



U.S. Commission on Civil Rights

**U.S. Commission on Civil Rights Recommendations for the
Reauthorization of the Individuals with Disabilities Education Act**

May 2002

On May 17, 2002, the following letter with attachment was sent to:

- The Honorable Edward M. Kennedy
Chair, Committee on Health, Education, Labor and Pensions
United States Senate
- The Honorable Judd Gregg
Ranking Minority Member
Committee on Health, Education, Labor and Pensions
United States Senate
- The Honorable John A. Boehner
Chair, Committee on Education and the Workforce
United States House of Representatives
- The Honorable George Miller
Ranking Minority Member
Committee on Education and the Workforce
United States House of Representatives

Dear Senators and Representatives:

The U.S. Commission on Civil Rights (Commission) commends the bipartisan spirit with which Congress passed the No Child Left Behind education reform initiative earlier this year. Now the nation must ensure that students with disabilities have equal access to the education these reforms make possible. As the nation's governmental conscience on civil rights, the Commission urges members of Congress to consider the civil rights implications of any revisions to the Individuals with Disabilities Education Act (IDEA) now before you for reauthorization. The Commission is continuing to work on these issues and will continue to consider ways to improve the enforcement of IDEA. However, we ask that you strengthen the protections afforded to students with disabilities under this landmark civil rights legislation during this reauthorization period.

The IDEA was enacted to (1) ensure that all children with disabilities have access to a free appropriate education that (2) meets their education and related service needs in the least restrictive environment. By extending civil rights protections under IDEA, Congress intended to end the history of segregation and exclusion of children with disabilities from the public school system in part by facilitating maximum interaction with nondisabled children.

The IDEA helped schools make tremendous strides toward improving the education of students with disabilities. Today, more than six million students benefit from IDEA funding, and integration has proven critical to students who have disabilities, as well as those who do not. Despite measurable progress and widespread agreement among educators, parents, and lawmakers that the law itself is good, there are problems that warrant attention. Educational outcomes remain less for students with disabilities than for other students, often leaving them unprepared to graduate and subsequently transition to work or secondary education. Congress must focus on ways to strengthen IDEA and build on the successes that have been achieved thus far.

In anticipation of IDEA reauthorization, the Commission engaged in fact-finding activities, including a briefing at which members received information from special education experts representing the interests of researchers, advocates, practitioners, and parents.^{1[1]} With additional research, the Commission has identified several areas critical to the preservation of civil rights.

Implementation of IDEA and the provision of adequate special education services require collaborative efforts between federal, state, and local education agencies, parents, teachers, and school administrators. The recommendations presented here, in keeping with the Commission's mandate, focus largely on what can be done at the federal level to improve implementation and outcomes. We respectfully request that you consider these recommendations as you undertake the reauthorization process:

1. IDEA should be fully funded immediately, and a federal safety net should be established to help states with small populations and school districts faced with children who require significant resources.
2. Support programs funded through Part D discretionary funds should receive increases comparable to increases in the Part B state grants. This should include increased funding for teacher recruitment, preparation, and training.
3. More money should be allocated for IDEA research, including the development of a single uniform data collection effort nationwide.
4. Adequate resources must be provided for state and federal monitoring and enforcement programs, including increased funding for the Department of Education's (DOEd) Office of Special Education Programs (OSEP).

^{1[1]} A complete transcript of the briefing is available on the Commission's Web site, which can be accessed at www.usccr.gov.

5. A complaint-handling process should be established at the federal level, and state complaint systems should be monitored by OSEP for efficiency and effectiveness.
6. State-supported mediation should be an available alternative for parents to utilize voluntarily when seeking to remedy a problem without participating in a full due process hearing.
7. National compliance standards should be established along with improvement measures and indicators that will trigger enforcement sanctions based on levels of noncompliance.
8. States must be held accountable for ensuring access to services required under the law, and for conducting ongoing progress assessments of students with disabilities. The federal government must help states develop infrastructures to support IDEA programs, achieve compliance, provide technical assistance, and identify best practice models.
9. States should be responsible for scrutinizing school district expenditures and allocating or withholding funds accordingly.
10. The reauthorized IDEA should give increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate overreferral of students of color.
11. Teachers must receive better training in diagnosing disabilities and recognizing cultural misconceptions that lead to misdiagnosis.
12. Judgment as to whether a child has a cognitive disability or emotional disturbance should be withheld until he or she has received high-quality instruction in the general education setting. More prereferral interventions should be implemented at the local level, and better evaluative tools, that are culturally and linguistically sensitive, should be devised.
13. Racial and ethnic data collected by OSEP should be disaggregated by gender. DOEd should fund research that tracks by race/ethnicity students who are wrongly identified as needing special education.
14. Schools with disproportionate representation in special education should be subject to federal evaluations to determine whether individual placements are appropriate. Where overreferral is found, districts should be required to develop plans for better evaluative tools and reintegration of misclassified students in regular education.
15. Federal funding should be available to encourage and reward districts that develop successful plans for reducing rates of overreferral and that engage in activities targeting underserved populations.
16. OSEP should develop culturally and linguistically appropriate technical assistance materials, and develop programs to better serve students living on or near Indian reservations.

17. The discipline provisions of the 1997 amendments should not be significantly changed, although they should be clarified and simplified. The no cessation provision should be retained.
18. Appropriate funding should be allocated for the development of behavior management programs that promote schoolwide models of positive behavior strategies and assessments.
19. DOEd should carefully examine the use of alternative schools to ensure that they are not in violation of the least restrictive environment provision of IDEA, and should promote other school models that prove effective.

Attached, for your reference, is a detailed presentation of these recommendations and a discussion of the critical civil rights issues that warrant consideration as legislation is developed. The pending reauthorization of the IDEA is an opportunity to strengthen the national resolve to leave no child behind, including one with disabilities. The Commission urges Congress to ensure that this mandate is fulfilled.

Respectfully for the Commission,

Mary Frances Berry
Chairperson

Attachment

ATTACHMENT

**U.S. Commission on Civil Rights Recommendations for the Reauthorization of
IDEA**

Following is a detailed discussion of the recommendations presented by the U.S. Commission on Civil Rights (Commission) on the reauthorization of the Individuals with

Disabilities Education Act (IDEA). These recommendations largely focus on the civil rights implications of the legislation and the federal role in its implementation. Four areas of particular interest to the Commission are funding, enforcement and compliance monitoring, the overrepresentation of minority students in special education, and discipline of students with disabilities.

FUNDING IDEA

Congress has authorized the federal government to pay 40 percent of each state's excess cost of educating children with disabilities. However, actual funding has consistently fallen well below the amount authorized and, despite increases in recent years, the 40 percent threshold remains far from being met. In addition, funding for IDEA Part D (support programs), which requires resources for professional development, technical assistance, and dissemination of promising practices, has remained inadequate for many years.

For the current academic year (2001–2002), the average per pupil expenditure for students with disabilities is estimated at \$7,300. Were Congress fully funding states at the 40 percent allocation designated under the statute, it would need to provide approximately \$18 billion in federal funds; instead, schools are only receiving \$7.5 billion, or nearly 17 percent.¹[1] The Commission commends Congress for the significant increases in IDEA allocations in the last few years; however, a 139 percent increase is still needed for IDEA to be funded at the level mandated by the original legislation.

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Full Funding

Thus, the Commission strongly urges Congress to fully fund IDEA immediately, not incrementally. Under an incremental model, students who are currently receiving special education services will have completed their schooling by the time full funding is achieved. They, like millions before them, will have been denied the opportunity to benefit from the programs to which they are entitled. The Commission also finds that requiring states to make up the difference has a negative impact on students who live in states with smaller populations and states that have larger numbers of students with special needs. Congress should consider creating a federal safety net to support school districts, smaller districts in particular, that educate children who have extraordinary needs and require more resources. States should also be provided adequate funds, above and beyond the mandated funding allocated in Part B (the state grants program), for the administration of federal grants to ensure appropriate allocation and monitoring expenditures at the local level.

2[1] 2Approximately 6.1 million students are served under the IDEA. At \$7,300 per student, the total expenditure is roughly \$44.5 billion, 40 percent of which (the federal obligation) is \$17.8 billion.

Discretionary Funds

Enough money should be allocated to both mandatory and discretionary funds to allow states and local school boards the flexibility to respond to local needs. The federal role in IDEA, as outlined by the 1997 amendments, includes: research, technical assistance, technology, teacher preparation, and parent education. These services, which are largely supported through discretionary funds identified in Part D, provide the necessary support for the implementation of Part B (state grants), and should be funded accordingly. It follows that when Part B funding is increased, a comparable percentage increase should be allocated to Part D support programs. In addition, more money should be allocated to preparing special education teachers, providing continuing education for practicing teachers, and attracting more qualified individuals to the field of special education, such as through loan forgiveness programs and grants to universities.

Finally, appropriate funding should be allocated for the furtherance of IDEA research, including a sizeable sum for the development of a single uniform large-scale data collection effort across states. Valuable research and support have come from grants funded through Part D via the Department of Education's (DOEd) Office of Special Education Programs (OSEP). State and local resources could be used more efficiently if guided by good research that is accessible to educators and parents.

ENFORCEMENT AND COMPLIANCE MONITORING

Of particular concern to the Commission is the role of the federal government in the oversight of IDEA implementation and the failure of DOEd to adequately monitor and compel compliance. While IDEA has yielded significant progress in securing educational rights for millions of students, the National Council on Disability (NCD), among other organizations, has found the inadequate enforcement of IDEA to be a major impediment to the civil rights guarantee initially intended with its passage.

In its 2000 study, *Back to School on Civil Rights*, NCD found that every state was out of compliance with IDEA requirements to some degree, and that federal efforts to enforce the law over several administrations have been "inconsistent, ineffective, and lacking any real teeth." Despite the evidence of noncompliance, DOEd has made limited use of its authority to impose enforcement sanctions, such as withholding funds. As a result, the responsibility for enforcement has often been carried out by parents of disabled students who have invoked formal proceedings to ensure that their children's needs have been met.

Funding and compliance should not be mutually exclusive, but rather intricately woven with accountability for positive outcomes. Moreover, funding sanctions must not be imposed at the expense of students. The Commission recognizes the difficulties associated with achieving the appropriate balance. Therefore, reauthorization provisions must include adequate resources to support state and federal monitoring and enforcement. For instance, the federal government has been criticized by states for monitoring that is neither effective nor timely, causing OSEP reports to be issued too late to be of any

relevance. One of the problems is that OSEP is largely understaffed in relation to the magnitude of its mandate. Congress, in the appropriations process, should ensure that OSEP is funded at levels commensurate with its responsibilities.

Complaints Processing

Congress should amend IDEA to create a complaint-handling process at the federal level, similar to those that support the enforcement of other civil rights laws. The process should be used when a state complaint system fails to address an issue that is systemic in nature. Strong state complaint systems are also vital to the assurance that noncompliant school districts are held accountable. State complaint systems should thus be monitored and periodically evaluated by OSEP to ensure that complaints are investigated in a timely and thorough manner, and that appropriate resolutions are achieved. Congress might consider including a provision in the law allowing state-supported mediation to resolve special education conflicts at the request of a parent, not just after a due process hearing, as is commonly the case.

Compliance Standards

The federal government must ensure that state special education programs comply with IDEA by gathering adequate data on each state's implementation and developing national compliance standards. DOEd should exercise its authority to sanction state and local education agencies that repeatedly fail to comply with IDEA by withholding allotments until compliance is achieved. To accomplish this, DOEd must conduct regular and thorough reviews of how states are spending federal funds. The amount of funds withheld should be based on level of noncompliance, and sanctions should be applied equally to all states. The Commission supports NCD's recommendation that DOEd and the Department of Justice be directed to develop national compliance standards, improvement measures, and enforcement sanctions that will be triggered by specific indicators. Students, parents, and teachers should be consulted in the development of standards.

Federal-State Partnerships

Compliance is best achieved through consistent federal enforcement bolstered by support activities performed by states. Accountability measures and performance outcomes must be established for school districts and states to ensure that students with disabilities have access to early intervention services and free appropriate education in the least restrictive environment, as required by the law. Such measures must also include accountability for achievement and ongoing progress assessments of students with disabilities. However, when states do not have adequate infrastructures for implementing IDEA, achieving compliance is difficult. Therefore, federal enforcement efforts should help states establish infrastructures and specific requirements for compliance. Working in collaboration, the federal government and states should develop timelines for building the infrastructure needed to conform to the established guidelines. Local teachers should have a clear role in the monitoring system and the development of compliance standards. Finally, OSEP

should provide more technical assistance to states struggling with compliance and identify best practice models for replication.

Uneven implementation of the law from one district to another, in the absence of uniform enforcement, has the effect of flooding “good” districts with special needs students when surrounding schools fail. Thus, states should be given the same sanction authority as federal enforcement agencies to ensure that local special education programs comply with IDEA. States should scrutinize school district expenditures and allocate or withhold funds accordingly.

The IDEA is unique in that it is at the same time a state grant program and civil rights statute, requiring a balance between the flexibility necessary in the former with the uniform requirements of the latter. Federal standards of sufficiency are needed, but at the same time states should have the discretion to meet the unique needs of their districts and enforce compliance locally. The Commission finds that compliance with civil rights statutes such as IDEA requires proper implementation, not just adherence to procedural requirements. In other words, outcomes are as important as the process by which they are achieved. State education officials should be charged with developing plans that lead to the desired outcomes.

DISPROPORTIONATE CLASSIFICATION OF MINORITY STUDENTS IN SPECIAL EDUCATION

The IDEA Amendments of 1997 required states to report by race/ethnicity their numbers of students who have disabilities and are served in special education. Research commissioned by the Harvard University Civil Rights Project and another study by the National Academy of Sciences determined that students of diverse racial and ethnic backgrounds are more likely to be placed in special education classes than their white peers.[2] For example, in the 2001–2002 school year, black (non-Hispanic) students account for 14.8 percent of the general population of students, but make up nearly 20 percent of the special education population. Additionally, black students’ representation in the mental retardation category is more than twice their national population estimates, and representation in the developmental delay and emotional disturbance categories is nearly two-thirds higher.

In addition to disparities in the identification of students’ needs and abilities, there are distinct differences in educational placement. Data compiled by the Department of Education reveal that African American students with disabilities are more likely than white students to be placed in special education environments outside the regular classroom, including residential facilities, separate schools, and correctional facilities. Further, researchers have found that white students are more likely to receive services

[2] See the Civil Rights Project at Harvard University, “Minority Issues in Special Education,” conference Nov. 17, 2000, publication forthcoming, accessed at <www.law.harvard.edu>; and M. Suzanne Donovan and Christopher T. Cross, eds., *Minority Students in Special and Gifted Education* (National Academy Press, 2002).

such as counseling and therapy than are black students, and for longer periods of time, thereby improving their likelihood to succeed during school and after graduation. The reasons for the disparities are complex. Factors contributing to overreferral include:

- Historical discrimination based on race, ethnicity, and gender, which is reflected in the decisions of educators, biased tests, and the structure of the special education system.
- Poor quality “regular” instruction, which causes low achievement and misbehavior, triggering more referrals to special education.
- Poorly trained teachers and diagnosticians.
- Lack of adequate school resources and the subsequent use of special education as a form of discipline.

Diagnosis and Placement

The presence of racial disparities in special education raises many complex questions. A significant part of the problem is the quality of general education available in many minority communities. Overreferral is evident when there exists poor general education coupled with poorly trained evaluators and teachers who are unable to teach to diverse populations. The Commission firmly believes that, as the most basic of civil rights promises, *all* students must be served according to their educational needs regardless of race, ethnicity, or gender. The reauthorized IDEA should give increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate overrepresentation, or in some cases underrepresentation, of minority children in special education.

There are preventive measures that educators can employ to prevent misdiagnosis. Judgment as to whether a child’s impairment is due to a cognitive disability or emotional disturbance should be withheld until he or she has received high-quality instructional and behavioral support in the general education setting. All teachers, including special education and general curriculum instructors, must receive better training in recognizing and diagnosing true disabilities. University schools of education should be encouraged to include in their curricula advanced studies on recognizing cultural misconceptions and identifying special education needs.

To guard against inappropriate referrals, unnecessary testing, and misclassification, prereferral interventions should be implemented at the local level. States and school districts should be required to engage in more prereferral processes before students are identified as needing special education to ensure that students are not incorrectly placed. States, with guidance from DOEd, need to develop and use better evaluative tools. Only reliable and valid measures of student performance that are culturally and linguistically sensitive, and allow for appropriate accommodation, should be used. Students from diverse backgrounds should be included in state- and districtwide assessments that determine the efficacy of special education evaluative tools and programs.

Data Collection

Continued and improved data collection is essential to assess national progress on the issue of overrepresentation of minority students in special education and the reasons behind such trends. The racial/ethnic data collected by OSEP should also be disaggregated by gender. In addition, DOEd should award a one-time research grant to track by race, ethnicity, and gender data on students who are wrongly identified as having special needs. This would better enable researchers to assess the root causes of overreferral and help OSEP determine which districts warrant closer scrutiny.

Monitoring and Evaluation

All schools identified as having disproportionate representation in special education should be subject to federal evaluation to ensure that placements are in fact appropriate. Districts that are found to have engaged in overreferral should be required to develop plans to reduce overrepresentation, develop better evaluative tools and processes, and reintegrate students who do not require special education. Timelines for completion should be established and observed. DOEd, in the disbursement of discretionary funds, should focus on traditionally underserved populations, allocating adequate money to improving the assessment process. Perhaps a percentage of federal funding could be used to tie demographic and income data to state and local performance plans or strategies designed to overcome overrepresentation or inappropriate categorization. Monetary bonuses could be awarded to districts that develop programs specifically to serve underserved communities, for example, by creating inner-city or rural parent training centers.

Technical Assistance

OSEP should develop culturally appropriate technical assistance and training materials to reach underserved populations, including non-English-speaking groups. In addition, OSEP should develop initiatives that focus attention on the needs of special education students on and near Indian reservations, and should work with the Bureau of Indian Affairs as well as tribal governments, to ensure that the needs of these communities are met. In response to the problem of disproportionality, there should be increased emphasis on outcomes and improving access to effective regular education and special education services.

DISCIPLINE OF STUDENTS WITH DISABILITIES

One of the key elements of the original IDEA, as conceived in 1975, was the recognition that, for children with behavioral disorders, access to school is meaningless if it does not include programming that addresses behavioral needs. Many schools still fail to appropriately accommodate the behavioral consequences of disability by focusing on controlling students rather than addressing unique social and emotional needs. Behavior that can be attributed to a disability is commonly mischaracterized as misconduct and treated with discipline rather than appropriate services.

The 1997 amendments to IDEA require behavior-related needs or disabilities to be addressed as an education matter, in the same manner as other disabilities. Schools are now required to assess each child's behavior and develop positive behavioral interventions. While schools and parents have reported improvements as a result of the amendments, one complaint of the 1997 discipline provisions is that they are too complicated and confusing, and therefore should be reviewed, clarified, and simplified for better implementation.

Moreover, evidence suggests that disciplinary action differs among students in special education, with race/ethnicity being a determining factor in the severity of punishment. According to data released by the Department of Education, in the 1999–2000 academic year, Hispanic, American Indian, and African American students with disabilities were substantially more likely than white students to be suspended, removed by school personnel, or removed by a hearing officer, and were more likely to be given both short- and long-term suspensions.

1 Positive Behavior Strategies

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In testimony before the Senate Education Committee, the Assistant Secretary for Special Education stated that DOEd's experience with the implementation of discipline provisions has highlighted the need for schools to focus on improved classroom management, schoolwide models of positive behavior strategies, and the use of behavioral assessments. The Commission supports this approach to the discipline process and recommends that appropriate funding be allocated to develop behavior management programs that take a holistic approach to discipline. District discipline policies should be proactive, research-based, and schoolwide, and promote positive behavioral support. OSEP can play an important role in providing guidance to states and school districts as uniform discipline guidelines are developed.

The current discipline provisions of the IDEA effectively strike a balance between protecting students and protecting school administrators, and should not be significantly changed, other than for the purpose of clarification. It is important that Congress preserve the no cessation provision of the law, which ensures the continuation of educational services to students removed from school for extended periods of time, so that these students most in need of structured education do not fall further behind.

Alternative Education

The Commission encourages DOEd to look carefully at state and local programs that allow the placement of students with disciplinary problems in alternative schools. Removing students from an integrated setting may not always be an appropriate response, particularly given the fact that many alternative schools provide less than adequate education. Alternative schools only work if there are adequate resources to ensure their proper function. DOEd should monitor districts that use alternative schools to ensure that

they are not in violation of least restrictive environment requirements of the IDEA. Other models, such as schools within schools, may work without having the effects of complete segregation and should be examined by OSEP for potential replication.

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U.S. Commission on Civil Rights

Making a Good IDEA Better: The Reauthorization of the Individuals with Disabilities Education Act

April 12, 2002

An Overview of the Law and Critical Civil Rights Issues

The U.S. Commission on Civil Rights (Commission) has long maintained an active interest in both education and disability as sources of critical civil rights concerns.⁴[1] At the intersection of these two concerns are educational opportunities for students with disabilities. In 1997, as a component of a series of reports on equal educational opportunity, the Commission examined the enforcement of Section 504 of the Rehabilitation Act of 1973.⁵[2] In that report, the Commission also examined related issues under the Individuals with Disabilities Education Act.⁶[3] At this juncture, with the IDEA up for reauthorization in Congress this year, the opportunity is present for continuing to examine the strengths and weaknesses of the legislation and its

4[1] The Commission and some of its State Advisory Committees have studied disability rights and issued numerous reports, including *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, May 1980; *Accommodating the Spectrum of Individual Abilities*, September 1983; *Protection of Handicapped Newborns*, hearings, June 12–14, 1985, and June 26–27, 1986; *Handicap Protection for AIDS Victims in Washington, DC*, May 1989 (District of Columbia Advisory Committee report); *Medical Discrimination Against Children with Disabilities*, September 1989; *Helping Employers Comply with the ADA*, September 1998; *Helping State and Local Governments Comply with the ADA*, September 1998; *Employment Rehabilitation Services in Michigan*, March 2000 (Michigan Advisory Committee report); *Sharing the Dream: Is the ADA Accommodating All?* October 2000.

5[2] Pub. L. No. 93-112 § 504, 87 STAT. 355 (codified as amended at 29 U.S.C. § 794 2000 (2000 and Supp. 2001)). See U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, September 1997 (hereafter cited as USCCR, *Equal Educational Opportunity*).

6[3] Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 STAT. 1143 (codified as amended at 20 U.S.C. §§ 1400–1485 (2000 & Supp. 2001)), *amended by* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 STAT. 37 (2000 & Supp. 2001).

enforcement. The purpose of this briefing paper is to apprise the Commission of the status of IDEA, to identify civil rights concerns that have arisen since it was reauthorized five years ago, and to make recommendations for how it might be strengthened and improved.

In the early days of public education in the United States, individuals with disabilities were largely denied access to formal education or were consigned to institutions or residential facilities that seldom addressed their needs.^{7[4]} Even as recent as the 1970s, children with disabilities were not afforded equal educational opportunities and were often placed in institutions or segregated from their nondisabled peers in separate facilities.

The Individuals with Disabilities Education Act (IDEA) was first enacted in 1975 (then known as the Education for All Handicapped Children Act) in an effort to ensure that all children with disabilities between the ages of 3 and 21 had access to a “free appropriate education” that met their education and related service needs in the “least restrictive environment.”^{8[5]} It is upon these two substantive rights that the legislation is predicated. By extending civil rights protections under the IDEA, Congress intended to end the history of segregation and exclusion of children with disabilities from the public school system in part through maximum interaction with nondisabled children.

At the center of the IDEA is the Individualized Education Program (IEP), which serves as a tool to ensure that an appropriate program and curriculum is developed to meet each child’s unique needs. The IEP is a written statement, produced in collaboration with parents, teachers, and service providers, that represents the child’s needs, level of performance, annual goals, and short-term objectives. It also explains the extent to which a child will be integrated into classes with nondisabled students.^{9[6]}

The IDEA applies to every state that receives federal funds for the provision and administration of special education for students with disabilities, including state entities involved in education-related activities. This includes state and local education agencies, political divisions involved in the education of children with disabilities, state agencies, such as departments of mental health, which provide educationally related services, and state correctional facilities.

The IDEA contains four sections: (A) lists the general provisions of the law and its goals; (B) “Assistance for Education of All Children with Disabilities” describes the federal grant program to states, the responsibilities of state education agencies to monitor implementation, and the basic rights and responsibilities of students with disabilities and

^{7[4]} See USCCR, *Equal Educational Opportunity*, pp. 10–16.

^{8[5]} 20 U.S.C. §§ 1401(8), 1412(a)(5) (2000 & Supp. 2001).

^{9[6]} National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind*, Jan. 25, 2000, p. 30 (hereafter cited as NCD, *Back to School on Civil Rights*).

their parents; (C) “Infants and Toddlers with Disabilities” describes the program for addressing the needs of children from infancy to 3 years of age; and (D) “National Activities to Improve Education of Children with Disabilities” authorizes discretionary programs related to state improvement. Although Part B does not have a reauthorization requirement, the reauthorization process for Parts C and D provides an opportunity to examine and make changes to Part B as well.

For more than 20 years, the IDEA remained largely unchanged, but in 1997, based on two decades of experience, the law was amended to clarify, strengthen, and provide guidance on its implementation. The 1997 amendments placed emphasis on education results and improved quality of special education and included tools for enforcement. Of particular concern at the time was the integration of students with disabilities into regular schools and classrooms. The revised bill also addressed school discipline, giving educators more flexibility in disciplining children with disabilities, while at the same time directing them to act in anticipation of challenging behavior rather than punishing children for misbehavior associated with their disabilities.^{10[7]} Now, five years after the 1997 reauthorization process, Congress is again assessing the law’s adequacy and determining how it can be strengthened.

There is general consensus that the IDEA has made tremendous strides toward improving the education of students with disabilities. Today, more than six million students benefit from IDEA funding, and the integration of students has proven critical to students who have disabilities, as well as those who do not. It is commonly believed that integration fosters understanding and tolerance, better preparing students of all abilities to function in the world beyond school. According to one advocacy group:

IDEA ensures that children with disabilities may attend public schools alongside their peers. There is no question about it: students, schools, and communities are enriched when all children have a right to a free, appropriate public education.^{11[8]}

In addition, post-school employment rates for individuals served under the IDEA are twice those of older adults with similar disabilities who did not have the benefit of the IDEA. Further, postsecondary school enrollments among individuals with disabilities have also increased; the percentage of first-year college students reporting disabilities has more than tripled since 1978.^{12[9]}

Despite this progress, educators, parents, and lawmakers agree that, while the law itself is good, there are unresolved problems that warrant attention. Educational outcomes remain

^{10[7]} Ibid., pp. 33–36.

^{11[8]} IDEA Funding Coalition, “IDEA Funding: Time for a New Approach,” Mandatory Funding Proposal, Feb. 20 2001, p. 2.

^{12[9]} U.S. Department of Education, IDEA 25th Anniversary, “Lesson 1: History and Impact,” accessed at <http://www.ed.gov/offices/OSERS/Policy/IDEA25th/lesson1_History.html>.

less for students with disabilities than for other students, often leaving them unprepared to graduate and subsequently transition to work. For example, according to information compiled by the Department of Education (DOEd), Office of Special Education and Rehabilitative Services (OSERS):

- Many students with disabilities are still excluded from the curriculum and assessments used with their nondisabled peers, limiting their possibilities of performing to higher standards.
- In the 1997–98 school year, only 25 percent of students ages 17 and older with disabilities graduated with a high school diploma. Graduation rates varied by state, ranging from 6.8 percent to 45.5 percent.
- Twice as many children with disabilities drop out of school.
- Dropouts rarely return to school, have difficulty finding jobs, and often end up in the criminal justice system.¹³[10]

Congress must focus on ways to strengthen the IDEA with more guidance and build on the successes that have been achieved thus far. The National Council on Disability (NCD) cites 10 problems facing children with disabilities in accessing public education. The problems existed before the IDEA and persist to some degree: exclusion, recognition of special needs, disciplinary exclusion, evaluation, educational goals, placement and segregation, obtaining related services, parental involvement, access to records, and due process.¹⁴[11]

Civil rights concerns likely to surface in the reauthorization discussions include: discipline of students with disabilities, overreferral of students from linguistically and culturally diverse backgrounds to special education classes, and monitoring and enforcement of the statute (which was likewise a concern during the 1997 reauthorization). The pending reauthorization of the statute is viewed by many as an opportunity to strengthen the national resolve to leave no child behind, including one with disabilities.

Funding the IDEA

Congress has authorized the federal government to pay 40 percent of each state's excess cost of educating children with disabilities. That amount, often referred to as "full funding," is calculated by multiplying 40 percent of the national average per pupil

¹³[10] U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities*, 22nd Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2000, p. xxxvi (hereafter cited as DOEd, 22nd Report to Congress on IDEA); U.S. Department of Education, Office of Special Education and Rehabilitative Services, "IDEA '97 General Information," accessed at <<http://www.ed.gov/offices/OSERS/Policy/IDEA/overview.html>>.

¹⁴[11] NCD, *Back to School on Civil Rights*, pp. 246–48.

expenditure by the number of children with disabilities educated under the IDEA.¹⁵[12] As the table and figures below indicate, Congress has never fulfilled this promise. Actual funding has fallen well below the amount authorized for the last 10 years and, despite increases in recent years, the 40 percent threshold remains far from being met. In addition, funding for the IDEA Part D Support Programs, which provides resources for professional development, technical assistance, and dissemination of promising practices, has remained stagnant for many years.¹⁶[13]

Table 1. IDEA Authorization Estimates, 1991–2002

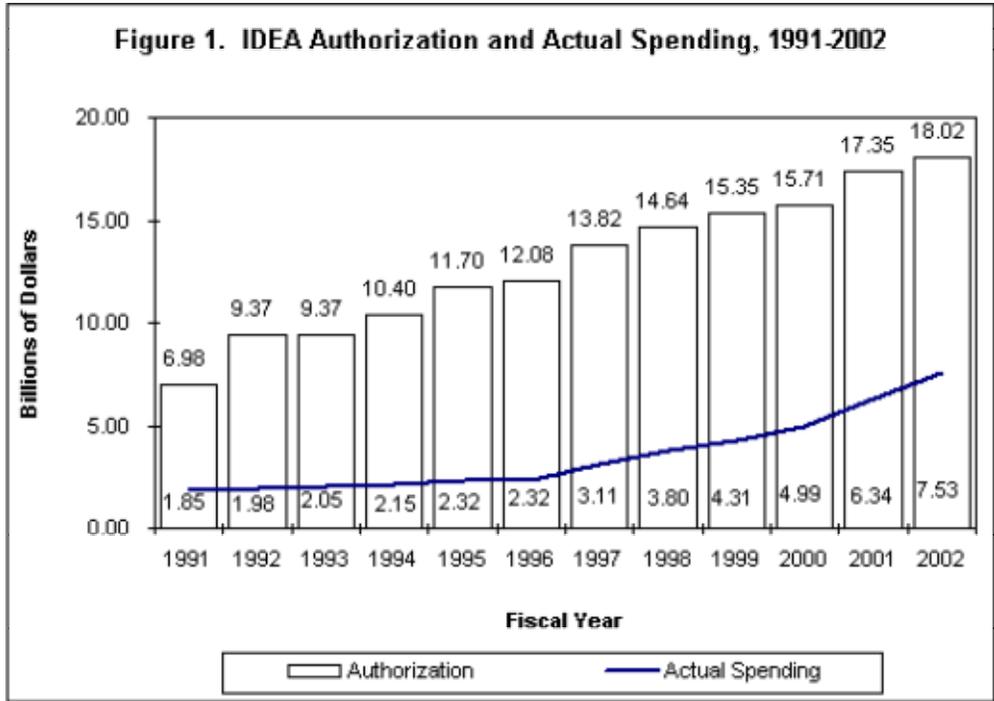
| FY | Per pupil expenditure | IDEA authorization (in billions) | Actual IDEA spending (in billions) | % of per pupil cost paid by fed. gov't.* |
|-----------|------------------------------|---|---|---|
| 1991 | \$5,023 | \$6.98 | \$1.85 | N/A |
| 1992 | \$5,160 | \$9.37 | \$1.98 | N/A |
| 1993 | \$5,327 | \$9.37 | \$2.05 | 9.0% |
| 1994 | \$5,529 | \$10.4 | \$2.15 | 8.0% |
| 1995 | \$5,689 | \$11.7 | \$2.32 | 8.0% |
| 1996 | \$5,923 | \$12.08 | \$2.32 | 7.4% |
| 1997 | \$6,168 | \$13.82 | \$3.11 | 9.5% |
| 1998 | \$6,407 | \$14.64 | \$3.80 | 9.5% |
| 1999 | \$6,584 | \$15.35 | \$4.31 | 10.0% |
| 2000 | \$6,821 | \$15.71 | \$4.99 | 13.0% |
| 2001 | \$7,066 | \$17.35 | \$6.34 | 14.8% |
| 2002 | \$7,320 | \$18.02 | \$7.53 | 16.7% |

* Data not available for 1991 and 1992.

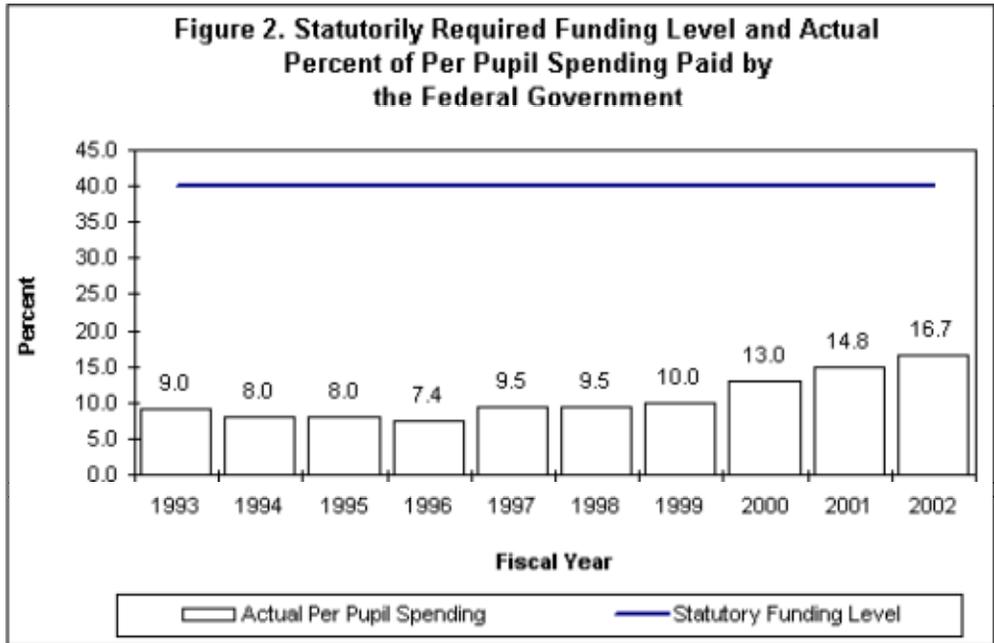
Source: IDEA Funding Coalition, “IDEA Funding: Time for a New Approach,” Mandatory Funding Proposal, February 2002, pp. 6–7.

¹⁵[12] National Council on Disability, “IDEA Reauthorization,” working paper, accessed at <http://www.ncd.gov/newsroom/reauthorizations/idea/idea_workingpaper.html> (hereafter cited as NCD, “IDEA Reauthorization”).

¹⁶[13] Ibid.



Source: IDEA Funding Coalition, "IDEA Funding: Time for a New Approach," Mandatory Funding Proposal, February 2002, pp. 6-7.



Source: IDEA Funding Coalition, "IDEA Funding: Time for a New Approach," Mandatory Funding Proposal, February 2002, pp. 6-7.

In 2002, the average per pupil expenditure for the academic year is estimated at approximately \$7,300. There are roughly 6.1 million students served under the IDEA. If Congress were fully funding states at the 40 percent allocation designated under the statute, it would need to provide more than \$18 billion in federal funds; instead, schools are only receiving \$7.5 billion, or nearly 17 percent.¹⁷[14] While Congress has made significant budget allocations to the IDEA in the last few years (for FY 2002, Congress increased the Part B grants to states by 19 percent, from \$6.3 billion in 2001 to \$7.5 billion), a 139 percent increase is needed for the IDEA to be fully funded.¹⁸[15] While there are many proposals for funding, there is strong support for spreading the increased funding out over the next several years through annual increases and allocating the money to mandatory funds in addition to discretionary funds.

By the end of this year, Congress is expected to approve the continued expenditure and use of federal funds to carry out discretionary activities under the IDEA. Herein lies a foremost point of disagreement: should Congress allocate more money to the IDEA without first repairing its problems, or can many of the problems be eliminated through full funding? According to a statement released by the chair of the House Education Committee, providing schools with guaranteed funding could have unintended consequences: schools may identify even more children as being in need of special education, when all they need is additional appropriate instruction.¹⁹[16] The 1997 reforms changed the funding formula and required that students in need of additional reading, math, and English instruction not be identified for special education. There is some fear that mandatory funding would undo these reforms.

On the other hand, many education and disability rights advocates argue that Congress must live up to its promised funding levels. They argue that for the entire 26 years of the IDEA, the federal contribution has fallen far short of the congressional commitment to full funding, and as a result, state and local budgets have had to absorb the shortfall.²⁰[17] The Council for Exceptional Children (CEC), an advocacy group working on behalf of students, issued a policy statement supporting the full funding of the IDEA to alleviate the budget crises that many departments of education and school boards face. In testimony before the Department of Education's IDEA Reauthorization Forum, the CEC executive director stated:

¹⁷[14] IDEA Funding Coalition, "IDEA Funding: Time for a New Approach," p. 3.

¹⁸[15] Ibid.

¹⁹[16] John Boehner, chair, House Education and the Workforce Committee, "IDEA Must be Fully Funded—But First it Must be Fixed," fact sheet, Sept. 18, 2001.

²⁰[17] IDEA Funding Coalition, "IDEA Funding: Time for a New Approach," p. 2.

Mandatory full funding for state grants is essential to ensure the federal government lives up to its commitment to children with disabilities. In addition, the Preschool Grants Program and Infants and Toddlers Program must receive full funding to assist young children with special needs to develop their potential.²¹[18]

According to a legislative specialist with the American Association of School Administrators, despite the accomplishments made in special education over the last 25 years, largely due to the IDEA, there is much more that could be done if Congress would fulfill its funding obligations.²²[19] The 1997 amendments required that a study be conducted to determine the actual cost of educating students with disabilities so that the 40 percent funding level could be reevaluated. This study is expected to be completed and released this year.

Enforcement and Compliance Monitoring

While the IDEA has yielded significant progress in securing educational rights for millions of students, the National Council on Disability, among other organizations, has found the inadequate enforcement of the IDEA to be a large impediment to the civil rights guarantee initially intended with its passage. The Office of Special Education Programs (OSEP) in the Department of Education is charged with ensuring the implementation of the law through monitoring and enforcement activities. However, the compliance/enforcement scheme for the IDEA is different than for other civil rights laws because there is no individual complaint system in place. Under the IDEA, there are three tiers of enforcement, including the federal government, state governments, and due process through the judicial system:

- The federal government approves state eligibility, monitors state implementation, provides technical assistance, and issues reports of noncompliance. DOE can withhold funds from states for substantial noncompliance and can refer states to the Justice Department if failure to comply persists. This latter provision was added in the 1997 amendments to address the concerns of parents and advocates that the IDEA was not being effectively enforced.
- State governments ensure that IDEA requirements are met in each state, determine the eligibility of local education agencies, monitor local agencies for compliance, maintain complaints systems for parents, and establish personnel standards. The states may also withhold funds from local education agencies and obtain corrective action plans.

²¹[18] Council for Exceptional Children, "CEC's President Testifies on IDEA Reauthorization," *CEC Today*, vol. 8, no. 6 (February/March 2002), p. 4 (hereafter cited as CEC, "President Testifies on IDEA Reauthorization").

²²[19] American Association of School Administrators, "National Summit Examines IDEA Implementation" accessed at <http://www.aasa.org/issues_and_insights/instruction/IDEA_conf_06-20-01>.

- Parents of students with disabilities have a private right of action to pursue redress through the judicial process. They also can file a complaint with the state education agency and often can pursue mediation or administrative hearings.²³[20]

Of particular concern to the Commission is the role of the federal government in the oversight of IDEA implementation and the failure of DOEd to adequately monitor and enforce compliance. In its 2000 study, NCD found that every state was out of compliance with IDEA requirements to some degree. The study confirmed that too many students with disabilities do not receive free appropriate public education (FAPE), are not educated in the least restrictive environment, are not able to access transition services, and do not receive the benefit of procedural safeguards in their evaluations.²⁴[21] Overall, NCD found that “federal efforts to enforce the law over several Administrations have been inconsistent, ineffective, and lacking any real teeth.”²⁵[22] Despite the evidence of noncompliance, DOEd has made limited use of its authority to impose enforcement sanctions, such as withholding funds. As a result, the burden of pursuing enforcement of the law has often fallen to the parents of disabled students who must invoke formal proceedings to ensure that their children’s needs are met.

Disproportionate Classification of Minority Students in Special Education

The IDEA amendments of 1997 required that states report the number of students with disabilities served by race/ethnicity. Recent research commissioned by the Harvard University Civil Rights Project and another study by the National Academy of Sciences determined that students of diverse racial and ethnic backgrounds are more likely to be placed in special education classes than their white peers. National statistics compiled by the Department of Education outline the disparities. For the 2001–2002 school year:

- Black (non-Hispanic) students account for 14.8 percent of the general population of students, but make up nearly 20 percent of the special education population.
- Black students’ representation in the mental retardation category is more than twice their national population estimates, and their representation in the developmental delay and emotional disturbance categories is nearly two-thirds higher.
- Asian American/Pacific Islanders represent 3.8 percent of the general student population, but make up less than 2 percent of the population receiving special education services.

²³[20] NCD, *Back to School on Civil Rights*, p. 37, table 1.

²⁴[21] NCD, “IDEA Reauthorization.”

²⁵[22] NCD, *Back to School on Civil Rights*, p. 5.

- American Indian students are also slightly overrepresented in special education in almost every disability category.^{26[23]}

Table 2 demonstrates the extent of the disparities in special education for each specific type of disability. For every type of disability except for two (orthopedic impairment and deaf-blindness), African American students make up a larger proportion of the students with special needs than their representation in the overall student population. Asian American students, on the other hand, are less likely to be identified as having a disability in every category with the exception of three—deaf-blindness, hearing impairments, and autism—compared with their representation in the student population. Hispanic students are generally represented in special education in numbers proportionate to their overall student population, with the exception of three categories in which they are overrepresented: specific learning disabilities, hearing impairments, and deaf-blindness.

Table 2. Percentage of Students Ages 6–21 Served Under the IDEA, Part B, by Race/Ethnicity and Disability, 2000–2001 School Year

| | American Indian/ Alaskan** | Asian/Pacific Islander | Black | Hispanic | White | % of all students*** |
|--------------------------------|---------------------------------------|-----------------------------------|--------------|-----------------|--------------|---------------------------------|
| Specific learning disabilities | 1.5 | 1.6 | 18.0 | 17.6 | 61.3 | 4.4 |
| Speech or language impairments | 1.2 | 2.5 | 15.6 | 13.0 | 67.7 | 1.7 |
| Mental retardation | 1.1 | 1.7 | 33.8 | 11.2 | 52.2 | 0.9 |
| Emotional disturbance | 1.2 | 1.3 | 26.7 | 8.1 | 62.7 | 0.7 |
| Multiple disabilities | 1.5 | 2.2 | 20.2 | 14.2 | 61.8 | 0.2 |
| Hearing impairments | 1.3 | 4.5 | 15.8 | 18.4 | 60.1 | 0.1 |
| Orthopedic impairments | 0.8 | 3.0 | 14.2 | 15.5 | 66.5 | 0.1 |
| Visual impairments | 1.1 | 3.4 | 16.8 | 15.4 | 63.3 | 0.0 |
| Autism | 0.7 | 4.8 | 18.3 | 9.4 | 66.9 | 0.1 |
| Deaf-blindness | 2.0 | 3.9 | 14.1 | 17.4 | 62.5 | 0.0 |

^{26[23]} U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS), accessed at <<http://www.ideadata.org>>. See also DOEd, 22nd Report to Congress on IDEA.

| | | | | | | |
|--|-----|-----|------|-------|-------|-----|
| Traumatic brain injury | 1.7 | 2.2 | 16.4 | 11.4 | 68.2 | 0.0 |
| Developmental delay | 1.3 | 2.1 | 25.5 | 6.3 | 64.8 | 0.0 |
| Other health impairments | 1.1 | 1.5 | 15.0 | 8.3 | 74.1 | 0.4 |
| All disabilities | 1.3 | 1.9 | 19.9 | 14.5 | 62.5 | 8.6 |
| Population estimates for children 6–21 | 1.0 | 3.8 | 14.8 | 17.5* | 62.95 | 100 |

Note: These estimates include the 50 states, the District of Columbia, and Puerto Rico.

*Because Puerto Rico is included, the Hispanic population numbers may be slightly inflated.

**Note that a large number of American Indian/Native Alaskan students with disabilities are served by the federal Bureau of Indian Affairs and are therefore not included in state counts.

***Based on 2000 Census figures.

Source: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS), accessed at <<http://www.ideadata.org>>.

In addition to disparities in the identification of students' needs and disabilities, there are distinct differences in educational placement (see table 3 below). The IDEA requires students with disabilities to be educated in the least restrictive environment and with the most interaction with their nondisabled peers as possible. However, data compiled by the Department of Education reveal that African American students with disabilities are more likely to be placed in special education environments outside the regular classroom, including residential facilities, separate schools, and correctional facilities. Conversely, white students with disabilities are more likely to be integrated into regular classrooms; they spend less than 20 percent of the school day in designated special education classrooms at a rate that exceeds their proportion of special education students. Further, researchers have found that white students are more likely to receive services such as counseling and therapy than are black students, and for longer periods of time, thereby limiting black students' success in and after school.²⁷[24]

Table 3. Percentage of Children Ages 6–21 Served in Different Educational Environments by Race/Ethnicity, 1999–2000 School Year

| | American | Asian/ | Black | Hispanic | White |
|--|----------|--------|-------|----------|-------|
|--|----------|--------|-------|----------|-------|

²⁷[24] David Osher, Darren Woodruff, and Anthony Sims, "Exploring Relationships between Inappropriate and Ineffective Special Education Services for African American Children and Youth and their Overrepresentation in the Juvenile Justice System," draft paper submitted to the Civil Rights Project at Harvard University, publication forthcoming (hereafter cites as Osher et al., "Exploring Relationships").

| | Indian/ Alaskan | Pacific Islander | | | |
|--|----------------------------|-----------------------------|------|------|------|
| Special ed. outside class less than 20% of day | 1.3 | 1.8 | 14.9 | 12.5 | 69.6 |
| Special ed. outside class 21%–60% of day | 1.5 | 1.7 | 20.2 | 14.5 | 62.1 |
| Special ed. outside class more than 60% of day | 1.0 | 2.0 | 30.7 | 19.1 | 47.2 |
| Separate public school | 0.9 | 1.9 | 25.5 | 12.4 | 59.3 |
| Separate private school | 0.6 | 1.8 | 27.3 | 12.3 | 58.1 |
| Public residential facility | 1.8 | 1.4 | 32.2 | 10.6 | 53.9 |
| Private residential facility | 1.2 | 1.6 | 25.1 | 9.7 | 62.5 |
| Homebound/hospital | 1.0 | 1.8 | 19.7 | 16.7 | 60.8 |
| Correctional facility | 1.4 | 1.2 | 46.4 | 15.5 | 35.6 |
| Private school not placed by public agency | 0.3 | 2.2 | 9.8 | 5.9 | 81.7 |
| Total | 1.2 | 1.8 | 20.1 | 14.4 | 62.5 |

Source: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS), accessed at <<http://www.ideadata.org>>.

The reasons for the disparities are complex. Some scholars argue that the disproportionate identification of African American students, particularly as emotionally and behaviorally disturbed, is the result of a combination of “risk factors both at school and in the community, misinformed decisions and judgments by education, mental health and juvenile justice professionals, and the impact of race, class, and culture across multiple social fields including the school.”^{28[25]} Other factors contributing to overreferral include:

- Historical discrimination along race, ethnicity, and gender lines, which is reflected in the decisions of educators, biased tests, and the structure of the special education system.
- Poor quality “regular” instruction, which causes low achievement and misbehavior, triggering more referrals to special education.
- Poorly trained teachers and diagnosticians.

^{28[25]} Ibid.

- Schools lacking adequate resources, thereby using special education as a form of discipline.²⁹[26]

According to researchers, the success of most districts in correctly identifying children with special needs is limited at best.³⁰[27]

School personnel not only fail to identify students with disabilities, but they also fail, with surprising frequency, to diagnose and address disabilities correctly, while in some cases identifying black students as having [emotional and behavioral disturbances] or mental retardation rather than learning disabilities.³¹[28]

Educators agree that the results of misperceptions and misidentification of students' competencies can be devastating to students who are inappropriately placed.³²[29] Thus, the Council for Exceptional Children identifies the elimination of "inappropriate, disproportionate representation of students from diverse backgrounds in special education" as a reauthorization priority.³³[30]

Discipline of Students with Disabilities

One of the key elements of the original IDEA, as conceived in 1975, was the recognition that, for children with behavioral disorders, access to school is meaningless if it does not include programming to address behavioral needs.³⁴[31] The issue of discipline for students with disabilities remains a concern of lawmakers, educators, and parents. Many schools still fail to appropriately address the behavioral consequences of disability by focusing on controlling students rather than addressing a child's unique social and emotional needs. Behavior that can be attributed to a disability is commonly characterized as misconduct and treated with discipline rather than appropriate special education and related services.³⁵[32]

²⁹[26] Harvard University, Civil Rights Project, "CRP Action Kit—Special Education," accessed at <www.law.harvard.edu/groups/civilrights/actionkits/special_ed/spedques.html>.

³⁰[27] Osher et al., "Exploring Relationships."

³¹[28] Ibid.

³²[29] NCD, "IDEA Reauthorization."

³³[30] CEC, "President Testifies on IDEA Reauthorization," p. 4.

³⁴[31] Eileen Ordovery, "Behavior as an Education Issue Under the Individuals with Disabilities Education Act," issue brief prepared for the Center for Law and Education, August 1999.

³⁵[32] Kathleen Boundy, Center for Law and Education, "Disability, Behavior and School Discipline—Current Law, Historical Context, Future Action," proposed position paper (hereafter cited as Boundy, "Disability, Behavior and School Discipline").

Prior to the 1997 IDEA amendments, the issue of discipline was only addressed as it pertained to taking action against a student who brought a gun to school; the law allowed school personnel to remove a child to an interim alternative educational placement for up to 45 days.³⁶[33] The 1997 IDEA amendments clarified disciplinary policy, authorizing schools to remove a student for up to 10 days for minor disciplinary infractions and for up to 45 days for behavior involving weapons or drugs. However, a child with a disability cannot be suspended long term or expelled for behavior that is a manifestation of his or her disability. In addition, schools were authorized to ask a hearing officer to remove students who are likely to injure themselves or others. Educational services are not required during the first 10 days in a given school year that a student is removed from class. If a child is subsequently removed for 10 or fewer additional school days for a violation of school conduct codes, services must be provided to enable him or her to continue to progress in the general curriculum.³⁷[34]

Schools are also required to assess each child's behavior and develop positive behavioral interventions. The amendments describe how to determine whether the behavior is related to the child's disability.³⁸[35] The IDEA requires behavior-related needs or disabilities to be addressed as an education matter, in the same manner as other disabilities. As such, students with behavioral needs must be afforded the same opportunity to learn in the general curriculum and be evaluated on a regular basis to determine their potential and needs as expressed in their Individualized Education Programs. The 1997 amendments to the IDEA clarified that when a child's behavior impedes the learning of self or others, "special factor" strategies must be considered. According to one legal and education expert, improvements have been reported among schools and parents who have taken part in new behavioral interventions.³⁹[36]

One complaint of the discipline provisions of the 1997 amendments is that they are too complicated and confusing, and therefore should be reviewed during reauthorization.⁴⁰[37] According to the Assistant Secretary for Special Education, the department's experience with the implementation of discipline provisions has highlighted

³⁶[33] U.S. Department of Education, Office of Special Education Programs, "Discipline Procedures, Changes from Proposed Rule," topic brief, March 1999, accessed at <<http://www.ed.gov/offices/OSERS/policy/IDEA/brief5.html>> (hereafter cited as OSEP, "Discipline Procedures").

³⁷[34] National Association of State Boards of Education, "IDEA Regulations," *Policy Update*, vol. 7, no. 13 (July 1999), p. 2.

³⁸[35] OSEP, "Discipline Procedures."

³⁹[36] Boundy, "Disability, Behavior and School Discipline."

⁴⁰[37] Robert H. Pasternack, Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education, testimony before the Senate Committee on Health, Education, Labor and Pensions, Mar. 21, 2002, p. 8 (hereafter cited as Pasternack testimony, Mar. 21, 2002).

the need for schools to focus on improved classroom management, schoolwide models of positive behavior strategies, and the use of behavioral assessments.⁴¹[38]

In 2001, the U.S. General Accounting Office (GAO) issued a report on discipline under the IDEA after surveying a national sample of middle and high schools. GAO found that, of the schools that responded to its survey, 81 percent reported one or more incidents of serious misconduct in the 1999–2000 school year. Students in special education were more likely to commit such misconduct—50 incidents for every 1,000 special education students as compared with 15 incidents per 1,000 regular education students.⁴²[39] GAO also found that, according to the reports of principals who responded to the survey, special education students involved in serious misconduct are being disciplined in a similar manner to regular education students. The length of suspension for each group is roughly equal, and less than half of suspended students in each group receive educational services during suspension. The same proportion of each group of students (about one in six) is expelled from school or placed in an alternative educational setting.⁴³[40]

Overall, the results of GAO’s study indicate that the IDEA has played a limited role in affecting schools’ ability to discipline students (as was a concern of those who thought the law created a double standard), but at the same time it also appears that school administrators fail to consider whether the consequences of discipline may be more detrimental to students with disabilities. Schools may not be doing enough to ensure that students with special needs, who are already at an academic disadvantage, are being provided educational services during suspension.

Moreover, evidence suggests that disciplinary action differs among students in special education, with race/ethnicity being a determining factor in the severity of punishment. According to data released by the Department of Education, in the 1999–2000 academic year, Latino, American Indian, and African American students with disabilities were substantially more likely than white students to be suspended, removed by school personnel, or removed by a hearing officer. African American students were three times more likely than white students to be given short-term suspensions. Similar disparities held true for long-term suspensions, with American Indian students (2.7 times) and African American students (2.6 times) more likely to be removed for 10 days or longer.⁴⁴[41]

Reauthorization Timeline

⁴¹[38] Ibid.

⁴²[39] U.S. General Accounting Office, *Student Discipline: Individuals with Disabilities Education Act*, GAO-01-210, January 2001, p. 6.

⁴³[40] Ibid.

⁴⁴[41] Boundy, “Disability, Behavior and School Discipline.”

In recent testimony before the Senate Committee on Health, Education, Labor and Pensions, the Assistant Secretary for Special Education stated:

We know that we will never improve outcomes for students with disabilities by focusing on special education alone. We must look at the whole education system, and see whether we are providing the right services to the right children, at the right time, in the right settings, and with the right personnel to achieve the right results.⁴⁵[42]

He identified the following implementation challenges: highly qualified and well-trained teachers and administrators; accountability systems and assessments; access to and participation in the general curriculum; transitional services from school to work or postsecondary education; and identification of students with disabilities. All of these issues are likely to surface during reauthorization discussions.

Congress is just beginning the reauthorization process and is holding a series of hearings that began in March and will run through July 2002. On October 2, 2001, the President issued an executive order creating the President's Commission on Excellence in Special Education, which is assigned to collect information and release a report with recommendations for the IDEA by July 1, 2002.⁴⁶[43] Although there is no established timeline for the reauthorization to be complete, it is expected that legislative proposals will be presented in July or September 2002, and it is likely that the process may continue into the next legislative session.

U.S. Commission on Civil Rights

Briefing on the Reauthorization of Individuals with Disabilities Education Act (IDEA)

April 12, 2002

Proceedings

⁴⁵[42] Pasternack testimony, Mar. 21, 2002.

⁴⁶[43] Executive Order 13227, President's Commission on Excellence in Special Education, 66 Fed. R. 51287 (October 2001), as amended in 67 Fed. R. 6157 (February 2002). The President's Commission will disband 30 days after submission of its final report, unless extended by the President.

CHAIRPERSON BERRY: Now, if we could ask the panelists to come forward: Dr. Martin Gould, Professor Donald Oswald, Ms. Kathleen Boundy, Ms. Barbara Cheadle, and Jeritza Montgomery. Would you please come forward and sit behind Jermaine. Don't sit behind somebody else.

I'll just say that does anyone—where is the sign interpreter? Could you please ask if anyone is in need of sign interpretation at this time. Okay. Thank you very much.

The Commission has long recognized the importance of education as a civil rights issue, and of course we've published a lot of reports about education. The Individuals with Disabilities Education Act, which used to be called the Education for All Handicapped Children Act, happened to be the first piece of legislation I encountered when I came to Washington to head up the Federal Education Program in the old HEW.

I happened to be at my first budget meeting in that January of 1976–1977 when Joe Califano, who was the Secretary, and I were sitting there with some folks talking about how would we revise the forward budget, and somebody said, “Four, put four in.” And I, coming from the University of Colorado, where I was used to my budget, which was in the range of about \$120 million, I guess, and whenever somebody said four, I thought they meant \$4,000 or something. So I said, “Four, we're only going to put”—and then I said, well, this is the federal government, so maybe it's bigger. So I said, “We're going to put \$4 million into this?” And Califano looked at me and said, “Well, I can lose that much on the way to the bathroom.” He said, “When we say four, we mean hundreds of millions of dollars.”

[Laughter.]

And we talked at that time about how we weren't able to fully fund the Education for All Handicapped Children's Act and how the federal share was supposed to be a certain amount and we weren't up to that, but we hoped that in 10 years it would be up there. And I guess we were incredibly optimistic.

IDEA, which is what it's called now, is up for reauthorization this year in Congress, as you know, and it's being discussed, and this will not be the last piece of work the Commission does on this. And we have done some briefings before that involved some of these topics, but we wanted you to come today to talk to us, particularly we're concerned about the civil rights issues, naturally, that are to be discussed on this subject.

So without further ado, I will introduce you. First, we will hear from Dr. Martin Gould, a senior research specialist with the National Council on Disability. He will give us an overview of the law and discuss enforcement and compliance.

And then we will hear from Dr. Donald Oswald, associate professor of psychiatry, associate clinical professor of psychology, and associate chair of child psychology at

Virginia Commonwealth University, who will speak to us about his research on the overrepresentation and overreferral of minority students in special education.

And then we will have Kathleen Boundy, co-director of the Center for Law and Education. As an attorney, she has dedicated much of her career to advocating on behalf of low-income children with particular emphasis on the issue of discipline in the special education setting.

And, fourth, we will hear from Ms. Barbara Cheadle, who is the program coordinator for the National Federation of the Blind and president of the National Organization of Parents of the Blind. And Ms. Cheadle will speak to us about her own experiences with the special education system as a parent of a blind student.

And, finally, we will have Ms. Jeritza Montgomery. I think you go by Ritza Montgomery, a special education teacher and IEP (Individualized Education Program) facilitator from Thomas Stone High School in Charles County, Maryland. Ms. Montgomery has been working in special education since the IDEA was newly enacted and will share with us some of the challenges teachers face and present ideas for reauthorization from a practitioner's perspective.

Please proceed, and then we'll have some questions for all of you. So please proceed, Dr. Gould.

Martin Gould, Senior Research Specialist, National Council on Disability

MR. GOULD: Thank you. Good morning, Chairwoman Berry and distinguished members of the Commission and, of course, your overworked staff. Thank you very much for—

[Laughter.]

VICE CHAIRPERSON REYNOSO: You heard all that discussion.

MR. GOULD: Thank you very much for inviting me to participate in the briefing. I have some prepared written remarks. I'll try not to be too stimulus-bound.

NCD is an independent federal agency making recommendations to the White House, the President, and Congress on all matters, laws, and regulations and programs that affect millions of Americans with disabilities every year. One of the areas involves public education.

During IDEA reauthorization this year, some of the key policy issues that we have identified for discussion that are likely to be addressed include monitoring and enforcement, full funding, discipline and eligibility, and overrepresentation of students from diverse cultural and linguistic backgrounds. And that certainly won't be the least of

the issues to be discussed, but those are the ones that we'll be addressing and that we've provided in our written comments to you today.

In the written briefing remarks we've submitted to you, we provide an overview analysis and research-oriented update on the four issues. Our remarks focus on what we believe is the key to successful implementation of IDEA and the achievement of valuable student outcomes regardless of what the impending reauthorization of IDEA looks like and how the law unfolds. And the key to a successful implementation is enforcement of the civil rights law. It's not possible to implement a civil rights law like IDEA without any degree of fidelity of enforcement.

As you know, in 1975, when Congress enacted the Education for All Handicapped Children Act, it found that the special ed needs of millions of children with disabilities were not being met. Students were entirely excluded from school, others were not receiving appropriate education, still others had unidentified disabilities or were misclassified. IDEA both authorizes federal funding for special ed and related services, and for states that accept these funds sets out principles under which special ed and related services will be provided. The requirements are detailed quite specifically and especially when the regulatory interpretations are considered.

Some of the major principles of the law include: First, states and school districts make available free appropriate public education to all children with disabilities, generally between the ages of 3 and 21. Second, each child receiving services have an Individualized Education Program, spelling out the specific special ed and related services to be provided to meet his or her needs. Each student aged 14 years and older should have a transition plan incorporated into that IEP. Third, to the maximum extent appropriate, children with disabilities should be educated with children who are not disabled in their neighborhood schools. And, fourth, states and school districts should provide procedure safeguards to children with disabilities and their parents, including the right to a due process hearing, the right to appeal to federal district court, and in some cases, the right to receive attorney fees.

IDEA is now one of the most far-reaching aspects of federal involvement in public education. Rich or poor, urban, suburban or rural, all schools and districts are affected by special education. The IDEA statute is made up of four parts, including Part A General Provision sections, Part B Grants to States Program, including preschool grants, Part C Infant and Toddler Program, and the Part D Supports Program.

The Part B is permanently authorized. Congress must periodically review and reauthorize Part C and D of IDEA usually every five years in order to ensure continuation of activities included under these parts.

Most recently, IDEA helped fund special education and related services for about six million children with disabilities, to the tune of about \$70 billion, combined federal, state, and local dollars. The largest group of children served were those with specific learning disabilities. Other types of disabilities specified in the law are mental retardation, hearing

impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, and other health impairments.

How well is IDEA working? During the course of five studies on the Individuals with Disabilities Education Act, from 1989 to 2000, NCD consistently learned that parents of children with disabilities are enthusiastic supporters of the law. They think it's a good law, but they've also told us repeatedly that there is room for improvement on the basics.

In the more than 25 years since its enactment, IDEA implementation has produced improvements in the quality and the effectiveness of public education received by millions of American children with disabilities. National data show that about 27 percent of students who receive special education graduate with diplomas, compared to about 75 percent of their peers in general education. About 27 percent of the students with IEPs complete high school, enroll in postsecondary education, compared to 69 percent of the general student population. In three to five years after exiting or leaving high school, only a little more than half are found to be employed, compared to 69 percent of their peers.

National data also show that about 50 percent of students who receive special ed are instructed in regular classrooms where they have access to the general curricula, more rigorous educational instruction, and sometimes high-stakes testing.

What accounts for these levels of student outcomes data? The answer, in part, can be found in some of the recent research we conducted in the area of federal enforcement of IDEA. For example, in January of 2000, we released *Back to School on Civil Rights*, a report that analyzed data contained in the Department of Education's state monitoring reports.

The study measured compliance and enforcement in the areas of free appropriate public education, least restrictive environment, Individualized Education Programs, transition services, generalized supervision, and procedural safeguards. The study also looked at the enforcement of decision-making efforts by leadership at the Department of Education, the calculus of their decision making in relation to 15 years of its own data about noncompliance with the law by state and local school districts.

As you probably already know, NCD's *Back to School* report revealed that 90 percent of the states failed to ensure compliance in the category of general supervision; 88 percent of the states failed to ensure compliance with the law's secondary transition service provisions.

VICE CHAIRPERSON REYNOSO: How many?

MR. GOULD: Eighty-eight percent.

VICE CHAIRPERSON REYNOSO: Wow.

MR. GOULD: Eighty percent of the states failed to ensure compliance with the law's free appropriate public education requirements; 78 percent of the states failed to ensure compliance with the procedural safeguard provisions of the law; and 72 percent of the states failed to ensure compliance with the placement and the least restrictive environment.

NCD found that students with disabilities in some states were not provided with transition services and supports or related services, such as speech therapy, physical therapy, or psychological counseling, as reflected in their IEPs.

Based on the research for its *Back to School* assessment, NCD reported that in addition to the testimony of parents, special education advocates attest that inappropriate placement and separate settings and a lack of service for students served in regular classrooms persist in far too many areas. Testimony of parents at public hearings, consultation with special education advocates serving rural, Native American and other minority communities around the country, as well as studies by various government and advocacy organizations, indicate that students from diverse backgrounds are disproportionately represented in separate education settings.

So what are the implications and consequences of noncompliance and nonenforcement or a lack of enforcement of the IDEA? When critical IEP services such as mental health or psychological counseling are not provided, students may well develop behavioral problems that require school districts to apply serious disciplinary consequences to those children. When students don't receive speech or physical therapy IEP services that they're deemed eligible for, they can't achieve academic outcomes, and clearly they'll be left behind.

And school systems continue to categorically and unnecessarily place students, particularly those from diverse backgrounds, in more restrictive educational settings. Students will be stigmatized, they have difficulty learning, and clearly school systems cannot maximize the use of scarce federal education dollars they receive yearly, particularly when those separate education settings cost on the order of 100 percent or greater of the average per pupil expenditure in the nation. That is about \$12,400.

When students don't have transition plans to prepare them and their family for enrollment into college or the demands of community life after high school, they're not likely to become independent and responsible adults.

NCD has included a set of recommendations in the form of written remarks that we've submitted to you for your briefing books. In the interest of time, I'll not repeat them for you now.

In 1975, Congress crafted a statute designed to produce quality outcomes for students while providing a system of checks and balances for school systems. The U.S. Code defines special ed as "specially designed instruction to meet the unique needs of students." Each IEP should set forth a student's specific needs and individually designed

instruction. Each placement is to be based on students' unique needs and individually designed instruction, and no more restrictive than necessary.

If IEPs are based on the unique needs of students, if instruction is individually designed, if IEPs are faithfully implemented, and if the LRE [least restrictive environment] requirements are followed, students will likely achieve valued outcomes while enjoying maximum interaction with their nondisabled peers. Compliance with and enforcement of these IDEA requirements is a necessary condition for student outcomes as well as reasonable and efficient use of scarce school system resources.

Thanks for allowing us the opportunity to provide these remarks today; look forward to your questions.

CHAIRPERSON BERRY: All right. Thank you very much. Dr. Oswald?

Donald Oswald, Associate Chair for Child Psychology, Virginia Commonwealth University

MR. OSWALD: Thank you, Madam Chair. Good morning to you and to the Commission members and the staff. I am a clinical psychologist by profession, but I'm here because of the research that my colleagues and I have been doing over the last five years on the disproportionate representation of minorities in special education.

Concern about the overrepresentation of children of color in special education programs extends back at least three decades to when Lloyd Dunn wrote about African American children in mental retardation classes. The issue became more widely known and better understood in the 1980s, when the National Academy of Sciences undertook an investigation of the matter and published a comprehensive analysis of the data that existed at that time.

Congress took an important step forward in their 1997 reauthorization of IDEA by mandating that states monitor and report on the racial/ethnic distribution of students in special education. Congress also commissioned a new study of the issue under the aegis of the National Academy of Sciences. The National Academy of Sciences report was recently released by the National Academy Press.

The U.S. Department of Education's Office for Civil Rights [OCR] has been collecting data on the racial/ethnic distribution of special education students for many years. My colleagues and I have been working with these and other data for several years in projects funded by the Department of Education's Office of Educational Research and Improvement and Office of Special Education Programs [OSEP].

We've been studying the likelihood of identification for special education for each of the racial/ethnic groups represented in the survey, examining data from 1976 to 1997. This past year, OSEP released their annual child count data from 1998, the first year that the child count was disaggregated by race and ethnicity. Although these data come from a

different source, by means of a different process, we have appended the results to the OCR survey findings in an effort to try to characterize recent changes in disproportionality.

The figures tracking these data are included in your handout. They're the last two pages of the handout. The data points reflect the likelihood that students of a given race/ethnicity group will be identified with a particular disability condition, as compared to Caucasian students. Thus numbers greater than one on the graph represent overrepresentation, while numbers less than one represent underrepresentation, once again, as compared to Caucasian students.

As you can see from the figure, in 1976, African American students were over three times as likely as their white peers to be identified for mental retardation services. For the next 15 years, this overrepresentation declined slightly so that in 1992 they were about twice as likely to be so identified. The disconcerting conclusion of recent data, however, is that since 1992 overrepresentation of African American students in mental retardation services appears to have rebounded nearly to the 1976 level. Based on the 1998 child count, African American students are once again over three times as likely as white students to be identified for mental retardation services.

A similar pattern is seen for African American students with emotional and behavioral disorders and those with learning disabilities. That is a similar pattern of increase in overrepresentation over the past three data points. Another striking finding generally ignored in the literature on the subject is the persistent overrepresentation of Native American students in learning disability services.

Chief among the controversial questions arising from these data is whether, first, this disproportionality represents a real difference in the prevalence of disability across racial/ethnic groups or the overrepresentation in special education as a result of a biased and discriminatory process that further marginalizes children of color.

A recent study based on parents' reports about disability in their children indicated that the disproportionate occurrence of mental retardation in African American children disappeared when the effects of poverty were accounted for. This finding offered support for the conclusion that disproportionality reflects a real increased risk for disability among African Americans because of the effects of poverty and other associated social ills.

Our investigation of the relation between overrepresentation and characteristics of school districts, however, suggests that this is not the only answer. We found that after accounting for a variety of fiscal and demographic characteristics, those districts with the greatest overrepresentation of African American students in classes for students with mental retardation and students with emotional and behavior disorders were those districts with the lowest poverty rates. Even more troubling was the fact that overrepresentation was most pronounced in districts with the greatest percentage of white

students. In short, African American students appear to be at the greatest risk for overrepresentation in districts serving mostly middle-class or wealthy white students.

The substantial literature on overrepresentation documents a persistent and apparently increasing issue for children of color. The scientific literature provides clear evidence that minority children are at increased risk for an educational disability because of increased exposure to social and economic conditions associated with such disabilities. The research also suggests that there are school districts in which overrepresentation may be a product of a biased and discriminatory process. To focus exclusively on one of these causes is to risk exacerbating the problem or creating other equally difficult problems.

The scientific literature also offers some directions for the future that should not be ignored. First, continued and improved data collection is essential. National progress on this issue and an improved understanding of the causes and remedies are dependent on the regular, systematic collection of high-quality data and its continued availability to the public in a usable form.

Gender is important. We find that further disaggregating the racial/ethnic groups by gender produces some striking findings. The circumstances of African American males in our education system are most concerning. The OSEP child count does not now provide separate counts for males and females. Requiring states to disaggregate special education data by race, ethnicity, and by gender is essential to the future of this issue. Race and gender data are critical not only for identification but also for placement and exit data if we are to adequately grasp how special education serves all of America's children.

Focus on outcomes. A constructive response to the problem of disproportionality will devote energy and resources to assessing and improving the outcomes of special education services. The technology of effective special education instruction is well established and should be disseminated more widely. Access to effective special education services can make an enormous difference in the lives of children with disabilities. Disproportionate access to an educational service that yields improved outcomes is unfair to children of color.

The impact of cultural competence training on disproportionality is unknown. Considerable effort has been put into developing and disseminating cultural competence training methods and materials over the past two decades. But the extent to which these training programs significantly affect outcomes for children has rarely been examined. Pursuit of cultural competence is, of itself, a valuable undertaking, yet the recent upsurge of overrepresentation suggests that cultural competence training efforts have thus far been unable to stem the tide.

Educational policy initiatives should be scrutinized for unintended consequences. The turnaround in progress on disproportionality suggests that changes may be driven by larger forces within the general and special education systems that are not directly associated with special education. Policy initiatives such as the contemporary focus on

school accountability and high-stakes testing may have unanticipated and unintended consequences with respect to disproportionality.

The concern of this Committee with disproportionality in special education is timely and well placed. The data are clear that the problem persists and grows, and our understanding of the causes and the remedies is limited. The importance of the question, however, is abundantly clear: Equal opportunity for all students depends on continued efforts to understand and respond to this critical issue. Thank you.

CHAIRPERSON BERRY: Thank you very much. Okay. Ms. Boundy, please.

Kathleen Boundy, Co-director, Center for Law and Education

MS. BOUNDY: Good morning, Madam Chairperson, members of the Commission, and staff. I appreciate the opportunity to testify before you today.

Let me just say that the Center for Law and Education is a national, nonprofit, legal and efficacy agency that seeks to ensure high-quality education for all children. From 1969 until 1994, the center served as a national support center in education law for the Legal Service Corporation. I point that out because for the next 20 years, from 1975 through 1994, the center received the highest requests for assistance from Legal Service field attorneys in the area of disciplinary exclusion of children with disabilities, a disproportionate percentage of whom were African American children.

Through my presentation about discipline in the reauthorization of the IDEA, I will identify some of the likely proposed changes to the current law, arguments against any weakening of the protections related to disciplinary exclusions for children with disabilities, and I will respectfully offer some recommendations to the Commission for your consideration. My written statements set forth the rationale for the positions taken as well as cite to evidence that are contrary to the proposals to change the law.

School discipline has undoubtedly been the most controversial issue with respect to the IDEA provisions. This was evident during the last reauthorization, and despite bipartisan agreement that culminated in the IDEA amendments of '97, this five-year period has been notable for the persistent attempts to amend the statute to limit the rights and protection of children with disabilities. We are also, by the way, protected under Section 504 of the Rehabilitation Act.

Currently, proposals have been floated that would eliminate the "no cessation" provision that requires every child with a disability to be provided free appropriate public education, including during the period of the suspension or expulsion, the right of a child to stay put during the pendency of any administrative or judicial proceedings, the requirement to conduct a manifestation determination before changing a child's educational placement, and then an affirmative proposal that would encourage or create alternative schools.

Based on the prior Congress' actions, we can anticipate an amendment that will be made to eliminate the no cessation provision of the IDEA. It's specifically 20 U.S.C. § 1412(a)(1)(a). This provision requires as a condition that a state shall provide a free appropriate public education to all children with disabilities residing in the state between the ages of 3 and 21, including children with disabilities who have been suspended or expelled from school. It can be anticipated that an amendment will be proposed to suggest that because the system needs to be fair to the teacher and the student in the school, that a single discipline standard ought to be established that applies to all students.

I would suggest to you that preservation of the no cessation principle is critical. Despite tremendous strides resulting in significantly improved access to school for children with disabilities since 1975, only now, through our federal and state framework for education reform and an accountability that is underscored in the IDEA amendments of 1997, are students with disabilities expected to participate meaningfully in the general curriculum to the maximum extent appropriate to meet the performance goals set for all children and to be included in all state and district assessments.

These children are entitled to free appropriate education under 504 as well as IDEA, and many of these children also have a right to equally participate in the general curriculum under Title VI. It is critical now, as we move forward with a vision of high expectations for all children most recently recognized through the reauthorization of the Elementary and Secondary Education Act, the Leave No Child Behind Act, that children with disabilities retain this protection so that they too may have a full and real opportunity to learn what all other children are expected to learn.

The importance of the no cessation provision is also underscored by recently gathered data by the Office of Special Education Programs, reflecting significant racial disparities and exclusionary discipline. In particular, unilateral decisions by school personnel for short-term and long-term suspensions and also meetings by hearing officers. I ask that the Commission oppose any proposal to eliminate a weakening of the no cessation provision.

Others, too, will suggest the elimination of the stay-put requirements. This is the provision that permits students with disabilities to remain in their current educational placement during the pendency of any matter relating to their identification, evaluation, program or their placement during the pendency of any judicial or administrative complaint. People argue that it ties the hands of educators who are trying to create orderly learning environments in the classroom.

This allegation is made despite the 105th Congress' granting additional exceptions to the stay-put provision. In 1988, in *Honig v. Doe*, Justice Brennan, writing for the majority, described this provision as unequivocal and expressly designed to counter the history of abuse, mistreatment, and exclusion of students with disabilities. The bipartisan IDEA amendments of '97 modified the unequivocal nature of the stay-put provision, giving school personnel the authority to remove immediately any student for up to 10 school days and to remove any child with a disability in possession of a dangerous weapon,

illegal drugs, to an interim alternative placement for up to 45 days, with the right to seek an extension through an expedited hearing before a hearing officer who may also remove a student with a disability over the objection of his parents if the hearing officer finds that the child substantially is likely to cause injury to self or others.

In addition, IEP teams today are required by the IDEA amendments of '97 to consider for children whose behavior may impede their ability to learn considering the development of behavior plans that would include positive behavior interventions. This is all in the '97 act. Given these explicit exceptions and the affirmative requirements of the IDEA amendments of '97, there is absolutely no justification for eliminating the protections designed to ensure that schools do not punish children with disabilities on the basis of their disability.

I would suggest now, more than ever, these children for the first time are included in their states' accountability systems, so their right to stay put and not have their education disrupted is paramount.

Also, with respect to children whose protections under Section 504—the right not to be discriminated against and receive comparable aids, benefits, and services—we need ask ourselves why children with significant cognitive disabilities comprise such a small percentage of students with disabilities and such a large percentage of children with disabilities are failing to meet their state standards. Why are they twice as likely to drop out of school? Why do they comprise more than 70 percent of those who end up in the juvenile justice system and experience unemployment at rates significantly higher than nondisabled adults? And, of course, we know within all of the above categories that African American children are disproportionately affected. Again, I urge you to oppose any proposed elimination or modification of stay put.

The elimination of the manifestation determination is another proposal. The manifestation determination was added to the IDEA amendments of '97 to give school authorities greater authority to discipline any student with a disability as a nondisabled student if it were determined there was no proven relationship between the student's inappropriate behavior and disability.

During the last Congress, amendments were unsuccessfully proposed to the Senate to that effect through the reauthorization of the Elementary and Secondary Education Act. In the House, an amendment that would have gone further proposed eliminating the manifestation determination as well as the duty to educate a child during a period of suspension and exclusion, the no cessation provision. Such an amendment, I would suggest, would violate Section 504, and I would urge the Commission to be clear in opposing such provision.

Also, although it's not clear that any data exists, I believe that it is likely that poor and minority children with disabilities would be found disproportionately unable to even show the nexus between their behaviors and disabilities. And I would urge the Commission, to the degree it can do these things, to conduct a study, to follow-up the

study of students with disabilities removed from their educational placements because of a finding of no manifestation, identifying them by race, ethnicity, type of disability, and the nature of the infraction to examine whether or not a manifestation hearing was convened, whether or not the outcome is affected by the child having legal representation and/or access to a qualified witnesses, for example, a pediatrician, a psychologist or a psychiatrist, as evidenced by the testimony being offered.

Creation of alternative schools is another proposal we are hearing in terms of to be anticipated through the reauthorization. This proposal to IDEA would make it easier to remove eligible children with disabilities who have behavioral manifestations from participating in the general curriculum with their nondisabled peers to the maximum extent appropriate and in the least restrictive environment. Twenty-six states already mandate provision of alternative education for students who are suspended or expelled from schools. Eighteen states make it voluntary and a part of local districts.

Amendments linked to the new federal funding are likely to be offered that will permit, indeed encourage and make possible, the removal of children with disabilities with behavioral manifestations through what we call alternative educational schools, where, purportedly, in the interest of equity, students without disabilities who are excluded for discipline reasons will also be placed. I would suggest to you that alternative schools, while perhaps a better option than exclusion, would exacerbate resegregation of public education by race and disability, and it is likely to be an unintended consequence of accountability or the movement to hold schools to high standards, as failing students will be shuttled or referred out the door.

Again, particularly in light of the requirements of Section 504 and Title VI, I would urge the Commission to oppose any amendments to use the right to attend alternative schools as a means to weaken the least restrictive environment provision of the Individuals with Disabilities Education Act and to encourage the channeling of students with disabilities from the regular education environment to alternative schools.

Finally, let me just say that the racial data that has been gathered I think demands attention and demands that we uphold the protections that exist currently under the IDEA. Data collected through the congressionally ordered General Accounting Office studies suggest that a significant majority of school administrators believe the act is effectively working and does not create a problem for implementation. Preliminary research indicates improved outcomes for individual students with behavior issues who are currently being provided positive behavior intervention supports.

And, finally, the racial data, with respect to what has been collected by the Department of Education, demonstrates that among children with disabilities, Latino, American Indian, and African American children are all substantially more likely than whites to be suspended and removed from school by school personnel or removed by a hearing officer. African American students with disabilities are more than three times as likely as whites to be given short-term suspensions, and racial disparities are nearly as great for

long-term suspensions for both American Indians and African American children who are likely to be removed for more than 10 days.

Again, in the context of the accountability movements in terms of where we finally are with children with disabilities being part of this system where they have a right to participate for a free appropriate education consistent with state education standards, it is the first time that these youngsters are included in what everybody else is expected to know and to be able to know. It is not time to weaken the protections that would push them out the door. Thank you.

CHAIRPERSON BERRY: Thank you very much, Ms. Boundy. There will be lots of questions. Ms. Cheadle, please.

**Barbara Cheadle, Program Coordinator, National Federation of the Blind;
President, National Organization of Parents of the Blind**

MS. CHEADLE: I'm a hillbilly, and I'm proud of it.

CHAIRPERSON BERRY: Where are you from?

MS. CHEADLE: I grew up in southern Missouri in a county that was so poor that I didn't even know how poor I was until I went away to college.

One of my cultural heritage things of which I am particularly proud is quilting. My mother is quite a quilter. And I don't know if you're familiar with quilts, but one of the most popular quilts that many people like are called crazy quilts. Crazy quilts are made up of scraps of cloth that come from—not just from—they're any shape and texture and color, and there is no particular pattern to the quilt. Most all other quilts have a particular pattern and pieces are carefully cut and shaped and put together. But not the crazy quilt. You take what you get, and you put it together, and you have a functional quilt at the end.

Whenever I've come to these functions, and I've been to D.C. many times over the years to testify on behalf of the National Federation of the Blind and as a parent about IDEA, I often think of the crazy quilt and wonder how we could pull so many diverse people together, diverse needs, diverse children, and come up with a system that works for everyone. And despite all of its problems, I think IDEA has done a pretty good job.

My own son, who is blind, and like many blind people he has partial vision, is now out of the system in the sense that he's no longer in school. He graduated from high school a few years ago. He's now completing a college degree at the University of Baltimore County, UMBC. He's an ancient studies major—go figure. He likes it, does well in it.

But I continue to be very active as an advocate for parents all over the country. I am the president of the National Organization of Parents of Blind Children, the editor of a national magazine for parents of blind children, *Future Reflections*. I go to IEP meetings regularly in Maryland to advocate. I consult with parents over the phone and other

members of our affiliate who are advocating for parents. And so I'm pretty familiar with what happens in the IEP process for parents. I went through due process proceedings for my own son some 14 years ago when he was denied braille instruction. So I know something about the whole system.

In a personal experience, I would say sometimes it's hard to make a pattern out of where things go wrong and how do you fix them. So it is a real challenge. One of the things I discovered is that some of it is disability specific. My fellow panelists here have addressed issues for which I'm very seldom concerned, partly, in terms of—these are real issues, by the way, and they really need to be addressed, and I know it, but with the specific population which I deal with, they are not the biggest issues.

For us, for the past two decades, for example, literacy has been the issue, and in the 1997 amendments, that was finally addressed. We have a provision which says that schools shall provide braille instruction to blind and visually impaired students unless an evaluation determines—an evaluation that considers their future needs for braille, by the way—determines that it isn't necessary. This has been a keystone and it is truly important that that provision not only be protected but extended to include training to parents in braille literacy. I don't know how that's going to fit into IDEA, because currently training provisions have to be cross-disability.

More and more I find, at least with the parents I work with, that we've done a good job of training parents about what their rights and responsibilities are under IDEA, what the procedural issues are, and they're doing a pretty good job of doing that. Far more parents are telling me, "But I need to know what to ask for." Well, that makes sense, doesn't it? All right. I know that when I go into a meeting that they're supposed to have informed me so many days in advance. I need to know who's there. We go through this, this, and this. But when I sit down, if I don't know what to ask for, what difference does all of this make? Should my son who has partial vision be taught braille? What kind of assessment should they do? How do you determine what the future needs may be?

And so I think that it is truly important, at least, that we look at finding specific training for parents. And in terms of their literacy, what we're talking about is that if a parent doesn't know braille and has a blind child that is a braille student, as far as I'm concerned, that student is as illiterate as anyone who doesn't even know how to read and write. How can they possibly help their child through school and do all of the things that we expect and we know helps children become good readers if they cannot review their homework, check their homework, read with them? So that is truly, I think, a very important next step.

Another area that's truly important in our issues—by the way, my son, through the due process proceedings, did get braille instruction, and he did not, however, because of the lateness of it, get it to the degree to which he could become fluent in it, which was a real disadvantage.

Nonvisual access in terms of technology and the Internet in classrooms is really a biggie. Right now, the way IDEA is focused, in terms of the—you know, everything's written for the student, "The student will do this, this, and this." The problem with that approach is that it doesn't take into account that you've got an environment which may not be accessible, and that if you were trying to change it after the fact and after everyone has already set up a whole computer system and a whole lab and they didn't think in that whole process of doing that, they bought the software for a new computer course that they're going to teach, and none of it's accessible. Yes, you can buy the students a Jaws Program, which will make it speak, but what if the program you have isn't accessible, so it doesn't matter whether you have Jaws on your computer or not. What if you've got the braille embosser but no one in the school knows how to hook it up?

And, listen, this is one of the most common problems parents face. They will get the computer, they will get the technology, it will sit there literally a year, truly a year, and never be hooked up. They've spent all this money, nobody knows how to hook it up, and once they hook it up, who do they go to to troubleshoot?

And really too much emphasis has been put on, well, the special education teacher. Wrong. A special education teacher can't be everything to everybody. They're not a technology—it's true. And yet we expect them to do everything and especially with technology coming along being a very big and important piece of that, that is simply not going to cut it. So we're looking at ways—we really need to be looking at ways so that the total environment in terms of technology and access is there.

Let me talk a little—those are a couple of really big pieces. Enforcement options, I don't have anything to recommend, but this is a real biggie. Time and time again, I tell parents when we talk about what's wrong and they ask, "Do I go to due process?" I very often advise them, "Explore Section 504 complaint first, because the due process proceeding is so lengthy and it is so adversarial, you may come out and you may win, but you have really lost because you have lost the good will, and there's nothing to enforce it."

Time and time again, when I review what has happened and made a change with parents that have advocated for—and what happened in my own case after due process, it wasn't really winning it that made the difference, it was a change in attitude and a change in personnel. Development of good will just is essential.

Some of the things that are really right in terms of what's going on has to do with that very thing, good will, and good will not at the teacher—necessarily teacher level but at the administration level. The administrators have to have a perspective and a vision and feel that these children belong in his school or her school.

Let me give you quick examples of some parents and some issues that would be helpful to look at. Crystal is a little girl in Ohio who has been integrated in a regular public school from preschool until last year, which is about the fifth grade. This year she's at a school for the blind. She's in this school because the school—her parents have changed because—not because I think because they really want her there as opposed to being in a

public school, but because she can't get her books and her textbooks on time, and her parents were tired of it. They were tired of waiting for textbooks and waiting for materials and never having enough. And that is another common problem.

Does that red light mean that I need to stop? Do I have one more statement can I make?

CHAIRPERSON BERRY: Yes, sure.

MS. CHEADLE: Okay. Another area that is a problem is statewide exams and district exams, you know, high-stakes testing. This has become a real issue in terms of accessibility. Example, a parent in Louisiana called me last month. Her third-grade son took the required statewide exam. It turned out that that exam had deleted an entire segment having to do with reading and using graphs or charts. She called the State Department of Education. Well, the company said that they couldn't braille it. She called the company. Well, we had asked some experts and they said we couldn't braille it. Her son had learned how to use tactical graphs and charts. That was totally inappropriate. They're investigating a Section 504 complaint for that now.

So those are some of the things that, in terms of time and personal experiences in this crazy work quilt that we have, that I hope that you will consider. Thank you.

CHAIRPERSON BERRY: Thank you very much. Ms. Montgomery?

VICE CHAIRPERSON REYNOSO: Ms. Montgomery's going to have all the answers.

CHAIRPERSON BERRY: Right.

[Laughter.]

Jeritza Montgomery, Special Education Teacher and IEP Coordinator

MS. MONTGOMERY: Good morning. I've heard everybody else speak, and I have a lot to agree with and disagree with. I was very reluctant to come, and I called our compliance officer before coming, because I said, "Can I lose my job?"

[Laughter.]

Because I am the honest one. There are a lot of problems with trying to implement IDEA. As a classroom teacher, I worked in the classroom for 17 years teaching a variety of disabilities. I've also been a department chair, and now I sit at the table making sure that IEPs are completed. And that's the most difficult process for teachers.

The main complaint is paperwork. There's just too much paperwork. Teachers cannot implement paperwork. A special educator has to do lesson plans, they have to do modifications for kids in classrooms, and then they have to do IEPs. They have to

develop behavioral plans, they have to make sure all of it's done in a timely fashion. They cannot get it done in a timely fashion for a 45-minute period per day.

Caseloads for case managers run anywhere from 13 to 25 kids sometimes, depending on the number of special ed students we have. In my particular county, we have the largest number of special ed students. So teachers do not have time to implement the things that they would like to do because of time. So that is a big, big complaint.

Take, for example on any given day when a teacher has to be out of the classroom to come in for an IEP meeting, then they have to write a lesson plan for a substitute. So if they're out for the whole day, something is not getting done.

We start off with the funding. I was given \$180 when I started 25 years ago. That same \$180 is still given to teachers, and so there are no resources for them to implement the types of things that they want to do. There's no extra money for behavior management plans. Every once in a while there's a pot of money, and then they take it away.

So teachers are pulling out of their pockets every day on a daily basis providing students with either incentives, gift certificates, tangibles, food, anything that they can think of to keep these kids happy. The problem with that is they get caught up into you're providing lunches for kids, kids are coming out of classrooms, regular ed teachers are complaining that you're pulling kids back into your classroom so that you can modify behavior plans. They're missing regular classwork. So there's always conflict between regular educators and special educators.

And then you'll see enforcement of trying to place kids in inclusion settings, which is wonderful, and I truly believe in the idea. I didn't at first, until I taught an inclusion class. I worked with a wonderful teacher who said, "Look, I do everything I have to do, but somebody else has to do the paperwork." And as a result, every kid in that class came out with a C or better, and they learned more than they learned in the special ed class because of the extra social settings that it provided. It's a good experience; however, there's not enough teacher training.

Teachers, special educators, and regular educators need to be trained on how to modify programs. I heard someone over here sit and say that modifications need to be done. You need to do Individualized Education Plans. How can you do that with a classroom of 25? This kid maybe needs to be read to, this kid needs a dictation modification, this kid needs extended time, this student needs something else. You forget. So when I sit at the table and I talk to parents about these are the modifications your student is going to have, who's going to make sure that's implemented?

And I have to be very honest with parents. A teacher will try to do the best that they can do; however, they may forget. So then we have to try to make students understand you have to be an advocate for yourself. If the teacher forgets, then you're going to have to say, "Hey, I'm supposed to get extended time." If that student forgets and the teacher

forgets, we're out of compliance. A parent is complaining. So then you ask a parent, "You might have to call and remind one of us that it's not being done."

That's a problem, because then we deal with advocates and lawyers. And once an advocate and a lawyer comes in, everybody's hands are tied, because the school system says, "You've got to make it right." So then what happens? Everybody else sits on the sidelines because you're preparing paperwork to make sure we aren't being sued.

So I see a lot of things that should be done but, honestly, they can't be done in a timely fashion. On any given day, and I said this openly at our facilitators meeting, I will be out of compliance. There will be something that is not done because of the extreme amount of paperwork. Administrators want you to make sure that when these kids get suspended, where are they going? There's only 10 days. You put them out and you put them—we have a home teaching program which is not functioning to the best of its ability.

But then what happens with those kids? You send them out to home teaching, they stay there for 10 days, maybe a little bit longer, and then they send them back to the school. And we're supposed to revise the IEP, find other things to do. We can't. We've done everything; we've exhausted all of our resources before a child gets suspended.

And then you send them back to school. Administrators are screaming, "Why is this kid here?" Because he has to be here; this is the law. Teachers are complaining, "This kid is the one that threatened somebody else. Why is he back in my classroom? My classroom was perfect once he was gone, and now what?" And teachers would like to do what they have to do, but there's just not enough time, there's not enough teacher training.

Special educators are not trained in the areas of chemistry, in the areas of geometry; they're trained globally. So now you're asking those teachers to go into the classroom and help. They can't. So I think one of the main concerns from teachers is the implementation of paperwork, the implementation of modifications in the classroom, complying with federal regulations, not enough time, not enough resources, not enough funding.

I think Ms. Boundy talked about alternative programs. That is something that is desperately needed in the high school level, because there are no alternative programs. Take, for example, we had a young man who has been suspended numerous times for the past two years. He was found to be a manifestation. They asked us to go back and retest. We retested. They were hoping that he would be found emotionally disturbed so that we could place him in an alternative emotional adjustment program. However, he wasn't—oppositional defiance, African American male, and he was having issues with drugs.

So then you have to ask yourself the question, where is the problem? Is it the drugs or is it a disability? And there's a fine line; you can't tell. However, this young man was placed out of school. He's been on home teaching off and on for the past two years. What is he going to gain from this? We need vocational programs for some of these kids.

Alternative programs are a must if these kids are going to succeed. Vocational programs are a must. We're talking about high-stakes assessment testing. The kids are not making it. I've given those tests. The kids will sit there and say, "You can read it all to me, I'm just going to bubble because I know nothing, I understand nothing," and that's what they will do. There has to be more time for training for special educators; there has to be smaller class sizes. Our special ed classes are as large as some of our regular ed classes.

Administrators. Administrators are frustrated because the suspension rate is high, and we're told, "You can't suspend." Administrators want the kids out of their schools, and then when they have to come back, they're screaming. There's no place for them to go. I really think when everything is redone, that you look at alternative programs, you look at vocational programs for special ed kids.

When you talk about transition, I've had kids come back numerous times talking about, "The thing that was the most important were the social skills that you taught us." The skills that we got when we went on job training. Now we're talking about putting MSPB kids in an inclusion setting. It's going to be interesting to see what parents are going to say about putting their MSPB kids in a chemistry class to gain what? They need vocational programs. Where are these kids going to work when they leave? As far as transition when they graduate, there's no follow-up, there's no one to do the follow-up, and that's a real concern.

Question-and-Answer Session

CHAIRPERSON BERRY: Okay. I think that—and then I'll turn to the commissioners—I was just sitting here thinking that it sounds like the system works for some people and that there are stories of success of kids who really are disabled. But they would agree, their parents would agree, everyone would agree that they get whatever services they need and they make it. And then there are all these other examples of people who don't make it.

And on the one hand, you have resource constraints as a reason why they don't make it. And you have kids who are really disabled who don't make it because of resource constraints and what services they are provided. And then you have kids who aren't disabled at all who are labeled disabled, and then the effort with them is to get them out of the system because no one wants to bother with them.

But I started out being depressed, and then I was elated, and then I ended up being depressed again. So let's see, maybe I just need more information. Does any commissioner have any questions for the panel? I do but I'll just let you guys go first, obviously. Vice Chair, you had your hand up.

VICE CHAIRPERSON REYNOSO: Madam Chair, just from hearing the testimony, I must say that the experts here have confirmed my own experience. Many years ago, I did a study in New Mexico, and at that time there was hardly any compliance by any school district. And more recently, I have two daughters, one of whom has an autistic daughter,

who had a terrible time finding education for her daughter. And, finally, because she knew about the law and all that, insisted that she be given private lessons. And only at that time did the school fess up that they actually had a program in their school, but it's so expensive apparently that they didn't want to let people know about it. It happened to be a good program once she got in it. And I have another daughter who has children who have some learning disabilities. She's a schoolteacher. She decided not to send the kids to public school, and she's home teaching them now.

So I've been around these issues for a long time, and all I can say is that you have, sadly—well, sadly and not sadly—confirmed all of my experiences, and that is that there are a lot of problems, but actually things are better now than they were in 1975.

It seems to me that from a civil rights point of view, my reaction in hearing the testimony was dual. One, some issues are so clear now and there's some danger that Congress will debilitate this, the statute, that maybe the staff—a little bit more work—could take a look at the testimony that's been presented. It seems to me some issues are so clear that we might be able to issue just a few-page memorandum that we can send to Congress. Other issues, in terms of implementation and all that, I think are a lot tougher, and we would have to study before we make recommendations. But some issues seem to me very clear.

CHAIRPERSON BERRY: Commissioner Thernstrom, you had your hand up.

COMMISSIONER THERNSTROM: Ms. Montgomery, I very much appreciated your testimony, which squares with my own knowledge of IDEA. I've been sitting on the State Board of Education for seven years in Massachusetts, and I actually also wrote quite a lengthy article, first for the Brookings Institution and then for the journal *The Public Interest*, on the problem of disruptive students. And not that I've looked at this article in a number of years, so I hardly remember what I said, but in any case, I completely agree with you that paperwork is overwhelming, suspensions are too difficult, we need alternative programs, we need vocational programs.

One of the things you didn't mention, and I would add, is that to too great a degree it's an unfunded congressional mandate. I mean the financial burden on the state of Massachusetts is such that regular education students are really being hurt, and I do think that the federal government should come through with the funds to back what it is demanding of the states.

I am concerned with the question of the disruptive students, because, as you know, two or three students in a classroom who are having behavioral problems can deny all other students in that classroom of an education. And that problem is driving away very good teachers or teachers who would be very good who start out in more difficult educational settings, most urban educational settings, when they have choices, they leave and they go to easier educational settings, which are usually suburban so that our inner-city kids who most need skilled teachers are on the losing end of that kind of migration. And, again, I think that this is closely linked to the problem of the way the question of disruption in the classroom has been handled.

You know, there's clearly a difficult tradeoff here, and, in addition, I mean one of the things I would like to hear from you is what do you hear from parents; that is, there are two messages here. There are lots of parents we hear from in Massachusetts that say, "I want my children or my child labeled because there is a great deal of additional help that comes with getting an Individualized Education Plan." And others who are, of course, concerned with the disproportionate number of African American students under special ed labels. That's one question: What do you hear from parents?

And the second is, do you have any knowledge of any difference in students who—is there any—in terms of the disparate impact, is there any difference between schools that are African American run, districts that are African American run and those that are not? That is, my impression is it really doesn't matter who—you know, these are problems that are very difficult to deal with, and it really doesn't matter what the racial or ethnic identity of teachers and administrators are in a particular district.

CHAIRPERSON BERRY: Ms. Montgomery?

MS. MONTGOMERY: Let me talk about parents. I think with parents who know the law and who come in and advocate for their students, those students tend to get exactly what they're supposed to. Parents of a lot of African American students do not know, normally do not have the time to deal with it. They say, "You deal with it." So, therefore, those kids do get suspended. Non-African American students tend not to get suspended as much or do not get placed out of school. Those are the kids that will remain in school because there is someone advocating for them.

I think there is a lot of parent training that really needs to be done, because parents just do not know what to do with their kids who have disabilities. And then there's that fine line: Is the kid truly disabled, does his testing come out so low because of social environment? And that's something we can't always determine. So I think that's the issue.

I live in P.G. [Prince George's] County, I work in Charles County. There's a big difference between the two counties. Our county does an extremely good job of implementing IDEA, because we have a compliance person who makes sure that we cross all our i's and dot all our t's. But being that P.G. is basically African American—and I have a son who's graduated from the system, and I also have a daughter, and I've worked in the schools consistently—there's a big difference. There's a big difference, and I think it's because of knowing what's available, asking for what you want for your students. I see that as another issue.

CHAIRPERSON BERRY: Ms. Cheadle wants to comment.

MS. CHEADLE: Can I make some comments—

CHAIRPERSON BERRY: Sure.

MS. CHEADLE:—about what I give to parents. First of all, blind and visually impaired children may also have a wide array of other disabilities. And as a matter of fact, some 40 to 60 percent, estimated, of these children have other disabilities. So I advocate for children who are blind and autistic, blind and have cerebral palsy, blind and mentally retarded, fewer blind and behavioral issues but some of them. So to that, I go back to parent training is important, but then you can't always get that, because there will be situations where the parents can't, won't advocate. And you're absolutely right, it makes a big difference in the ability for that child to get services.

Secondly, behavioral issues. The parents need to be trained too. I mean it isn't just the school that doesn't know what to do with them; it's the parents that don't know what to do. And there is good information out there. I know a number of blind children who are autistic, and one is currently in a school system in Baltimore City getting very good services. That took a lot of advocacy on his part with our involvement, but it requires resources: one-on-one instruction, commitment. It wasn't a school for the blind and it wasn't happening, by the way. We had to pull him out to get him in that.

Another autistic child who's blind in Maryland, the school system has utterly failed. She's been home taught for the last five years, and a number of parents of blind children and multiply involved children have pulled up and have opted for home schooling and other options simply because the school doesn't have the resources or teachers with the training to provide the resources. And the big crux of it with her was that it was truly essential that she had small class size, extremely small class size, but she could have in that setting. How do I know that? Because she's in a lot of our programs in social settings. She goes on youth retreat and she fits in fine, because we know how to work with her and we know what to do.

CHAIRPERSON BERRY: Commissioner Edley?

COMMISSIONER EDLEY: Well, I was hoping to hear from Kathleen Boundy about it, but let me—

CHAIRPERSON BERRY: Oh, you want to wait. Were you trying to comment on this? I didn't notice, I'm sorry.

MS. BOUNDY: I'd be glad to.

CHAIRPERSON BERRY: Okay. Go ahead.

MS. BOUNDY: Thank you. I think we need to go back to the beginning. In 1975, Public Law 94-142 was passed explicitly for these children with behavioral disabilities, who have disruptive behavior, who were excluded from school. One million have been entirely excluded, and the other eight million, half of them, inappropriately educated.

I think what we have done since 1975 is learned a lot, and I think we know how children learn. We know there's a relationship between how children learn and how they behave.

We also know that when children aren't taught to read and fall further and further behind, that this is something that exacerbates behavior and causes misbehavior.

Ms. Montgomery told us, and we know, that we have a problem with teacher training in this country. We have a problem with the fact that we have a shortage of properly trained teachers. We have special ed teachers who have only been taught globally to deal with children with disabilities who don't therefore learn content, which everybody else is entitled to learn under our new accountability system. That's the difference.

This parent spoke about, what is it that parents need to ask? What they need to ask is what are all other children expected to learn? That's where you start, and that's what civil rights is about. And this is a civil rights statute, and we are protected under 504 as well. But it's not just about talking laws here, we're talking about we know, the knowledge base is there. We need to bring it into the classroom, we need to bring it into the schools, we need to have special education teachers working with regular education teachers who, by the way, don't get taught anything about how to teach a child with specialized needs. Special education includes vocational education; it's part of the definition. It includes vocational education programs.

Programming should be available for children who have that opportunity to learn, but they should also have the opportunity to learn about Shakespeare. They should also have the opportunity to learn about Martin Luther King and history. And there should not be expectations they can't learn because they have behavior issues or ADHD or oppositional defiant disorders or whatever else we want to call these things.

The basic point is these youngsters can learn, they can learn with the proper support, and they have a right to learn. And they didn't get a right to go to alternative education and have another copout for public education in this country so they don't get held accountable when, for the first time, they were being held accountable to help all children learn to high standards.

COMMISSIONER THERNSTROM: Well, I don't think anybody's in disagreement with that.

CHAIRPERSON BERRY: Just a moment. Mr. Edley has the floor.

COMMISSIONER EDLEY: The reason I wanted to hear Kathleen Boundy's response is because I found so much to disagree with in what Commissioner Thernstrom had said. If the suspensions are too difficult—this is about civil rights, in my view, and the other underlying question is what is the behavior and what's the source of the behavior that's resulted in the suspensions, and what are the alternative measures that are available before we do something with these—a lot of these folks don't want to be regulated, period.

And I'm sorry, but civil rights often is about having some kind of legal structure that forces people to do what apparently, otherwise, they might not be inclined to do. And

they may feel put upon; it may require some additional resources. I think that's why it's so difficult to implement. I don't think that that means you roll back and say do less. I don't think it means you make it easier to push kids out. I don't think the problem, frankly, is paperwork. I think the problem is resources.

So I think we have to recognize the one reason you want to have the paperwork is because the problems of compliance have been so daunting. And the problems of disparate impact and disparate treatment and an unfair provision of services and so forth. If you don't have the paperwork, then there is no way, from either a management standpoint or dollar issue standpoint, or, frankly, a civil rights standpoint, to see how the system is working and how to figure out how to improve it.

So I think the lesson that I take from this is if teachers want the kids out of the classroom because they're disruptive, maybe that teacher needs more training, more skill in classroom management. Maybe they need more help, maybe they need a smaller classroom. What the solution seems to be is not to deprive the child of the civil right we were trying to establish in the 1975 statute.

The unfunded mandate idea—I mean with all respect, I think that phrase is thrown around in a bit of a—I won't say polemical, but it's a buzz word. The First Amendment's an unfunded mandate. The 14th Amendment is an unfunded mandate. The problem is that the real issue is, who's going to pay the bill for our aspirations?

Now, Massachusetts is perfectly free to say, "We're not interested in an aspiration. We don't want any of the money. Thank you very much." But you don't do that. Not only do you not do that, but you try to establish statewide standards every child can learn. There's lots of rhetoric, and you try to be ambitious. Well, this is about trying to be ambitious for all children, which I'm sure you would agree with.

COMMISSIONER THERNSTROM: Yes.

COMMISSIONER EDLEY: So it's not an unfunded mandate; it's a mandate that the state has willingly accepted and then refused to pay the bill for.

Now, we can have a debate about who's going to be fiscally responsible, right, and call for tax cuts and program cuts, on the one hand, and then attack another level of government for not pulling its weight, but the bottom line, it seems to me, is this difficulty of living up to promises.

What troubles me—let me get to a question. No, not quite yet.

[Laughter.]

The description of alternative schools. The difficulty here is that the research shows that some alternative schools are terrific and a lot of alternative schools, I think the technical term is, suck. They're warehouses and warehouses in which education does not occur.

And we know what the disproportionality problems are in terms of if we get support into these warehouses. So to suggest that alternative schools are some silver bullet is simply not the case. We're not providing adequate resources in regular education, much less in this alternative hidden education.

I would like to ask two questions. Number one is if Dr. Oswald could please, because I know he's done research on this, could you please go back and highlight for us again some of the comments about the odds ratios and how the odds ratios change depending upon the demography of the schools and the school districts? Because I think it's a very important counterintuitive point that goes to something that Commissioner Thernstrom raised.

And the second thing is Kathy Boundy. The compliance problems, to my mind, are perhaps the hardest intellectual problem that the Congress faces in reauthorizing IDEA as regards the disparities issues. What could be done legislatively that would make a difference? Because simply saying thou shalt not discriminate isn't going to work, especially since actually we don't really have a smoking gun of intentional discrimination based on race going on here. So that it's this incredibly complex, social, psychological, class, everything going on that's producing the disparities and odds ratios that I think Dr. Oswald is speaking to.

So I'm just curious if you or anybody else has a suggestion about the kind of thing that Congress might try to do that would offer us some hope that over time states and districts would be able to do something about these incredible odds ratios of two, three, four times? Whatever the source of it, it can't be acceptable.

CHAIRPERSON BERRY: Dr. Oswald?

MR. OSWALD: Well, I guess I would refer you to the paper that was included—although I didn't refer to it this morning—in my testimony. This was a paper that came out of the Harvard Civil Rights Conference that was held two years ago, I guess it was, in which we presented some additional information looking more specifically at how odds ratios change across the distribution of districts, from the most poor to the least poor, for example.

And I won't go into sort of excruciating detail about that, but one of the most sort of disconcerting findings, I think, there is that as we look across from wealthier to less wealthy districts, we find that the so-called incidence of mental retardation, among African American males particularly, changes wildly and that in fact the highest so-called incidence of mental retardation among African American males occurs in the districts with the least poverty. And that's a disconcerting finding. It's hard to know what to make of that.

COMMISSIONER EDLEY: And the least minorities.

MR. OSWALD: And the least minorities is also true, although it's a little bit less now.

Now, I would go back to a point that was I think alluded to in the National Academy of Sciences report. They, I think, characterized our work as saying that, well, somehow we are talking about the cause of disproportionality, and I would say we cannot say what causes disproportionality, but it is a reflection of the status of events. This is a reflection of the status of how—where kids are showing up and where they are showing up in mental retardation classes.

And I guess the end point of that is just to say that I think we cannot fall off on either side of that argument and say, well, it is only because African American kids are disproportionately exposed to toxic environments, which is certainly true and which certainly causes disability. I think we also need to go beyond that to say what is the process that operates in these districts where this disproportionality is most striking? And can we ensure that those kids are being appropriately identified and that they're being appropriately served?

CHAIRPERSON BERRY: Ms. Boundy is going to answer, and then I'll recognize someone else.

MS. BOUNDY: With respect to the question about what could be done legislatively to address the disparities, I think in some ways the IDEA amendments of '97 made an attempt to do that and took a very strong first step toward doing that. There are requirements for the first time that IEP teams have to address and develop behavioral intervention plans about issues behavior is known to impede. If we have schools where we have disproportionate numbers of children who are being excluded from school based on race with disabilities, we should be looking at those schools and saying, what could be done here? There's something wrong with the school? There's something different here, there's some reason they're thrown out. Why?

And we should be going in and looking at those schools and saying, do these kids have positive behavior strategies being offered? Do their plans include them? Are they being implemented or is this an issue here of resources or poorly trained teachers or teachers who haven't had the opportunity to have professional development training in terms of implementing or even developing a behavioral plan?

Similarly, I think there's a lot of research being done by George Sequay and others around—it's systemwide positive behavior interventions and whether or not there's an argument here for a school to adopt a system approach to address this. And I think the possibilities are there.

I also think in terms of early education that that can't be underestimated in terms of how critical a role we have here, starting with HeadStart, talking about our early intervention programs for children from zero to 3, our 3- to 5-year-old programs under the IDEA. These youngsters should be in inclusive settings and natural settings, and they also should be given educational components to learn so that they're not starting kindergarten already behind. I think an awful lot of what happens in learning is that when children come into school behind, behavior becomes the way to hide themselves as they age up.

COMMISSIONER EDLEY: Can I just note for everybody, I think what is so interesting but in a way troubling about what Kathy just said is that the sort of corrective measures that she described are exactly the kinds of things that we think the wealthier districts would be more able to do, and yet it's the wealthier districts where the problems of disproportionality are most severe.

CHAIRPERSON BERRY: Okay.

COMMISSIONER EDLEY: It's very disturbing.

CHAIRPERSON BERRY: Commissioner Braceras?

COMMISSIONER BRACERAS: I want to make a brief statement and then ask a question. The statement, I guess, is to the staff and that is I want to thank them for including the perspective of parents and educators on this panel, because that's been very helpful to me to hear from the last two witnesses, because I think I, as a lawyer, sometimes sort of get caught up in the legal, theoretical, statutory arguments, and to bring this real-life perspective to this briefing has been extremely useful, and I hope the staff will continue to do that with other briefings. So thank you.

My question, and anyone can answer, but I guess I would specifically direct it to Mr. Oswald and Ms. Montgomery, goes to who is classified as special ed and do we have a problem in classifying the wrong people at both ends of the spectrum? And I guess, specifically, I would ask, if you know the proportion of black students that are incorrectly labeled special ed and the percentage of black students who are in special ed that are incorrectly labeled special ed, and also the same numbers for whites.

And also I would ask if either of you have experience with, and I think Commissioner Thernstrom alluded to this, parents in wealthier districts trying to get their students into special ed that perhaps maybe shouldn't be technically special ed so that they can get their hands on resources for their students that may be suffering academically?

And this is by no means scientific, but I live in what is basically a wealthy town in Massachusetts and I have seen parents whose children are struggling academically, and I don't know for certain whether their children are disabled or not, but it seems to me that they have gone to great lengths to get resources for children that don't necessarily appear to need it. And I'm wondering whether you feel that there are people taking resources from the system when the system is so strapped for resources? And, of course, we'd all like to make the pie bigger, but we can't make the pie bigger.

And do you think that there are some people, particularly in wealthier communities, who are improperly getting classified as special ed when really the problem is just academic achievement, and those resources should actually be going to people who have more severe problems? So it's a two-part question.

MS. MONTGOMERY: I can answer that from a firsthand basis. I can remember an incident with a young lady. I transition eighth graders to the ninth grade, and a parent whose child—we did the reevaluation, her daughter did not qualify. However, she had been in special ed for the past six or seven years. Mother demanded that we qualify. I went on record as not agreeing. I was then taken to the Board of Education as being a noncompliant person, because I didn't agree with the parent, and the parent felt like it was a transitional period. Her daughter needed the extra help. We were told to go back and relook at the situation, because the parent threatened to sue. So we relooked at the situation, and they offered to give her consultative services for the following year. The mother wanted a program that we have in our county called CATS, which is a work study program, because the mother felt she's got to have some job skills so that when she leaves us she can independently take care of herself. That was her main focus of why she wanted her to stay in special ed, because if she was out of the program she could not receive those services.

We also have parents who will—kids will not qualify, but they will try to find loopholes to make sure that we can qualify them. Why? Because they want extended time on the SAT test. Okay? Those are not your African American parents, because they don't know about that.

COMMISSIONER BRACERAS: Yes. I mean I guess—yes. I mean I see a lot of wealthy white parents trying to game the system for services. And at the other end of the spectrum, you see people who aren't aware of the law not getting services that they really need.

MS. MONTGOMERY: And not wanting it because they don't want their children—black parents, excuse me, tend not to want their kids to be labeled, because they do not understand the resources that their kids need. So you get both of that.

COMMISSIONER BRACERAS: And if, Mr. Oswald, if you know the answer sort of statistically, how often are people improperly placed—do you know it by race?

MR. OSWALD: I don't know the answer to that. I don't know that we have real good data. I've looked for that kind of thing, and I haven't really seen a very good answer. We do have some studies that look at the children who get into special education, looking at differences across special ethnic groups of functioning level, for example. And there was a relatively small study, I don't know, a number of years ago, that—actually, the one that comes to mind immediately was not between racial and ethnic groups but between genders, and finding that, for example, girls who get into special education tend to be more severely disabled than boys who get into special education, which is a little different issue than what we're talking about here today, but it illustrates, I think, the technology that the potential for addressing the question is there, but I haven't really seen very good data.

COMMISSIONER BRACERAS: All right. I mean I guess I think it would be very useful to know, and you can take this back to your organizations for whatever it's worth, but I

think it would be useful data to have to know the percentage of special ed kids that are improperly placed in special ed, broken down not only by race but by the wealth of the community. And I bet you'd see a very different picture between Concorde, Massachusetts, the kids who may be in special ed improperly, and Boston. And I think it's a very complex picture, but I think that those statistics—it's not just a matter of disparate impact in terms of who's represented, I think the real question is, who is improperly represented in special ed classes? And to try to understand why, to look at some of the class and other issues that are out there to kind of break down what's happening here.

MR. OSWALD: If I could respond to the second question that you had asked about wealthy parents sort of inappropriately advocating for their children to get special services. In the other part of my life I'm a clinician and serve the children of autism and their families, and as I think back over the last 20 years, I've occasionally encountered parents who said, "I want the label, autism, for my child because it will get him special services."

COMMISSIONER BRACERAS: You have encountered that or you have not?

MR. OSWALD: I have occasionally, but I would have to say it's pretty rare. And I think in the grand scope of the problem, I would say that that—this is a personal opinion, I don't have data on it—but that that is probably less of an issue. I certainly could find examples of that, but in terms of the total amount of resources that gets devoted to those children who come from wealthy families who are being inappropriately advocated for, my guess is that it constitutes a fairly small portion of the problem, that we're far more likely to find that inappropriate representation happens among other populations.

CHAIRPERSON BERRY: Yes, Vice Chair?

VICE CHAIRPERSON REYNOSO: Let me make a statement and then ask a question. An organization in California has said that it is going to put on the ballot a constitutional provision in California that nobody can be identified by race or ethnicity. One, I wonder what your reaction is to that in terms of the effectiveness of implementing some of the corrective measures that you've suggested? That's one question.

A second question is the following: In California, we have found a great problem with non-English-speaking children being improperly placed in education and mentally retarded classes. Despite successful litigation and so on, it's still a problem. I wonder how often you run into these types of linguistic issues in your studies? So those are two different questions. I wonder if—Mr. Gould, you're involved in making recommendations to the legislature. I wonder if those issues come up in your studies or your concerns?

MR. GOULD: Thank you. The latter issue has come up. In fact, it was raised at the Senate Health Education, Labor and Pensions Committee hearing on IDEA recently. The testimony of Lillian Rangle Diaz, one of our board members, who's also a parent of

children who get special ed, who's also a statewide advocate in Florida, indicated that from her experiences and from some of our own hearings from the National Council, typically students are possibly identified or evaluated, in part, for needing special education because of the nature of the tests and the lack of sensitivity of the tests, which is no surprise.

What is a surprise is given the frequency with which we're sure the Office of Civil Rights and the Department of Education and researchers have heard that complaint, that there apparently has been little done to try to remedy that issue from people who design tests to the people who use tests in the different states, "child find" identification and evaluation procedures to try to correct or remedy that issue.

Perhaps an approach by California to try to negate that or to diffuse that by passing some measure might prove fruitful, but in the absence of sensitive tests and tests that are better designed and then used, the people who are in charge of special ed child find evaluation will continue to get the same results.

VICE CHAIRPERSON REYNOSO: May I add that we were involved in some litigation some years ago where we had the children tested in a bilingual fashion, and one child tested sufficiently low to be placed in what were then called EMR classes actually came out in a juniors category when tested by a bilingual psychologist, a school-authorized psychologist. Well, all of the children happened to be Spanish speaking in that class, and all but one, according to the bilingual psychologist, school psychologist, had been improperly placed. That was a pretty high percentage.

MR. GOULD: Asking the question of which children who were receiving special ed are improperly identified is a very difficult one, in part, because of those kinds of issues. I think one of the things that the Commission needs to consider when you try to look at some of the issues that can be dealt with legislatively, and that you might investigate, are simply the way that school systems are run and the kind of leadership that's provided.

We may never have enough money to fully fund special education, whether it's federal dollars or state and local dollars, but the way that decisions are made, much like they're made by this Commission on what works, pursuant the way they develop, the way that decisions are made about how resources that are scarce are used by school systems is a critical one. School systems that, for whatever reason, accept federal dollars but decide not to use a deliberative process for apportioning those dollars to pay for special ed and related services that their students demand is one issue that has not really undergone strict scrutiny until it gets to a point where a school system at a local or state level is under a consent decree.

And you start looking at some of those leadership and resource decision-making and infrastructure issues. And it's difficult to try to unravel and get a fix for those problems, but they are, in part, driving some of the difficulty in special ed, either automatic placements in segregated settings or automatically assigning a series of IEP services based on a categorical label is driving up the costs of special education as well as the

much ballyhooed necessary paperwork. And school systems have to look to themselves for the way they make those decisions and have to be held responsible and accountable for remediating those kinds of issues.

One of the other things that Congress may or may not need to look at or maybe—can possibly be addressed legislatively is the states' own regulations that they have to write to implement a federal special education law. In some instances, states have written themselves into a corner. There's some states who have written timeline requirements in their regulations that far exceed the timelines that are not clearly expressed, written into federal law, in which case they catch themselves short, because they're constantly running to try to meet their own timelines, which are impossible year after year for them to address. Yet that's not being looked at and addressed.

VICE CHAIRPERSON REYNOSO: Could you address the second question I had, because I think it's an important policy question. How restrictive, if at all, would it be to you or the other folk on the panel in making recommendations if you didn't know the data that you know now about race, ethnicity, and so on? How important is it to know that data? That's my question, because we now have a statement that an organization's going to sponsor a proposal, that that data not be solicited or kept. And so my question to you is, how important has that data been to you in making recommendations to policy setters?

MR. GOULD: The data that we have that's qualitative has been critical, and it's been part of the basis of at least four or five studies, in addition to the scant quantitative data that we've gleaned from the Office of Civil Rights. But the qualitative data, the reports from parents and others who have come to testify at hearings over the years has been critical.

MR. OSWALD: The quantitative data about racial/ethnic distribution among all the education services is critical, and I think the abandoning of the collection of that data would be a huge mistake. I think that we would just give over the battle. We would be giving up, and I think that would be a major mistake.

MS. BOUNDY: I would agree with Mr. Oswald.

CHAIRPERSON BERRY: Do you agree? Everybody who's on the panel—

MS. MONTGOMERY: I would also agree, because we've been told we have overrepresentation of African American males in our special ed department, and that is something that we're looking at to see what we can do to make some modifications there.

VICE CHAIRPERSON REYNOSO: Thank you.

CHAIRPERSON BERRY: But if you didn't know, you wouldn't have to do anything.

MS. MONTGOMERY: Exactly.

[Laughter.]

CHAIRPERSON BERRY: Yes.

MS. CHEADLE: May I ask a question of the Commission?

CHAIRPERSON BERRY: It depends on whether we want—

[Laughter.]

MS. CHEADLE: Well, I just want to, I guess, determine if I'm making a correct assumption here. It seems to me that access to high-stakes state and districtwide assessments and testing is a civil rights issue. Is that correct?

CHAIRPERSON BERRY: Yes.

COMMISSIONER EDLEY: I think it's very, very important to distinguish between testing and high-stakes testing. And I think, to me—and it's too bad Commissioner Thornstrom has left because we could throw things at each other about this. But—

COMMISSIONER BRACERAS: I can help.

[Laughter.]

COMMISSIONER EDLEY: You can help. But I think that being included in a testing program is a civil right, because I think parents, students, and the society, as a whole, need to know how students are doing, including the students that have historically been forgotten and pushed aside. And the only way in this era of the test to see how they're doing is to see to it that there's measurement and assessment.

But having said that, it's got to be the right kind of measurement and assessments so that there has to be an appropriate accommodation so that the instrument is, and the use of the instrument, is valid in psychometric terms. And doing that kind of accommodation is—it's not always easy to figure out what the right accommodation is to ensure that the assessment will be psychometrically valid.

But then it's a completely different question, it seems to me, as to whether you then use the results of the tests to deny somebody a diploma, retain them in grade, reduce a teacher's salary, whatever. And the list of consequences that ought to flow from the results of the assessment I think is somewhat separable from the question of the civil right of the student to be evaluated effectively. That's really what we're talking about is their right to be evaluated effectively so that the appropriate people can be held accountable for achievement.

MS. CHEADLE: Could I make a couple of comments then in response to that?

CHAIRPERSON BERRY: Go right ahead.

MS. CHEADLE: Because this is really a big issue in regards to blind and visually impaired children—a really biggie. We see a pattern of schools for the blind tracking students out of diploma programs into certification programs. This is a serious problem. I see it in Maryland, and I see it around the country. And without the diploma it lessens their opportunities for future employment, and it further decreases their expectations of their current educational standards and programs of what is expected of them.

Secondly, as an example in Louisiana, we're finding that statewide assessments and tests are inappropriately modified or they're designed in such a way that they're so visual that by the time you get through fixing them for a blind student, they're totally meaningless. And so the issue is, "Why should we have to go through this? It's a meaningless thing anyway. But if we don't go through it, then you will expect us blind students to not be included and have the same expectations as other students."

And the problem is further complicated because this is a low-incidence population. It's extremely difficult or impossible to standardize, create certain standardized tests for this population. So this is a biggie in our organization.

Beyond that, other assessments for other disabilities are really important. You mentioned children, African American children being misdiagnosed as mentally retarded. That happens also within the blind population, misdiagnosed as mentally retarded when in fact there's other issues. And I think this is a problem within the population of disabled students itself.

CHAIRPERSON BERRY: I had three quick questions myself here at the end, but I wanted to say for the staff that's working on the education project the point you just made is very, very good, because the way we have defined the project is that we understood in the accountability of the state government for the education of kids and high-stakes testing and how it relates to that, so there's accountability for providing access, and then there is the issue of what they do with the high-stakes testing in context, not just high-stakes testing by itself. So you made an excellent point that I hope the staff will keep in mind.

My three quick questions are, first, Dr. Oswald, do you know where the Latinos and Indian kids are? We talked a lot about where the African American kids are located who are part of this disproportionately overrepresented group, and you mentioned Indians and you mentioned Latinos, but has there been any research done or anything we can find or you can tell us about? Are they similarly located or are they located in places where it's all Indians or places where it's all poor people or do you know anything about that?

MR. OSWALD: We know just a little bit about that. First of all, the students who are identified as Hispanic in the OCR data generally tend to be underrepresented, actually, in special education, which is a little bit counterintuitive also. And I think, in part, going back to the question about limited English proficiency, we don't have very good data

from the OCR survey about English proficiency. It's on the survey but it's not collected in such a way that it's very useful, and we might want to think through that. So the Hispanics tend, generally, as a rule, tend to be underrepresented rather than overrepresented.

CHAIRPERSON BERRY: Okay.

MR. OSWALD: For the American Indian kids—we know a little bit about that—there's some real peculiar sort of divergences of the odds ratios on American Indian kids. Specifically—I don't have it in front of me here—but there is one disability condition in which in high minority districts, the American Indian kids tend to be overrepresented, and in the high minority districts tend to be even more disproportionately overrepresented.

Now, I'm a little bit hesitant to even make very much of that, because in the American Indian population the numbers are low, and we can't get too carried away on interpretation of data with low numbers. It gets a little weird. But the most concerning disability has to do with the overrepresentation of Native Americans, and at least there is some question about districts that have high minority populations being more likely to overidentify American Indians, although honestly I don't know what to make of that.

CHAIRPERSON BERRY: Needs to be more research.

MR. OSWALD: Perhaps, yes.

CHAIRPERSON BERRY: All right. So that's something to look at. The other quick questions are for Ms. Boundy and perhaps Dr. Gould. On the enforcement side, these are enforcement questions, Commissioner Edley asked you about proposals to try to make this stuff work, and you gave a response. How about a proposal that relates to how many complaints they have about people being misidentified in some way, either complaints or litigation or things that go through due process or some measure like that connected to the funding that the districts get? If there were some kind of sliding scale in terms of—just as in the welfare reform plan where if you reduce the counts by X amount, you get more money or less money. How about some sliding scale related to one of those measures? Would that work? I know you haven't had a chance to think about it.

MS. BOUNDY: Well, I'm thinking of the instance where federal funding was withheld with respect to Virginia when Virginia refused to educate kids who had been put out on expulsion. And that's the only instance that I can think of that money was actually withheld. I think one of the issues around what you're suggesting is, first of all, the difficulty of identifying who's overidentified or who's improperly identified. I think this notion of collecting data about who's improperly disabled is a very difficult question. Obviously, there are systemic ways of looking at it, and there's ways of doing the kind of research that Dr. Oswald has done, clearly, to allow this to be identified. And clearly in the area of African Americans, mental retardation, learning disabled, underidentification of kids with—Latino children, we've been able to do that. And based on incidents there

and what the expectations are, I guess the concern I would have would be this notion of people just sort of encouraging them to do something that I'm not sure is getting at the right issue.

CHAIRPERSON BERRY: Okay.

MS. BOUNDY: To me, the question would be looking at the whole process of evaluation. I mean it's an issue of this notion that Commissioner Braceras raised with respect to who's improperly identified really gets to the issue of it's not parents who improperly identify their children. Parents may want their child evaluated, but the schools do it. The schools have to be complicit in this. So I mean it doesn't work on this one-way street.

But the question you're raising where we're talking about overidentification to something negative, I think the way to look at this issue really in special education is specialized instruction. The time is now for us to improve specialized instruction. These youngsters shouldn't be in alternative schools, they shouldn't be in separate settings, they should be in our schools as equal partners in our educational program. If specialized instruction was like Title I services, following these youngsters into advanced placement classes, physics class with a properly trained teacher, nobody would care who's identified as anything. It wouldn't be an issue, because they're receiving specialized instruction to enable them to learn to master the standards that everybody else is expected to learn.

COMMISSIONER BRACERAS: Well, with all due respect, I think—

CHAIRPERSON BERRY: Yes, Commissioner Braceras, I have now recognized you. I think I was asking questions. I had the floor.

COMMISSIONER BRACERAS: I think that there would be a concern—

CHAIRPERSON BERRY: Commissioner Braceras, I had the floor. I said I had three questions. I was engaging her, but I will now recognize you to intervene.

COMMISSIONER BRACERAS: Thank you. I think it would be a concern if resources were being spent where they don't need to be spent, on the one hand. And I think that there are some people who would be upset to be labeled with a certain disability that they did not have. I mean that's why we're concerned if there's a disproportionate number of African American students labeled as mentally retarded. I mean that's why it's concerning. So I do think we shouldn't spend resources whether or not we need it, and we shouldn't place labels on people that are inapplicable.

MS. BOUNDY: I don't disagree with the notion of mislabeling or misidentifying. The center actually sued the city of Boston, in *Kay Stewart v. Phillipson* in 1979, and, again, *SI v. Trillington* in the state of Florida on behalf of African American children who were identified as having mental retardation. The question really, though, was were they being educated as if they were mentally retarded with an expectation that they couldn't learn?

And we don't do that anymore, supposedly, based on law. We shouldn't be doing that, because we don't have those expectations anymore, because we recognize that all kids have a right to learn to high standards.

COMMISSIONER BRACERAS: Yes. The points are not mutually exclusive.

MS. BOUNDY: No, no.

COMMISSIONER BRACERAS: I mean it's—

MS. BOUNDY: But it gets back to this issue of who's improperly identified, and it also gets to the issue of how you would identify them and what the—

CHAIRPERSON BERRY: What I'm trying to get at, if I may be permitted to ask a question—I'm talking about enforcement, basically, and how do we go about enforcing this stuff? That's what I'm trying to focus on. And I'm not suggesting withholding funds, because I know how dicey that is with the Feds; I've tried it a couple of times. What I'm suggesting is maybe if there were some sliding scale put in the legislation that related to some measure of overrepresentation or how hard you were working to reduce the numbers or something like that.

Originally, maybe there would be some incentive or how your evaluations are conducted or how many people you have involved in it or something like that. I'm just trying to find some way to enforce the stuff, and that's why I asked you the question. And Commissioner Edley wants to intervene, and I will politely permit you to intervene in my line of questioning.

[Laughter.]

COMMISSIONER EDLEY: Thank you, my dear Madam Chair. Well, let me just put on the table something that we've been thinking about at the Harvard Civil Rights Project, and that is to try to steal a page from the reauthorization of ESEA [Elementary and Secondary Education Act], the No Child Left Behind Act, which has this aspiration of closing disparities over the next, what is it, 10 years, 12 years. And in a sense, what it does is it forces the state to come up with this and figure out how you're going to make adequate yearly progress. And there's no rigid theory about how to do it or what the problem is that might be keeping states from achieving it. I mean there are lots of different ideas, and it could be different things in different places. But, at any rate, they've set the standard.

One could imagine, it seems to me, stealing a page from that and looking at IDEA and looking at this problem of disparities in referral rates and just looking at the odds ratios and saying, what we want is a strategy over a period of time to get the odds ratios down to one or towards one or something or at least down to the best idea the research can tell us.

CHAIRPERSON BERRY: And you could get a bonus if you do it.

COMMISSIONER EDLEY: Yes. Now, what happens if you fail, if you're not making the kind of progress, what kind of sanction is there? That's a second and very important part of the discussion, whether there's a financial penalty out of some pot of money that comes on top of your basic aid or whether there are rewards in terms of the degree of regulatory flexibility you have or don't have based upon your progress towards the goal. But what we're really talking about is figuring out an enforcement track that's keyed to results, to your progress, to some outcome measure about whether you're doing the job you're supposed to be doing, as opposed to relying exclusively on procedural due process kinds of strategies or paperwork kinds of strategies and looks instead at the back of the pipeline to see what's going on.

CHAIRPERSON BERRY: Right. The front-end strategies I'm talking about instead of back-end ones. Yes?

MS. BOUNDY: I actually had a conversation recently with Dr. Pasternak about this same issue, and his suggestion was using incentives in the sense of—for example, schools that were doing just what you're suggesting: decreasing their overrepresentation, decreasing their suspension rates, their expulsion rates. And we talked about the additional federal funds, the new monies that have been promised, that in order to get that new money, the schools that were in noncompliance, if you will, because of the overrepresentation or disparities in discipline would have to get those numbers down in order to get the new federal monies.

CHAIRPERSON BERRY: Okay.

MS. BOUNDY: So somehow linking it.

CHAIRPERSON BERRY: Then the last question of my questions was for Dr. Gould, and you can say whatever you like, but let me add on the other question I had for you.

MR. GOULD: Sure.

CHAIRPERSON BERRY: Always with enforcement we have this problem when the Feds are giving money to states that the departments that are responsible for granting the money when they're the same departments that are supposed to be enforcing this stuff, the problem with the reluctance to do anything about enforcing the stuff, more reluctance than to give the money, because the states want the money, obviously, and politics always intervenes.

So you suggested in your statement, and the council has suggested, more emphasis on Department of Justice enforcement and more money going to the Department of Justice. Now, you can answer both questions, the other earlier one, and I'd said whatever you like, but that always seems to me to be a problem too, because, first of all, we know the Department of Justice never has enough resources to do anything, and it's a political

agency just like every other agency. People often talk about the Justice Department in any administration as if it's somehow aside from the political process. And it's not. And so it depends on who's there whether or not they would—or is it just that this proposal is because there's nothing else to think of or what's going on here?

MR. GOULD: Commissioner Berry, we put that in there for a couple of reasons. First, the Department of Justice seems to be more suited, in some instances, depending on the circumstances, to enforcement clearly than the Department of Education has proven itself to be.

Second, the Department of Justice has recently learned how to leverage certain reports about their own enforcement work, for example, around the Americans with Disabilities Act, to, on the one hand, say that perhaps we were being too harsh in evaluating their enforcement work. But on the other hand, being able to use the information to go to Congress to get considerable additional resources to increase their staffing load and to do some fairly decent, more rigorous enforcement work under ADA over the past year. So that's the second part of the answer.

Third, we think that there are aspects of the Department of Justice who have run smaller programs that was enforcement, like the Civil Rights and Institutionalized Persons Act, that have done a somewhat commendable job, given the number of staff and resources devoted to it, in which other agencies are expected to refer cases to it, for example, the Department of Health and Human Services, in which case they have. That's clearly not been the case with the Department of Education even though 1997 IDEA amendments specifically tried to address the inherent conflict in having the Department of Ed be a grant giver then an enforcer of the same law. And we just basically tried to address that conflict of interest.

In terms of your previous question, on the front end you could try to adjust the incentives or disincentives for school systems, possibly borrowing from the playbook of ESEA, in which case you would wind up trying to look at how whole school systems actually operate in the continuum of services that they roll out to children when they need them. Theoretically, it's almost flawless in its logic. Practically, we assume that school systems have a good understanding of who their students are, how their needs are met or not met, what kind of good information systems they do and do not have to track them in following them from regular education to Title I to special education. That simply tends not to be the case. It's more the exception than the rule, but that's just reality, and we don't need to get at that in terms of legislative proposals.

But while were at it, while we're theorizing, you might as well throw in back-end incentives as well. For those students who are returned to the school system, we do have data and have reported it to Congress for a number of years for students who are 14 years or older who have been returned back to regular education who have been success stories. They no longer need special ed services and support, and clearly school systems should be rewarded for that to some degree. Students probably should too.

CHAIRPERSON BERRY: Yes. Vice Chair?

VICE CHAIRPERSON REYNOSO: Madam Chair, I was just going to suggest that—to pick up both on the response and Commissioner Edley’s suggestion that borrowing from the environmental laws where they require an environmental impact report, if we had a statute that required school districts to think through what resources they have, what problems they have, how in two or five years they’re going to take care of those problems and so on, that could—

CHAIRPERSON BERRY: I like that.

VICE CHAIRPERSON REYNOSO: That’s something that one could work legislatively with.

CHAIRPERSON BERRY: I like that.

COMMISSIONER EDLEY: But that also, in a way, is the whole idea under NCLB, the No Child Left Behind Act—

VICE CHAIRPERSON REYNOSO: Right, right.

COMMISSIONER EDLEY:—which is to say when you’ve got a school with a problem, they’re supposed to formulate a corrective action plan, if you will. They’re supposed to formulate a reform strategy that’s going to get them back on track, and that’s really what we’re talking about, whether the right strategy has to do with teacher training or class size or better integration with mental health services or whatever. And the answer is going to be different in different places.

CHAIRPERSON BERRY: Absolutely. Does—yes?

MS. CHEADLE: Could I make a comment regarding enforcement?

CHAIRPERSON BERRY: Absolutely.

MS. CHEADLE: There’s kind of two pieces to that. One is looking at the big picture and getting the schools to change and Departments of Education to change. And then there’s the really personal area where I’ve gone to due process as a parent, and it doesn’t matter. I’ve gone to court, I’ve won, and it still doesn’t matter, because it’s still not happening. And that’s the way that it is.

For 20 years I’ve been an advocate, and it’s pretty sad but, as I said earlier, mostly I say, “Think real carefully. What are you going to get? Is it a procedural issue that you can win on, simple, straightforward? If it’s instructional, let’s look at your options, Section 504, other things.”

But looking at that, in due process, what I was recently told—I hope this is accurate—I think that in Maryland that in due process proceedings, some 15 percent of parents prevail. Well, I don't believe that that accurately reflects the situation. So why can't something be done on the enforcement incentive area, looking at aggregate results of due process proceedings in that state? You know, I'd be a lot more willing to tell parents, "Go for it," if I know something's going to happen at the end of the year or a cycle, a funding cycle. And our state is either going to be rewarded or something's going to happen to the state. Then I'm going, "Yes, get them in there. Go for it," because I know something will happen. Otherwise nothing happens.

CHAIRPERSON BERRY: That's a good point. A second sort of note, I was thinking that maybe you could relate it to complaints successfully pursued, some kind of measure when you're trying to look at impacts and what they're doing and how well they're doing. If they've got these complaints that were successful, relate that somehow to the funding, throw that in the mix, at least as something to look at.

Okay. This has been a very, very important, significant, informative. Would anyone like to make a statement before we conclude here? Yes, Christopher?

COMMISSIONER EDLEY: Can I just make one observation that I didn't—I may have fuzzed out for a moment and missed it. But there are also those very important disparities that research chose in the implementation of LRE, that you do get these problems of minority kids who once referred are more likely to be put into settings in which they're isolated or sent to alternative schools in which there is not as much effort made at mainstreaming, and the like. So that's just another dimension of the problem, it seems to me, that's coming out.

And, finally, the other thing I wanted to mention is that there's an opportunity also now with the reauthorization of OERI, the Office of Education and Research and Improvement or—

CHAIRPERSON BERRY: Improvement.

COMMISSIONER EDLEY: Improvement.

CHAIRPERSON BERRY: Supposedly.

COMMISSIONER EDLEY: And I just wondered whether it's through that bill or whether it's through IDEA whether the nation's really spending enough money on the research agenda on this issue. And we might simply consider again more work for the staff, but if, in consulting with experts, there's some judgment about an unattended research agenda that would help illuminate these problems, that might also be worth mentioning to the Congress.

CHAIRPERSON BERRY: Okay. Let me just say that—yes?

MS. MONTGOMERY: One last comment. He was talking about LRE. We have a grant in place at our school now, and it comes with a lot of funding, though most of our kids are incoming ninth graders.

CHAIRPERSON BERRY: Least restrictive environment for the uninitiated.

MS. MONTGOMERY: Yes. I'm sorry. Most of our ninth graders will be placed in regular education classes, and so right now I've done the incoming ninth graders, and we're at 90 percent kids who will be included in the regular ed classes. So we're going to see how that's going to work, but the only way it can work is with teacher training, ongoing support, and the funding that's being offered.

CHAIRPERSON BERRY: Okay. I want to thank you very much for coming. I want to thank Terri Dickerson and Mireille Zieseniss for their usual good work, and you've got lots of research questions to follow-up on, some raised by the Commission, others raised by people on the panel, as we proceed. Thank you very much. I'll entertain a motion that we adjourn.

VICE CHAIRPERSON REYNOSO: So motioned.

CHAIRPERSON BERRY: Nondebatable. All in favor indicate by saying aye. Opposed.

[Commissioners vote aye.]

[Whereupon, at 12:40 p.m., the Commission meeting was concluded.]

U.S. Commission on Civil Rights

Briefing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA)

April 12, 2002

Bios of Briefing Panelists

Kathleen Boundy
Co-Director
Center for Law and Education

Kathleen Boundy, co-director of the Center for Law and Education (CLE), has an extensive background in education law, providing legal support and technical assistance to attorneys and advocates representing low-income children and youth. An attorney with CLE for more than 20 years, Ms. Boundy has played a significant role through legislation, policy development, and litigation in implementing and enforcing the rights of students with disabilities, including improved educational outcomes under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Ms. Boundy has an M.A.T. degree in history, which she taught at a large public high school prior to earning her law degree from Northeastern School of Law. CLE is a national nonprofit legal and advocacy agency that strives to promote the right of all students to quality education and to help communities address their own public education problems effectively.

Barbara Cheadle

Program Coordinator

National Federation of the Blind

President

National Organization of Parents of the Blind

Barbara Cheadle is the coordinator of programs for blind and visually impaired children at the National Federation of the Blind and serves as editor, writer, and desktop publisher for *Future Reflections*, the publication of the National Federation of the Blind. President of the National Organization of Parents of Blind Children (NOPBC) since 1985, Ms. Cheadle was a founding member of the organization and served as treasurer from 1983 to 1985. Ms. Cheadle has served on numerous federal and state advisory panels dealing with education and disability policy as well as on the boards of nonprofit organizations that address the needs of, and provide support for, blind and visually impaired children. Ms. Cheadle holds a bachelor's in education (secondary, social studies) from Southwest Missouri State University, and has completed two semesters of post-baccalaureate courses in rehabilitation and education of the visually impaired at the University of Nebraska. She is also the parent of a blind son.

Martin Gould

Senior Research Specialist

National Council on Disability

Martin Gould, Ed.D., is a senior research specialist at the National Council on Disability, an independent federal agency making recommendations to the President and Congress on issues affecting 54 million Americans with disabilities. His current work activities include: fair housing enforcement, electronic and information technology and e-government, juvenile justice, and special education reauthorization. Over the past two years, Dr. Gould has worked for NCD on issues involving: assistive technology, special

education, electronic and information technology; transition and postsecondary outcomes for youth, disability statistics, fair housing, and presidential transition planning.

Jeritza Montgomery

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Jeritza Montgomery currently serves as a special education teacher and Individualized Education Plan (IEP) facilitator for Thomas Stone High School in Charles County, Maryland, where she has worked since 1977. She has experience teaching students with a variety of disabilities at the elementary and high school levels. She also provides consultation services to educators and parents with an emphasis on learning styles, behavior management, and curriculum modification. As the IEP coordinator, Ms. Montgomery is responsible for coordinating the special education referral, evaluation, eligibility, and placement process, as well as overseeing the development of IEPs. She also assisted in the development of the HIATUS Program, which is designed to provide students an alternative to disciplinary suspensions through behavior management, conflict resolution, and the development of social skills. Ms. Montgomery holds a bachelor's degree from the University of Maryland and a master's in education from Bowie State.

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Donald Oswald is an associate professor in the Department of Psychiatry, associate affiliate clinical professor in the Department of Psychology, and associate chair for child psychology at Virginia Commonwealth University in Richmond, Virginia. In addition to his teaching and clinical positions, Dr. Oswald serves as an editor for the *Journal of Child and Family Studies* and as a consulting editor for *Focus on Autism and Other Developmental Disabilities*. He has served as principal investigator for numerous research studies and has published work on a variety of child development and education topics, including the identification of students for special education. He has several articles currently in press on the influence of socio-demographic factors on the identification rates of minority students as mentally retarded, emotionally disturbed, and learning disabled. Dr. Oswald holds a master's of education in school psychology from James Madison University and a Ph.D. in psychology from Virginia Polytechnic Institute and State University.

U.S. Commission on Civil Rights

Briefing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA)

April 12, 2002

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