hispanic	8.5%	0.9 times
Asian Pac-Islander	4.7%	0.5 times

As a per cent of the population age 6-21



## Problematic Categories: MR

- ❑ Composition: African students constitute 15% of the US student population, but 33% of the US MR population is African American.
- ❑ Risk: Approximately 1.7% of African American students are classified as MR. The rate for white students is 0.6%
- ❑ The relative risk for MR for African American and white students is =2.8
- ❑ African American students are approximately 2.8 times more likely to be in MR than students in other groups

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## Problem Categories: ED

**Composition:** 28.8% of Students with ED are African American vs. 15% Af Am in general student population

**Risk:** 1.3% of African-American Students are in ED vs. 0.7% of White Students

**Relative Risk Ratio:** Af-Am rate is 2.3 times the rate for all other groups

No other group overrepresented in ED

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## Problem Categories: LD

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**Composition:** About 1.8% of Students with LD are Native American Indian vs. 1.0% of Indian Students in the General Population

**Risk:** 7.3% of Indian students are in LD vs. 3.6% of White Students

**Relative Risk:** Indians are 1.8 times more likely to be in LD than students in other groups

## Prevalence and Disproportionality in SEAs and LEAs

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- Enormous variations across SEAs
- Enormous variations across LEAs within a state
- Variations are not easily explained
- Failures to explain prevalence variations in LD and ED

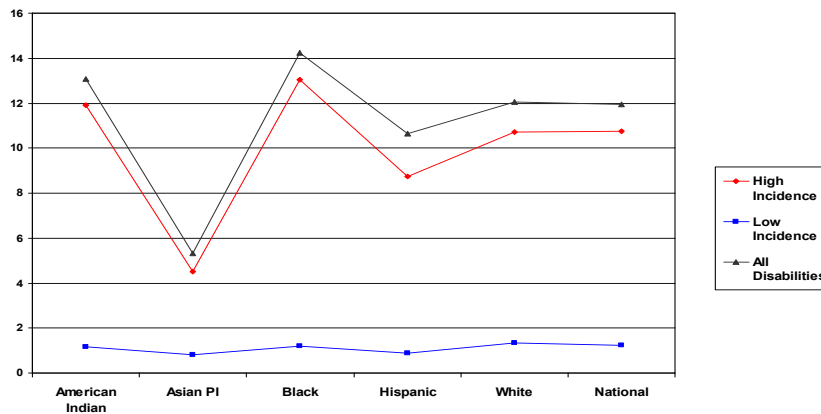
## Criteria for Significant Disproportionality

- ❑ No precise numerical guidelines (Grutter and Gratz Supreme Court Cases)
- ❑ Reschly Tentative Guidelines:
  - Relative Risk of (RR) 1.0 to 1.2 acceptable
  - RR of 1.2 to 1.5 moderate, questionable, more study
  - RR of 1.5-2.0 Clearly significant
  - RR > 2.0 Highly significant, scrutiny should follow

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### Disproportionality Occurs In High Incidence Disabilities



High Incidence = Speech/language, SLD, MR and ED

Low Incidence = The remaining 9 IDEA categories

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## Is Sp Ed Disproportionality Restricted to the US?

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- ❑ Overrepresentation of Roma in Czech Republic-City of Ostrava
  
- ❑ 51.5% of Roma in Special Schools vs.
- ❑ 2.4% of Non-Roma in Special Schools
- ❑ Relative risk for Roma was 21.5, i.e., Roma 21 times more likely to be classified as MR

## Expectations for Representation

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- ❑ Should we expect **equal** representation?
- ❑ U.S. Courts: Competing ideas of fairness: Equal treatment vs. Equal results
- ❑ Sowell (1996) "worldwide study of multiethnic societies found "few, if any" which even approximated proportional representation of the different ethnic groups in different levels or sectors of the economy." (p. 372).

## Other Disproportionality in U.S.

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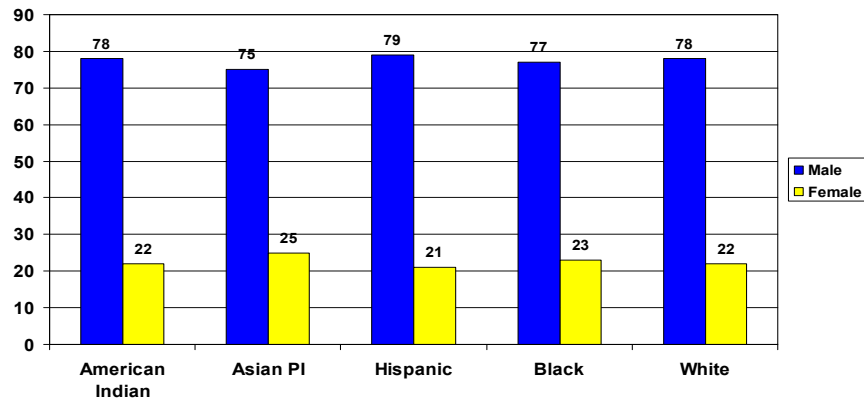
- Asian Americans are much less likely to be in special education.
- Asian Americans compared to whites
  - MR  $1.18/0.64=1.84$  white nearly two times higher
  - LD  $6.02/2.23=2.70$  white much higher
  - ED  $0.91/0.26=3.50$  white much higher

## Gender Disproportionality

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- Gender Ratios in ED, LD, and MR
  - ED Male to Female is 4:1
  - LD Male to Female is 2:1
  - MR Male to Female is 1.5:1
- Same gender ratios exist across all groups

## Other Disproportionality OCR Gender Data on ED



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## Overrepresentation Issues

- National Academy of Sciences/National Research Council Panel Report
  - <http://www.nap.edu/catalog/10128.html>
- Donovan, M. S., & Cross, C. T. (2002). Minority students in special and gifted education. Washington, DC: National Academy Press.

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## Causes of Overrepresentation

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- Biological factors**
- Social factors**
- General education experiences**
- Special education system**

## Do Biological Factors Contribute? Avoid Over-Generalizations!!

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Pre- and post-natal health care and nutrition  
Greater exposure to toxins  
Greater likelihood of pre-maturity, low birth weight  
Greater exposure to environmental toxins  
Greater likelihood of preventable childhood diseases and other illnesses/conditions  
Greater likelihood physical abuse and neglect

## Do Social Factors Contribute

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### □ Social Bases-Yes

- Less supportive environments for language and cognitive development; poorer preparation for reading and academic achievement generally, less direct teaching

### □ Substantial Difference Exist at Kindergarten

## Do Schooling Differences Contribute to Disproportionality?

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- Differences in Resources in Schools with High and Low Income Students
- Differences in Teacher Education, Experience, and Training in High and Low
- In Low Income Schools, Greater Need for Highly Systematic Instruction and Strong Classroom Organization/Behavior Mgmt
- Kellam research re: classroom management



## Role of Special Education

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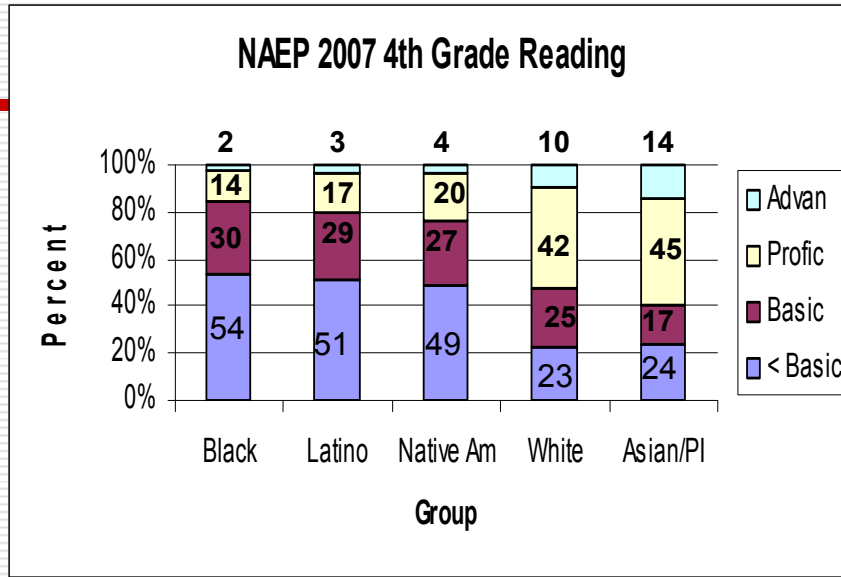
- Policies that focus on disability-based treatment and placements
- Practices that focus eligibility determination on factors largely unrelated to the precise referral concerns and effective treatments
- Excessive use of separate placements, especially in MR and ED, categories with the most over-representation
- Little emphasis on prevention or on intense interventions leading to sp ed exit

## NRC Recommendations

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- Improve health care, etc.
- Increase pre-school interventions for the most vulnerable children and families
- Change general education to emphasize
  - More effective instruction and behavior interventions, especially in reading and math
  - Universal early screening followed by intense early interventions for those at risk for educational failure
  - Equitable distribution of highly qualified teachers

**The Nation's Report Card: Reading 2007. NCES, US DE**



Data derived from Table A-9, pp. 54-55

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THE ROANOKE TIMES  
Monday, September 20, 2004

Some things do not make sense



STEPHANIE KLEIN-DAVIS | The Roanoke Times

██████████, 35, a Bullitt Avenue resident, worries about the effect on her unborn child from the sound of jackhammers.

## NRC Recommendations cont.

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- Special Education
  - Emphasize prevention through Response to Intervention
  - Adopt problem solving practices with strong evidence of effectiveness
  - Reform special education to a set of services brought to students in general education rather than a place largely apart from the general education curriculum
  - Stress intense interventions and exit from special education.

## Irony of Disproportionate Representation

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- Special Education for SWD with Mild Disabilities (LD, Mild MR, ED)
  - Individualized educational programs with related services as needed, based on individual evaluation
  - Significantly greater expenditures
  - Greater parent involvement
  - Mandated annual review
  - Procedural safeguards

## Irony of Disproportionate Representation cont.

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- Why is disproportionate representation unacceptable?
- Overrepresentation per se? Consider Head Start and Title I
- Assumptions about special education
  - Stigma
  - Poor outcomes
  - Limited curriculum and career options
  - Often segregated programs (Mild MR & ED)
- Differences in sp ed: Suburbs vs Cities

## Stigma Issues

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- MR has greatest stigma
  - MR>ED>ADHD>LD>Normal (autism ??)
- Overrepresentation occurs in the categories with the greatest stigma
- IQ is especially problematic in views of minority scholars
  - Tie to racist interpretations of differences
  - MR diagnosis and LD exclusions

## Solutions to Overrepresentation

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□ NRC Panel Report Major Conclusion

**“ There is substantial evidence with regard to both behavior and achievement that early identification and intervention is more effective than later identification and intervention.”**

Executive Summary, p. 5

## Sense of Humor

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Three things that are real: God, human folly, and laughter;

The first two are beyond our comprehension

So we must do what we can with the third. John F. Kennedy

Best wishes to you for a great holiday season

**Hilary O. Shelton: “On the Overrepresentation of Racial and Ethnic Minority Children and Limited English Proficient Children in Special Education Classes”**

Good morning. My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau. We are the federal public policy and national advocacy arm of our Nation’s oldest, largest and most widely-recognized grassroots civil rights organization.

The NAACP greatly appreciates the fact that the Commission has decided to look into the issue of the overrepresentation of racial and ethnic minority students and Limited English Proficient (LEP) students in special education classes throughout the country. The NAACP views this as a crucial civil rights and 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 a problem, and that the problem exists in all too many every school district in 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 deeply held 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 mis-placed in special education classes, and what can be done, always comes up from audience members. This has, sadly, been the case for decades and shows no sign of abating.

One especially grave concern in special education is the overrepresentation of black males in disability categories such as “educationally mentally retarded” (EMR) or “emotionally or behaviorally disordered” (ED). Some mislabeled students need no special education services whatsoever. In my written testimony here, I have summarized several examples to illustrate the problem and responses.

In my oral statement, however, I will focus less on whether or not there is a problem – most sensible people agree that there is -- 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 whole communities, and our Nation.

**Rhode Island**

For FFY 2003, in response to a request by the Office of Special Education Programs, U.S. Department of Education, the State used the risk ratio to analyze data which indicated significant disproportionality. At the State level, White children were 6.07 times more likely than all other children to be identified as autistic. Black, Latino and Asian/Pacific Islander children were underrepresented in many disability categories: Asian/Pacific Islander children

in 11 of 12 disability categories; Black children in 10 of 12 disability categories; and *Latino* children in 10 of the 12 disability categories. Black children were overrepresented in mental retardation and emotional disturbance, while *Latino* children were overrepresented in mental retardation. White children were overrepresented in 10 of 12 disability categories and underrepresented in mental retardation. American Indian/Alaska Native children were overrepresented in mental retardation, emotional disturbance and learning disabilities.

FFY 2003 data indicated White, Black or *Latino* children with disabilities were approaching equal representation outside of the general education classroom less than 21% of the time. However, Black, *Latino* and American Indian/Alaska Native children were still overrepresented outside of the general education classroom more than 60% of the time and in combined separate facilities (White children were underrepresented in this category).

Using risk ratios for State-level analysis and weighted risk ratios for district level analysis, the Rhode Island Department of Education (RIDE) reported that the data indicated statewide underrepresentation occurred more than overrepresentation, while pockets of overrepresentation existed for some disability categories and placements. Pockets of disproportionality also existed at the local levels. RIDE indicated that to address this disproportionality, it would continue to examine State and district policies and procedures for identifying students with disabilities for bias and will continue to provide support to districts for culturally competent, standards-based teaching. RIDE also promised to continue to provide guidance and professional development to districts on best practices for identifying and instructing English language learners who may also have disabilities and will incorporate district-level disproportionality analyses into its monitoring system.

RIDE's goal language now indicates, among other things, that its policies, procedures and practices for identification and placement of children with disabilities will be non-biased and that where patterns of disproportionality are evident, the State will provide continued guidance, technical assistance and professional development on appropriate pre-referral intervention services, the selection and use of non-biased evaluation instruments and materials, the selection and use of nonbiased evaluation criteria, and placement in the least restrictive environment. The State of Rhode Island will also continue to collaborate with the University of Rhode Island to analyze State- and district-level disproportionality data, continue to enhance and streamline its data collection systems to improve accurate placement and race/ethnicity reporting and will jointly examine other special education disproportionality data for future trends and themes.

### **Missouri**

The Missouri Department of Elementary & Secondary Education (DESE) also provided data to the Office of Special Education Programs (OSEP), U.S. Department of Education. FY 2003 data showed that Black children were 1.22 times more likely than all other children to receive special education and related services. DESE reported that while this was not significantly disproportionality, overrepresentation of Black children at the district level was part of the district-level analysis for monitoring. DESE further reported that underrepresentation was found for *Latino*, Asian and Native American children, but that this

underrepresentation was not a focus area, due to the small percentage of both children with disabilities and all children in these racial/ethnic categories in Missouri.

DESE reported that, after reviewing its statewide data, it was clear that the most significant areas of disproportionality were overrepresentation of Black children in special education and in disability categories of mental retardation (MR), emotional disturbance (ED) and specific learning disabilities (LD), in self-contained placements (outside the regular classroom more than 60 percent of the time), and in separate facilities.<sup>1</sup> DESE reported that other areas of disproportionality existed, but were either in racial/ethnic categories that represented less than three percent of Missouri's child population or were in low-incidence disability or placement categories.

The State indicated that its effort to address disproportionality fell under two areas: (1) technical assistance; and (2) corrective action. With regard to technical assistance, the State reported that, when special education consultants are working in districts with identified disproportionality, data analysis is required to include examination of the identified disproportionality and the policies, procedures and practices used in the identification and placement of children with disabilities to ensure consistency with special education regulations. If the review of the data indicates a need for revisions or additional training, DESE will use its State Improvement Grant to provide professional development. Also, efforts and effects for those districts (result of review, what revisions, if any, would be made) would be tracked. The State indicated, for example, that eight districts with identified disproportionality are currently working with special education consultants. DESE indicated that disproportionality information would be used as a factor in determining which districts would receive an on-site monitoring review. OSEP reviewed and accepted those State Strategies.

With regard to the corrective action taken, the State's monitoring data for FFY 2003 showed that two of six districts monitored were found out of compliance and that the noncompliance was being addressed through corrective action plans. The State explained that one of those agencies had an enrollment that was 95% White, and the agency had subsequently closed, so "any significant disproportionality disappeared." There is no indication what the State did to analyze or remediate any harm that may have befallen such students as a result of the disproportionality. Nor is there any indication that OSEP required the State to do so. The State reported that in the other district, all principals had been trained in various special education topics, including eligibility and that a compliance supervisor is working with the district to address disproportionality issues with them. DESE reported that corrective actions would include reviewing and, if necessary, revising policies and procedures in regards to identification and placement of students with disabilities.

### **Oklahoma**

The Oklahoma State Department of Education (OSDE), using FFY 2003 data provided to OSEP, reported that Black children in Oklahoma were 2.55 times more likely than all other

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<sup>1</sup> "Separate facilities" includes public and private residential facilities, public and private schools for children with disabilities and home/hospital environments.



children to receive special education and related services in the disability category of mental retardation. OSEP instructed the State to provide it with “data, analysis and targets addressing significant disproportionality related to identification.”<sup>2</sup>

### **Arkansas**

For FFY 2003, the Arkansas Department of Education reported to OSEP that:

- any district that reported 13.37 percent more Black children in special education than in general education was identified with possible disproportionality;
- in 2003-2004 Black children were twice as likely to be identified as having mental retardation as any other ethnic group in the State;
- the educational environment risk ratios revealed that in 2003-2004, Black children were four times more likely to be placed outside the regular classroom more than 21% of the instructional day than any other racial/ethnic group; and
- Black children were also slightly over-identified in the disability category of specific learning disability, with a risk ratio of 1.07.

The State reported strategies, proposed evidence of change, targets and timelines designed to ensure compliance as soon as possible, as required by OSEP’s December 2004 letter. Strategies included: 1) continued review of policies and procedures to determine if any might lead to disproportionate racial/ethnic representation in disability category or educational setting; 2) internal analysis of whether school choice and location of residential treatment facilities effect local education agency (LEA) disproportionality; and 3) incorporating a risk ratio analysis into the monitoring data for disability category, educational placement, graduation, dropout, and suspension/expulsion.

### **Florida**

In OSEP’s August 19, 2005 letter to the Florida Department of Education (FDE), OSEP noted that in August 2000 FDE and the Office for Civil Rights entered into a “partnership agreement” concerning the overrepresentation of Black children in the disability category of mental retardation (particularly educable mental handicapped) and a trend indicating the provision of special education and related services to Black children in more restrictive settings than for other racial/ethnic groups. FDE also noted an additional area of concern regarding the overrepresentation of Black children in the disability category of emotional disturbance.

FDE’s data showed that there was no change from previous years with regard to disproportionate representation. Additionally, improvement plans created through FDE’s continuous improvement monitoring had little impact. FDE described plans, including convening a team of individuals to address disproportionate representation to determine if progress is being made on new referrals to special education. FDE also agreed to continue to review policies and procedures in the area of disproportionate representation in districts identified for continuous improvement monitoring in the area of disproportionate

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<sup>2</sup> This was to be provided in the State’s Performance Plan, due December 2, 2005.

representation to ensure that such policies, procedures and practices are non-biased. OSEP was to review the State's data and analysis, due December 2, 2005, in this area.

To be clear, we have discussed Rhode Island, Oklahoma, Missouri, Arkansas and Florida *not* to pick on these states (they have plenty of company) but to offer them as snapshots, if you will, of a significant national problem.<sup>3</sup>

Let me say at this point that there is no question that students of all racial and ethnic backgrounds who are eligible for special education may get important help such as tutoring, extra teacher 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 insure 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 or 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 classrooms. 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 is 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

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<sup>3</sup> Black identification for mental retardation is pronounced in the South, and in wealthier districts, Black children, especially males, were more likely to be labeled mentally retarded. Further, the process of identification and placement is rife with subjectivity, with subjective decisions creeping into all elements of the evaluation process, including whom to test, what test to administer, when to use alternative tests and how to interpret the results. Civil Rights Project, *Racial Inequity in Special Education: Executive Summary for Federal Policy Makers 2* [http://www.civilrightsproject.ucla.edu/research/specialedIDEA\\_paper02.php](http://www.civilrightsproject.ucla.edu/research/specialedIDEA_paper02.php) .

to identify it, a child in Alaska may have no problem. A child who has spent his or her whole 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 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 the “stigma” of 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.

And so you have a whole 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 oftentimes 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. 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 age.

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 again for the opportunity to share our preliminary thoughts on this important issue. We look forward to working with you on this important issue.

**Peter Zamora: “Minorities in Special Education”**

On behalf of the Mexican American Legal Defense and Educational Fund (MALDEF), 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. MALDEF employs litigation, policy advocacy, and community education to improve educational opportunities for Latino students and families.

My testimony today will focus upon the misclassification of English language learners (ELLs) in special education. MALDEF is particularly concerned with the academic outcomes of the nation’s 5.5 million ELL students because nearly 80% of K-12 ELLs are Spanish-speaking Latinos.<sup>1</sup> ELLs constitute the fastest-growing subgroup of students in U.S. public schools, with an annual increase of about 10% and a 72% overall increase between 1992 and 2002.<sup>2</sup> Experts predict that one-quarter of the nation’s K-12 student population will be made up of ELLs by 2025.<sup>3</sup>

Despite common assumptions to the contrary, native-born U.S. citizens predominate in the ELL student population: 76% of elementary school and 56% of secondary school ELLs are U.S. citizens, and over one-half of the ELLs in public secondary schools are second- or third-generation citizens.<sup>4</sup> The stereotype of ELLs as foreign-born immigrants is, therefore, inaccurate: the substantial majority are, in fact, long-term ELLs whose academic and linguistic needs are not being met by our public education system.

ELLs typically underperform on nearly every measure of academic performance. On the 2005 National Assessment of Educational Progress, for example, only 29% of ELLs scored at or above the basic level in reading, compared with 75% of non-ELLs.<sup>5</sup> ELLs also drop out of schools at disproportionately high rates: Latino ELLs aged 16-19, for example, have a 59% school dropout rate.<sup>6</sup>

**ELL Misclassification in Special Education**

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 other ELLs without cognitive disabilities are improperly placed in special education programs that deny them full access to the standard academic curriculum.

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<sup>1</sup> See <http://www.nclb.gov/expert/fastfaq/4.html> (Source: U.S. Department of Education).

<sup>2</sup> See Keller-Allen, C., “English Language Learners with Disabilities: Identification and Other State Policies and Issues,” Alexandria, VA: National Association of State Directors of Special Education, (August 2006).

<sup>3</sup> See <http://www.ed.gov/nclb/methods/english/lepfactsheet.html> (Source: U.S. Department of Education).

<sup>4</sup> See Capps, R., Fix, M., Murray, J., Ost, J., Passel, J., & Herwanto, S., “The New Demography of America’s Schools: Immigration and the No Child Left Behind Act,” Washington, D.C.: The Urban Institute (2005), p18.

<sup>5</sup> National Center for Education Statistics, National Assessment of Educational Progress (NAEP): Reading and Mathematics, Washington, D.C.

<sup>6</sup> See Fry, R., “Hispanic Youths Dropping Out of Schools: Measuring the Problem,” Washington, D.C.: Pew Hispanic Center (2003), p. 8.

In 2001-02, there were an estimated 357,325 ELL students receiving special education services in U.S. public schools.<sup>7</sup> Researchers have estimated that as many as three-fourths of ELLs enrolled in special education programs are improperly placed.<sup>8</sup> Nationally, the percentage of ELL students in special education programs (9%) was smaller in 2001-02 than the percentage of all students in special education, both overall and within individual disability categories.<sup>9</sup>

Research demonstrates patterns of both overrepresentation and underrepresentation of ELLs in special education programs, with significant variance between states and districts.<sup>10</sup> In 2001-02, special education ELL students were enrolled in an estimated 4,744 public school districts in the U.S.<sup>11</sup> The majority of the special education ELL student population was enrolled in a relatively small number of districts, however.<sup>12</sup> Districts with 99 or fewer ELL students reported significantly higher percentages of special education ELLs (15.8% of all ELLs) than did districts with 100 or more ELL students (9.1% of all ELLs). Generally, the fewer ELLs that a district serves, the more likely the district is to classify ELLs as learning disabled. This may be because districts with smaller numbers of ELLs have less capacity to distinguish between low academic performance caused by linguistic barriers and poor performance caused by learning disabilities.

Teachers and school officials 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.<sup>13</sup> ELLs who struggle academically because of language barriers may share characteristics with students with disabilities. These shared features may include: making articulation and pronunciation errors; being distracted and having a short attention span, i.e. being frequently off task; reading below grade level, with low vocabulary and comprehension; and having low self esteem, shyness or anxiety.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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<sup>7</sup> Zehler, A., *et al.*, "Descriptive Study of Services to LEP Students and LEP Students with Disabilities" Washington, D.C: Center for Equity and Excellence in Education (2003), p. vii.

<sup>8</sup> See Sparks, S. "Educators struggle with ELL classification." *Education Daily*, V.40, 204. November 6, 2007, p 1.

<sup>9</sup> Zehler, *supra* note 7 at 23.

<sup>10</sup> Keller-Allen, *supra* note 2 at p.1.

<sup>11</sup> Zehler, *supra* note 7 at 24.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See Sparks, *supra* note 8 at 6.

<sup>15</sup> See Zehler, *supra* note 7 at 36.

<sup>16</sup> See, e.g., Macswan, J. and Rolstad, K., "How Language Proficiency Tests Mislead Us About Ability: Implications for English Language Learner Placement in Special Education," *Teachers College Record* V. 108, No. 11 (November 2006).

Assessments used to evaluate ELLs for disabilities often fail to identify the level of ability of the student in each language. Students with limited academic proficiency in both their first language (L1) and their second language (L2) are more likely to be misclassified as learning disabled.

### **Recommendations for Improvement**

The majority of ELLs who struggle academically do so not because of a learning disability but because they are taught by underqualified teachers who employ curricula and instructional strategies that do not meet ELLs' academic needs.<sup>17</sup> Significant improvements in the quality of academic services delivered to all ELLs will permit ELLs to develop academic skills at a rate comparable to their non-ELL peers and avoid the risk of misclassification and inappropriate placement in special education programs.

In addition, schools must increase their 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 for collaboration across ELL and special education programs.<sup>18</sup> The federal government and states must also support programs to encourage teachers and prospective teachers to develop expertise in this area through the credentialing process and/or professional development. Improving evaluation processes for ELLs is also critical to limiting the misclassification of ELLs in special education.

The U.S. Department of Education must ensure that schools comply with federal laws requiring public education systems to take affirmative steps to help ELL students overcome language barriers and to prevent the misclassification of students in special education programs.

Federal and state governments and institutions of higher education must encourage increased research into ELLs and special education. The limited research available in this area impedes the implementation of effective student evaluation processes and academic interventions.

Available research suggests that schools should implement pre-referral processes for ELLs to limit the misclassification of ELLs. Under this model, schools create "teacher assistance teams" (TATs) that examine the quality of instruction received by underperforming students and the validity of referral and assessment processes.<sup>19</sup> These teams are comprised of regular classroom teachers who meet to discuss problems in the special education evaluation process, brainstorm solutions, and develop action plans to correct problems that influence academic achievement. These teams would not involve special education personnel except when they are invited to serve as consultants to the committee. This structure emphasizes that the TAT is under the authority and is the responsibility of the regular education system and will address non-cognitive barriers to academic success for ELLs.

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<sup>17</sup> See Lesaux, N., "Building Consensus: Future Directions for Research on English Language Learners at Risk for Learning Difficulties," *Teachers College Record*, V.108, No. 11 (November 2006).

<sup>18</sup> See Keller-Allen, *supra* note 2 at 2.

<sup>19</sup> See Garcia, S. and Ortiz, A., "Preventing Inappropriate Referrals of Language Minority Students to Special Education," Silver Spring, MD: National Clearinghouse for Bilingual Education (June 1988).

Another promising practice to prevent the misclassification of ELLs is the “Responsiveness to Intervention” (RTI) model, 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 (e.g., class attendance, tardiness, truancy, suspensions, and disciplinary actions) for all students. The results of this monitoring determine which students need closer monitoring or an intervention. RTI imposes three tiers of interventions. During primary intervention (which accounts for 80% of all RTI interventions), students receive high-quality, research-based instruction by qualified staff in their general education setting. Secondary (15% of all RTI interventions) and tertiary intervention (5% of RTI interventions) requires school staff to continuously monitor individual student performance and implement interventions targeted to each student’s particular linguistic and/or cognitive needs. RTI is a valuable model for the schools because of it both successfully identifies students with learning disabilities and addresses the academic success of all students.

### **Conclusion**

Under- and overrepresentation of ELLs in special education programs hinders the academic progress of many of the nation’s 5.5 million English language learners in K-12 public schools. 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 as learning disabled and are denied appropriate academic services and access to a rigorous standard curriculum.

The misclassification of ELLs is caused largely by the failure to distinguish between academic deficiencies attributable to language barriers and those caused by learning 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 special education referrals. Research into the appropriate evaluation of ELLs for special education is also greatly needed. Further, increased capacity at the school and district levels to ensure the appropriate evaluation of ELLs is also necessary.



***William H. Hurd: “Racial Discrepancies in Special Education”***

As a litigator in the area of education, I devote a substantial portion of my practice to representing parents of children with disabilities in disputes with school systems. At Troutman Sanders, my practice has included representing parents in IEP Team meetings, in administrative hearings, in federal district courts, in federal courts of appeal and, in one case, in the United States Supreme Court. Based on this experience—and on conversations with other special education attorneys—I have a perspective on the problems confronting minorities that may be somewhat different from the perspective of others here this morning. And while the problems I see as a litigator do not account for all of the numerical anomalies that are shown by the studies, I do believe that they account for a significant part of them.

As an introduction to these problems, let me briefly review how the special education system works in terms of its basic procedures. Under the Individuals with Disabilities Education Act (“IDEA”), parents and school systems are supposed to be equal partners in designing individualized education programs (“IEPs”) for children with disabilities. This is obviously a very different model than the one that the public schools typically enjoy, where the schools make the decisions and where the legal rights of parents to complain are very, very limited. And, for many public school educators, the special education model is not a model that they like.

Under the IDEA, parents and school system employees and, sometimes, others as well, form what is called the IEP Team. The IEP Team is supposed to decide—by consensus—whether the child has a disability and, if so, what the disability is, and what goals should be set for the child and what services are needed to meet those goals.

In most cases, the IEP Team reaches a consensus. Where a consensus has been reached, it may be because the parents are truly in agreement with the school. Or it may be because the parents believe that the school employees are the experts and have the child’s best interests at heart. Or it may be because the parents feel, for a variety of reasons, they have no real choice but to go along.

But what the law says is that, when the parents and the school system reach an impasse, then the parents have the right to ask for a hearing before a neutral hearing officer, where they can try to convince the hearing officer that what the school has proposed is inappropriate and that their proposal should be adopted instead. These administrative hearings—which are called “due process hearings”—are supposed to be relatively informal. But, as one special education lawyer has remarked, they involve all the emotional turmoil of a domestic relations dispute combined with the battle of experts in a medical malpractice case. When they are the ones asking for the hearing, the parents have the burden of proof. If they win, they can seek reimbursement for their attorney’s fees, but not for their expert witness fees. And so, even where they win, they are going to wind up having to pay.

And, then there are the appeals that lie ahead. The losing side—either the parents or the school system—may ask to have the case reviewed by a state or federal trial court, with

appeals going from there up the line, all the way, in some case, to the United States Supreme Court.

Now, what does this mean for minorities? And, and what does it mean in light of the fact that Americans of African or Hispanic ancestry compose a disproportionate number of people with lower socio-economic status? Based on my experience, what it means is that, as a group, these minorities are at a disadvantage at every step in the process:

- Minority parents are less likely to have their own independent medical, psychological or educational evaluations and more likely to depend on the evaluations conducted by the school system.
- Minority parents are less likely to have the economic resources to retain lawyers and the experts necessary to make a credible challenge to the school system in a due process hearing.
- Minority parents are less likely to be members of parent support groups where information can be exchanged and guidance obtained in 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 with the percentage of special education students who are minorities. For now, I would point out that, in 2003, the General Accounting Office reported a “significant relationship” between household income and hearing requests. Not surprisingly, households with lower income are significantly less likely to request a due process hearing than households with higher income.<sup>1</sup> And, when differences in household income are correlated with race, the result is going to be a substantial under-representation of minorities in the due process arena.

When a school system sits across the table from parents at an IEP meeting, the school system employees try to figure out pretty quickly whether the parents are going to be compliant and will take what they are offered, or whether they are the sort of parents who are going to cause problems if the school system refuses to compromise and, if so, how far they are likely to push.

Now, to understand the dynamics of this process, it is important to recognize that some school systems do not fully embrace the duties that the IDEA places on them. This is, to some extent, a continuation of the old attitude that the education of children with disabilities is simply not the job of the public schools. 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 are quick to tell you, for example, that, when the law was passed 30 years ago, Congress promised to fund 40 percent of the costs, and that the federal funding level

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<sup>1</sup> GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) at 15 n. 22.

today is closer to 18 percent.<sup>2</sup> State and local funding makes up the balance of the costs of special education and, inevitably, paying these costs cuts into the ability of the public schools to offer programs designed for the population of typical students.

Special education advocates are concerned that school officials often cut corners and offer children something less than what the law requires in order to keep within the budgetary limits they have been allotted for special education. As one court observed: “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.”<sup>3</sup> 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 needs can have a direct affect on the disability classification given to a 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. This is because programs dealing with mental retardation and emotional problems are typically less expensive than autism 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 that the child will spend more years in special education. Moreover, as the child grows older, the presence of unresolved special education needs creates the risk that the child will lose self-esteem and will suffer from teasing and bullying from his peers, with resulting emotional problems that also may become disability issues.

In a nutshell, the special education systems works best when two things occur in combination: 1) when parents actually *have* the ability to assert themselves and advocate for their child, and 2) when school systems *recognize* that parents have those abilities. Now, tying this idea to race, let me offer three final observations.

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

Second, 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 social-economic factors and that also accounts for regional differences, for urban-suburban-rural differences and for other salient differences as well. The Commission may very well want to consider undertaking such a study.

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<sup>2</sup> See, e.g., K. Mehfood, “Basic Special Education Law in Virginia,” *Journal of Law and Local Government*, Virginia State Bar, Vol. XVII, No. 1 (Summer 2007), p. 9.

<sup>3</sup> *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864–65 (6th Cir. 2004).

Third, to the extent that racial attitudes can be isolated and quantified, it does not necessarily mean that the racial attitude at work is one of deliberate racial animus. It may also be a kind of reflexive racial stereotyping. In any special education case, a major goal of the school system is to handle the child's case in a way that keeps costs to a minimum. Regardless of the race of the school system employees, if they are dealing with a black family, they may make the assumption—consciously or subconsciously—that the parents are less likely to present a problem for them than are white parents. Being predisposed to believe that the black family would be willing to accept less, the school system may offer less. And, unless that family has the experience—or the lawyers—to assert themselves vigorously, they are likely to end up with less. And that basic fact pattern, multiplied many times over, can produce some of the disparate treatment that is seen in some of the numbers that have been called to the Commission's attention.

## **Public Comments**

In addition to the written and oral testimony presented at the briefing, one organization and an individual contributed statements to the Commission for inclusion in the public record.

### **Charlotte Greenberg, President of the Broward Coalition, Inc.**

Ms. Greenberg submitted documents showing an analysis of the Broward County, Florida, student population by racial and special education categories. She discussed her conclusion that racial disparities in educationally mentally handicapped (EMH), trainable mentally handicapped (TMH) and gifted categories still exist in Broward County, compared to the racial percentages of students in Broward County as a whole. Ms. Greenberg is concerned, not that there are some disparities on a proportional basis, but by the large and consistent size of the disparities. She recommended that more research be done to determine whether the disparities were due to better diagnoses, incorrect diagnoses, or inability to read because of the “whole-language” method of teaching reading.

For informational purposes, Ms. Greenberg also sent a copy of a research brief discussing racial disparities in AP test-taking and score results, which she notes is outside the scope of the Commission’s briefing but submits as a suggestion for future Commission discussion.

### **Unidentified Bilingual Education Teacher in Massachusetts**

This public comment expressed concern over misidentification of minorities and other students in special education, as a result of teachers’ inability and/or unwillingness to be held responsible for their students’ inadequate academic performance. The writer views the motivation for such over-identification as a consequence of “Title I” (likely, the No Child Left Behind Act of 2001). In this regard, the writer stated that her school is in violation of the applicable laws.

## **Other Submissions**

The commission also received public comments pertaining to a news media summary. They are not summarized here because they were not responding to materials actually published by the Commission.

- Larry Schlack, consultant
- Kathy Macpherson
- Berry Wall, former educational diagnostician
- Lew Romano, Ed.D.
- Anonymous



## Statements of Commissioners

### *Gail Heriot*

Contemporary thinking about race can be disturbingly simplistic. But if anything can remind us of the complexity of racial issues, it is the subject of this briefing report—racial minorities in special education.

There is little dispute that African-American and American-Indian children are assigned to special education programs more often than white and Hispanic children and that Asian-American children are assigned less often.<sup>1</sup> This is true for programs for the mentally retarded, the learning disabled and the emotionally disturbed. Any temptation to blame this entirely on racial discrimination, however, should be resisted. The situation is considerably more complex than such a conclusion would suggest. But the opposite temptation—to insist that discrimination can be ruled out as a direct factor entirely—is probably also a mistake. Based on the evidence presented to the Commission, it is possible that racial discrimination of one sort or another plays a direct, though limited, role in the overall story.

Untangling the complex web of cause and effect is a daunting task. The number of contributing factors is no doubt quite large—too large to catalog here. For example, for whatever reason, African American infants on average weigh less at birth than white infants,<sup>2</sup> and low birth weight is associated with increased risk for mental retardation and other developmental and behavioral disabilities.<sup>3</sup> It is unclear what causes the racial gap in birth weight, but one factor may be illegal drug use rates,<sup>4</sup> which tend to be somewhat higher for African Americans and American Indians than for whites and Asian Americans and which are associated with low birth weights and other adverse outcomes for the children of users.<sup>5</sup> Another factor may be smoking rates, which have similar associations.<sup>6</sup>

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<sup>1</sup> See generally, Briefing Transcript. See also Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1400 *et seq.*, which was re-authorized with amendment by Congress and signed into law by President Bush on Dec. 3, 2004.

<sup>2</sup> Barbara Starfield, Sam Shapiro, Judith Weiss, Kung-Lee Liang, Knut Ra, David Paige, & Xiaobin Wang, Race, Family Income and Low Birth Weight, 134 *Am. J. Epidemiology* 1167 (1991).

<sup>3</sup> Cynthia A. Mervis, Pierre Decoufle, Catherine C. Murphy, & Marshallynn Yeargin-Allsopp, Low Birthweight and the Risk for Mental Retardation Later in Childhood, 2 *Paediatric and Perinatal Epidemiology* 455 (April 7, 2008), available at <http://www3.interscience.wiley.com/journal/119961971/abstract?CRETRY=1&SRETRY=0>; Donald H. Sykes, Elizabeth A. Hoy, John M. Bill, B. Garth McClure, Henry L. Halliday, & Mark McC. Reid, Behavioural Adjustment in School of Very Low Birthweight Children, 38 *J. Child Psych. & Psychiatry* 315 (Dec. 7, 2006), available at <http://www3.interscience.wiley.com/journal/119143872/abstract>; Rachel Nonkin Avchen, Keith G. Scott & Craig A. Mason, Birth Weight and School-Age Disabilities: A Population-Based Study, 154 *Am. J. Epidemiology* 895 (2001), available at <http://aje.oxfordjournals.org/cgi/content/full/154/10/895>.

<sup>4</sup> See Seetha Shankaran, Abhik Das, Charles R. Bauer, Henrietta S. Bada, Barry Lester, Linda L. Wright, and Vincent Smeriglio, Association Between Patterns of Maternal Substance Use and Infant Birth Weight, Length and Head Circumference, 114 *Pediatrics* e226 (August 2004), available at <http://pediatrics.aappublications.org/cgi/content/full/114/2/e226>.

<sup>5</sup> See Office of Applied Studies, Substance Abuse and Mental Health Services Administration, Illicit Drug Use by Race/Ethnicity in Metropolitan and Non-Metropolitan Counties: 2004 and 2005, *The National Survey on*

More broadly, the cycle of poverty and out-of-wedlock birth probably plays an important role in the comparatively high rates of special education assignment for African-American and American-Indian children. And if it does, the problem could grow. Back in 1960, only 5.3% of American live births were to unwed mothers—2.3% of live births to whites and 23% of live births to blacks or African Americans. By 2005, the overall proportion had skyrocketed to 36.9%. The rate for non-Hispanic whites is at 25.3%, for non-Hispanic blacks or African Americans at 69.9%, American Indians or Alaska Natives at 63.5%, for Asians or Pacific Islanders at 16.2%, and for Hispanics at 48.0%.<sup>7</sup>

There are millions of single, divorced and widowed parents who have done wonders for their children, but in general they could have done even more with a partner. One adult generally cannot do as much for a child as two, and no amount of wishful thinking will change this. If a single mother is not already a high-earner at the time of her child's birth, it is difficult to see how she can care for the child at home, earn a living for herself and her child and receive the education and training she will need to assure a middle class life-style and education for her child in the future. There are only 24 hours in the day.

If African-American and American-Indian women have the highest rates of out-of-wedlock birth, it is unsurprising that they will have higher than average poverty rates. And since poverty is associated with education problems no matter what the race of the children, it is not remarkable that African-American and American-Indian children will therefore have higher than average rates of assignment to special education. While racial discrimination probably played a role in creating the culture of poverty and out-of-wedlock birth in the first place, it is not clear that acknowledging this moves us closer to a solution to the problem. Indeed, emphasizing discrimination may make it more difficult for young women and girls to take control of their own lives and resist pressure to continue the cycle.

Is it possible that race discrimination also plays a more direct and immediate role in the differing rates of special education placement? Yes, it is. But if it does, it is probably not the

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*Drug Use and Health Report* (June 21, 2007), available at <http://ncadistore.samhsa.gov/catalog/productDetails.aspx?ProductID=17703>. According to this report, among persons aged 12 or older, 3.1% of Asians, 7.4% of Hispanics, 8.1% of whites, 9.2% of blacks or African Americans, 12.5% of Native Hawaiians or other Pacific Islanders, 12.6% of American Indians/Alaska Natives and 12.7% of those who claim two or more races reported that they had used an illicit drug in the last month. The difference between whites and black or African Americans in rates of usage of illegal drugs is somewhat understated in these numbers, because the numbers include the illicit use of prescription drugs (for which the white rates are higher than the black or African American rates).

<sup>6</sup> See Kaiser Family Foundation, *Smoking Rates for Adults by Race/Ethnicity 2007*, available at <http://www.statehealthfacts.org/comparetable.jsp?ind=82&cat=2>. That survey, which used data collected by the Centers for Disease Control and Prevention in 2007, found that 19.7% of whites, 21.5% of blacks, 16.2% of Hispanics, 11% of Asians/Pacific Islanders, 34.9% of American Indians/Alaska Natives and 23.1% of Other/Multi-Racial reported that they currently smoke every day or on some days.

<sup>7</sup> The differences in out-of-wedlock birth rate among racial/ethnic subgroups can also be quite wide. For example, among Asian American/Pacific Islanders in 2002, the overall percentage of live births to unwed mothers was 14.9%. But the among Chinese Americans, the rate was only 9%, while for Filipino Americans it was 20.0% and for Hawaiians it was 50.4%. See National Center for Health Statistics, Centers for Disease Control and Prevention, *Health, United States, 2007 With Chartbook on Trends in the Health of Americans*, tbl. 10 at 143, available at [http://www.cdc.gov/nchs/data/07.pdf#010](http://www.cdc.gov/nchs/data/hus/07.pdf#010).



kind of race discrimination that is motivated by ill will. Much more likely, it is the unthinking kind. As William H. Hurd, a partner at Troutman Sanders LLP, described in his testimony before the Commission, well-educated, middle-class parents of special needs children are often squeaky wheels. They are more likely to take the lead in assessing whether their child would benefit from special education and what form that special education should take than are poorer, less well-educated, and often single parents. If they disagree with the recommendations of the school district's professionals, they are unlikely to remain silent. If necessary, many are in a position to hire a lawyer to ensure they are heard. In contrast, the children of parents who are poor and under-educated may defer to the professionals employed by the school district. Since they are more likely to be single parents, they may simply be overwhelmed with other problems.

Should it surprise anyone that special education professionals learn that they must carefully think through their plans for the children of highly-motivated parents? Should it surprise anyone that without that parental input and pressure, on the whole, these professionals devote less time thinking and re-thinking about what would be best for the child? When anyone spends less time thinking about an issue, they are more likely to engage in sloppy thinking. Sloppy thinking can lead to the use of stereotypes. Sometimes those stereotypes will be racial.

The appropriate conclusion to all this, however, is very uncertain. Although the Department of Education has recently issued regulations that require states to keep a close eye on racial disproportionality, it is unclear what effect these regulations will have on the ground. If they cause state education officials to err on the side of not putting African-American and American-Indian students into special education programs in which they are "over-represented," it is unclear whether this will be beneficial. If there really are too many African-American and American-Indian students enrolled in special education programs and these students would fare better outside those programs, such a reaction will have helped to solve the problem. The wrongly placed students will be placed entirely in the mainstream classroom, and whatever stigma that is associated with special education placement will be removed. But it has not yet been proven that too many African-American and American-Indian students are enrolled in special education programs or that large numbers of their assignments are a mistake. Special education may in fact be in the students' best interests.

The problem may instead be that too few Hispanic, white or Asian American children are being placed into special education. Alternatively, there may be no problem with the assignment process at all. Despite the racial disparities, it may be that generally the right students are being assigned to the right programs and that there is no racial bias at work. It is even possible that racially disproportionate special education assignments today will correct problems and hence prevent racially disproportionate outcomes tomorrow.

Based on the evidence it has before it, the Department of Education may be right to require states to keep a close eye on racial disproportionality in special education assignments. But the law is always ham-fisted when it tries to deal with complex and subtle problems. Department of Education officials should keep a close eye on the effects of its new

regulations and be ever mindful of their potential to do mischief. The maxim of physicians—First Do No Harm—should be also the maxim of careful education officials.

**Arlan D. Melendez**

Erroneous placement of minority children into special education programs is a serious, under-reported, and under-researched problem. In many cases, appropriate classification also may be complicated by students' limited English language proficiency. This report provides an important starting place for those wishing to better understand the nature of the problem and possible solutions.

Yet, this briefing report contains no findings or recommendations on how to redress the problem. Unlike virtually every other issued by the Commission since its 2004 change in leadership, the Commission majority decided to simply report what briefing speakers said. This is a good thing. For years I have urged the Commission's conservative members to abandon their practice of issuing findings and recommendations in reports like this where the Commission hasn't done independent research. A two-hour briefing, as was the basis of this report, can be a good platform to raise important civil rights issues. However, no follow-up research and investigation was done by Commission staff on this (or other recent briefing topics) to ensure that the record is complete and checked for accuracy. Such Commission briefings are not a sufficient basis for issuing findings and recommendations to the President, Congress, and the American people.

My colleagues' recognition in this report that the agency did not conduct the independent fact-finding necessary for the topic begs the question—why didn't the Commission do more?

The answer is simple and has nothing to do with the important problem of minority students' placement rates in special education programs. As currently constituted, the Commission cannot do more. Poor management decisions and budgetary constraints have left our national office staff currently unable to complete more than one or two significant research or investigatory projects each year. Our regional office staff are even more limited. With staff reorganization and improved procedures, the agency's capacity to do quality, independent fact-finding could be improved. However, at present, the U.S. Commission on Civil Rights is not meeting its full statutory mission to report on denials of equal protection. The agency's reporting process is broken.

I hope researchers and concerned government bodies will take up the important questions and points raised in this briefing. Also, I hope that changes in the Commission soon will restore its will and capacity to report on critical civil rights issues like this.

**Abigail Thernstrom**

I think this is, on the whole, a good report, and thank the staff for its hard work.

I do have, however, a few additional observations of my own.

1. I think the report could have used a brief history of the evolution of special education law. The law—as is so often the case—has had both intended and unintended consequences. Children have been helped and children have been hurt. This is a very complicated subject, as the Commission’s report makes clear. The potential benefits are generally understood and rightly applauded; those who need special educational attention should certainly get it. But there is a downside to some aspects of special education law—mostly neglected in this report. I focus in the remarks that follow on the problem of legally protected disruptive kids in regular classrooms.

Federal protection for special needs youth, by now extensive and very expensive, got a quiet and innocuous start in 1966, when Congress added Title VI to the Elementary and Secondary Education Act (ESEA), passed the year before. The amendment was principally an appropriations measure, providing money to the states for plans designed “to meet the special educational and related needs of handicapped children.” “Handicapped” was a term defined to include the “seriously emotionally disturbed”—the decision that, in time, had an important impact on the ability of schools to discipline children whose behavior turned classrooms into chaotic scenes.

The ESEA was further altered in 1970, with a package of amendments known as the Education of the Handicapped Act (EHA). The statute was still primarily a funding measure, and states retained considerable power to shape their own programs. But that power began to erode in the early 1970s, in part as a consequence of judicial decisions that made education an entitlement “which must be made available to all on equal terms.”

Those decisions made education of the “disabled” a basic civil right. “Disabled” was a category that included children with behavioral and emotional problems that ranged from the merely hyperactive to the positively violent. Congress soon ratified the views from the bench, passing four groundbreaking bills in the mid-1970s. The first two added (and subsequently amended) Section 504 of the Rehabilitation Act of 1973, which gave broad antidiscrimination protection to the handicapped in all federally funded programs. The third further altered the Elementary and Secondary Education Act (ESEA) by incorporating language that referred to providing “full educational opportunities for all handicapped children.” Among the rights the statute ensured was an entitlement to due process hearings if the school proposed a change to an emotionally “disabled” child’s classroom placement. Moreover, unless such children were totally unable to learn even with extraordinary supplemental help, they were entitled to instruction in a “regular education environment.”

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), renamed the Individuals with Disabilities Education Act (IDEA) in 1990. The 1975 legislation directed districts to locate and properly identify all disabled children and

appropriated substantial federal funds to help states meet their special education needs. But it also spoke of the “unique needs” of children with disabilities and the need to provide extensive protection for their procedural rights. Parents thus acquired a role at every step in the evaluation process, and became entitled to an impartial hearing on their child’s educational placement. Moreover, parents or the district could pursue the matter further in a state or federal district court. As the Supreme Court made clear in a 1988 decision, the emotionally disturbed child could not be removed for longer than ten days. After that brief expulsion, even the disruptive or even dangerous child was entitled to “stay put”—to remain in the classroom to which he or she had been assigned. Unless, that is, the unacceptable conduct was totally unrelated to the student’s “disability.” Or unless the hearing officer or a court approved another placement, or the parties agreed to one.

IDEA remains the main federal statute that governs the educational rights of the special needs students. That category continues to include those with a “serious emotional disturbance.” The phrase covers a range of children, because the definition of “serious emotional disturbance” is vague and capacious. “An inability to build or maintain satisfactory interpersonal relationships with peers and teachers,” for instance, is one sign of disability, although what constitutes a “satisfactory” relationship is never spelled out. And while students who are merely “socially maladjusted” are not protected by the act, the line between “maladjusted” and “disturbed” is never drawn. The statutorily mandated multidisciplinary team that evaluates a child must fill in the blanks.

As a consequence, the evaluation may label as emotionally “disabled” the child who was once called “bad” or “wild” or “difficult.” Antisocial acts have become expressions of an illness. Children who are, say, blind or in a wheelchair unquestionably need help, not discipline. But while the analogy between the wheelchair-bound child and one who is selling drugs or habitually starting fights is right, it is not entirely so. My concern here is with the regular students eager and ready to learn in a classroom in which just a handful of kids can make schooling extremely difficult.

The central mandate of IDEA flows from the “illness” paradigm. Districts must create an individualized educational program (IEP) for all children with disabilities (emotional as well as physical), and to the maximum extent appropriate, they must be educated in regular classrooms. Exceptions can be made “only when the nature or the severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.”

Unlike regular pupils, special education students with severe disciplinary problems cannot be expelled or subjected to lengthy suspension if their behavior is at least in part related to their disability. Thus, the child labeled “emotionally disturbed” who throws a desk at a teacher cannot be kicked out of the classroom permanently unless a psychologist or other member of his evaluative team sees no connection between his violence and his “disability.” Removing a special education student from a classroom for more than ten days remains procedurally very difficult, although the original statute was modified to allow schools to provide an alternative placement for up to forty-five days when a student shows up with drugs or a weapon, or a hearing officer has determined that the student is dangerous.

The elaborate procedural protections embedded in IDEA mean, as the *New York Times* noted in 1997, that every school “has a story about the problems of disciplining children with disabilities—the wild kindergartner who disrupts classes for everyone else but cannot legally be removed from class, or the gang of youngsters caught selling drugs in which all are expelled except the one diagnosed with a disability.”<sup>1</sup> It’s long been an issue of central concern to the American Federation of Teachers (AFT). “Many [schools] have become afraid of litigation and financial penalties,” Marcia Reback, an AFT spokesman, testified at U.S. Senate subcommittee hearing in July 1995.<sup>2</sup>

If schools try to go to bat for the regular students whose education is disrupted by troublemakers, they risk, at best, endless hours compiling a proper paper trail, and, at worst, defeat in a courtroom many years down the road, with huge legal bills on their hands. And yet the education of students who are ready to learn must be severely compromised when one of their peers repeatedly screams at a teacher, while another rolls around on the floor and eats paper clips and staples. There is the problem of teachers who have become risk-averse to litigation. In addition, some report that those who cannot punish the “emotionally disturbed” child are often reluctant to put their foot down with students who are “socially maladjusted” but have not been classified as positively disabled. And even as schools feel compelled to have different rules for different youngsters, another problem arises: what the AFT has called the “battered teacher syndrome”—the belief that being pummeled, bitten, spit at, pushed, and assaulted comes with the job.<sup>3</sup>

When the first version of IDEA was passed in 1975, “nobody envisioned...the kinds of discipline problems that are on the table now,” Michael Resnick, associate executive director of the National School Boards Association, said in 1997. “And no one anticipated how much the culture would change and how big an issue discipline would become in the schools,” he went on.<sup>4</sup>

IDEA made the long-term suspension or expulsion of an emotionally disturbed child exceedingly difficult, and judicial decisions ensured due process rights for all students.<sup>5</sup> By now, the power of the federal courts and Congress, it is safe to say, is felt in every classroom. Violence and just plain disorder in the society and the schools have increased since sometime in the 1960s. The courts haven’t helped; Congress hasn’t helped. But the larger problem is uncertainty and disagreement over a basic normative issue, as I have suggested above. To what extent can schools legitimately insist that all students conform to certain behavioral norms? And in what ways can they act when disruptive students destroy the possibility of education? By the late 1960s, consensus on the answers to such questions had broken down. And to this day, the issue remains unresolved.

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<sup>1</sup> Peter Appelbome, “Push for School Safety Led to New Rules on Discipline,” *New York Times*, May 14, 1997, p. B8.

<sup>2</sup> Statement of Marcia Reback, President, Rhode Island Federation of Teachers to the Labor and Human Resources Committee, Subcommittee on Disability Policy, U.S. Senate, July 11, 1995.

<sup>3</sup> Ibid.

<sup>4</sup> “Congress Revises Rules on Teaching Disabled,” *The Providence Journal Bulletin*, May 15, 1997, 1A.

<sup>5</sup> See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

Discipline problems are most pervasive in inner-city schools where the academic performance of the students is also most worrisome. These are settings with high numbers of impoverished minority youth, and as is so often the case, those who already have the least get the short end of the educational stick. Order in the schools is an essential ingredient in the drive for racial equality. Education is the key to economic opportunity; if a safe environment for learning cannot be secured, already deprived kids will pay a stiff, life-long price.

2. Special education is expensive schooling; the per pupil cost is at least double that of regular students.<sup>6</sup> As Hilary Shelton pointed out, for some students, it is also “segregated”—although especially for black kids. Studies often refer to “minority” children, but in fact the central issue—only hinted at in the Commission report—is the disproportionately high number of black children in the programs. The executive summary of a 1997 Harvard Civil Rights Project conference findings noted, black children were “almost three times more likely” than those who were white “to be labeled ‘mentally retarded,’” and were classified as emotionally disturbed nearly twice as often.<sup>7</sup> As those same conference findings made clear, neither Hispanics nor Asians have more than their share of students classified as disabled. Hispanics are quite strongly *underrepresented* in the categories “mental retardation” and “emotional disturbance,” and Asians dramatically *underrepresented* across the board.

Civil rights advocacy groups have been strong supporters of special education. And those deeply concerned about the education of disadvantaged students have welcomed its steady and dramatic expansion over a quarter of a century.<sup>8</sup> But, in actuality, their message has actually been quite equivocal. They have objected to the disparate impact of special education programs while simultaneously seeking to expand them. I am open to the argument that special education classifications are often not in the best academic interest of black students—particularly when they contribute to racial isolation. This is a critically important point that was not discussed with enough depth at this briefing.

3. As I stated at the briefing, the disproportionately high number of black children, particularly, in certain special education categories does not (in my view) generally reflect racism by school personnel. It’s not out of the realm of possibility that in particular schools or districts racial stereotyping is at work, but low-income children, whatever their color, generally come to school less prepared to learn than those who are more advantaged. Moreover, there are not fewer special education placements in districts controlled by African Americans, nor are black teachers less likely to classify minority students as SPED.

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<sup>6</sup> See a 2002 study by the United States General Accounting Office, *Per Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area*, GAO-03-234 (Washington, D.C.: 2002), 37 for the estimate that special students cost school districts twice as much on average as regular students.

<sup>7</sup> Harvard Civil Rights Project, “Executive Summary: Conference on Minority Issues in Special Education,” 1; at the time it was issued, it was available at [www.law.harvard.edu/civilrights](http://www.law.harvard.edu/civilrights).

<sup>8</sup> Between 1976 and 2000, the proportion of students found eligible increased 65 percent—from eight percent of the student population to 13 percent; *Digest of Education Statistics: 2001*, 66. The cost has gone up even more; Wade Horn and Douglas Tynan, “Revamping Special Education,” *Public Interest*, Summer 2001.

In the above paragraph, I have referred to the “disproportionately high number of black children” assigned to special education. Looking at such disparities is important; numbers can suggest problems that require further inquiry and explanation. But the terms “disproportion,” “overrepresentation,” or “underrepresentation” are too often used as shorthand for racial discrimination at work. Discrimination requires evidence beyond the data, which are only the beginning of an inquiry. Moreover, proportionality is not the obvious measure—in education, employment, or contracting—of equal opportunity; almost all the violinists in a school orchestra may be Asian, but that is not because doors are closed to members of other groups.

The higher number of black students in some SPED categories should certainly ring bells of alarm, but not because the policies that place them there are generally implemented by racially callous teachers and other school authorities, but because most of us believe the proper intervention can stop that train before it starts.

On the other hand, it is important to note that while schools can play an important role in making sure children are reading by third grade and in other ways help keep them on a regular education track, the greatest influence on a child is his or her family. It is important that black leaders, especially, talk to black audiences about the role they can play in making sure their children are part of learning culture from a very early age. Some of us hope that President Obama and his family might serve as a role model, illustrating that many doors of opportunity will be wide open to those who acquire skills and knowledge—*regardless* of the color of their skin.

4. Special education policies need to be changed. The financial incentives for schools to place children in special education should be removed. Several panelists pointedly referred to this perverse “bounty” system. As Ladner pointed out, Florida’s “McKay Scholarships” programs and other such strategies have shown some success. In Florida, if a parent is dissatisfied with the school’s provision of special education services to their child, parents must be given the option of transferring the SPED money that the school would have spent to a qualified educational service provider. Such programs turn financial incentives on their head and, in theory, give school systems an incentive to increase the effectiveness of their special ed programs.

What will give schools an incentive, however, to reduce the high administrative costs associated with SPED? As one former special education teacher has put it, “there are extra degreed people on payroll, school psychologists, speech paths [pathologists], social workers, occupational therapists, and physical therapists all involved above and beyond the classroom teacher. So if you add all those salaries into the picture then, it is a lot of money for a small group of students per school building.”<sup>9</sup>

District of Columbia schools chancellor Michelle Rhee is determined to overhaul special education in the District, where the costs (as elsewhere) are exorbitant, inevitably resulting in reduced availability of funds for other students. Chancellor Rhee has a new proposal: offer,

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<sup>9</sup> Private communication, Nov. 30, 2008.



in effect, individual learning plans for all students, whatever their academic level. As the *Washington Post* describes it, “she wants to treat all students in the differentiated instruction classrooms much like special education students, with each getting an education plan outlining how teachers would address the child’s specific strengths, weaknesses and learning style.”<sup>10</sup> Rhee’s plan would apply to regular students, gifted students, and special ed students, *all* of whom would be taught in the same classroom.

Nothing ventured, nothing gained. It’s at least an interesting, creative idea.

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<sup>10</sup> V. Dion Haynes, “Rhee Wants School to Serve as “Differentiated Learning” Lab,” *Washington Post*, Feb. 19, 2008, B02.

***Michael Yaki***

I join in Commissioner Melendez's statement, and wish to add a few points of my own.

Since my tenure at the Commission, I have argued that briefings were, by their very nature, just that—short, limited presentations on issues that can often highlight the key arguments for and against an issue. To that end, both Commissioner Melendez and I have argued vociferously against briefing “reports” that contain findings and recommendations of the Commission, as these reports by their very nature do not and cannot explore the depths of an issue to the extent that we can safely and legitimately opine on an issue.

The fact that a report of this nature will not contain findings and recommendations is in keeping with the philosophy argued by Commissioner Melendez and myself. However, as a Commission we should not pick and choose which briefings should be treated in a similar way. We should adopt a transparent rule that applies to all briefings. At most, briefings should raise questions for further inquiry either by the Commission or the appropriate federal, state, or local agency with jurisdiction over the issue at question.

Our role as a Commission has been to be the watchdog of civil rights for the federal government, indeed, for the nation. It is a role that we are uniquely suited for should we choose to exercise it. There are many important issues, some new, some old that continue to vex our nation's quest to become a more perfect union that guarantees liberty and quality for all. We must rededicate ourselves to this mission, rather than engage in partisan bickering—instead of bipartisan leadership—that this Commission and this country deserves.

The question facing many who care about civil rights in this country is whether this Commission has the ability to do that in its current configuration and authorization, or whether it needs new statutory authority and guidance to redirect its mission. Unless we, as Commissioners, choose to do it ourselves, then it may be taken away from us—with no guarantees that any new 2.0 iteration will be any more successful or even pass legislative muster.

Both Commissioner Melendez and I are prepared to work in a bipartisan manner to revitalize this Commission. Our question, which we cannot answer, is whether our colleagues are similarly motivated. For the sake of those in our country who still experience discrimination in their lives, their work, their school, who need the laser focus of a fully engaged Commission on Civil Rights, we hope the answer is in the affirmative.

## Speaker Biographies

### **Stephanie J. Monroe**

In 2005, President George W. Bush nominated Stephanie J. Monroe as Assistant Secretary for Civil Rights in the U.S. Department of Education. She is Secretary Spellings' primary adviser on civil rights and is responsible for enforcing U.S. civil rights laws as they pertain to education. She supervises proactive enforcement activities, regulatory and policy development. Originally from Baltimore, Maryland, Monroe earned her bachelor's degree in government and politics from the University of Maryland–College Park, and *juris doctor* degree from the University of Baltimore. She began her career in the U.S. House of Representatives where she served as a legislative assistant for Rep. Bobbi Fiedler (R-CA), and Sen. Gordon Humphrey (R-NH). She also served as the chief counsel and minority staff director of the Senate Labor and Human Resources Subcommittee on Children and Families, and chief counsel of the U.S. Senate Committee on Health, Education, Labor and Pensions.

### **Martin Gould**

Dr. Gould is a director of research and technology at the National Council on Disability (NCD), an independent federal agency. His current work activities include: national performance indicators, K–12 public education, electronic and information technology and e-government, and homeland security. Prior to joining NCD in 2000, he worked as director of outcomes research for an international nonprofit. Prior to that work, he served as an assistant superintendent for student and family support services in a large urban school system.

### **Reginald M. Felton**

Reginald M. Felton is Director of Federal Relations for the National School Boards Association (NSBA), where he is responsible for developing and implementing comprehensive legislative strategies and representing the interests of local school boards. His legislative areas include the Elementary and Secondary Education Act/No Child Left Behind (NCLB), reauthorization; Individual with Disabilities Education Act (IDEA)/Special Education; and a broad range of business operations issues. Prior to joining NSBA, he was a senior executive with the Department of the Navy. During his career, Felton was responsible for a wide range of functions, including human resources management, shore installation management, and congressional relations in civilian matters. For ten years, he was an elected school board member with the Montgomery County Board of Education in Maryland, and is currently on the Board of Trustees at Montgomery College. Mr. Felton has a bachelor's degree in sociology from Howard University, and a master's degree in urban studies from Tulane University. He has extensive experience in the areas of public policy, management, legislative advocacy, communications and organizational development at the national level within the public and nonprofit sectors.

**Matthew Ladner**

Dr. Matthew Ladner is Vice President of Research at the Goldwater Institute. Prior to joining Goldwater, he was Director of State Projects at the Alliance for School Choice, where he provided support and resources for state-based school choice efforts. Dr. Ladner has written numerous studies on parental choice in education, education reform, and the role of race in special education placements. He is a graduate of the University of Texas at Austin and received both a master's and doctorate in political science from the University of Houston. He served previously as director of the Goldwater Institute's Center for Economic Prosperity and as Vice President of Policy and Communications at Children First America.

**Daniel J. Reschly**

Mr. Reschly is Professor of Education and Psychology in Peabody College, Vanderbilt University, where he also chaired its Department of Special Education. Prior to Vanderbilt, he directed the Iowa State University School Psychology Program where he achieved the rank of Distinguished Professor of Psychology and Education. Reschly earned graduate degrees at the University of Iowa and the University of Oregon, and served as a school psychologist in Iowa, Oregon, and Arizona. He has published on the topics of response to intervention, reduction of special education disproportionality, identification of disabilities (high incidence, minority issues), and policy issues in special education. He has trained teachers, principals, and related services personnel in 27 states regarding implementation of the response to intervention process in general, remedial, and special education. He has been active in state and national leadership roles, including President of the National Association of School Psychologists, Editor of the *School Psychology Review*, Chair of NASP Graduate Program Approval, President of the Society for the Study of School Psychology, and Chair of the Council of Directors of School Psychology Programs. Reschly served on the National Academy of Sciences Panels on Standards-based Reform and the Education of Students with Disabilities and Minority Overrepresentation in Special Education. He chaired the National Academy Panel on Disability Determination in Mental Retardation.

**Hilary O. Shelton**

Mr. Shelton is the director of the federal legislative and national public policy division of the NAACP in Washington, DC. He is responsible for advocating the national civil rights organization's federal public policy issue agenda, dealing with issues such as affirmative action, equal employment protection, access to quality education, voting rights protection, federal sentencing reform, and a host of civil rights enforcement, expansion, and protection issues. Prior to this position, he served as Federal Liaison/Assistant Director to the Government Affairs Department of The United Negro College Fund in Washington, DC, and as Federal Policy Program Director of the United Methodist Church's social justice advocacy agency, The General Board of Church & Society. Mr. Shelton serves on a number of national boards of directors including The Leadership Conference on Civil Rights, The Center for Democratic Renewal, the Coalition to Stop Gun Violence, and the Congressional Black Caucus Institute, among many others. Originally from St. Louis, Missouri, Mr. Shelton holds degrees in political science, communications, and legal studies from Howard University in

Washington, DC, the University of Missouri in St. Louis, and Northeastern University in Boston, Massachusetts, respectively.

### **Peter A. Zamora**

As the Washington, DC Regional Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), Mr. Zamora develops and manages federal legislative strategies regarding education law and policy, voting rights, immigration, and other Latino civil rights concerns. He serves as co-Chair of the Hispanic Education Coalition, which unites 26 key national and local organizations in support of improved educational opportunities for Latino students and families. Mr. Zamora has testified before the U.S. House Committee on Education and Labor and the U.S. Senate Judiciary Committee. 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 an attorney in a private federal education law practice. He has a Bachelor of Arts from the University of California at Berkeley, a teaching credential from the University of San Francisco, and a *juris doctor* degree from the Georgetown University Law Center.

### **William H. Hurd**

Since 2004, Mr. Hurd has been an attorney with Troutman Sanders LLP in Richmond, Virginia, specializing in complex litigation. He received his bachelor's and law degrees from University of Virginia, and has served as State Solicitor General, Senior Counsel to the Attorney General, Deputy Attorney General, and Assistant Attorney General in the Commonwealth of Virginia. He has argued three cases before the U.S. Supreme Court personally, including two cases involving the First Amendment and one involving federal special education law. He also served as lead counsel for the Commonwealth in a special education case, securing the right of states to discipline students for misconduct unrelated to their disabilities (*Virginia Dep't. of Education v. Riley*).



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