

Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children

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INTRODUCTION

Special education can provide tremendous benefits to children who need supports and services. While for some children this ideal may approach reality, minority children often have a far different experience with special education.¹ Many students, regardless of race, who are deemed eligible to receive special education services are unnecessarily isolated, stigmatized, and confronted with fear and prejudice. Further, as a result of misdiagnosis and inappropriate labeling, special education is far too often a vehicle for the segregation and degradation of minority children. Racial discrimination, according to Assistant Secretary of Education Judy Heumann, Director of the Office for Special Education and Rehabilitative Services in the Clinton administration, exists within the systems of both regular and special education: “[M]inority children are more likely not to receive the kinds of services they need in the regular ed[ucation] system and the special ed system. . . . And special ed is used

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¹ See, e.g., U.S. DEP’T OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, at v–vii (2000), available at <http://www.ed.gov/offices/OSERS/OSEP/OSEP2000AnlRpt>; see also *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

as a place to move kids from a regular classroom out into a separate setting.”²

For these minority students, the Civil Rights movement brought about vital legal protections. Most important among these was Title VI of the Civil Rights Act of 1964.³ Inspired by such achievements, grassroots activists and lawyers embarked upon a successful campaign on behalf of students with disabilities,⁴ culminating in the 1975 congressional passage of the legislation now known as the Individuals with Disabilities Education Act (“IDEA”).⁵

Despite remarkable legislative achievements over the last thirty-seven years,⁶ minority students remain doubly vulnerable to discrimination. First, they tend to receive inequitable treatment within school systems that remain segregated and unequal.⁷ Second, they are put disproportionately at risk of receiving inadequate or inappropriate special education services because of systemic problems with special education identification and placement.⁸ While we focus in this Article on the latter issue, we remain constantly mindful of the former. The systemic challenges we outline are driven, in part, by our broader concerns about inequality of educational opportunity. Although discrimination based upon disability and race/ethnicity have each been targeted by powerful laws,

² *The Merrow Report: What's So Special About Special Education?* (PBS television broadcast, May 10, 1996) [hereinafter *The Merrow Report*], transcript available at <http://www.pbs.org/merrow/tv/transcripts/index.html>.

³ 42 U.S.C. §§ 2000d to 2000d-4 (1994). Title VI provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.* § 2000d.

⁴ See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n. for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

⁵ Individuals with Disabilities Education Act Amendments of 1997, 20 U.S.C. §§ 1400–1487 (1994 & Supp. V 1999) (originally enacted as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773).

⁶ In addition to IDEA, federal legislation protecting students and others with disabilities includes Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994), discussed *infra* Part II.A.

⁷ See JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* (1997); JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (1985); Linda Darling-Hammond, *Inequality and Access to Knowledge*, in *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION* 465 (James A. Banks & Cherry A. McGee Banks eds., 1995).

⁸ The findings of the Individuals with Disabilities Education Act Amendments of 1997 state that “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.” 20 U.S.C. § 1400(c)(8)(A); see also Jeremy D. Finn, *Patterns in Special Education Placement as Revealed by the OCR Surveys*, in *PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY* 322 (Kirby A. Heller et al. eds., 1982); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 Wis. L. Rev. 1237; Tom Parrish, *Disparities in the Identification, Funding, and Provision of Special Education*, in *MINORITY ISSUES IN SPECIAL EDUCATION* (Daniel J. Losen, Carolyn C. Peele & Gary Orfield eds., forthcoming Feb. 2002), available at <http://www.law.harvard.edu/civilrights/conferences/SpecEd/parrishpaper2.html>.

civil rights litigation has seldom used these laws in concert. This Article describes the relative strengths of Title VI and disability law and explores the benefits of combining these two sources of protection to bring systemic challenges.

The body of this Article is divided into three parts. Part I explores the most recent research on inappropriate identification and placement of minority students in special education. Part II reviews legal challenges to overrepresentation and inadequate or inappropriate special education services. It also explores past challenges under both disability law and Title VI. Part III examines new ways of combining Title VI with disability law and the possible advantages of such a combined approach. Part III also considers how the new standards-based reform movement can be leveraged to achieve greater equality of educational opportunity for minority students deemed eligible for special education services.

This Article highlights the strengths of various legal challenges and reaches three main conclusions. All three conclusions are grounded, in part, in the reality that special education identification and placement is a long process, beginning in the regular education classroom and involving many interconnected factors and subjective decisions. The first conclusion is that, given the relative strength of disability law, complaints on behalf of minorities harmed in the process of identification or placement are generally strongest when built upon a combination of disability law and Title VI.

On April 24, 2001, the Supreme Court rejected the argument that there was an implied "private right of action" available to individuals to enforce the Title VI disparate impact regulations in court. The *Alexander v. Sandoval*⁹ ruling, however, does not preclude individuals, or organizations, from seeking the enforcement of the disparate impact regulations by filing federal administrative complaints with the United States Department of Education's Office for Civil Rights ("OCR"). Therefore, the 5-4 ruling cuts against our first conclusion to the extent that it prevents the plaintiffs we envision here from suing in state or federal court. Further, the dicta in the majority's opinion suggested that the disparate impact regulations themselves were of questionable validity, although the Court did not elect to address the issue directly.¹⁰

On closer examination, however, it remains to be seen how severely the Court's holding will meaningfully curtail the ability of private parties to bring actions against state actors to enforce the Title VI disparate impact regulations. Pursuant to 42 U.S.C. § 1983, private parties can sue, at law or in equity, state actors responsible for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."¹¹

⁹ 121 S. Ct. 1511 (2001).

¹⁰ *Id.* at 1517.

¹¹ 42 U.S.C. § 1983 (1994).

In the words of Justice Stevens' dissent: "[T]his case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief"¹² Accordingly, while *Sandoval* eliminated the implied private right of action whereby plaintiffs sue directly under the authority provided by Title VI's implementing regulations, actions brought under § 1983 bypass the increasingly difficult *implied right of action* analysis. Congress expressly intended § 1983 to give civil rights plaintiffs access to direct judicial relief.

This Article's discussion of private disparate impact actions should therefore be read as concerning actions enforcing Title VI regulations via § 1983.¹³ Furthermore, as a legal matter, *Sandoval* leaves untouched the other main avenue of Title VI enforcement discussed throughout this Article: OCR complaints.¹⁴ This administrative complaint mechanism allows aggrieved individuals and organizations to pursue disparate impact arguments, as well as combined disability-Title VI arguments. Technically speaking, OCR cannot order injunctive relief, only the withdrawal of federal funds. But as discussed below, OCR can use this leverage for settlement purposes and through negotiated resolution agreements can seek the equivalent of court-ordered injunctive and declaratory relief.

The Article's second conclusion is that isolating one particular step in the identification and placement process as the cause of a racially identifiable harm may limit plaintiffs to ineffective, marginal remedies. Therefore, legal challenges will generate the best remedies when they address the system of inseparable factors that drive overrepresentation of minority students.

Third, standards-based education reforms, as embraced by almost every state, provide officially adopted benchmarks for progress and set

¹² *Sandoval*, 121 S. Ct. at 1527 (Stevens, J., dissenting); see *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, No. CIV. A. 01-702, 2001 WL 491965, at *36-*39 (D.N.J. May 10, 2001) (holding that it is consistent with *Sandoval* to permit the plaintiffs to rely on § 1983 to enforce the EPA's disparate impact regulations promulgated under section 602 of Title VI and denying the defendant's motion to vacate the court's prior order); see also *Powell v. Ridge*, 189 F.3d 387, 400-03 (3d Cir. 1999); Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001). For a contrary argument, to the effect that federal regulations should not be treated as "laws" pursuant to § 1983 (notwithstanding the weight of precedent), see Todd E. Pet-tys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51 (1998).

¹³ We also recognize the possibility that Congress may enact legislation returning Title VI jurisprudence to its pre-*Sandoval* state, as was done with the Civil Rights Act of 1991, Pub. L. No. 102-66, § 105(a), 105 Stat. 1071, 1074-75, following the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). However, we prefer to address the law as it presently stands.

¹⁴ The Court did not address the validity of the disparate impact regulations themselves: "we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Sandoval*, 121 S. Ct. at 1517.

high expectations for all schools and students.¹⁵ These benchmarks are relevant to legal interpretations of educational adequacy. Consequently, standards-based reforms, while often problematic,¹⁶ provide a compelling new means for advocates to strengthen the entitlement claims of minority students and leverage comprehensive, outcome-based remedies for all students subjected to discriminatory school practices. For example, successful plaintiffs could use standards benchmarks to set concrete compensatory goals, monitor settlements, and ensure that agreed-upon input remedies yield actual benefits for children.

I. THE PROBLEM OF INADEQUATE AND INAPPROPRIATE SPECIAL EDUCATION SERVICES FOR MINORITY STUDENTS

Texas College President Billy C. Hawkins recently recalled being wrongfully labeled "mentally retarded" as a child.¹⁷ As a result, he was isolated and received a watered down curriculum. He explained how the misdiagnosis "tore at his self esteem."¹⁸ Hawkins' experience was apparently widespread.¹⁹ In 1982, the National Academy of Sciences released a study based on data from the late 1970s detailing disturbing patterns of racial disproportionality in special education programs, especially among African Americans labeled mentally retarded.²⁰ According to the study, the disproportionate overrepresentations²¹ were most pronounced in

¹⁵ See 20 U.S.C. § 6311(b) (1994).

¹⁶ The authors offer no opinion here about the merits of using standards-based reform assessments for school system accountability. Such systemic assessment and accountability are what we mean whenever we refer to "standards-based reforms." However, given the widespread failure by schools to ensure that students have equitable opportunities to learn, we do reject the educationally unsound practice of using high-stakes tests that can result in diploma denial and retention. For recent research on high-stakes testing, see *RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION* (Gary Orfield & Mindy L. Kornhaber eds., 2001). See also DIANE MASSELL ET AL., *PERSISTENCE AND CHANGE: STANDARDS-BASED SYSTEMIC REFORM IN NINE STATES* (1997); MILBREY W. McLAUGHLIN & LORRIE A. SHEPARD, *IMPROVING EDUCATION THROUGH STANDARDS-BASED REFORM: A REPORT BY THE NATIONAL ACADEMY OF EDUCATION PANEL ON STANDARDS-BASED EDUCATION REFORM* (1995); ANNE WHELOCK, *SAFE TO BE SMART: BUILDING A CULTURE FOR STANDARDS-BASED REFORM IN THE MIDDLE GRADES* (1998).

¹⁷ See *ABC World News Tonight with Peter Jennings* (ABC television broadcast, Mar. 2, 2001).

¹⁸ *Id.*

¹⁹ Asa G. Hilliard, III, *The Predictive Validity of Norm-Referenced Standardized Tests: Piaget or Biner?* 28 NEGRO EDUC. REV. 189 (1977). In this critique of the use of IQ tests as never having worked, Hilliard points out that "among a sample of the Afro-American doctoral population from 1866 to 1962, nearly . . . 10 percent would, by these measures, actually be called 'retarded.'" *Id.* at 199; see also *The Merrow Report*, *supra* note 2 (reporting statement of Thomas Hehir that three African American colleagues with Ph.D.s have told him about being mislabeled retarded as children).

²⁰ See Finn, *supra* note 8.

²¹ Overrepresentation is defined for the purposes of this Article generically as minority representation in a certain category of disability that is so high as compared to whites that it is extremely unlikely to occur by chance (i.e., with likelihoods of less than five percent).

southern states.²² Not until 1995, however, did the Department of Education's Office for Civil Rights make a concerted effort to address these disturbing trends,²³ and it took two more years for Congress to address the issue directly when it passed the IDEA Amendments of 1997.

A. *New Research on Racial Disproportionality*

Despite these incremental policy and legislative efforts, the evidence from national databases shows persisting problems of both overrepresentation and underservicing of minority children.²⁴ These alarming statistics depicting significant overrepresentation of minorities identified for special education suggest that minority students are often misdiagnosed and inappropriately labeled, resulting in a denial of educational opportunities.²⁵ Most striking, African American children nationwide are nearly three times as likely as white students to be labeled mentally retarded, and in five states the likelihood is more than four times that of whites.²⁶

Although African Americans appear to bear the brunt of overidentification, the evidence indicates that all minority groups are vulnerable to discrimination in identification for special education. For example, Hispanics, Native Americans, and Asian Pacific Americans are each overrepresented in mental retardation classifications at more than three times the rate of whites in at least one state. In most states, however, Hispanics and Asian Pacific Americans are more likely to be underrepresented.²⁷

Similarly disturbing statistical trends and levels of disparity exist for minorities classified as having an emotional disturbance ("ED"). African

²² See generally Finn, *supra* note 8.

²³ See, e.g., Theresa Glennon & Megan Whiteside Shafer, *OCR and the Misplacement of African American Students in Special Education: Conceptual, Structural, Strategic and Administrative Barriers to Effective Enforcement*, in MINORITY ISSUES IN SPECIAL EDUCATION, *supra* note 8. See generally Glennon, *supra* note 8.

²⁴ See Finn, *supra* note 8 (demonstrating through evidence from the 1982 National Academy of Sciences study that this disproportionality is not new to education researchers); see also Lloyd M. Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5 (1968).

²⁵ See, e.g., Jay Gottlieb et al., *Special Education in Urban America: It's Not Justifiable for Many*, 27 J. SPECIAL EDUC. 453, 459 (1994). For an extensive review of earlier statistics as they pertain to African American students, see Glennon, *supra* note 8. See also Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133 (1999).

²⁶ Although not the primary focus of this Article, pervasive and substantial underrepresentation, especially for Hispanics and Asian Pacific Americans as compared to whites, suggests that large segments of these minority groups are not getting enough special education supports and services. Moreover, in a few states like Alabama, overrepresentation of African Americans in Mental Retardation (3.89 times the representation of whites), combined with underrepresentation in the category of specific learning disabilities (0.97 times that of whites), suggests that African Americans with specific learning disabilities are being misclassified and therefore inappropriately placed and served. See Parrish, *supra* note 8, at tbl.2.

²⁷ *Id.*

Americans are the most overrepresented group in the category of ED, and the most overrepresented minority group in every category, in nearly every state.²⁸ However, overidentification of other minorities in the ED²⁹ and learning disability categories remains problematic in many places.³⁰ When the effects of race and gender are analyzed together, and white females serve as the basis of comparison, black and Native American males are more than five times as likely as white females to be labeled emotionally disturbed.³¹

One prominent study by Dr. Tom Parrish, discussed herein, highlights the most disturbing national and statewide racial disproportionalities by describing as *substantially overrepresented* those states in which minorities have at least twice the likelihood of a given disability identification as do whites.³² Notwithstanding this high standard, such gross disproportionalities are common.³³ It is crucial, however, to avoid the heuristic trap of regarding overrepresentation that falls below the twice as likely benchmark, or the national average, as an acceptable level. In fact, statistically significant disproportionalities include many situations where the odds of identification are far less than twice that of whites.³⁴ A wide range of proportions in representation may suggest a racially discriminatory implementation of special education programs. The racial distor-

²⁸ *Id.*

²⁹ Hispanics are significantly overrepresented in the category of emotional disturbance in New York, Connecticut, and Pennsylvania. Native Americans are identified at nearly five times the rate of whites in Nebraska, and are between two and five times as likely to be classified as emotionally disturbed in nine states. *Id.*

³⁰ In nine states, for example, African American children are more than twice as likely as white children to be found to have a learning disability. In Hawaii, Asian Pacific Americans are identified at nearly twice the rate of whites. In six states, Native American children are identified at more than twice the rate of whites. *Id.*

³¹ Donald P. Oswald et al., *Community and School Predictors of Over Representation of Minority Children in Special Education* 7, in MINORITY ISSUES IN SPECIAL EDUCATION, *supra* note 8.

³² Parrish similarly finds that minorities are substantially underrepresented when they have a placement rate at half the rate of white students. Parrish, *supra* note 8. Both benchmarks were created by the researcher to highlight the severity of the problem and are not intended to replace the theoretical base for determining when disproportionality is significant from either a statistical or legal perspective. See *id.* at 5-6. For some suggested statistical tests, see Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 EDUC. L. REP. 759 (2000). See also Beth Harry & Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education Programs: A Critique of the Process*, 63 J. NEGRO EDUC. 602 (1995).

³³ See Parrish, *supra* note 8, at tbl.2. This study is discussed in detail below. See *infra* note 46 and accompanying text.

³⁴ Cf. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (discussing the racial bias in high-stakes tests); Parrish, *supra* note 8, at 5-6 (disclaiming the use of the extraordinarily large benchmark as useful for any other purpose beyond the research analysis presented); see also 1 U.S. COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES 157 (1996) [hereinafter EEOP VOL. I].

tion in the provision of those services has significant legal and policy implications.³⁵

State aggregate statistics have both strengths and weaknesses. They highlight disparities that arise because of differences in policy and practice between mostly white and mostly minority districts.³⁶ However, these state aggregate statistics could easily mask disturbing levels of minority overrepresentation within a given district—disparities that may be evened out when these localities are aggregated with other, non-problematic districts.

Close examination of substantially disproportionate representation, nationally and at the state level, reveals other troubling trends. For example, five of the seven states with the highest overrepresentation of African Americans labeled “mentally retarded” are in the South (Mississippi, South Carolina, North Carolina, Florida, and Alabama) where intentional racial discrimination in education was once required by law.³⁷ In contrast, *no* southern states were among the top seven states where Hispanic children deemed mentally retarded were most heavily overrepresented.³⁸

These demographic differences among minority groups provide further evidence of systemic discrimination. While increased poverty is associated with increased risk for disability,³⁹ recent research indicates that

³⁵ For example, courts have generally regarded much smaller disparities, such as a deviation of twenty percent from an expected representation (based on representation in the general population), to be legally significant because such deviations are very unlikely to occur by chance. *See Watson*, 487 U.S. at 995 n.3; *see also Parrish*, *supra* note 8.

³⁶ These districts themselves exhibit such a high degree of racial isolation (e.g., a ninety percent minority district) that one cannot meaningfully discuss racial disparities within the mostly minority districts.

³⁷ Parrish, *supra* note 8. The 1982 study of national data by Jeremy Finn also found the highest levels of overrepresentation of African American children in “mental retardation” in the southern states. *See Finn*, *supra* note 8; *cf. John U. Ogbu, Castelike Stratification as a Risk Factor for Mental Retardation in the United States*, in *RISK IN INTELLECTUAL AND PSYCHOSOCIAL DEVELOPMENT* 94 (Dale C. Farran & James D. McKinney eds., 1986) (demonstrating that jobs and education are directly related to the issue of IQ test scores and mental retardation of blacks, and connecting lower IQ scores to castelike stratification in both the South and the North).

³⁸ Parrish, *supra* note 8, at tbl.2.

³⁹ *Cf. id.* at 5. Beginning with the Coleman study in 1966, some educational scholars have repeated the counterintuitive argument that children’s learning is largely beyond the control of schools. *See, e.g., JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION* (1990), JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966); David Armor, *Why is Black Education Achievement Rising?*, *PUB. INT.*, Summer 1992, at 65. Accordingly, they ascribe a variety of educational ills to students’ differing socioeconomic statuses (“SES”), as opposed to their stratified educational opportunities. *Id.*; Lloyd G. Humphries, *Trends in Levels of Academic Achievement of Blacks and Other Minorities*, 12 *INTELLIGENCE* 231 (1988). Similarly, different studies spot different trends in levels of academic achievement among minorities. *Id.*; Herbert J. Walberg, *Improving the Productivity of America’s Schools*, 41 *EDUC. LEADERSHIP* 19 (1984). Because race and SES substantially overlap, defendants in desegregation cases tended to argue that discrimination was the result of non-remediable SES difference. Racial differences, they contended, were merely coincidental or derivative. *See, e.g., Coalition to Save our Children v. State Bd. of Educ.*, 901 F. Supp. 784, 818–19 (D. Del. 1995).

the effect of poverty falls far short of explaining the gross racial and gender/race disproportionalities discussed above. In other words, distortions in the representation of racial groups cannot be explained simply because minority groups are disproportionately represented among the poor, as some commentators have suggested.⁴⁰ In fact, a national comparison of identification rates between whites and minorities found that poverty effects did not alter the comparative representations at all.⁴¹ Other research that examined the influence of poverty within racial and ethnic subgroups found that although disability incidence increased with poverty, ethnicity and gender remained significant predictors of cognitive disability identification by schools when factors linked to poverty and wealth were controlled for in a regression analysis.⁴²

Most disturbing was that as factors associated with *wealth increased*, contrary to the expected trend, African American children were *more likely to be labeled* "mentally retarded."⁴³ Specifically, wealth-linked factors included per pupil expenditure, median housing value, median income for households with children, percent of children in households

However, these analyses can take us only so far. Traditional measures of SES account (in a statistical sense) for no more than a third of the black-white test score gap. See Meredith Phillips et al., *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP* 103 (Christopher Jencks & Meredith Phillips eds., 1998). Another third of the gap also relates to factors associated with SES: grandparents' educational attainment, mothers' household size, mothers' high school quality, mothers' perceived self-efficacy, children's birth weight, and children's household size. *Id.* at 138. The remaining third is presumably attributable to factors such as formal schooling, although the racist explanation of genetic differences still has its followers. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). But what should be obvious from this list is that most (if not all) of these factors are confounded by race and with racial discrimination.

⁴⁰ See, e.g., Donald MacMillan & Daniel J. Reschly, *Overrepresentation of Minority Students: The Case for Greater Specificity or Reconsideration of the Variables Examined*, 32 J. SPECIAL EDUC. 15 (1998); Loretta A. Serna et al., *Intervention Versus Affirmation: Proposed Solutions to the Problem of Disproportionate Minority Representation in Special Education*, 32 J. SPECIAL EDUC. 48 (1998) (suggesting that there is not enough information to conclude that bias is a major cause of disproportionate representation). According to the U.S. Department of Education's 1996 report to Congress, which relied on National Longitudinal Transition Study of Special Education Students data on secondary school students, poverty—and not race or ethnicity—is the most important factor influencing the disproportionality. U.S. DEP'T OF EDUC., *TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: EIGHTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* 86 (1996), available at <http://www.ed.gov/pubs/OSEP96AnlRpt>. The report concedes that a 1995 study formed this conclusion despite the fact that statistically significant disproportionate representation remains in three categories, including mental retardation, when income is accounted for. *Id.* But see Alfredo Artiles et al., *Learning Disabilities Empirical Research on Ethnic Minority Students: An Analysis of 22 Years of Studies Published in Selected Refereed Journals*, 12 LEARNING DISABILITIES: RES. & PRAC. 82 (1997).

⁴¹ Tom Parrish, Statement at the American Youth Policy Forum Congressional Briefing (Mar. 2, 2001) (transcript on file with authors).

⁴² Oswald et al., *supra* note 31, at 6. Further, the impact of socio-demographic factors was different for each of the various gender/ethnicity groups. *Id.* at 7.

⁴³ *Id.* at 8.

below the poverty level, and percent of adults in the community who have education of twelfth grade or less and no diploma.⁴⁴

Demographic differences also suggest that systemic discrimination is a substantial cause of these gross racial disproportionalities.⁴⁵ These trends are found in numerous studies of national databases.⁴⁶ For example, a national comparison of state overrepresentation statistics, using data collected in 1997, revealed that as minority populations grew relative to other populations in a given state the likelihood of minority students being labeled "mentally retarded" compared to whites increased dramatically.⁴⁷ Asian Pacific Americans, underrepresented in forty-six states (with a national average of representation in special education that is about half the level for whites) were more than three times as likely as whites to be so labeled in Hawaii, where Asian Pacific Americans represent approximately fifty-nine percent of the overall population. Similarly, Native American children in Alaska, where they comprise over twenty-one percent of the population, were 2.43 times as likely to be labeled "mentally retarded" but were only 1.31 times as likely to be so classified nationally, where they are often less than one percent of the total population. For Hispanic children, the odds increased threefold, from being underrepresented (.42 times as likely as whites) in the ten states in which they comprised the least percent of the total population (averaging 1.2% of the population across those ten states) to overrepresented (1.55 times as likely as whites) in the ten states where they represented large segments of the population (25.6%).⁴⁸

As stated above, poverty does account for some of the observed disproportions in disability identification.⁴⁹ One could imagine, for example, that the influence of poverty might account for a higher incidence of "hard" disabilities (e.g., blindness and deafness) among members of low-wealth minority groups, due to the impact of poor nutrition and inadequate prenatal care.⁵⁰ But the most recent research shows that blacks in any given state are substantially less likely to be overrepresented in these "hard" categories.⁵¹ For example, African American children nationally

⁴⁴ *Id.* at 14 tbl.1.

⁴⁵ *See id.* at 8; Glennon, *supra* note 8, at 1242, 1252.

⁴⁶ *See, e.g.,* Edward Garcia Fierros, *An Examination of Restrictiveness in Special Education, in MINORITY ISSUES IN SPECIAL EDUCATION*, *supra* note 8; Finn, *supra* note 8; Oswald et al., *supra* note 31; Parrish *supra* note 8. Fierros used OCR data from the 1998 compliance report. Finn relied on 1982 OCR data. Oswald and his co-authors relied on OCR data from the compliance report for school year 1994–1995, and the Parrish study is based on National Center for Education Statistics data from fiscal year 1997–1998 and other sources. *See also* Glennon, *supra* note 8, at 1250–60.

⁴⁷ Parrish, *supra* note 8, at 9 tbl.3.

⁴⁸ *Id.*

⁴⁹ *See supra* notes 39–40 and accompanying text.

⁵⁰ "Hard" disabilities include physical disabilities that are generally discernable through a medical examination and are rarely disputed.

⁵¹ Parrish uses the benchmark of twice the rate of whites to define gross overrepresent-

are 1.23 times more likely than whites to have hearing impairments, but 2.88 times as likely to be labeled mentally retarded. African Americans are also less likely than whites to be identified as deaf-blind, yet are almost twice as likely to be labeled emotionally disturbed.⁵² In fact, blacks are substantially underidentified in a number of states in these "hard" disability categories,⁵³ but substantially underidentified only *once* for a cognitive disability category—the specific learning disability category in New Hampshire.⁵⁴ In Connecticut, where data from the 1998–1999 school year show African American children nearly five times as likely as whites to be labeled mentally retarded, they are underrepresented in two "hard" categories and overrepresented to a much lesser degree in the others.⁵⁵ Where the category of mental retardation is broken down into sub-categories by severity, African American children are substantially more likely to be overrepresented in the mildest category, sometimes referred to as "educable," than in the category of "trainable."⁵⁶

Moreover, the theory that poverty and socioeconomic factors are to blame fails to explain the *extreme* differences between black overrepresentation and Hispanic underrepresentation, differences that are even more significant in many states than disparities between blacks and whites.⁵⁷ For example, blacks in Alabama and Arkansas are between three and four times more likely than whites to be labeled mentally retarded, but Hispanics in each state are less than half as likely as whites to be so labeled, making blacks more than seven to nine times as likely as Hispanics to be classified as such.⁵⁸

B. The Harms from Inappropriate Placements and Inadequate Services

While overrepresentation in all disability categories is problematic, children who are labeled "mentally retarded" are the most likely to be segregated from regular education classrooms and their regular education peers.⁵⁹ Over eighty percent of students labeled mentally retarded are

tation. Parrish, *supra* note 8, at 7 tbl.1. Table 1 in Parrish's study shows that blacks are substantially overidentified (more than twice as likely as whites) for mental retardation and emotional disturbance in thirty-eight and twenty-nine states respectively, yet overrepresented to a similar degree in hearing impairments and orthopedic impairments in only five and four states respectively. *Id.*

⁵² Tom Parrish, Black Children—Identification Rates by Disability by State (unpublished table, on file with authors).

⁵³ The number of states ranges from two to twenty-four, depending on the category. *Id.*

⁵⁴ Parrish, *supra* note 8, at tbl.2; see also *id.* at 7 tbl.1.

⁵⁵ The categories and rates in Connecticut, expressed as odds compared to whites, are as follows: Hearing Impairment (1.22); Visual Impairment (1.60); Traumatic Brain Injury (1.10); Orthopedic Impairment (0.72); and Deaf-Blind (0.52). Parrish, *supra* note 51.

⁵⁶ U.S. DEP'T OF EDUC., *supra* note 40.

⁵⁷ Parrish, *supra* note 8, at tbl.2.

⁵⁸ *Id.*

⁵⁹ Fierros, *supra* note 46, at 1 tbl.B.

educated outside the regular education classroom for the equivalent of one or more days per week, compared to seventy percent of students with emotional disturbance, and fifty-six percent of students with specific learning disabilities.⁶⁰ While there is little doubt that substantially separate education environments are desirable for some individual students with disabilities, it is equally well established in research, and recognized in federal statutes, that students with disabilities benefit most when they are educated with their regular education peers to the *maximum* extent appropriate.⁶¹

According to the National Council on Disability January 2000 Report, there are, regardless of race, substantial violations of the least restrictive environment⁶² requirements in most states.⁶³ Therefore, it is safe to assume that the national average statistics for restrictiveness described above reflect unlawful levels of isolation and are far from ideal.

Not surprisingly, there are numerous states that show both unusually high levels of black and Hispanic overrepresentation *and* unusually high levels of restrictiveness.⁶⁴ That black children with disabilities are disproportionately placed in restrictive environments is nothing new. Theresa Glennon, in her article *Race, Education, and the Construction of a Disabled Class*, cites a number of reports highlighting this tendency.⁶⁵ Although OCR still does not collect national data to determine racial disparities in educational environment,⁶⁶ the IDEA Amendments of 1997 appear to obligate states both to collect data and to intervene where racial disproportionality in placement is substantial.⁶⁷

The concern with overrepresentation of minorities in special education would be mitigated if the evidence suggested that minority students identified as having special needs were receiving a benefit. But as government officials acknowledge⁶⁸ and as data demonstrate, this does not appear to be the case.⁶⁹ Consider further these disturbing statistics for African American students:

⁶⁰ *Id.*

⁶¹ See U.S. DEP'T OF EDUC., *supra* note 40.

⁶² See *infra* notes 116–117 and accompanying text.

⁶³ See NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 95 (2000), available at http://www.ncd.gov/newsroom/publications/backtoschool_2.html [hereinafter NCD REPORT].

⁶⁴ See, e.g., Fierros, *supra* note 46; James W. Conroy, Connecticut's Special Education Labeling and Placement Practices: Analyses of the ISSIS Data Base (Sept. 1999) (unpublished manuscript, on file with authors).

⁶⁵ Glennon, *supra* note 8, at 1255 n.69.

⁶⁶ *Id.* at 1252.

⁶⁷ 20 U.S.C. § 1400(c)(8)(A) (1994 & Supp. V 1999).

⁶⁸ See *The Merrow Report*, *supra* note 2.

⁶⁹ James M. Patton, *The Disproportionate Representation of African Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, 32 J. SPECIAL EDUC. 25 (1998).

For African American children and youth, the proportion of students identified as emotionally and behaviorally disturbed (EBD), the proportion expelled or removed from their local school settings, and the proportion ultimately arrested and adjudicated into the juvenile correctional system is far greater than comparable percentages for white youth. For example, while African American children represent 16 percent of the school population and 21 percent of the enrollments in special education, they represent 25.1 percent of youth identified by schools as having emotional and behavioral disorders. In addition, they constitute 26 percent of those arrested, 30 percent of the cases in juvenile court, 40 percent of youth in juvenile detention, 45 percent of cases involving some kind of detention, and 46 percent of the cases waived to criminal court.⁷⁰

Based on these statistics and others, any benefits to minorities who are disproportionately overrepresented in special education are, at best, "meager."⁷¹ Ironically, according to Thomas Hehir, who directed the Department of Education's Office for Special Education Programs ("OSEP") for six years in the Clinton Administration, white students are overrepresented among students with disabilities seeking accommodations for the SAT, whereas minority students with disabilities are grossly underrepresented among this same group.⁷² This is one indication of racially differential use of special education: the use by schools to isolate difficult minority children versus the use by white parents to gain additional resources and advantages for their children.⁷³

While the statistics on overrepresentation point to systemic discrimination against minority students in public education, the high degree of subjectivity in the identification of cognitive disabilities further allows for this conclusion. Most students enter school as regular education students and are referred by classroom teachers for evaluations that may lead to special education identification and placement. Therefore, the cause of the systemic bias is not rooted in the system of special edu-

⁷⁰ David Osher et al., *Exploring Relationships between Inappropriate and Ineffective Special Education Services for African American Children and Youth and their Overrepresentation in the Juvenile Justice System* 1, in MINORITY ISSUES IN SPECIAL EDUCATION, *supra* note 8 (citations omitted). The authors also point out that high quality and less restrictive early special education interventions may be needed for many students who are inadequately served. *Id.* at 2.

⁷¹ Oswald et al., *supra* note 31, at 3.

⁷² Thomas Hehir, Statement at the American Youth Policy Forum Congressional Briefing (Mar. 2, 2001) (transcript on file with authors).

⁷³ Of course, these differences are neither universal nor absolute. Many white students are isolated and many minority students gain resource and other advantages. Yet the distinct trends are troubling.

cation itself but in the system of regular education as it encompasses special education.⁷⁴

Based on years of research, Dr. Beth Harry, Dr. Janette Klingner, and Keith M. Sturges conclude, "The point at which differences [in measured performance and ability] result in one child being labeled disabled and another not, are totally matters of social decision-making."⁷⁵ Special education evaluations are often presented to parents as a set of discrete decisions based on scientific analysis and assessment, but even test-driven decisions are inescapably subjective in nature.⁷⁶ The existence of some bias in test *content* is not the only, or even primary, concern. Dr. Harry's research, for example, describes the manner in which subjectivity creeps into many elements of the evaluation *process*. For example, decisions of whom to test, what test to use, when to use alternative tests, discretion in interpreting student responses, and determining what weight to give results from specific tests all can alter the outcomes.⁷⁷ Further, school politics, power relationships between school authorities and minority parents, the quality of regular education, and the classroom management skills of the referring teacher introduce equally important elements of subjectivity that often go unrecognized.⁷⁸ The political nature of the evaluation process is also reflected in the fact that "[i]dentification of a student with a disability depends on the definitional criteria used, and these change from state to state, district to district, and year to year."⁷⁹ Perhaps the most conspicuous example was the definition change, "simply by a pen-stroke of the American Association on Mental Retardation (AAMR)," which lowered the IQ score cut-off point for "mental retardation" from eighty-five to seventy, swiftly curing thousands of previously disabled children.⁸⁰

⁷⁴ Jim Ysseldyke, for example, discusses the importance of considering the opportunities to learn available to the student, rather than simply focusing on a deficit that lies within the student, when students' cognitive abilities are assessed. The clear implication is that what we assess as a cognitive disability may actually be a failure to provide a student with an adequate opportunity to learn. See Jim Ysseldyke, *Reflections on a Research Career: Generalizations from 25 Years of Research on Assessment and Instructional Decision Making*, 67 *EXCEPTIONAL CHILD* 295, 304 (2001).

⁷⁵ Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative Methods to Investigate the Processes that Result in Disproportionality*, in *MINORITY ISSUES IN SPECIAL EDUCATION*, *supra* note 8; see also Ysseldyke, *supra* note 74, at 296.

⁷⁶ Harry et al., *supra* note 75, at 6.

⁷⁷ *Id.*; see also Ysseldyke, *supra* note 74, at 303 ("Once a classroom teacher or parent refers a student [for an evaluation] it is likely that the student will be found eligible for special education services We have demonstrated repeatedly that teachers refer students who bother them.").

⁷⁸ Ysseldyke, *supra* note 74, at 304 ("[T]here are no reliable psychometric differences between those labeled learning disabled (LD) and low-achieving students . . . but most have chosen simply to ignore [these findings]."); Harry et al., *supra* note 75.

⁷⁹ Ysseldyke, *supra* note 74, at 303.

⁸⁰ Harry & Anderson, *supra* note 32, at 607.

These problems of misidentification and inappropriate services do not occur randomly: minority students are hit hardest.⁸¹ And these inequitable practices that injure individual minority students are driven by broad, systemic forces.⁸² In addition to the forces discussed above, such as poverty, these include poorly trained teachers who are disproportionately employed in minority schools (some of whom use special education as a disciplinary tool),⁸³ other resource inequalities correlated to race,⁸⁴ beliefs of black and Latino inferiority and the low expectations that accompany these beliefs,⁸⁵ cultural insensitivity,⁸⁶ praise differentials,⁸⁷ fear and misunderstanding of black males,⁸⁸ and overcrowded schools and

⁸¹ See *id.*; Parrish, *supra* note 8.

⁸² See KEVIN G. WELNER, *LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY* (forthcoming Oct. 2001).

⁸³ For a review of the research about teacher quality and service of minority students, see the work of Linda Darling-Hammond—in particular, Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (2000), at <http://epaa.asu.edu/epaa/v8n1>, and Linda Darling-Hammond, *supra* note 7. See also Richard Ingersoll, *The Problem of Underqualified Teachers in American Secondary Schools*, 28 EDUC. RESEARCHER 26 (1999); Deborah L. Voltz, *Challenges and Choices in Urban Teaching: The Perspectives of General and Special Educators*, in MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS 41 (2001). For a discussion of the use of special education placement to segregate children racially, see KENNETH J. MEIER ET AL., *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* (1989). For a discussion of its use as a disciplinary tool, see Osher et al., *supra* note 70.

⁸⁴ These other resources include textbooks, library books, science laboratories, the schools' physical plants and repair records, class size, field trips, enriched courses, college counseling, and computer equipment. See Richard Rothstein, *Equalizing Educational Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31 (Richard Kahlenburg ed., 2000); see also *Williams v. State*, No. 312236 (Cal. Super. Ct. filed May 17, 2000). The *Williams* plaintiffs hope to hold the state liable for substandard learning conditions in many California schools pursuant to the state constitution's education clause, CAL. CONST. art. IX, § 1, equal protection clauses, CAL. CONST. art. I, § 7(a); art. IV, § 16(a), and due process clauses, CAL. CONST. art. I, §§ 7(a), 15. *Daniels v. State*, No. BC214156 (Cal. Super. Ct. filed July 27, 1999), filed in Los Angeles Superior Court, challenged the denial of equal and adequate access to Advanced Placement courses by the State of California and by the Inglewood Unified School District, again alleging violations of the equal protection clauses and the education clause of the California Constitution, as well as California educational statutes. Both *Williams* and *Daniels* are based on *Butt v. State*, 842 P.2d 1240 (Cal. 1992) (holding the state ultimately responsible for providing the constitutionally guaranteed education).

⁸⁵ See PAULINE LIPMAN, *RACE, CLASS AND POWER IN SCHOOL RESTRUCTURING* (1998); see also MICHELLE FINE, *FRAMING DROPOUTS: NOTES ON THE POLITICS OF AN URBAN PUBLIC HIGH SCHOOL* (1991).

⁸⁶ FINE, *supra* note 85; see also ANYON, *supra* note 7.

⁸⁷ For example, the American Association of University Women's *How Schools Shortchange Girls* cites research on student-teacher interaction on the basis of gender, race, ethnicity, and/or social class. The studies indicate that white males receive more attention than males from various racial and ethnic minority groups; that black males are perceived less favorably by their teachers and seen as less able than other students; and that black females receive less reinforcement from teachers than do other students. AM. ASS'N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* 122-23 (1992); see also Harry & Anderson, *supra* note 32, at 610.

⁸⁸ Brenda L. Townsend, *Disproportionate Discipline of African American Learners:*

classrooms that are disproportionately located in school districts with high percentages of minority students.⁸⁹

In addition, over the last ten years, the use of high-stakes testing has disproportionately punished poor and minority students, as well as the teachers and schools that serve them.⁹⁰ "When tests are used to make high-stakes decisions (such as graduation or promotion/retention decisions), referral rates and dropout rates increase, and increasing numbers of students with disabilities are retained at grade level."⁹¹ Moreover, retention in grade is the single most reliable predictor of a student eventually dropping out of school.⁹² Add to these forces the general phenomenon of white parents' activism, efficaciousness, and large investment of social capital on behalf of their children,⁹³ compared to the relative lack of parent power among minority parents,⁹⁴ and one can easily understand how the combination of regular education problems and the special education identification process has had a disparate impact on students of different races and ethnicities.

From the time of the passage of the IDEA, these broad, systemic problems have impacted thousands of individual children and have, as

Reducing School Suspensions and Expulsions, 66 EXCEPTIONAL CHILD 381 (2000). African American males are expelled, suspended, and otherwise punished at much higher rates than black females and white males. See James F. Gregory, *Three Strikes and They're Out: African American Boys and American Schools' Responses to Misbehavior*, 7 INT'L J. ADOLESCENCE & YOUTH 25 (1997); James F. Gregory, *The Crime of Punishment: Racial and Gender Disparities in the Use of Corporal Punishment in the U.S. Public Schools*, 64 J. NEGRO EDUC. 454 (1996); Maurice C. Taylor & Gerald A. Foster, *Bad Boys and School Suspensions: Public Policy Implications for Black Males*, 56 SOC. INQUIRY 498 (1986).

⁸⁹ E.g., *Campaign for Fiscal Equity, Inc. v. State*, 719 N.Y.S.2d 475, 538 (Sup. Ct. 2001); see also JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

⁹⁰ ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTS: RAISING THE SCORES, RUINING THE SCHOOLS* 35-41 (2000); Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (2000), at <http://epaa.asu.edu/epaa/v8n41>; Linda McNeil & Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric* (Jan. 6, 2000) (unpublished manuscript, on file with authors), available at http://www.law.harvard.edu/groups/civilrights/conferences/testing98/drafts/mcneil_valenzuela.html; see also NOE MEDINA & MONTY NEILL, *FALL-OUT FROM THE TESTING EXPLOSION: HOW 100 MILLION STANDARDIZED EXAMS UNDERMINE EQUITY AND EXCELLENCE IN AMERICA'S PUBLIC SCHOOLS* (3d ed. 1990); Jay Heubert, *High Stakes Testing: Opportunities and Risks for Students of Color, English-Language Learners, and Students with Disabilities*, in *THE CONTINUING CHALLENGE: MOVING THE YOUTH AGENDA FORWARD* (M. Pines ed., forthcoming 2001) (manuscript at 5, on file with authors).

⁹¹ Ysseldyke, *supra* note 74, at 304.

⁹² See Heubert, *supra* note 90 (manuscript at 5).

⁹³ A parallel phenomenon occurs with regard to tracking and gifted placements. See Amy S. Wells & Irene Serna, *The Politics of Culture: Understanding Local Political Resistance to Detracking in Racially Mixed Schools*, 66 HARV. EDUC. REV. 93 (1996); Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 525 (1999); WELNER, *supra* note 82. For a discussion of social capital, see Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241 (John G. Richardson ed., 1985).

⁹⁴ Voltz, *supra* note 83; Harry & Anderson, *supra* note 32, at 612.

discussed in Part II, prompted a great deal of litigation. But that litigation has been predominantly directed at individual violations, seeking individualized remedies. Given systemic wrongs and individualized remedies, litigation has achieved only minimal change for minority students. Accordingly, following Part II's examination of the present legal terrain, we offer in Part III several litigation approaches that take a more expansive view of violations and remedies, paying particular attention to the need for both input and outcome remedies.

II. LEGAL CHALLENGES TO MINORITY OVERREPRESENTATION

From the late 1960s through the early 1980s, successful lawsuits such as *Hobson v. Hansen*,⁹⁵ *Diana v. State Board of Education*,⁹⁶ and *Larry P. v. Riles*⁹⁷ emphasized the discriminatory treatment of overrepresented Latino and African American students who had been racially isolated in special education classes. The decades since have witnessed a scaling back of legal avenues for challenging racially discriminatory practices under Title VI.⁹⁸ Courts have expressed reluctance to side with Title VI plaintiffs where remedies entail overriding the "local control" of public school educators, and school systems throughout the nation are being released from desegregation obligations.⁹⁹ Yet, as the available Title VI causes of action have shrunk over the last twenty-five years, disability law has strengthened. While this Article argues that Title VI challenges are still worth pursuing and that Title VI doctrine is still worth expanding, it begins with a review of challenges to disability law violations, which in some cases may be easier to prove.

A. Disability Law

Three laws—Section 504 of the Rehabilitation Act of 1973,¹⁰⁰ Title II of the Americans with Disabilities Act,¹⁰¹ and the Individuals with Dis-

⁹⁵ 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

⁹⁶ Consent decree entered in C-70-37 RFP (N.D. Cal. June 18, 1973) (containing state agreement to stop English-language intelligence testing of Mexican American students whose home language was Spanish and to eliminate the overrepresentation of Spanish-speaking students in classes for the educably mentally retarded ("EMR")).

⁹⁷ 793 F.2d 969 (9th Cir. 1984) (holding that California school districts over-relied on IQ tests to identify African American students in EMR classes, in violation of Title VI, IDEA, and Section 504 of the Rehabilitation Act of 1973).

⁹⁸ Culminating this year in *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001).

⁹⁹ For desegregation cases, see *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); and *Board of Education v. Dowell*, 498 U.S. 237 (1991). For Title VI cases, see *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); and *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000).

¹⁰⁰ 29 U.S.C. § 794 (1994).

¹⁰¹ 42 U.S.C. §§ 12101–12213 (1994). Title II of the ADA prohibits discrimination be-

abilities Education Act¹⁰²—provide procedural and substantive protection for students who have been misclassified and/or placed in overly restrictive settings. Section 504 and Title II are federal antidiscrimination laws that prohibit discrimination based on disability and are applicable in public schools. To simplify the analyses here, all further references in this Article to Section 504 can be assumed to cover Title II as well, due to parallel language and interpretations of the laws.¹⁰³

The IDEA includes provisions granting funds for special education implementation and ensuring that all states provide procedural rights and entitlements to eligible individuals and their parents or guardians. The Act also includes detailed requirements regarding reporting and monitoring of its provisions by state governments. Similar state obligations have resulted from other recent federal legislation.¹⁰⁴ Among the IDEA requirements are those mandating that states do the following:

monitor school districts for potential discrimination in suspensions and expulsions of children with disabilities;¹⁰⁵

establish performance goals, using indicators such as performance on assessments, dropout rates, and high school completion;¹⁰⁶

intervene by revising policies, procedures, and practices, where significant racial disproportionality exists in special education identification and placement.¹⁰⁷

cause of a person's disability in all services, programs, and activities provided or made available by any public entity. *Id.* § 12132.

¹⁰² 20 U.S.C. §§ 1400–1487 (1994 & Supp. V 1999). For a full discussion of required procedures and procedural safeguards under IDEA, see EILEEN ORDOVER, OVERVIEW: EDUCATION RIGHTS OF CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973 (1999). See also BAZELON CTR. FOR MENTAL HEALTH, A NEW IDEA: A PARENT'S GUIDE TO THE CHANGES IN SPECIAL EDUCATION LAW FOR CHILDREN WITH DISABILITIES (1998).

¹⁰³ Important differences do exist, but they are not relevant to this discussion. See, e.g., 2 U.S. COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES, EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH DISABILITIES: FEDERAL ENFORCEMENT OF SECTION 504, at 89–90 (1997) [hereinafter EEOP Vol. II].

¹⁰⁴ Most notable was Congress's bipartisan reauthorization and amendment of the Elementary and Secondary Education Act, calling it the "Improving America's Schools Act of 1994." Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C., 29 U.S.C., and 42 U.S.C.). This 1994 Act emphasized maximum access to regular education for all students. 20 U.S.C. § 6301(c)(4) (1994). It required that states align their curriculum and assessment with high academic standards, *id.* § 6301(a), and test all children practicable. See *id.* § 6311(b). Title I of this Act also stressed that economically disadvantaged students, English-language learners, and students with disabilities be included in these assessments. *Id.* Most importantly, Title I required states to report data to the public, disaggregated by race, ethnicity, and gender, and compare the achievement of students with disabilities with their non-disabled peers. *Id.* § 6311(b)(3)(I).

¹⁰⁵ 20 U.S.C. § 1412(a)(22) (Supp. V 1999); 34 C.F.R. § 300.146 (2000).

¹⁰⁶ 20 U.S.C. § 1412(a)(16); 34 C.F.R. § 300.755.

¹⁰⁷ 20 U.S.C. § 1418(c); 34 C.F.R. § 300.755.

The IDEA Amendments of 1997 reemphasized the Act's twenty-five-year-old preference that students with disabilities be taught in the regular education classroom.¹⁰⁸ "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁰⁹ The congressional findings accompanying the 1997 Act noted that IDEA's successful implementation "has been impeded by low expectations" and acknowledged substantial concerns about students with cognitive and behavioral disabilities who are taught in restrictive, segregated classrooms.¹¹⁰ For example, Congress found that isolated students are usually worse off in comparison to similarly situated mainstreamed students.¹¹¹ To the extent that a complaint seeks to redress the isolation of minority students with disabilities caused by a district's violation of IDEA, state inaction alone may constitute a violation of Title VI.¹¹²

1. Free and Appropriate Public Education Under IDEA and Section 504

By law, all students with disabilities are entitled to an education with their regular education peers to the maximum extent appropriate, given each student's special education needs.¹¹³ This ensures exposure to the same curriculum, the same high academic standards, and the same opportunities for socialization.¹¹⁴ The shorthand version of this concept is taken from language in the IDEA: a Free and Appropriate Public Education ("FAPE")¹¹⁵ in the Least Restrictive Environment ("LRE").¹¹⁶ The

¹⁰⁸ 20 U.S.C. § 1412(a)(5)(A).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 1401(c)(4).

¹¹¹ *Id.* § 1401(c)(5).

¹¹² See *Cesar v. Pataki*, No. 98 CIV. 8532 (LMM), 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000). Dismissing defendants' motion for summary judgment, the *Cesar* court upheld the legal theory that a state's failure to act in accordance with legal enforcement mandates is an actionable offense under Title VI regulations if such inaction has a disparate impact on minorities. *Id.* at *4. "The Complaint adequately alleges that defendants have adopted a policy of nonenforcement of legal mandates evident in five specified areas: certified teachers, remedial instruction, school facilities and grounds, libraries, and regents courses and diplomas." *Id.* This decision has been called into doubt by the Supreme Court's decision in *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001). *Sandoval* left open the question of whether plaintiffs can rely on disparate impact theory and still file suit against the state using § 1983; but without a § 1983 claim as the basis for using the regulations, such claims will be dismissed. See *supra* notes 11–12 and accompanying text.

¹¹³ 20 U.S.C. § 1412 (Supp. V 1999).

¹¹⁴ See, e.g., *id.* §§ 1401(8), 1414(b)–(d); 34 C.F.R. §§ 300.26(b)(3), .344(a)(2), .344(a)(4)(ii), .347, .532(b), .533(a)(2)(ii) (2000); see also *id.* §§ 300.550–.554; *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989).

¹¹⁵ 20 U.S.C. § 1412(a)(1).

¹¹⁶ *Id.* § 1412(a)(5).

concept of LRE is subsumed under the definition of "appropriate" in FAPE.¹¹⁷

Individually, some students may benefit from educational settings apart from the regular classroom. Accordingly, IDEA authorizes student placements based on individual needs, rather than based on disability type such as educationally mentally retarded. The right to an individual eligibility determination and subsequent individualized education plan ("IEP"), along with the right to be educated with regular education peers to the "maximum extent appropriate,"¹¹⁸ lie at the heart of the FAPE and LRE provisions.

The United States Department of Education ("DOE") Office for Special Education Programs is charged with ensuring that states properly enforce the provisions of IDEA. Furthermore, the DOE's Office for Civil Rights regards failure to provide FAPE as a form of disability discrimination under Section 504.¹¹⁹ OCR has jurisdiction over many discrimination complaints that fall under Section 504—including FAPE-based complaints—where exhaustion at the state administrative level is either not required or has been completed.¹²⁰ The legislative and enforcement regime thus implicates, in some situations of FAPE denial, two different laws and two different federal agencies for enforcement.

2. *Appropriate and Meaningful Access*

The reauthorized Act also emphasizes that special education should provide assistance and supports for children; special education is not a place—it is a service.¹²¹ This service must provide curricular access to the maximum extent appropriate. Without needed aids and services in the classroom, or without regular education teachers who can deliver instruction in ways that meet individual students' needs, schools are not providing "meaningful" access.¹²² A decision to place any student in an

¹¹⁷ There is some disagreement as to whether the LRE entitlement is a right wholly subsumed by FAPE or a separate right when tensions arise over how restrictive an environment is appropriate. See Telephone Interview with Kathleen Boundy, Director, Center for Law and Education (Nov. 10, 2000). Courts tend to seek a balance when the two are in tension. *E.g.*, *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

¹¹⁸ *Oberti*, 995 F.2d at 1206 (quoting 20 U.S.C. § 1412(5)(B) (1988)). In *Oberti*, the Third Circuit held that the school district has the burden of proving compliance with the LRE requirement, regardless of which party brought the claim in court. See *id.* at 1223.

¹¹⁹ Memorandum from Norma Cantu, Assistant Secretary for the Office of Civil Rights, U.S. Department of Education (July 6, 1995) (on file with authors); see also EEOP VOL. II, *supra* note 103.

¹²⁰ See 3 U.S. COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES: EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH LIMITED ENGLISH PROFICIENCY: FEDERAL ENFORCEMENT OF TITLE VI AND LAU V. NICHOLS 98–109 (1997).

¹²¹ 20 U.S.C. § 1411(b)(2)(C) (Supp. V 1999).

¹²² See, *e.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200–02 (1982) (interpreting the

educational setting that is more restrictive than the regular education classroom can only be justified in terms of individual benefits to the student, not in terms of administrative convenience to the school.¹²³

Minority students deemed eligible for special education are significantly more likely than their white counterparts to wind up in substantially separate settings with a watered-down curriculum.¹²⁴ They are therefore in double jeopardy of experiencing school failure: they experience hardships derived from their minority status plus their disabled status. Not surprisingly, overrepresentation data for black students in special education mirror overrepresentation in such undesirable categories as dropping out,¹²⁵ suspension and expulsion,¹²⁶ low-track placement,¹²⁷ involvement with juvenile justice,¹²⁸ and underrepresentation in Advanced Placement ("AP") and gifted classes.¹²⁹ This broad pattern suggests that underlying political and social forces connect these phenomena.¹³⁰

Moreover, minority students tend to be overrepresented in certain categories of disability while underrepresented in others. As a general rule, the classifications that carry greater stigma and entail more restrictive placements, Emotionally Disturbed and Mild Mental Retardation, have disproportionately been the preserve of students of color, while white special education students have disproportionately been classified as having Learning Disabilities.¹³¹

a. Differences Between IDEA and Section 504

There are important differences between the legal requirements of Section 504 and the requirements of IDEA. These differences are rele-

IDEA requirement of a free appropriate public education).

¹²³ 20 U.S.C. § 1412(a)(5).

¹²⁴ While black students are consistently overrepresented, the data are less consistent for Hispanic students, often indicating underrepresentation for non-black minority students. However, data from California show that the percentage of every minority subgroup that received services in a mainstreamed regular education classroom was lower than the percentage for white students. See Parrish, *supra* note 8; see also Fierros, *supra* note 46; Conroy, *supra* note 64.

¹²⁵ FINE, *supra* note 85.

¹²⁶ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORTS (1998).

¹²⁷ For a full description of legal challenges to tracking, see Losen, *supra* note 93, and Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451 (1996).

¹²⁸ BUILDING BLOCKS FOR YOUTH, AND JUSTICE FOR SOME (2000); HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (1999); see also Parrish, *supra* note 8, at 17 tbl.8.

¹²⁹ MARA SAPON-SHEVIN, PLAYING FAVORITES: GIFTED EDUCATION AND THE DISRUPTION OF COMMUNITY 32-33 (1994); WELNER, *supra* note 82.

¹³⁰ WELNER, *supra* note 82.

¹³¹ Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. SPECIAL EDUC. 410 (1994).

vant to overrepresentation and underservicing concerns. For instance, the assurance of a FAPE under IDEA applies only to students who, because of their disability, need special education and related services.¹³² Section 504's protections, on the other hand, include all students covered by IDEA as well as students whose disabilities substantially impair one or more major life activities.¹³³ A student with diabetes or in need of counseling outside of the classroom would not be covered under IDEA but would likely be covered under Section 504.¹³⁴ Most protected individuals under 504 are entitled to a "free appropriate public education" in much the same way that students with qualifying disabilities are entitled to FAPE under IDEA.¹³⁵

If a minority student was (or were to be) identified as educationally mentally retarded but did not, in fact, have a disability, that student would not need special education services. Such a student would not be entitled to a FAPE under IDEA.¹³⁶ But such a student, if harmed by the wrongful placement, could conceivably wind up eligible for FAPE under Section 504.¹³⁷

At a minimum, misidentified students are protected from discrimination that resulted from "having a record of" or being "regarded as" having a disability. The regulations, for example, state that a *non-disabled individual* is covered when that student, "[h]as a record of such an impairment," meaning that he or she "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."¹³⁸ Accordingly, non-disabled students who have a record of a disability or are regarded as having a disability are specifically covered under Section 504's definition of qualified "handicapped person."¹³⁹

Overrepresentation directly concerns the inadequacy of special education and indirectly implicates the inadequacy of regular education, especially where that regular education leads to wholesale misidentification. In this regard, Section 504 has two litigation advantages

¹³² Individuals with Disabilities Act Amendments of 1997 § 602(3)(A)-(B), 20 U.S.C. § 1401(3)(A)-(B) (Supp. V 1999) (listing eligible categories of disability).

¹³³ 29 U.S.C. § 705(20) (1994).

¹³⁴ *Id.*; *id.* § 794(a); 34 C.F.R. § 104.3(j) (2000).

¹³⁵ 29 U.S.C. § 794. Courts, however, have been split with regard to legal claims based on FAPE. Telephone Interview with Kathleen Boundy, *supra* note 117.

¹³⁶ Certain procedural protections would still apply, however. Moreover, IDEA requires districts to ensure the use of assessments that are neither racially nor culturally biased. 20 U.S.C. § 1414(b)(3)(A)(i) (Supp. V 1999). Failure to do so could conceivably provide a cause of action in some cases.

¹³⁷ Imagine a misidentified student who suffered psychological harm and was denied access to the regular education curriculum for years in an inappropriate isolated placement. In some cases these new needs may qualify thus harmed students for FAPE under the broader, non-categorical Section 504 disability definition "otherwise health impaired." For more information on the differences, see EEOP Vol. II, *supra* note 103, at 98.

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

¹³⁹ *Id.* § 104.3(j).

over IDEA. It affords substantive compensatory remedies to misidentified non-disabled minority students pursuant to its discrimination protections, and entitles to a FAPE some misidentified students under its broader definition of "handicapped."

b. Remedies for Misidentified or Overly Restricted Students

Because of its more expansive reach, Section 504 provides an important vehicle for systemic challenges seeking comprehensive remedies for minority students who have been underserved and misidentified. Students wrongfully identified as having a disability, even if not entitled to a FAPE under IDEA, can likely seek substantially similar compensatory remedies under Section 504 (and sometimes for complaints of intentional discrimination under Title VI). FAPE-type remedies would be necessary to enable such students to make up for time lost, and recover from any psychological damage and other harm incurred as a result of the school's misidentification. In related contexts, court-imposed solutions have embodied the notion that victims of misidentification are entitled to much more than the right to return to the regular education classroom.¹⁴⁰

Another advantage to Section 504 FAPE claims is that in defining "appropriate," the regulations promulgated under Section 504 include regular or special education and related aides and services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."¹⁴¹ Plaintiffs seeking regular education reform thus have a strong foothold in the Section 504 regulations.

3. Private Enforcement of IDEA

According to the National Council on Disability, every state is out of compliance with IDEA to some degree.¹⁴² This organization also notes the reality that, notwithstanding OSEP's role, the practical burden of IDEA enforcement rests heavily on the shoulders of individual parents and children.¹⁴³ In this context, for instance, IDEA gives parents the pro-

¹⁴⁰ 20 U.S.C. § 1412(a) (Supp. V 1999); see *infra* notes 174–178 (describing the recent consent decree in Alabama); Kathleen Boundy, *Including Students with Disabilities in Standards-Based Education Reform*, Center for Law and Education, at <http://www.cleweb.org/nta.htm> (last visited Apr. 10, 2001). Poor minority students, regardless of disability status, could conceivably have some entitlement to the benefits of standards-based reform under Title I of the Improving America's Schools Act. Legal action to enforce Title I's requirements may be beneficial as a shield to prevent overrepresentation and a sword to require higher quality education, but remains a nearly vacant area of litigation, in comparison with FAPE entitlement.

¹⁴¹ 34 C.F.R. § 104.33(b)(1) (2000).

¹⁴² NCD REPORT, *supra* note 63.

¹⁴³ *Id.*

phylactic legal right of refusing to consent to an evaluation, thereby preventing special education identification.¹⁴⁴ Parents, acting on behalf of their children, may also enforce IDEA through private litigation.¹⁴⁵ They can bring individual actions against their school districts (as well as against their states) if their children are not benefiting from the services provided. In addition, given the evidence suggesting that many minority students are denied FAPE because of misclassification or denial of LRE entitlements, advocates would likely be on steady ground should they decide to file both individual and systemic challenges simultaneously.

Private individual lawsuits, however, can often take months or years to resolve. Given the pragmatic constraints on court challenges, poor and minority children are unlikely to avail themselves of such IDEA protections.¹⁴⁶ Private litigants, consequently, are often white parents who have the necessary resources to pursue these challenges. Although such parents can raise systemic issues, they more commonly challenge specific failures that primarily impact their own children.

Moreover, individual challengers seeking individual remedies generally must exhaust state administrative processes before a lawsuit can be filed in state or federal court, even when the action alleges a failure rooted in a systemic violation.¹⁴⁷ For example, individuals seeking to remedy a specific disciplinary decision directed at a special education child must exhaust the administrative remedies spelled out under IDEA (and the state laws and regulations implementing IDEA).¹⁴⁸ On the other hand, challenges seeking systemic remedies are not necessarily required to exhaust administrative procedures.¹⁴⁹ Courts have allowed such actions

¹⁴⁴ Schools can dispute this refusal and seek an administrative remedy. *See* 20 U.S.C. § 1414(a)(1)(C)(ii) (Supp. V 1999). Notwithstanding the legal requirements, advocates tell of many instances in which students have been transferred to special education classrooms without parental consent, and poorly informed or misinformed parents have agreed to sign papers based on grossly inadequate information.

¹⁴⁵ A complainant dissatisfied with the state's disposition may request review of the state's decision by the United States Secretary of Education, who is authorized to withhold federal funding from a state found to be in noncompliance with the IDEA. 34 C.F.R. § 76.401(d) (2000). Furthermore, if the cause of action turns on the state's adoption of a policy or practice of general applicability that is contrary to the law, or seeks structural or systemic reforms, plaintiffs may file suit against the state in court. *See, e.g.*, Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1093-95 (1st Cir. 1989).

¹⁴⁶ *See* SASHA POLAKOW-SURANSKY, ACCESS DENIED: MANDATORY EXPULSION REQUIREMENTS AND THE EROSION OF EDUCATIONAL OPPORTUNITY IN MICHIGAN (1999).

¹⁴⁷ 20 U.S.C. § 1415(f), (g), (h) (Supp. V 1999).

¹⁴⁸ *Smith v. Robinson*, 468 U.S. 992, 1009-13 (1984). However, individual Section 504 claims that could not also be filed under the IDEA do not require plaintiffs to exhaust administrative remedies.

¹⁴⁹ For example,

parents need not exhaust IDEA's administrative remedies where the state or local agency's procedures would be inadequate or futile. "Administrative remedies are generally inadequate where structural, systemic reforms are sought . . . Exhaustion may also be excused because of inadequacy of administrative remedies where the plaintiffs' substantive claims themselves concern the adequacy of the admin-

against a school, district, or state, based on failure to provide IDEA's unique procedural rights.¹⁵⁰

This difference in exhaustion requirements, as well as the lack of practical options for aggrieved parents with minimal resources, helps to explain why systemic class action challenges under the IDEA are especially important to poor and minority students with disabilities. Such challenges may be combined with allegations of discrimination pursuant to different treatment and disparate impact theory.¹⁵¹ Exclusion from participation and/or denial of benefits challenges, however, may on their own offer unique opportunities for driving IDEA and Section 504 compliance.¹⁵²

4. *The Corey H. Example*

Successful systemic challenges hold the promise of positive and enduring effects for large numbers of minority children. As an example, consider *Corey H. v. Chicago*, a 1992 class action brought on behalf of all children with disabilities in the Chicago public schools. The plaintiffs sued the Board of Education of the City of Chicago and the State of Illinois under the IDEA, Section 504, and Title II of the ADA, alleging systemic denial of LREs through the use of a categorical system that assigned students with disabilities to school classrooms.¹⁵³ The court held that LRE requirements were violated because the state had done little to ensure compliance with the IDEA, because children with disabilities were rarely placed in regular education classes, and because district per-

istrative process."

Learning Disabilities Ass'n of Md., Inc. v. Bd. of Educ., 837 F. Supp. 717, 722-23 n.14 (D. Md. 1993) (quoting *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1309 (9th Cir. 1992)).

¹⁵⁰ For example, in *Doe v. Rockingham County School Board*, the district court held that the student was not required to exhaust administrative proceedings because the district had failed to provide a prompt hearing and notice and sought to maintain the disciplinary suspension during the pendency of the hearing. *Doe v. Rockingham County Sch. Bd.*, 658 F. Supp. 403 (W.D. Va. 1987).

¹⁵¹ The theories are outlined under the discussion of race discrimination and Title VI. See *infra* Part III. These theories are not directly available under the IDEA.

¹⁵² Disparate treatment and adverse impact claims are typically raised under Section 504, which prohibits discrimination on the basis of disability by recipients of federal funding. Exclusion and denial of benefit theories can constitute separate causes of action. See Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 515-16 (1984). They differ from disparate impact and different treatment theories because a policy or practice that violates the requirements of IDEA or Section 504 is itself considered a form of discrimination against students with disabilities. See 29 U.S.C. § 794(a) (1994).

¹⁵³ See *Corey H. v. Bd. of Educ.*, 27 Individuals with Disabilities Educ. L. Rptr. 688 (N.D. Ill. 1998) (approving a settlement with the school district). The plaintiffs settled with the Chicago Board, and continued to judgment against the state.

sonnel were inadequately trained to assist students with disabilities placed in regular education.

The two settlement agreements reached contained broad remedies designed to improve educational opportunities for all students with disabilities.¹⁵⁴ In August 1997, the plaintiffs and one defendant, the Board of Education of the City of Chicago, reached a tentative settlement agreement, which the court finally approved on January 16, 1998. The State of Illinois refused to settle, and the court issued findings of liability against the Illinois State Board of Education ("ISBE") in February 1998.¹⁵⁵ In mid-December 1998, the plaintiffs and ISBE reopened negotiations regarding possible settlement, and the court approved that settlement on June 18, 1999.¹⁵⁶

Through the two settlement agreements the predominantly minority *Corey H.* plaintiffs won the following comprehensive remedies:

A. Intensive planning and support for numerous schools each year, including professional development for teachers and LRE training for administrators, to create a more inclusive system of special education;

B. Funds to implement and monitor the plans at each school, including 43 million dollars through the 2006 school year for Chicago to implement the individual local school plans for which the agreement calls;

C. Required measures to ensure that special education staffing needs are met;

D. A requirement that the Chicago Board develop a new IEP for each student to include:

1. A description of the student's general achievement and a comparison of it to the general curriculum;
2. A description of the related services and program modifications necessary for the student to participate in *all* components of the general education program;
3. A statement of measurable annual goals related to the student's ability to learn and master the systemwide learning

¹⁵⁴ For a full description of this case and its implications for improved educational opportunities, see Sharon Weitzman Soltman & Donald R. Moore, *Ending Illegal Segregation of Chicago's Students with Disabilities: Strategy, Implementation and the Implications of the Corey H. Lawsuit*, in MINORITY ISSUES IN SPECIAL EDUCATION, *supra* note 8.

¹⁵⁵ *Corey H. v. Bd. of Educ.*, 27 Individuals with Disabilities Educ. L. Rptr. 713 (N.D. Ill. 1998).

¹⁵⁶ *Corey H. v. Bd. of Educ.*, No. 92 C 3409 (N.D. Ill. June 18, 1999) (settlement agreement) (on file with authors).

outcomes to the appropriate maximum extent, or the alternative outcomes the student shall be expected to meet; and

4. A justification of the extent to which the student is not educated with non-disabled students;

E. Regular reviews by ISBE to update and revise its LRE monitoring procedures to set districtwide targets for LRE for Chicago, including collecting individual school and districtwide information on students IEPs to ensure they are being created with the LRE requirements met;

F. Dissemination of detailed information about the agreement to parents, staff, principals, and others;

G. Revisions by ISBE of its special education funding policies to be consistent with LRE mandates of IDEA;

H. The creation of a Corey H. information center to provide assistance to parents and professionals in Chicago regarding issues relevant to the settlement;

I. Changes in ISBE certification requirements for special education and regular education teachers so that they will be better prepared to make individual evaluations, recommend individualized programs, and teach students with disabilities in a more inclusive fashion;

J. Oversight by court appointed monitor of the state and Chicago Board with extensive authority to take any reasonable steps necessary to ensure compliance with the agreement.¹⁵⁷

Because of the focus on instituting practical mechanisms for ensuring FAPE and LRE for all students, the *Corey H.* settlements promise to have a major impact on the isolation of minority students with disabilities in Chicago, despite the fact that the documents never address race.¹⁵⁸ Just as important is the fact that the state was held liable for its practice of placing students in educational settings according to a disability label rather than each student's individual needs.

¹⁵⁷ The above compilation greatly abbreviates the two agreements.

¹⁵⁸ Prior to the litigation, the Chicago Board, as part of the implementation of a desegregation order, reassessed minority students labeled as EMR. It de-classified 3000 students previously classified as such, although according to anecdotal reports many were subsequently re-classified in other disability categories. The fact that many of the *Corey H.* plaintiffs were represented in that previous class action explains, in part, why a Title VI challenge was not added to the *Corey H.* lawsuit. The original consent decree was approved by the Northern District of Illinois on September 24, 1980. *United States v. Bd. of Educ.*, 567 F. Supp. 272, 274 (N.D. Ill. 1983).

Another longstanding suit, on behalf of the predominantly minority students in Baltimore (a city with an eighty-five percent African American student population), also reached a systemic settlement agreement recently.¹⁵⁹ The case was originally brought to challenge the district's widespread failure to evaluate and provide services for students with disabilities. The plaintiffs, relying solely on disability law, won both procedural and substantive improvements. Most notably, the agreement required that modest yet concrete achievement outcomes be met, using state standards as benchmarks.

B. Overrepresentation Issues in Desegregation Cases

Despite diminishing opportunities to raise challenges pursuant to desegregation orders, several cases do confront overrepresentation issues in the context of dual (racially segregated) systems. This approach is more than a historical curiosity; hundreds of school districts remain under either court supervision¹⁶⁰ or administrative agreements with the United States Department of Education to desegregate.¹⁶¹

Once desegregation began in earnest, following enactment of the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965 ("ESEA"), and cases such as *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁶² schools experienced a wave of second-generation discrimination taking the form of tracking (also known as ability grouping), abuse of expulsions and suspensions, and special education placements in substantially separate classrooms.¹⁶³ Early desegregation opinions report widespread abuse involving minority students with average and above-average IQ scores being relegated to isolated classes for men-

¹⁵⁹ *Vaughn G. v. Mayor of Balt.*, Civil Action No. 84-1911(MJG) (D. Md. May 1, 2000) (calling for monitoring to reduce disparity in achievement, an annual school report regarding "significant progress" defined in terms of specific narrowing of the test score gap, increases in the rates of high school completion, and increases in the percentage of students receiving diplomas).

¹⁶⁰ Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1159 (2000).

¹⁶¹ There are over two hundred school districts where the Department of Justice was party to a case that has not been declared unitary and dismissed outright. U.S. Dep't of Justice, Educational Opportunities Litigation Section Caseload List (Apr. 1998) (on file with authors) [hereinafter DOJ Caseload List]. According to Gary Orfield, there are additionally hundreds of other dormant court cases and administrative agreements with the United States Department of Education that retain some kind of monitoring status or permanent injunction that could be re-activated, but there has been no official count. Interview with Gary Orfield, Co-Director, The Civil Rights Project at Harvard University, in Cambridge, Mass. (Mar. 24, 2001).

¹⁶² 402 U.S. 1 (1971) (approving the school desegregation plan in the Charlotte-Mecklenburg school system).

¹⁶³ See MEIER ET AL., *supra* note 83; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 24 (1990) (noting attempts to circumvent *Brown* as particularly prevalent in the southern states).

tally retarded students.¹⁶⁴ This use of racially discriminatory special education placement to circumvent *Brown's* mandate relied on at least two pervasive normative beliefs: the stereotypical belief of white intellectual superiority, and a well-grooved pattern of paternalism and animus toward people with disabilities.¹⁶⁵ The predictable consequence of these beliefs was that many special education programs existed as segregated ghettos within public schools.¹⁶⁶

By 1982, at least 484 school districts remained under court order to desegregate.¹⁶⁷ During that approximate time, in Alabama, over nine percent of enrolled minority students were deemed educably mentally retarded ("EMR"), compared with just over two percent of white students,¹⁶⁸ suggesting continuing effects of past de jure discrimination.

Present-day minority overrepresentation in special education in a given school district may evidence the continuing impact of a prior dual system in that district, as well as a veiled continuation of that system. This argument, linking special education overrepresentation to a school district's adjudicated operation of a formerly dual system, has successfully prompted courts to modify desegregation orders, requiring school districts to address racial disparities in special education.¹⁶⁹

In some cases, an entire state may be impacted by a court order, as is presently the situation in Alabama. The United States Department of Justice ("DOJ") identifies itself as a party to at least one consent decree in each of twenty-two states. Tellingly, the odds that an African American student will be identified as mentally retarded are more than double

¹⁶⁴ *Hobsen v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) (holding that when minority children are relegated to lower tracks based on intelligence tests largely standardized to white middle class children, and then given reduced education, children are denied equal education opportunity); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1453-62 (S.D.N.Y. 1985) (holding that "the historically discriminatory operation of the Special Education program continued to have discriminatory effects").

¹⁶⁵ There appears to be a confluence of unconscious racism and ableism. Despite the intended benefits of special education, it is not surprising that well-meaning educators disproportionately identify minority children, whom they may subconsciously believe are both less intelligent than whites and less worthy of the same education, as having disabilities. At the same time, people with disabilities are often regarded as having intractable problems in need of fixing. The gross disproportionalities, especially with regard to labeling children as educably mentally retarded, fit within the constructs for "unconscious racism" described by Professor Charles Lawrence. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319-24, 366-67 (1987); see also Losen, *supra* note 93, at 526-27.

¹⁶⁶ MEIER ET AL., *supra* note 83.

¹⁶⁷ See Finn, *supra* note 8, at 349-51. Outstanding desegregation orders remained in all but twelve states and the District of Columbia, including seventeen in California and nine in Connecticut. The eleven southern states accounted for most desegregation orders. DOJ Caseload List, *supra* note 161.

¹⁶⁸ See Finn, *supra* note 8, at 336.

¹⁶⁹ See, e.g., *Yonkers*, 624 F. Supp. at 1276.

the odds that white students will be identified as such¹⁷⁰ in nineteen of the twenty-two states where DOJ is a party.¹⁷¹

Courts have ruled that a school district that carried out an intentionally segregative policy in one area of operation is presumed to have acted intentionally with regard to all other areas resulting in segregation.¹⁷² Courts presume intent when significant disparities exist and they order remedies designed to dismantle formerly dual systems "root and branch," at least in theory.¹⁷³ Challenges to minority overrepresentation in special education may be analyzed under this presumed intent framework if the district is under a desegregation order.¹⁷⁴

The overrepresentation issue now often arises as an aspect of judicial review of desegregation consent decrees.¹⁷⁵ In one recent example, district court Judge Myron Thompson consolidated the issue of unitary

¹⁷⁰ See Parrish, *supra* note 8, at tbl.2.

¹⁷¹ These states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, South Carolina, Tennessee, and Texas. DOJ Caseload List, *supra* note 161.

¹⁷² See, e.g., *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189 (1973) (finding intentional segregation upon district gerrymandering and schools being sited in racially isolated neighborhoods, even without explicit statutes requiring de jure segregation).

¹⁷³ See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968). The *Green* Court required that desegregation be achieved with regard to facilities, extracurricular activities, staff, faculty, and transportation. Since *Green*, courts have expanded the "root and branch" rationale to include such practices as tracking, overrepresentation in special education, and school discipline. E.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985); *Evans v. Buchanan*, 582 F.2d 750, 772 (3d Cir. 1978); see also *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905 (N.D. Ill. 1994) (identifying discrimination in discipline, tracking, and special education as part of original Fourteenth Amendment violation).

¹⁷⁴ *Keyes*, 413 U.S. at 208. The burden on the defendant school district is especially heavy if the original consent decree addresses the issue of minority overrepresentation in special education. If not, challengers may nonetheless prevail by establishing that the overrepresentation is a vestige of the prior intentional segregation. Once plaintiffs establish such a link to the dual system of old, courts may regard a statistical disparity as a proxy for intent and place the burden on defendant school districts to rebut the presumption. When statistical evidence suffices as evidence of intent, advocates may also be successful by claiming a violation of the Equal Protection Clause of the United States Constitution.

Some challenges have been silent on the blatant segregation of special education students and the gross inadequacies of special education services in segregated special education classrooms and programs. See, e.g., *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985). If no desegregation order exists, or if a court rules that the disparity is not a vestige of prior segregation, challengers may nonetheless establish a claim of intentionally discriminatory overrepresentation through direct evidence of a discriminatory purpose. However, this course of action would be extremely difficult, given the great discretion that courts would likely grant to school districts in matters of special education.

¹⁷⁵ Judges engaged in such reviews seek to determine whether a state or school district has fulfilled its duty to eradicate vestiges of prior intentional segregation. Judges may review these cases without action by either party, but requests from plaintiffs to revisit a desegregation order/consent decree for failure to comply are not uncommon. Even more common are district-initiated motions to dissolve a court order. E.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

status and reviewed eleven Alabama school districts pursuant to *Lee v. Macon County Board of Education*.¹⁷⁶ On August 30, 2000, the court issued a revised consent decree in all eleven cases addressing the state's persistent problem of minority student overrepresentation in special education.¹⁷⁷ The decrees are comprehensive, including remedies to overrepresentation in the categories of "emotionally conflicted, specific learning disability, and mental retardation."¹⁷⁸ Alabama, which has had one of the worst track records of any state in terms of statistical overrepresentation of African Americans,¹⁷⁹ agreed to extensive corrective measures.¹⁸⁰

¹⁷⁶ 267 F. Supp. 458 (M.D. Ala. 1967).

¹⁷⁷ *Lee v. Phoenix City Bd. of Educ.*, C.A. No. 70-T-854 (M.D. Ala. Aug. 30, 2000). The consent decrees consist of two documents in each case: an order approving the consent decree on statewide special education issues and the consent decree itself.

¹⁷⁸ *Id.*

¹⁷⁹ Finn, *supra* note 8, at 358.

¹⁸⁰ The reforms included in the consent decree can be summarized as follows:

A. To conduct awareness and prereferral training. Teachers will be made aware of the tendency to refer minority students disproportionately, and receive training in how to use certain teaching and behavior management techniques that will improve learning for all students and diminish overreliance on special education to reach children that may pose challenges in the classroom.

B. To monitor the agreement, including yearly status conferences. The state will collect data for its own evaluation as well as report this data to the parties.

C. To make certain changes to the Alabama Code. The IDEA encourages, but does not require prereferral intervention. The Alabama Code will go much further and require prereferral intervention for six weeks, in most cases, before a child can be referred for special education.

D. To revamp the assessment. The new code also revises criteria for determining specific learning disabilities, emotionally conflicted, as well as MR. It also requires that home behavior assessments be attempted for students suspected of MR. Other contextual factors must be considered for all three categories to rule out other causes of low achievement that are not actually rooted in a disability.

E. To provide culturally sensitive psychometrics and training. New measures of aptitude that are culturally sensitive will be used in determining eligibility for minority students. Psychologists and school personnel will be trained in their proper administration.

F. To allocate funds to accomplish the Decree's goals using a state improvement grant. The funds are not for the changes in the decree except for the piloting of a mentoring program. Many of the changes in the decree will be funded through a state improvement grant.

G. To require reevaluation of all borderline MR students. Minority students who were borderline MR (IQ of 65 or above, or not assessed with an adaptive behavior measure) will be retested and others will be given the option to be retested. Students who were wholly misidentified will be provided with support and services to aid them in their transition back into regular education classrooms. Students who no longer meet the new code's criteria for MR or are deemed no longer eligible under the terms of the new agreement will be evaluated for possible placement if they are subsequently deemed eligible in another disability category.

Notwithstanding plaintiffs' success in cases such as *Lee* and *Yonkers*, a desegregation context has not always led to success in overrepresentation challenges. In *Vaughns v. Board of Education*, for instance, the plaintiffs unsuccessfully alleged, inter alia, that the disproportionate number of African American students in special education programs should be redressed as a vestige of the prior intentional discrimination.¹⁸¹ Although the court acknowledged a disturbing statistical overrepresentation of African American children among those classified as EMR (African Americans constituted 47.4% of the student population but 67.7% of EMR students), the court found no violation of the desegregation order.¹⁸²

These desegregation cases, taken together, offer important lessons for the future. On the one hand, the holding in *Vaughns* offers a reminder that many judges are highly reluctant to intervene in educational policy decisions, preferring to defer to the discretion of local decisionmakers. On the other hand, cases such as *Yonkers* point to the systemic nature of discrimination, while *Lee* offers the promise of systemic, meaningful remedies to such discrimination. The following two sections continue building the argument for comprehensive challenges to overrepresentation.

C. Disparate Impact Analysis in Education Cases

As stated at the outset, plaintiffs challenging statistical special education racial overrepresentation might still be able to bring an action pursuant to regulations promulgated under Title VI by citing § 1983.¹⁸³ Such actions, if available, would allow plaintiffs in court to rely on statistical evidence that a "neutral" policy had a racially disparate impact. The use of statistical evidence to establish a claim of intentional racial discrimination should be explored whenever feasible, but under disparate impact theory, plaintiffs are required neither to allege nor to prove that the defendant intentionally discriminated.

¹⁸¹ *Vaughns v. Bd. of Educ.*, 574 F. Supp. 1280 (D. Md. 1983).

¹⁸² *Id.* at 1307. Even after the Fourth Circuit overturned this decision, for failure to shift the burden of disproving discrimination to the defendant, *Vaughns v. Bd. of Educ.*, 758 F.2d 983 (4th Cir. 1985), the district court found no discrimination. *Vaughns v. Bd. of Educ.*, 627 F. Supp. 837, 839 (D. Md. 1986).

¹⁸³ Plaintiffs bringing race-based challenges to questionable school practices have recently encountered a federal bench hesitant to acknowledge vestiges of prior segregation or justiciable disparate impact. *See Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985) (holding that grouping students by achievement levels offered better educational opportunities and, thus, did not violate equal protection); *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (finding that the use of academic skills test as requisite for high school graduation did not violate Title VI regulations); *see also supra* notes 9–14 and accompanying text. *But cf. People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905 (N.D. Ill. 1994) (holding that acts of school district caused, in substantial part, the current racial segregation of students in the district).

The Title VI regulations describe an "effects test" prohibiting the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program."¹⁸⁴ Similar effects test regulations exist with regard to discrimination on the basis of disability (Section 504),¹⁸⁵ and gender (Title IX).¹⁸⁶ These disability and gender protections may also be germane to a minority overrepresentation case under disparate impact legal theory.¹⁸⁷

1. Private Actions

Courts ruling on private actions brought directly pursuant to the Title VI regulations have employed a three-pronged analysis to determine whether the effects of a school district's policy or program violate those regulations.¹⁸⁸ First, the plaintiff must establish that a criterion or method of administration has both a negative and disparate impact on a protected class.¹⁸⁹ If such impact is found, the defendant district must demonstrate that the policy or practice at issue is an educational necessity.¹⁹⁰ Upon such proof, the burden then shifts again to the plaintiff to demonstrate a less discriminatory alternative that can reasonably meet the defendant's articulated goals.¹⁹¹ Although a plaintiff is not required to prove that the defendant intended to discriminate, evidence of such intent can bolster the plaintiff's disparate impact claim.¹⁹²

Private Title VI litigants may encounter judges with some reluctance to apply the law as set forth above.¹⁹³ For instance, the court in *Georgia State Conference of Branches of NAACP v. Georgia* relied heavily on employment case law and theory¹⁹⁴ to insist upon a difficult particularity

¹⁸⁴ 34 C.F.R. § 100.3(b)(2) (2000). Title VI, section 602, "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance to particular programs or activities "to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1 (1994).

¹⁸⁵ 34 C.F.R. § 104.4(b)(4).

¹⁸⁶ *Id.* § 106.1.

¹⁸⁷ Title IX, for instance, could be implicated where males of a certain race are disparately impacted by a school district's referral, evaluation, and placement policy.

¹⁸⁸ *E.g.*, *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

¹⁸⁹ *E.g.*, *Elston*, 997 F.2d at 1407.

¹⁹⁰ *E.g.*, *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000).

¹⁹¹ *E.g.*, *id.*

¹⁹² Telephone Interview with Barbra Shannon, Senior Counsel, Office for Civil Rights, U.S. Department of Education (Apr. 13, 2001).

¹⁹³ As discussed above, judges expressed such reluctance even before *Sandoval*. See *supra* note 99 and accompanying text. We expect that similar or greater reluctance will be encountered by those using § 1983 to enforce the disparate impact regulations.

¹⁹⁴ *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1421-22 (11th Cir. 1985). In particular, the *Georgia State Conference* court cites only Title VII cases in describing what burden the plaintiffs must prove to establish a *prima facie* dispa-

requirement.¹⁹⁵ Specifically, the court rejected a challenge to the overrepresentation of minority students in EMR classes. The plaintiffs had claimed that non-disabled black students were misidentified as a result of improper procedures and test use, attempting to show the disparity by comparing the number of black students in the general population with the number of black students identified as EMR and placed in separate classes.¹⁹⁶ The court found this showing to be unsatisfactory, reasoning that the plaintiffs' statistical analyses failed to establish the causal link between the particular code violations (and misinterpretations), the misidentification of black students, and the statistical racial disparity. The court suggested that the plaintiffs might have prevailed had they reviewed the files of similarly situated white students for the purpose of racial comparisons.¹⁹⁷

The *Georgia State Conference* decision suggests that advocates should present disproportionality arguments with as much particularity as possible whenever they attempt to tie causation to a given, identifiable element in a process. However, requiring this high a degree of particularity, given the multiplicity of factors involved, may be inappropriate in special education overrepresentation cases. For example, in *Larry P. v. Riles*, the court found a disparity by comparing the percentage of black students in general education to those in EMR placement.¹⁹⁸

Further, studies have identified many interconnected and often highly subjective factors that contribute to minority overrepresentation.¹⁹⁹ Among the many, often race-linked, factors under the school's control that contribute to minority overrepresentation are IQ test disparity reliance, testing biases of school psychologists, school politics, dynamics of the special education team, failure to communicate to parents in the dominant language of the home, lack of adequate counseling services, poor behavior management skills on the part of teachers, inadequate reading programs, lack of prereferral interventions, stereotypes, animus,

rate impact case and then quotes an employment law treatise as justification for rejecting the plaintiff's statistical analysis. *Id.*

¹⁹⁵ *Id.* at 1422. *But see* *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984), wherein the Ninth Circuit applied a discriminatory effects test to analyze the Title VI claims of a class of African American school children who were placed in special classes for the educably mentally retarded on the basis of non-validated IQ tests. The Ninth Circuit, arguably applying a more liberal particularity standard than that used in *Georgia State Conference*, upheld the district court's finding that the use of these IQ tests for placement in EMR classes constituted a violation of Title VI. *Id.* at 983.

¹⁹⁶ *Georgia State Conference*, 775 F.2d at 1421-22.

¹⁹⁷ According to the court, the plaintiffs failed to establish their prima facie case. The court held that the plaintiffs should have compared statistics for the African American EMR students who had been misidentified due to particular faulty processes to misidentified whites whose files also indicated that they had been subjected to the violative process. *Id.*

¹⁹⁸ *Larry P.*, 793 F.2d at 969.

¹⁹⁹ For a complete analysis of the many inextricable factors that cause overrepresentation, see Harry et al., *supra* note 75.

over-use of retention, funding mechanisms, and resource inequalities.²⁰⁰ Many of these factors are interdependent and confound one another for the purposes of statistical analysis.²⁰¹

In this regard, it should be noted that the *Georgia State Conference* case was decided in 1985, before the Civil Rights Act of 1991, which codified the following exception into Title VII (it is also applicable to Title VI interpretation²⁰²):

the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court

²⁰⁰ On the issue of poverty, see the discussion in Marshalyne Yeargin-Allsopp et al., *Mild Mental Retardation in Black and White Children in Metropolitan Atlanta: A Case-Control Study*, 85 AM. J. PUB. HEALTH, 324, 324-28 (1995). For a discussion of issues affecting second-language learners, see PATRICIA T. CEGELKA ET AL., EDUCATIONAL SERVICES TO HANDICAPPED STUDENTS WITH LIMITED ENGLISH PROFICIENCY: A CALIFORNIA STATEWIDE STUDY (1986), noting that teachers unfamiliar with the effect of language development on student achievement may refer students for special education assessment. See also Richard A. Figueroa, *Psychological Testing of Linguistic-Minority Students: Knowledge Gaps and Regulations*, 56 EXCEPTIONAL CHILD, 145 (1989) (finding that diagnostic testing of limited English-proficient students is often performed primarily in English). For a discussion of cultural issues (bias) in IQ testing, see JIM CUMMINS, BILINGUALISM AND SPECIAL EDUCATION: ISSUES IN ASSESSMENT AND PEDAGOGY (1984); and Asa G. Hilliard, III, *Behavioral Style, Culture, and Teaching and Learning*, 61 J. NEGRO EDUC. 370 (1992). For an examination of resource and funding issues and their impact on schooling opportunities, see DAVID C. BERLINER & BRUCE J. BIDDLE, THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS (1995); and KOZOL, *supra* note 89. For a study linking lower parent education levels to late identification, see Judith Palfrey et al., *Early Identification of Children's Special Needs: A Study in Five Metropolitan Communities*, 111 J. PEDIATRICS 651 (1987). Concerning the lack of prereferral interventions, see Osher et al., *supra* note 70. Finally, for a more general discussion of many of these factors and how they all drive achievement, see THE BLACK-WHITE TEST SCORE GAP, *supra* note 39.

²⁰¹ Linking overrepresentation to a singular school practice would also be ill-advised for several other reasons. First, an "inseparable system" is more common in a school system that has a broad responsibility to educate children than in the case of a private employer that has no similar duty toward a job applicant. Second, disproportionalities exist across all states, notwithstanding differences in such areas as funding mechanisms and evaluation tools. Third, such linking of overrepresentation to a singular school practice might inappropriately limit the remedies available to a plaintiff. As a matter of statutory interpretation, applying Title VII case law and statutory interpretation to a Title VI Department of Education regulation is also highly questionable in many contexts. The doctrine of *in para materia* is arguably the lynchpin of this statutory interpretation. But Title VI regulations were developed separately and do not borrow much language from Title VII, apart from the term disparate impact. The *Guardians* case, on which courts have relied to uphold the "no intent" requirement in the Title VI regulations, should aptly be limited to Title VI and not provide the basis to apply all employment disparate impact cases to education law. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

²⁰² Although the disparate impact approach has been the subject of considerable Title VI case law, in analyzing disparate impact theory under Title VI, courts have often reflected on Title VII legislative history and jurisprudence. E.g., *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 549 (M.D. Ala. 1996) ("The elements of a Title VI disparate impact claim under 34 C.F.R. § 100.3(b)(2) derive from cases decided under Title VII."); *Campaign for Fiscal Equity, Inc. v. State*, 719 N.Y.S.2d 475, 541 (Sup. Ct. 2001).

that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.²⁰³

The authoritative legislative history of this provision adds, "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, . . . the particular, functionally-integrated practices may be analyzed as one employment practice."²⁰⁴ This addition allows for a more comprehensive challenge to a system that has a disparate impact on minority students.²⁰⁵ In employment cases, courts have applied the 1991 law and have upheld a number of challenges relying on inseparability, where subjectivity played an important role in the outcome of the process.²⁰⁶

Further, states receiving federal financial assistance under IDEA, Title I of the ESEA, or other federal statutes also accept legal responsibility to comply with Title VI.²⁰⁷ This responsibility, as well as the civic-

²⁰³ 42 U.S.C. § 2000e-2(k)(1)(B)(i) (1994).

²⁰⁴ 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

²⁰⁵ See, e.g., *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 540-42 (finding that the New York state finance scheme violated Title VI, the court stated that a similar case that failed to establish causal connection between attendance-based funding and the "hold harmless" provisions and a racially disparate impact were irrelevant in part because, "[h]ere plaintiffs challenge the operation of the entire system"); *African Am. Def. Fund v. N.Y. State Educ. Dep't*, 8 F. Supp. 2d 330, 338 (S.D.N.Y. 1998).

²⁰⁶ See *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 275 (E.D. Tex. 1999) (treating various components of an employer's system of administration, including hiring, promotion, and demotion as one employment practice due to the subjective decisionmaking involved in the initial hiring and placement of the employee, which the court found had an inextricable rippling effect on the employee's career); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal. 1992) (finding "that the elements of [the employer's] subjective and ambiguous decision making processes are not separable for the purposes of analysis, and therefore may be analyzed as one employment practice"); see also *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 395 (D. Me. 1994) (drawing support from the 1991 amendments, the court, in an age discrimination suit, held that a disparate impact challenge to an employer's selection process for terminating employees would be scrutinized as one practice over employer's claim that the selection process comprised separately identifiable components). The 1991 amendments arguably revived the value of precedents limited or vacated by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Prior cases allowed disparate impact challenges even where plaintiffs could not identify which component of a process caused the discriminatory effect. See, e.g., *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), vacated and remanded, 490 U.S. 110 (1989); see also *Griffin v. Carlin*, 755 F.2d 1516, 1523 (11th Cir. 1985).

²⁰⁷ The regulations interpreting Title VI provide:

The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

minded nature of the mission of public schools, distinguishes schools from private employers and correspondingly distinguishes Title VI from Title VII. *Pursuant to IDEA in particular, states have a new affirmative duty to intervene where there is significant racial disparity in special education placement.* This responsibility belongs to the state, and the failure of a state to intervene now violates both IDEA and Title VI. In this respect, the legal landscape has changed significantly since the mid-1980s.

There are specific reasons in policy and law for rejecting a strict adoption of Title VII particularity in Title VI cases. Schools and children are not similarly situated to employers and adult employees in our society. Children must attend schools and cannot leave if they suspect others are discriminating against them. Workers have many choices if they feel they are being subjected to unfair employment practices but cannot particularize them. Children are especially vulnerable to harm from the discriminatory consequences of neutral policies. That harm will likely be multiplied over their entire lives. This situation is less true for employees.

Schools have the responsibility to educate children and prepare them to be both successful citizens and productive workers. These tasks are part of every public school's mission, and we seek to ensure their implementation with our tax dollars. Private employers do not share these responsibilities and are not accountable to the public for how they spend their revenues. Further, public schools, unlike private employers, have a responsibility to society to avoid perpetuating inequality whenever possible.

At a policy level, then, the particularity requirement in Title VII cases is meant to achieve two purposes: to ensure that employers are only required to fix what is broken, and to hold employers responsible only for fixing those disparities they caused.²⁰⁸ While these same rationales may seem at first blush to apply to schools, they do not. In fact, Congress has been adamant that schools are to be held accountable for the failure to teach children even when a court cannot pinpoint a specific cause for the failure. Specifically, Title I of the ESEA requires states to intervene in districts where tests of student achievement repeatedly indicate that too few students are meeting a state's high standards.²⁰⁹ Federal mandates of state "corrective action"—which may include reconstituting the school staff, taking over school-level decisionmaking, or even shutting a school down entirely—fly in the face of the argument that school policy is al-

28 C.F.R. § 42.102(f) (2000) (emphasis added).

²⁰⁸ One would not want to hold an employer responsible when "even if we assume that the figures show that the employer must be doing something wrong, there is nothing to show that the wrong is [the employer's practice]." LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 74.41 (2d ed. 1994).

²⁰⁹ 20 U.S.C. § 6311 (1994); *id.* § 6317(d)(5), (6).

most always best left to local control.²¹⁰ Moreover, proposals before Congress regarding Title I would require state intervention if racial or ethnic subgroups consistently fail to make “adequate yearly progress,” even if the school’s aggregate performance meets state goals.²¹¹ For all these reasons, the *Georgia State Conference* opinion appears to be a less weighty precedent for future Title VI jurisprudence. Although considerable questions remain regarding a private party’s ability to bring such a claim in court, this reasoning supports the argument that OCR should pursue a more expansive role in investigating and adjudicating disparate impact claims.

2. OCR Enforcement Policy and Practice

Outside the desegregation context, legal challenges to overrepresentation are most often raised in the form of OCR-initiated compliance reviews and resolution agreements, as well as through private complaints investigated by OCR.²¹² OCR has an affirmative legal duty to intervene and remedy potentially discriminatory methods of special education administration. While OCR responds to private complaints, its interventions in special education practices usually are based on indices of significant disproportionality derived from an annual sampling of school districts. Its investigations typically emphasize either different treatment or disparate impact analysis under Title VI, but the Agency sometimes exercises its jurisdiction to combine this emphasis with a Section 504 analysis.²¹³

As a matter of policy, OCR seeks to resolve disputes through a “partnership process” without issuing a letter of violation against the school district.²¹⁴ Consequently, the Agency rarely issues findings of violation, instead reaching negotiated agreements with the districts. There are clear benefits to this approach, especially considering that effective long-term change is most likely when school district personnel are convinced to take the lead. To date, however, this approach has failed

²¹⁰ *Id.* § 6317(d)(6).

²¹¹ Better Education for Students and Teachers Act, S. 1, 107th Cong. § 111 (2001).

²¹² Pursuant to a Freedom of Information Act request, OCR furnished the following details regarding its handling of minority/special education cases. From 1996–2000 the Agency received 130 complaints—just over 40 per year. Letter from Rebekah Tosado, Attorney, Office of the Assistant Secretary for Civil Rights, U.S. Department of Education, to Daniel J. Losen, Staff Attorney, The Harvard Civil Rights Project app. (Oct. 11, 2000) (on file with authors). During that same period of time, the Agency initiated 110 compliance reviews, only 8 of which are currently outstanding. *Id.*; see also EEOP Vol. II, *supra* note 103, at 72. From 1993–1995 only two complaints and no OCR-initiated reviews raised multiple jurisdictional categories. *Id.* at tbl.3.10.

²¹³ Unlike the Title VI analysis, OCR’s Section 504 analysis is typically not a disparate impact analysis, in part, because failures to follow numerous legal procedures delineated in disability law are considered per se discrimination and are relatively easy to establish. EEOP Vol. II, *supra* note 103, 162–63.

²¹⁴ EEOP Vol. I, *supra* note 34, at 209–13.

to provide the sort of clear guidelines that would be provided by more direct and public enforcement efforts. The Agency's lack of clarity apparently has resulted in a high degree of enforcement inconsistency, and both school officials and advocates are left guessing as to OCR's interpretation of its own regulations.

Another concern is that OCR is subject to bureaucratic and political pressures that limit the effectiveness of its enforcement activities. The impact of these pressures can be seen in a July 6, 1995 internal memorandum from Norma Cantu, Assistant Secretary for the Office of Civil Rights.²¹⁵ This memorandum offers a detailed outline of how to investigate for possible violations under disparate treatment and disparate impact theory. Interestingly, it discusses a number of legal frameworks that combine Title VI with Section 504. These combined approaches would, as a general rule, involve more intensive investigations and more comprehensive remedies. After introducing this prospect, however, the memorandum recommends that the "approach . . . should be used only in selected cases" where preliminary data do not permit the investigation to be narrowed.²¹⁶ Accordingly, OCR has stated that when it receives complaints concerning minority issues in special education, the Agency rarely investigates beyond the specific issues raised by the complainant.²¹⁷ The memorandum further suggests an agency preference for limiting investigations when possible because "extensive data would [otherwise] likely need to be collected."²¹⁸

The Agency should be commended to the extent that it has embraced a comprehensive approach, as it did in the recent Alabama desegregation settlement. Further, OCR has played an important role in highlighting the issue of minority overrepresentation. But to the extent that the Agency still embraces a conservative investigatory approach, it is unlikely that OCR enforcement will have a significant long-term impact on a national scale. There are many school-driven causes of minority overrepresentation and meaningful remedies would require changes in the regular education classroom, not just in the special education identification and placement process. To this end, the Agency's exploration of Title VI violations rooted in inequitable distribution of resources²¹⁹—such as high quality teachers, staff training opportunities,

²¹⁵ Memorandum from Norma Cantu, *supra* note 119.

²¹⁶ *Id.* at 19.

²¹⁷ Telephone Interview with Timothy Blanchard, Co-Facilitator, Office of Civil Rights National Minorities and Special Education Network (Sept. 25, 2000).

²¹⁸ Memorandum from Norma Cantu, *supra* note 119, at 19.

²¹⁹ For more on inequitable resource distribution, see William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses after Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10 (1997); and Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991). See also *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993); *Rose v. Council for Better Educ.*,

facilities and materials, and curriculum—also holds potential for improving school quality and thereby reducing minority overrepresentation in special education.²²⁰

However, a review of OCR resolution agreements suggests three types of troubling inconsistencies in agency agreements. First, OCR enforcement varies in terms of the depth of the investigation. Second, and related to the first, there is inconsistency in terms of how comprehensive a remedy OCR seeks. Third, OCR's rigor in subsequent monitoring appears to vary considerably.²²¹

The preference for investigation and identification of particular violations over more systemic ones, combined with the preference for negotiated settlements rather than issuing letters of violation, has important practical implications. Narrower approaches investigating the use of a given criterion or zeroing in on specific teachers who have especially high minority referral rates may be extremely helpful in the short term and within the specified boundaries. One might even imagine that a large number of such narrow investigations, leading to the issuance of a high rate of letters of violation or well-publicized resolution agreements, might drive additional school districts to scrutinize their own practices and perhaps even institute reforms in regular education. However, if such public dissemination of enforcement activity happens at all, the evidence suggests it is on a very small scale. OCR's preferences for negotiated resolution agreements, combined with its failure to proactively disseminate those agreements and other information about outcomes, monitoring, and enforcement policy to the public, severely mitigates any ripple effect from its usually narrow investigations and agreements.

Furthermore, despite the creation of an inter-agency national task force, there presently is no system for reporting and recording minority special education cases within the Agency.²²² The lack of a reporting system makes agency evaluation especially difficult for outsiders and Agency officials. This low level of information access is particularly

Inc., 790 S.W.2d 186, 211 (Ky. 1989); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 368–69 (N.Y. 1982).

²²⁰ Special education students may suffer doubly from resource shortfalls. Like others in underfunded schools, these students are directly impacted. Unlike regular education students, however, they may also be indirectly impacted in that such schools are more poorly equipped for inclusion. Meaningful access for special education students is jeopardized when general education classrooms are overcrowded and taught by inexperienced and sometimes uncertified teachers who lack classroom supports and special education training. As a result, unsupported and ill-prepared teachers may resort to non-mainstreamed special education in a desperate attempt to teach. Finally, one may allege inequity in the provision of resources in special education programs as simply one area of inequality when bringing a broader Title VI resource comparability challenge. *See generally* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., INTRADISTRICT RESOURCE COMPARABILITY: INVESTIGATIVE RESOURCES (2000).

²²¹ *See* Glennon, *supra* note 8.

²²² Telephone Interview with Timothy Blanchard, *supra* note 217.

troubling given the national dimension of the problem, the readily available case-tracking technology, and the fact that the Agency has been aware of the problem for years. Moreover, there exist no clear OCR precedents for an enforcement approach combining disability law and Title VI—the only guide is OCR’s suggested enforcement framework, which describes the potential for combined causes of action.²²³ However, the guidance also stresses the type of narrow investigations that would forestall the comprehensive investigations required by a combined legal theory seeking systemic remedies.²²⁴

Notwithstanding this relative dearth of OCR guidance, the next section explores the potential of combining disability and Title VI causes of action and suggests that combining these legal challenges holds great potential, especially in overrepresentation cases.

III. COMBINING DISABILITY LAW WITH TITLE VI TO DRIVE SYSTEMIC CHALLENGES

A. When Claims Might Be Linked

In cases that first establish a FAPE/LRE-based disability law violation, a Title VI claim can be added where minority children are overrepresented among those harmed by the disability violation. This addition is possible because once the FAPE violation is established for all disabled students, overrepresentation will mean that minority students in the class are disproportionately harmed by the violation. One advantage to this approach is that the violation is readily identifiable as a particular administrative method or practice causing disproportionate harm. A second advantage is that there can be no effective response of educational necessity proffered in defense of a systemic violation of FAPE.

A combined approach could, for instance, be forceful in challenging the overrepresentation of minority students in alternative schools ostensibly created to address discipline concerns. Special education students and minority students are overrepresented among students suspended and expelled from school.²²⁵ Thus, minority children are doubly at risk of discrimination in discipline, first by race/ethnicity²²⁶ and again by disability.

²²³ See Memorandum from Norma Cantu, *supra* note 119.

²²⁴ *Id.* at 19. Norma Cantu suggests using disability law in conjunction with Title VI disparate impact theory as follows: “A district violates Title VI and Section 504 where it places a disproportionate number of minority students into special education programs in which they do not receive a benefit from the district’s education program.” *Id.*

²²⁵ In many districts, such students represent one third or more of all suspensions. KIM BROOKS ET AL., SCHOOL HOUSE HYPE: TWO YEARS LATER 19 (2000), available at <http://www.jjic.org/pdf/shh2.pdf>.

²²⁶ See Robert C. Johnston, *Federal Data Highlight Disparities in Discipline*, EDUC. WEEK, June 21, 2000, at 3, available at <http://www.edweek.org/ew/ewstory.cfm?slug=41Zero.h19>.

Because alternative schools sometimes fail to provide disabled students with any special education services whatsoever, disproportionate disciplinary placements of minority students in such settings are ripe for legal challenge.²²⁷

For example, the Florida Department of Education recently ordered a withholding or reduction of Palm Beach County's state and federal funding for students with disabilities.²²⁸ Responding to a complaint on behalf of students with disabilities filed on March 3, 1999, the Department found serious and systemic noncompliance with state and federal requirements for students with disabilities in the district's Alternative Education Programs.²²⁹ The superintendent of the district later entered into a resolution agreement with OCR, dated August 1999, regarding a related race and disability-based complaint. With regard to race, the OCR agreement paraphrased the complaint as follows: "the District discriminates, on the basis of race, in the areas of discipline, general treatment, and the provision of educational opportunities [T]he District discriminates against students at [the alternative school] on the basis of disability because students are not provided an appropriate education."²³⁰ In a letter to the complainant, OCR described finding "significant disproportion" by race in the number of African American students involved in incidents where law enforcement became involved, and significant disparities in the rate of referrals and the meting out of discipline to African American students for a wide range of offenses.²³¹

Thus, while some may welcome the growing number of alternative schools to educate students with problematic behavior, these substantially separate programs raise serious new concerns. To the extent that states often fail to monitor alternative education programs for IDEA compliance, systemic challenges sounding in both Title VI and disability

²²⁷ Nancy Zollers, *Schools Need Rules When It Comes to Students with Disabilities*, EDUC. WEEK, Mar. 1, 2000, at 46, available at <http://www.edweek.org/ew/ewstory.cfm?slug=25Zollers.h19>; see also Kevin G. Welner & Kenneth R. Howe, *Steering Toward Separation: The Evidence and Implications of Special Education Students' Exclusion from Choice Schools*, in SCHOOL CHOICE AND DIVERSITY (Janelle Scott ed., forthcoming 2002).

²²⁸ Sch. Bd. of Palm Beach County, Order No. DOE-99-440-FOF (Fla. Dep't of Educ. Sept. 27, 1999).

²²⁹ *Id.*

²³⁰ Letter from Gary S. Walker, Director, Atlanta Office, Southern Division, Office for Civil Rights, Department of Education, to Dr. Joan Kowal, Superintendent, Palm Beach County School District (Aug. 13, 1999) (on file with authors). Despite this agreement, another complaint was filed against the district alleging similar violations. This complaint resulted in a new resolution agreement signed by a new interim superintendent for the district. Palm Beach County Sch. Dist., No. 04-99-1285 (Office for Civil Rights, Dep't of Educ. Sept. 7, 2000) (resolution agreement).

²³¹ Letter from Gary S. Walker, Director, Atlanta Office, Southern Division, Office for Civil Rights, Department of Education, to Barbara Burch, Esq. (Sept. 7, 2000) (on file with authors). OCR's investigation also revealed that the district had disciplined one student with disabilities despite finding that the IEP and current placement were inappropriate, and that the district neglected to conduct a manifestation hearing for another student with disabilities who was suspended for thirteen cumulative days. See *id.*

law may be effective in curtailing the inappropriate use of these programs.

As a general matter, combined challenges could be useful where minority students are disparately harmed by systemic state and/or district disability violations. Some examples might include the following:

- a state's funding mechanism that creates incentives for restrictive placements;

- a state or district's system of classification and placement that fails to consider the inclusion of broad groups of students with disabilities, as in Illinois;

- a district that routinely fails to meet timelines for writing and implementing IEPs, as in Baltimore, for students it has deemed eligible for special education;

- a state or district that fails to ensure that students' IEPs explain why the chosen placement is the least restrictive environment and to design steps for students' progress toward a less restrictive placement;

- a state that fails to ensure that all students with disabilities are included in statewide assessments and their scores reported publicly;

- a state or district, as in Palm Beach County, that places students in alternative schools with no certified special educators on staff; or

- a district that consistently fails to identify students with disabilities until after they have failed a promotion test and/or repeated a grade.

B. Advantages of Including a § 1983 Claim Alleging Violation of Title VI Disparate Impact Regulations

As demonstrated by the earlier survey of disability law challenges to inadequate services, misidentification, and minority overrepresentation, individuals who incurred a harm within the special education system can seek direct remedies for that harm. This remedial approach, however, focuses on only the most superficial symptoms of serious, endemic problems. An approach that supplements disability law with Title VI has greater potential to focus inquiry and remediation at deeper layers of these problems—in particular, racial inequities in regular and special education. That is, inclusion of a § 1983 claim, alleging violations of Title VI disparate impact regulations, holds the potential to expand the

litigation's scope beyond the particular disability law violation to the whole process that caused minority students to suffer harm in disproportionate numbers.

Plaintiffs in such a comprehensive action would be better situated to seek outcome goals, such as reductions in dropout rates and improved academic achievement. Such goals are crucial to overrepresented minority groups. Additionally, these plaintiffs could demand that the data used for monitoring compliance (or lack thereof) be disaggregated by race and ethnicity along with disability classification.²³² This race and ethnicity data might also help plaintiffs monitor the efficacy of Title VI input remedies that seek to reduce rates of minority special education referrals, such as teacher training in multicultural education for both regular and special education teachers.

Another benefit of combining Title VI with disability law litigation lies in its potential ripple effect, forcing non-party states and districts to address their own problems with racial disproportionality. Because of the visibility of such litigation, or the potential visibility stemming from an OCR investigation and intervention, observer states and districts might take proactive steps to diminish all three problems—misidentification, misclassification, and inadequate services for minority students. Otherwise, given the many (non-racial) compliance issues facing states,²³³ and despite the 1997 IDEA amendments requiring monitoring and intervention, without the leverage of a lawsuit or OCR complaint there is little incentive for states to focus on racial inequities in special education.

Combined approaches also hold an advantage with regard to the vital issue of resources. As a practical matter, states or districts that are found liable for violating disability law face politically difficult resource distribution choices. Adding a Title VI claim ensures that the needs of minority students, who are at greater risk of suffering the harm, receive a high priority in the remedy stage. More generally, adding the Title VI claim to a disability claim could result in important priority-setting with regard to how and where the disability violation remedies are provided.

A final advantage to adding a Title VI claim is unique to challenges made specifically under Section 504. Remedies in such a combined action can include disability-based interventions in the regular education

²³² For example, OCR sampling questionnaires ask what percent of the school week special education students are with their regular education peers. They request this data disaggregated for each disability category, but do not request further disaggregation by race/ethnicity or gender within the disability groups. Advocates could seek such information to monitor LRE violations in the placement of MR students, where overly restrictive placements have had a disparate impact on African American students overrepresented among students deemed mentally retarded.

²³³ The report by the National Council on Disability, for example, highlights widespread noncompliance in every state, but only mentions racial disparities briefly. *See* NCD REPORT, *supra* note 63.

classroom, as well as changes to special education practices and policy.²³⁴ When inadequate reading and math instruction is one of the causes of overrepresentation (regardless of race), remedies pursuant to Section 504 and Title VI on behalf of minority misclassified students could seek to require significant improvements in curriculum and teacher quality in those subject areas, especially targeting classrooms serving minority students. To the extent that IDEA and Section 504 require race-neutral evaluation and placement, there may be a basis for seeking remedial measures that specifically redress racial overrepresentation in special education. Most importantly, Section 504 lawsuits, alone, brought on behalf of a class of minority students who were subjected to misidentification for special education could potentially achieve the same results as a Title VI disparate impact claim that is combined with a disability claim. In the wake of *Sandoval*, targeted class action Section 504 lawsuits brought on the basis of FAPE denial and LRE violations as they pertain to minority children “regarded as” having a disability may be the most viable means of challenging minority overrepresentation directly in court, and may still allow advocates to address the problems as they arise in both regular and special education.

C. Adding Disability Challenges to Title VI: Rethinking GI Forum

The above discussion largely assumes disability law as the starting point. That is, it examines the addition of Title VI claims to an action otherwise grounded in disability law. The reverse, however, should also be considered.²³⁵ To investigate this possibility, this section uses *GI Forum v. Texas Education Agency*,²³⁶ a recent Title VI case involving the high-stakes testing system in Texas. The court was called upon to determine the legality of the state’s use of the Texas Assessment of Academic Skills (“TAAS”) test as an exit exam in light of high dropout rates and high, racially disparate failure rates for minority test-takers.²³⁷ At its base, the plaintiffs presented their case in terms of the injustice of the state’s denial of a diploma to minority students who had already been given passing grades by the state’s teachers.²³⁸ The defendants prevailed, however, in part, because they were able to shift the court’s attention from the disparate impact to the general appropriateness and wisdom of the state’s standards and testing regime.

²³⁴ See 34 C.F.R. § 104.33(a)–(b)(1) (2000) (“[F]ree appropriate public education [may consist of] regular or special education and related aids and services.”).

²³⁵ Once again, this assumes a starting point of either a Title VI court challenge invoking § 1983 or an OCR complaint, each seeking to enforce the disparate impact regulations.

²³⁶ 87 F. Supp. 2d 667 (W.D. Tex. 2000).

²³⁷ *Id.* at 673, 676.

²³⁸ *Id.* at 675.

The *GI Forum* defendants buttressed their argument by showing a dramatic increase in the minority passage rate on the TAAS and a lesser, but still significant, increase in scores on the National Assessment of Educational Progress test ("NAEP").²³⁹ Yet, when the TAAS was first introduced, 3.9% of the special education students were exempted. By 1998, the percentage rose to over 6.3%, and the percentage is growing.²⁴⁰ When considering the state's increasingly bilingual student body, the total number of students in exemptible categories (bilingual and special education combined) from 1991–1992 to 1999–2000 rose from one-fifth of the total to one-quarter, and by roughly 326,000 students.²⁴¹

The *GI Forum* court did not consider these data because the complaint's allegations did not directly implicate special education. In contrast, combined challenges to high-stakes tests based on disability law as well as Title VI would allow a close examination of how the introduction of tests correlates with prior demographics concerning enrollment in special education, resulting test exemptions, and the dropout rates for students with disabilities. Texas may have used special education exemptions of questionable legality to bolster the state's argument and undermine the Title VI claim brought by non-disabled minorities.²⁴² A fuller exploration of how TAAS impacted identification and possibly drove overrepresentation of minorities may have helped the plaintiffs' case by casting doubt on the apparent achievement gains.²⁴³ The *GI Forum* court also disregarded disturbingly high dropout and retention rates, concluding that they were merely correlational.²⁴⁴ Under IDEA, however, states

²³⁹ *Id.*

²⁴⁰ See Haney, *supra* note 90. It has also been reported that large numbers of English-language learners were likewise exempted. Although NAEP scores have gone up in Texas, it is likely that exemption from the TAAS also resulted in NAEP exemption. Stephen P. Klein et al., *What Do Test Scores in Texas Tell Us*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (2000), at <http://epaa.asu.edu/epaa/v8n49>.

²⁴¹ More than 12% of all Texas children were eligible for special education services in 1999–2000. This percentage represents a significant increase of 141,580 students between 1991–1992 and 1999–2000, representing a change from 9.9% to 12.1% of all those enrolled in Texas schools. During this same period the bilingual student enrollment rose from 307,818 to 492,222. Although total enrollment grew over the same period by 531,405 students (15%), the growth of bilingual program enrollment (60%) and special education enrollment (41%) depicts a significant change in the placement of students. See TEX. EDUC. AGENCY, TEXAS PUBLIC SCHOOL STATISTICS, at <http://www.tea.state.tx.us/perfreport/pocked> (last visited June 28, 2001).

²⁴² A recent University of Texas analysis concluded that those schools that climbed highest in the state's accountability ratings in 1999 had substantially larger increases in TAAS exemptions for special education students than did other schools. *TAAS Exemptions May Be Lifting Schools' Ratings*, HOUSTON CHRON., Nov. 13, 2000, at A17.

²⁴³ Moreover, adding a cause of action based in disability law might have helped enjoin the test until it was established that FAPE was being provided to test-takers with disabilities.

²⁴⁴ *GI Forum*, 87 F. Supp. 2d at 676.

must consider dropout rates along with scores on state assessments to determine whether students are benefiting from special education.²⁴⁵

D. IDEA and High Standards

The Supreme Court first addressed the issue of the level of educational opportunity ensured by IDEA's mandate of a FAPE for each special education student in 1982. In *Board of Education v. Rowley*, the Court held that, while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education.²⁴⁶ The placement must also confer "some educational benefit" upon the child for whom it is designed.²⁴⁷ In determining the degree of educational benefit necessary to satisfy IDEA, the Court explicitly rejected a bright-line rule, noting that children of different abilities are capable of greatly different levels of achievement. Accordingly, the Court adopted an approach that requires each lower court to consider the potential of the particular disabled student before it.²⁴⁸

The *Rowley* Court offered some helpful guidelines concerning what, at that time, constituted meaningful educational opportunity. These guidelines included providing the opportunity to "meet the State's educational standards, . . . approximat[ing] the grade levels used in the State's regular education, and . . . comport[ing] with the child's IEP."²⁴⁹ "[I]f the child is being educated in the regular classrooms of the public education system, [the placement] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."²⁵⁰

But the *Rowley* Court was interpreting IDEA before the 1997 amendments. State educational standards are now higher and, more importantly, a new crucial hurdle has been placed in front of students. No

²⁴⁵ Texas is no stranger to minority overrepresentation, as nearly one-third of its students with disabilities are minority students—just under twice their overall representation in the population—and black students are more than three times as likely as white students to be labeled "mentally retarded." Parrish, *supra* note 8, at tbl.2. The Texas statistics show a clear pattern whereby large numbers of students deemed eligible for special education were first identified and then exempted from the TAAS. This dramatic increase in the ranks of exempted students with disabilities is highly problematic, especially in light of IDEA's mandate that all students with disabilities be given the same tests, with accommodations if necessary, or be given alternative assessments if the test would be inappropriate. 20 U.S.C. § 1412(a)(16)–(17) (Supp. V 1999).

²⁴⁶ Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982). *Rowley* was brought by the parents of a deaf girl who was performing above average in a regular education class. Notwithstanding her acceptable academic performance, the plaintiff was not achieving up to her full potential, and the school refused to provide her with a full-time interpreter. *Id.* at 185.

²⁴⁷ *Id.* at 200.

²⁴⁸ *Id.* at 202.

²⁴⁹ *Id.* at 203.

²⁵⁰ *Id.* at 203–04.

longer is it sufficient for students “to achieve passing marks and advance from grade to grade.”²⁵¹ In 1982, this statement from the Supreme Court may have adequately summarized what students like Amy Rowley needed to do to graduate in school districts like Peekskill, New York’s Hendrick Hudson Central School District. Now, many students with disabilities must also clear hurdles linked to meeting high standards as assessed by high-stakes tests.²⁵² In fact, 20 U.S.C. § 1401(8)(B) expressly defines “free appropriate public education” as “special education and related services that . . . meet the standards of the State educational agency.”²⁵³

Accordingly, in school districts and states where students’ promotion and/or graduation are tied to high-stakes tests, the placement should now be *reasonably calculated to enable the child to achieve passing marks, achieve passing scores on high-stakes exams, and advance from grade to grade, eventually meeting state and district graduation requirements*. The nature of the benefit to which minority students eligible for special education services are now entitled appears to have increased in many states operating within standards-based regimes. If this assumption is correct, minority students who challenge FAPE violations could be individually entitled to meaningful opportunities to meet the states’ high standards—not just “some benefit.”²⁵⁴

Kathleen Boundy suggests that all students with disabilities, through FAPE, are entitled to a standards-based education:

once a State has adopted a strategy for standards-based education reform, including identifying desired knowledge and competencies, aligning curricula and instruction, and measuring whether [local education agencies] are making progress in enabling all students to meet the challenging standards, then all these components must be applied to or include students with disabilities.²⁵⁵

The idea that students, regardless of label, are entitled to something more today than “some [vague] benefit,” is reflected in *Campaign for Fiscal Equity, Inc. v. State*.²⁵⁶ In holding that a “sound basic education”

²⁵¹ *Id.* at 204.

²⁵² See, e.g., Martha Groves, *Suit Claims High School Exit Exam Is Biased*, L.A. TIMES, May 9, 2001, § 2, at 1 (describing education suit on behalf of students with disabilities in California claiming lack of adequate accommodations for California’s high school exit exam).

²⁵³ This definition was also included in IDEA at the time of the *Rowley* decision. 20 U.S.C. § 1401(18)(B) (1982). Since then, many state standards have changed.

²⁵⁴ *Rowley*, 458 U.S. at 214 (White, J., dissenting).

²⁵⁵ Boundy, *supra* note 140.

²⁵⁶ 719 N.Y.S.2d 475, 484–88 (Sup. Ct. 2001) (holding that the “sound basic education” provision of the state constitution requires that students need to be capable of civic

requires the development of a much higher level set of skills than the minimum required for voting or jury duty, the *Campaign for Fiscal Equity* court cautioned against relying solely on standards developed by the New York State Board of Regents—standards that might “exceed” the basics or fall short of them.²⁵⁷ In addition to its focus on schools’ role in preparing children for citizenship, the opinion includes an economically driven constitutional definition of a sound basic education pursuant to the New York Constitution, describing a new and higher standard for educational preparation for employment (one requiring greater skills than those needed for low-level service jobs).²⁵⁸

The *Campaign for Fiscal Equity* court further noted that adequacy arguments under state constitutions and statutes may bolster comprehensive remedies in combined legal challenges to inappropriate or inadequate special education services. Specifically, the court highlighted as evidence of inadequacy in the regular education program the fact that far greater proportions of students in New York City were assigned to special education classrooms in restrictive settings as compared to their suburban counterparts.²⁵⁹ While the decision did not challenge the overrepresentation of minorities in special education directly, it did take the important step of equating overrepresentation in special education with regular education inadequacy.²⁶⁰ Moreover, the plaintiffs prevailed on their disparate impact Title VI claim. This decision lends legal support to the theory forwarded herein—that the problems of minority overrepresentation and isolation in special education are rooted in the inadequacies of regular education, and effective remedies will therefore often need to address the entire system of education.

IV. CONCLUSION: SYSTEMIC REMEDIES FOR SYSTEMIC FAILURES

Throughout American history advocates for underserved students have fought for more equitable learning opportunities. Such efforts have resulted in substantial, but incomplete, improvements. This Article examines persistent inequalities affecting minority students and surveys various legal challenges to overrepresentation, misidentification, and underservicing in special education. The most straightforward of these challenges focuses on overrepresentation and FAPE/LRE violations, and

engagement and sustaining competitive employment, rather than merely prepared to serve on a jury or vote).

²⁵⁷ See *id.* at 484.

²⁵⁸ *Id.* at 486–88.

²⁵⁹ *Id.* at 475, 537–38. This challenge to resource inequities was brought on state constitutional and Title VI grounds. According to the evidence accepted by the court, “58% of the City’s special education children are in restrictive placements.” *Id.* at 538.

²⁶⁰ “The evidence demonstrates that the primary cause[] of New York City’s overreferral and overplacement in restrictive settings [is] a lack of support services in general education” *Id.* at 538.

is well-grounded in disability law precedent. Two important examples of comprehensive systemic remedies discussed herein include the recent settlement of cases brought on behalf of primarily minority students in Chicago, Illinois, and the government intervention in desegregation cases in Alabama.²⁶¹

Our review of legal precedent, statutory reforms, persistent racial overrepresentation, and the broader educational context suggests a need for more systemic, class action challenges. We suggest that an additional avenue for seeking comprehensive change for minority students could be grounded in Section 504 claims alone, or in Section 504 claims combined with § 1983 claims alleging violation of the Title VI regulations. Most importantly, systemic challenges that carry the potential of more comprehensive remedies, whether through OCR complaints or litigation, must be brought to leverage meaningful long-term improvements for minority children.

American public schools are justifiably praised for pursuing a bold vision of high standards for all students and for their noteworthy accomplishments. However, these same schools fall short in other areas, including the tendency of policymakers to promote quick fixes to engrained, complex problems.²⁶²

In the future, OCR and OSEP can assist states in reducing minority overrepresentation and generating more effective special education services for minorities by observing carefully the court-ordered remedies for these problems in Illinois and Alabama, and by helping other states that are out of compliance to adopt and adapt the most effective of these measures.

Much of the research cited in Part I highlights the general need for a systemic approach to the process of identification and placement in special education that includes regular education reform. Because the identification and placement process is fundamentally subjective, state and federal enforcement agents responding to disproportionality should not be swayed from intervention simply because school districts appear to rely on so-called "objective" testing and are in procedural compliance with IDEA. Rather than seeking to "fix" the test or other discrete aspects of the process, school districts with significant disproportionality should be required to pursue multiple education reform measures that address effectively the needs of minority students in both regular and special

²⁶¹ The recent Baltimore settlement discussed briefly above, *see supra* note 159, is a third example of a comprehensive systemic remedy, but it does not appear to be as comprehensive as these two.

The section on federal enforcement recommendations was excerpted from DANIEL J. LOSEN, *NEW RESEARCH ON SPECIAL EDUCATION AND MINORITY STUDENTS WITH IMPLICATIONS FOR FEDERAL EDUCATION POLICY AND ENFORCEMENT* (forthcoming 2001).

²⁶² *See* DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* (1995).

education. Whether a given set of remedies is effective must be measured by outcomes for children as well as by inputs to the system, and then adjusted accordingly. It is almost certain that the most effective remedies will go beyond the special education evaluation process and entail regular education reforms. As Dr. Thomas Hehir points out, "Simply focusing on special education may not only be ineffective, but may also inadvertently promote continued segregation [of students with disabilities]."²⁶³

In general, the persistent and disturbing patterns of overrepresentation and underservicing demand stepped-up enforcement and oversight activity both by state and federal government enforcement agents. On the federal level, OSEP should make use of new enforcement options—especially the partial withholding of funds—to target specific compliance. Likewise, OCR needs to exercise a wider range of enforcement measures, including seeking broader remedies and issuing letters of violation for obstinate, noncompliant school districts. Further, OCR should aggressively disseminate information about its enforcement activities and maintain an easily accessible database documenting its activities. Moreover, OCR, DOJ, and OSEP would each benefit from a greater exchange of information regarding minority overrepresentation in special education and related enforcement activity.²⁶⁴ Each of these federal agencies should bring intensive pressure to bear on states for failure to monitor and intervene in the face of persistent and significant overrepresentation.

Similarly, states must take seriously their new duty to monitor disproportionality, intervene where appropriate, and make information about both disproportionality and state interventions readily available to the public. To this end, states must not focus solely on district data, as disproportionality at the school level may be masked by district-wide data,

²⁶³ See *The Merrow Report*, *supra* note 2.

²⁶⁴ Currently, overrepresentation data evidence egregious disparities for most states. This crucial information, however, is not readily accessible. Federal oversight can ensure that uniform and quality data on identification and placement by race and ethnicity, already required for state collection and analysis by IDEA, are actually collected and reviewed rigorously each year. Part of the problem may lie in the fact that school districts are either unaware of, or allowed to remain unconcerned about, these disproportionalities. See Glennon & Shafer, *supra* note 23. Therefore, in addition to vigorous enforcement in districts where disproportionalities are most pronounced, compliance reports specific to these issues should be disseminated to all school districts, along with guidance about the best practices to use in addressing significant overrepresentation.

Another problem may result if oversight focuses only on district disproportionality without considering statewide disproportionality. Racially isolated school districts may not look internally disproportionate by race, because of the simple fact that there is little diversity within the district. But if high-minority districts identify high numbers of minority students as eligible for special education as compared to white districts, the statewide disproportionality in labeling minority children as "mentally retarded" (for example) will not be reflected as a significant disproportionality on the district level, due to the absence of comparable white students. The IDEA should also require that these data be accessible to the general public, in the same way that Title I requires comprehensive reporting on student achievement.

and disproportionality at the state level may not be reflected in data from school districts that are highly segregated.²⁶⁵

The need for greater comprehensive and systemic intervention suggests a concomitant need for technical assistance and supports that consider the needs of students and teachers in regular education classrooms alongside potential problems in the process of special education evaluation and placement. Shining more light on the numeric disparities is an important first step, as it can generate public leverage for meaningful reform. To meet their new obligations under federal law, states will need to collect and analyze data that focus on race and the restrictiveness of placement, not just identification. These data could also be used at the district and school level to help track the effectiveness of interventions. If remedies seek only to correct numerical disparities in special education identification and placement, however, they will be short-sighted and potentially harmful. Reducing disparities on paper without improving the quality of both regular and special education classrooms could result in further underservicing of students with academic and special education needs.

In light of the above, we endorse both "input" and "outcome" remedies. On the input side, advocates should seek remedies that improve both regular and special education. These include: higher-quality, experienced teachers; more teacher training in what is popularly called classroom management;²⁶⁶ training for special and regular education teachers in the provision of challenging academic curriculum through multiple modes of instruction; smaller class sizes and the use of programs of instruction that are proven effective;²⁶⁷ more inclusive, heterogeneous classrooms; teacher practica in inclusive settings; certification requirements that reflect IDEA mandates; time for regular and special education teacher collaboration and problem-solving; more pervasive and effective student supports and services (and corresponding additional resources); and incentive programs to attract and retain talented, multilingual special educators, as well as regular education teachers.

Beneficial combinations of inputs such as those outlined above should produce worthwhile outcomes. In recent years, educational policymakers have put a great deal of faith in the idea that the process of measuring outcomes and holding schools accountable for meeting certain

²⁶⁵ For example, statistical analysis in a district like Hartford, Connecticut, which has very few white students, would not necessarily yield signs of racial disproportionality. But if minority children in the majority-minority Hartford schools are far more often classified as having "mental retardation" than are white children in mostly white suburban schools, the state of Connecticut is still required to address the problem of racial disproportionality.

²⁶⁶ Boundy, *supra* note 140. Note also that effective instruction involves engaging students, as opposed to managing them. See ALFIE KOHN, *BEYOND DISCIPLINE: FROM COMPLIANCE TO COMMUNITY* (1996).

²⁶⁷ See *HARD WORK FOR GOOD SCHOOLS* (Gary Orfield & Elizabeth H. DeBray eds., forthcoming 2001).

outcome objectives will itself drive better practices. In the context of the issues addressed in this Article, we agree that remedies should include incentives to improve outcome measures that focus on achievement and graduation rates (with diplomas) of students with disabilities and those who have been misidentified and need to be transitioned back into regular education classrooms. This will ensure that the above-listed inputs are evaluated, that adjustments will be made to maximize effectiveness, and that schools will have concrete incentives to make other changes voluntarily.

Advocates seeking remedies can anchor measures of effectiveness by using states' own Title I mechanisms for determining adequate progress. As in the Chicago settlement, advocates and school officials can sit down together and hammer out realistic numeric goals and create multi-year plans to ensure that the necessary inputs are employed and that outcomes are measured accurately.²⁶⁸ Researchers can play a vital role in helping attorneys and school officials determine which inputs are most effective in improving regular and special education.

Systemic challenges, emphasizing measures that have proven effective in the remedy stage, can bring the force of litigation to bear on pervasive educational inequities and racial injustice, and they can serve to ensure that the federal governmental institutions charged with enforcing civil rights law fulfill the duty they owe to protected classes. Systemic litigation, therefore, should go far beyond numerical reduction in disproportionality and seek improvements in the quality of education in both regular and special education classrooms. Collaboration with cutting-edge researchers is critical to shaping remedies with a lasting positive impact. To the extent that the best solutions may still need to be discovered, advocates urging higher expectations for all can play a central role in establishing evaluative frameworks and demanding disaggregated data that can shed light on what works and what does not.²⁶⁹ These systemic legal challenges recognize that many factors need to be addressed, including many of the inextricably entwined factors concerning regular education. Advocates who demonstrate systemic failure will not be unnecessarily restricted to addressing only isolated components of the special education evaluation process such as the use of IQ tests. The legal challenges recommended above are ultimately intended to jump-start meaningful education reforms and stronger federal enforcement.

²⁶⁸ See Soltman & Moore, *supra* note 154.

²⁶⁹ Texas, for example, uses accountability benchmarks based on assessments, dropout rates, and diploma rates disaggregated by race, gender, disability status, socioeconomic status, and English-language learner status. See *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000); Klein, *supra* note 240. IDEA and Title I have reporting requirements that have some of these characteristics. See 20 U.S.C. § 1412(a) (1994) (IDEA); *Id.* § 6314(b) (Title I).

By moving the litigation ball forward, advocates can create incentives for educators to dig deeper and collaborate with researchers and the community to find meaningful solutions. Given that the overrepresentation of minority students in unnecessarily restrictive programs has continued unabated for over fifty years, additional litigation, especially systemic challenges combining disability law with Title VI, is sorely needed.