

## CHAPTER EIGHT

---

# Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children<sup>1</sup>

---

DANIEL J. LOSEN  
KEVIN G. WELNER

### INTRODUCTION

Special education can provide vital benefits to children who need supports and services. For some children reality may approach this ideal, but many students who are deemed eligible to receive special education services are unnecessarily isolated, stigmatized, and confronted with fear and prejudice, regardless of race. In addition, for minority children, special education is far too often a vehicle for segregation and degradation that results from misdiagnosis and inappropriate labeling.<sup>2</sup>

For these minority students, the civil rights movement brought about critical legal protections. Among the most important was Title VI of the Civil Rights Act of 1964, which provides that “[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>3</sup> Inspired by such achievements, grassroots activists and lawyers embarked upon a successful campaign on behalf of students with disabilities,<sup>4</sup> culminating in the passage, in 1975, of the legislation now known as the Individuals with Disabilities Education Act (IDEA).<sup>5</sup>

Despite important legislative and judicial progress over the last thirty-seven years, minority students remain doubly vulnerable to discrimination. First, they tend to receive inequitable treatment in segregated and unequal schools.<sup>6</sup> 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.<sup>7</sup> While we focus in this chapter on the latter issue, we are mindful of the former.

The following exploration of legal issues emphasizes systemic challenges, in part because of our broader concerns about inequality of educational opportunity and in part because of our awareness that poor and minority parents are reliant on systemic change due to their limited resources for pursuing independent individual legal challenges. Discrimination based on disability and race/ethnicity has been targeted by powerful laws, but civil rights litigants have seldom used these laws in concert. This chapter describes the relative strengths of Title VI and disability law, as well as the added benefits of combining these two sources of protection to bring systemic challenges.

This chapter is divided into two parts. The first part reviews legal challenges to overrepresentation and to inadequate or inappropriate special education services for minority students and explores past challenges under disability law and under Title VI. The second part examines new ways of combining Title VI with disability law and the possible advantages of a combined approach. Part two 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 chapter highlights the strengths of various legal challenges and reaches three main conclusions, all of which are grounded in the fact that special education identification and placement is a long process that begins in the regular education classroom and involves 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 on a combination of disability law and Title VI. In reaching this conclusion we acknowledge that the U.S. Supreme Court's opinion in *Alexander v. Sandoval*, handed down in 2001, may limit this combined approach to the realm of administrative complaints.<sup>8</sup> The Court in *Sandoval* held that private litigants may not directly rely on Title VI's implementing regulations to file a discrimination claim in a formal court of law. This highly technical ruling forecloses the possibility of directly adding a Title VI discriminatory impact claim to a court challenge rooted in disability law, but it would not limit the ability to do so when filing a claim with the U.S. Department of Education's Office for Civil Rights (OCR).<sup>9</sup>

Further, the holding in *Sandoval* leaves open one possible legal avenue for private enforcement of rights set forth in the Title VI regulations. Another civil rights statute enables private parties to sue state actors responsible for the "deprivation of any rights, privileges, or immunities secured by the Constitution

and laws.”<sup>10</sup> In the words of Justice Stevens (dissenting in *Sandoval*), “[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.”<sup>11</sup> In fact, one court has, since *Sandoval*, allowed plaintiffs to use §1983 to invoke the Title VI regulations.<sup>12</sup> Because of this alternative approach to enforcing Title VI rights, the Court’s *Sandoval* decision presently has an uncertain impact on the combined litigation we suggest. This chapter’s discussion of legal actions should therefore be read as concerning actions enforcing Title VI regulations via § 1983. That said, advocates must be wary of this legal avenue, since it is highly susceptible to an eventual Supreme Court decision foreclosing this possibility and perhaps striking down the “disparate impact” cause of action altogether.<sup>13</sup>

The 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 redress the system of inseparable factors that drive overrepresentation of minority students.

The third conclusion is that standards-based education reforms, as embraced by almost every state, provide officially adopted benchmarks for progress and set (in some states, at least) high expectations for all schools and students.<sup>14</sup> These benchmarks offer courts persuasive and specific evidence of educational adequacy. Consequently, standards-based reforms provide a compelling new means for advocates to strengthen the entitlement claims of minority students and leverage comprehensive, outcomes-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.

## LEGAL CHALLENGES TO MINORITY OVERREPRESENTATION

In the late 1960s and throughout the 1970s and early 1980s, successful lawsuits such as *Hobson v. Hansen*,<sup>15</sup> *Diana v. State Board of Education*,<sup>16</sup> and *Larry P. v. Riles*<sup>17</sup> emphasized the discriminatory treatment of overrepresented Latino and African American students in racially isolated special education classes. The past few decades have witnessed a scaling back of legal avenues for challenging racially discriminatory practices. For instance, courts have expressed reluctance to side with Title VI plaintiffs where remedies entail intervening in the “local control” of public schools.<sup>18</sup> However, coinciding with this narrowing of avail-

able Title VI causes of action has been the growing strength of disability law. While this chapter argues that Title VI challenges are still worth pursuing and expanding, especially with respect to administrative complaints, it begins with a review of challenges to disability law violations, which in some cases are easier to prove.

## DISABILITY LAW

Three laws—Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Individuals with Disabilities in Education Act—provide procedural and substantive protection for students who have been misclassified and/or placed in overly restrictive settings. Section 504<sup>19</sup> and Title II of the Americans with Disabilities Act<sup>20</sup> 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 chapter to Section 504 can be assumed to cover Title II as well, due to parallel language and interpretations of the laws.

IDEA includes provisions that grant funds for special education implementation and ensure that all states provide entitlements and procedural rights to eligible individuals and their parents or guardians. IDEA also includes detailed requirements regarding reporting and monitoring of its provisions by state governments. Among the IDEA requirements are those requiring states to intervene by revising policies, procedures, and practices where significant racial disproportionality exists in special education identification and placement.<sup>21</sup>

The 1997 IDEA amendments reemphasized the act's preference that students with disabilities be taught in general education classrooms.<sup>22</sup> Further, the act's congressional findings noted that IDEA's successful implementation "has been impeded by low expectations" and acknowledged substantial concerns about students with cognitive and emotional/behavioral disabilities who are taught in restrictive, segregated classrooms.<sup>23</sup>

## FREE AND APPROPRIATE PUBLIC EDUCATION UNDER IDEA AND SECTION 504

By law, all students with disabilities are entitled to be educated with their regular education peers to the maximum extent appropriate given each student's special education needs.<sup>24</sup> This ensures exposure to the same curriculum, the same high academic standards, and the same opportunities for socialization. The shorthand version of this concept is taken from language in the IDEA: a Free and Appropriate Public Education (FAPE) in the Least Restrictive Envi-

ronment (LRE). The concept of LRE is subsumed under the definition of "appropriate" in FAPE.

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

The U.S. Department of Education (DOE) Office for Special Education Programs (OSEP) is charged with ensuring that states properly enforce the provisions of IDEA. Furthermore, the DOE's Office for Civil Rights regards the failure to provide FAPE as a form of disability discrimination under Section 504.<sup>25</sup>

#### APPROPRIATE AND MEANINGFUL ACCESS

IDEA also emphasizes that special education is not a place—rather, it consists of supports and services.<sup>26</sup> The services provided should ensure, not diminish, access to the general curriculum to the maximum extent appropriate. Therefore, a decision to place any student in an 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.<sup>27</sup> However, it is also true that, 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 cannot be considered to be providing "meaningful" access.

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. They are in double jeopardy of experiencing a denial of educational opportunity, first on account of racial discrimination and again on account of their disability status. Not surprisingly, overrepresentation data for black students in special education mirror overrepresentation in such undesirable categories as dropping out,<sup>28</sup> suspension and expulsion,<sup>29</sup> low-track placement,<sup>30</sup> involvement with juvenile justice,<sup>31</sup> and underrepresentation in Advanced Placement (AP) and gifted classes.<sup>32</sup> The consistency of this pattern of denial and restriction suggests that underlying political and social forces connect these phenomena.<sup>33</sup>

Moreover, minority students tend to be overrepresented in certain categories of disability while underrepresented in others. As a general rule, classifica-

tions that carry greater stigma and entail more restrictive placements, such as "emotionally disturbed" and "mild mental retardation," have disproportionately been the preserve of students of color.

There are important differences between the legal requirements of Sections 504 and IDEA relevant to concern about overrepresentation and underservicing. For instance, the assurance of a FAPE under IDEA applies only to students who, because of their disability, need special education and related services.<sup>34</sup> 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, or have a record of a disability, or are regarded as having a disability.<sup>35</sup> A student in need of counseling only outside of the classroom might not be covered under IDEA but would likely be covered under Section 504.<sup>36</sup> Most individuals protected under Section 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.<sup>37</sup>

If a minority student were identified as educationally mentally retarded but did not, in fact, have a disability, that student would not need special education services. Although under a strict interpretation such a student might not be entitled to a FAPE under the IDEA, he or she, particularly if harmed by the wrongful placement, should be eligible for FAPE under Section 504.

At a minimum, misidentified students are protected from discrimination that results from "having a record of" or "being regarded as having" a disability. The Section 504 regulations, for example, explain the coverage for a non-disabled individual as follows: "[H]as a record of such an impairment means *has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.*"<sup>38</sup> Accordingly, non-disabled students who were treated by a school as if they were disabled fall under Section 504's definition of "qualified handicapped person."<sup>39</sup>

Overrepresentation directly concerns the inadequacy of special education and indirectly implicates the inadequacy of general education, especially where that general education leads to wholesale misidentification. In this regard, Section 504 has two litigation advantages over IDEA. It affords substantive compensatory remedies to misidentified nondisabled minority students pursuant to its discrimination protections, and it entitles some misidentified students to be eligible for FAPE under its broader definition of "handicapped."<sup>40</sup>

Because of their more expansive reach, the Section 504 regulations provide an important vehicle for systemic challenges seeking comprehensive remedies for minority students who have been underserved and misidentified. Many students wrongfully identified as having a disability can seek compensatory remedies under Section 504 (and sometimes Title VI), which enables them to make

up for time lost 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.<sup>41</sup>

Another advantage to Section 504 claims is that, in defining "appropriate" in Free Appropriate Public Education, 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 non-handicapped persons are met."<sup>42</sup> Misidentified and underserved minority plaintiffs seeking regular education reform thus have a foothold in the Section 504 regulations.

### PRIVATE ENFORCEMENT OF IDEA

According to the National Council on Disabilities, no state is even close to full compliance with IDEA.<sup>43</sup> This federally funded organization also notes that the practical burden of IDEA enforcement rests heavily on the shoulders of individual parents and children.<sup>44</sup> For instance, IDEA gives parents the legal right to refuse to consent to an evaluation of their child, thereby preventing special education identification. Parents acting on behalf of their children may also enforce IDEA through private litigation. They can bring individual actions against their school districts, as well as against their states, if their children are not being provided with beneficial services. In addition, given the evidence suggesting that many minority students are denied FAPE or LRE because of misclassification or denial of entitlements, advocates would likely be on steady ground should they decide to file both individual and systemic challenges.

Private individual lawsuits, however, can often take years to resolve. Given the pragmatic constraints on court challenges, poor and minority children with disabilities and their families often find that the legal services needed to avail themselves of such IDEA protections are far beyond their financial reach, and that they are "frequently not represented as players in the process."<sup>45</sup> Private litigants, consequently, are more likely to be wealthier white parents who have the resources to sue. Although any parent can raise systemic issues, plaintiffs more commonly challenge specific failures and seek remedies that primarily impact their own children.

Moreover, individual challenges 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 that an individual failure is rooted in a systemic violation.<sup>46</sup> 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 under the state laws and regulations implementing IDEA.<sup>47</sup> On the other hand, challenges seeking systemic remedies are not necessarily required to exhaust administrative procedures. Courts have allowed such actions against a school, district, or state based on their failure to provide IDEA's unique procedural rights.<sup>48</sup>

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 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. But challenges pertaining to exclusion from participation and/or denial of benefits may still offer unique opportunities for driving IDEA and Section 504 compliance.

#### 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 court supervision<sup>49</sup> or remain party to administrative agreements to desegregate with the U.S. Department of Education.

Once desegregation began in earnest—following enactment of the 1964 Civil Rights Act, the 1965 Elementary and Secondary Education Act, and cases such as *Swann*<sup>50</sup>—schools exhibited a wave of within-school race discrimination, which took the form of tracking, abuse of expulsions and suspensions, and special education placements in substantially separate classrooms.<sup>51</sup> Early desegregation opinions reported widespread abuses involving minority students with average and above-average IQ scores being relegated to isolated classes for mentally retarded students.<sup>52</sup> This use of racially discriminatory special education placement to circumvent *Brown's* mandate was built 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. The predictable consequence of these beliefs was that many special education programs existed as segregated ghettos within public schools.<sup>53</sup>

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. Courts have ruled that school districts that carried out an intentionally segregative policy in one

area of operation are presumed to have acted intentionally with regard to all other areas resulting in segregation.<sup>54</sup> Courts presume intent when significant disparities exist and (at least in theory) order remedies designed to dismantle formerly dual systems "root and branch."<sup>55</sup> Based on these precedents, challenges to minority overrepresentation in special education may take advantage of a presumed intent framework if the district is under a desegregation order.<sup>56</sup> Legal claims linking overrepresentation in special education to a school district's previous operation of a segregated system have successfully prompted courts to require school districts to remedy racial disparities in special education.<sup>57</sup> However, given that courts have also refused to recognize connections to the prior *de jure* system, plaintiffs taking this approach will be expected to provide strong evidence establishing the link.

The overrepresentation issue now often arises as an aspect of judicial review of desegregation consent decrees. In one recent example, Alabama District Court Judge Myron Thompson, in *Lee v. Macon County*, consolidated the issue of unitary status and reviewed eleven school districts.<sup>58</sup> On August 30, 2000, the district court issued revised consent decrees in all eleven cases, addressing the state's persistent problem of minority student overrepresentation in special education. The decrees are comprehensive, including remedies to overrepresentation in the categories of "emotionally conflicted, specific learning disability, and mental retardation." Alabama, which has had one of the worst track records of any state in terms of statistical overrepresentation of African Americans,<sup>59</sup> agreed to extensive corrective measures. The Alabama consent decree included the following reforms:

- 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 and report these 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 mentally re-

tarded (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. Students who were wholly misidentified will be provided with supports 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 would be evaluated for possible placement if they were subsequently deemed eligible in another disability category.

Plaintiffs have not always prevailed when bringing such claims in the desegregation context. In *Vaughns v. Board of Education of Prince George's County*, for instance, the plaintiffs unsuccessfully alleged, among other things, that the disproportionate number of African American students in special education programs should be redressed as a vestige of the prior intentional discrimination.<sup>60</sup> Although the court acknowledged a disturbing statistical overrepresentation of black children among those classified as educationally mentally retarded, or EMR (African Americans comprised 47.4% of the student population and 67.7% of EMR students), that court found no violation of the desegregation order.

These desegregation cases taken together offer important lessons for advocates. On the one hand, the holding in *Vaughns* offers a reminder that many judges are extraordinarily reluctant to intervene in educational policy decisions, preferring to defer to the discretion of local decisionmakers. On the other hand, some cases<sup>61</sup> 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.

## DISPARATE IMPACT ANALYSIS IN EDUCATION CASES

Plaintiffs challenging racially discriminatory special education overrepresentation can also bring a § 1983 action invoking regulations promulgated by the U.S. Department of Education under Title VI. Such actions allow plaintiffs to rely on statistical evidence of discrimination; plaintiffs are not required to either allege or prove that the defendant intentionally discriminated.

Specifically, the Title VI regulations describe an "effects test" prohibiting the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination or have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the educational program."<sup>62</sup> Similar effects-test regulations exist with regard to discrimination on the basis of disability (Section 504)<sup>63</sup> and gender (Title IX).<sup>64</sup> These gender and disability protections may also be germane to a minority overrepresentation case under "disparate impact" legal theory.

## PRIVATE ACTIONS

Courts conduct the following three-pronged analysis to determine whether the effects of a school district's policy or program violate the Title VI regulations.<sup>65</sup> First, the plaintiff must establish that a criteria or method of administration has both a negative and disparate impact on a protected class.<sup>66</sup> In legal parlance, this is referred to as establishing a *prima facie* case. If the *prima facie* case is established, the defendant district must demonstrate that the policy or practice at issue is an educational necessity. Upon such proof, the burden then shifts again to the plaintiff to demonstrate a less discriminatory alternative that can reasonably meet the defendant's "educationally necessary" goals.<sup>67</sup> 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.

It is important to note that, even before the recent *Alexander v. Sandoval* decision, private Title VI litigants encountered judges with some reluctance to apply the law as set forth above. For instance, in *Georgia State Conference of Branches of NAACP v. State of Georgia*, the court relied heavily on employment case law and theory to insist on a difficult particularity requirement.<sup>68</sup> Specifically, the court of appeals rejected a Title VI disparate impact challenge to the overrepresentation of minority students in EMR classes. The plaintiffs had claimed that nondisabled black students were misidentified as a result of improper procedures and test use. For evidence, the plaintiffs relied on the disparity between the number of black students in the general population and the number of black students identified as EMR and placed in separate classes.<sup>69</sup>

The court overruled the lower court finding that the plaintiffs had established a *prima facie* case, reasoning that the statistical analyses of plaintiffs' experts 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.

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 such a high degree of particularity may be inappropriate in special education overrepresentation cases. For a contrasting approach, consider *Larry P. v. Riles*, wherein the court found a disparity by comparing the percentage of black students in general education and in EMR placement.<sup>70</sup>

Further, studies have identified many interconnected and often highly subjective factors that contribute to minority overrepresentation.<sup>71</sup> 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, overuse of retention, funding mechanisms, and resource inequalities are just some of the many, often race-linked, factors under the school's control that contribute to minority overrepresentation.<sup>72</sup> Many of these factors are interdependent and confound one another for the purposes of statistical analysis.

Tying together the relationship between regular and special education classrooms, a trial court judge in New York noted that adequacy arguments under state constitutions and statutes may bolster comprehensive remedies in bringing combined legal challenges to inappropriate or inadequate special education services. Specifically, Justice Leland Degrasse Jr., in *Campaign for Fiscal Equity v. New York*,<sup>73</sup> 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 than were their suburban counterparts.<sup>74</sup> 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.<sup>75</sup> Moreover, the plaintiffs prevailed on their disparate impact Title VI claim. Although this case was reversed on June 25, 2002, New York's Supreme Court of the Appellate Division stated that improper identification and restrictive placements for special education "is a problem of the educa-

tional system. . . .”<sup>76</sup> Thus, both decisions described minority overrepresentation and isolation in special education as a problem rooted in the inadequacies of regular education, although the lower court’s interpretation of New York’s adequacy requirements was overruled.

### 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. OCR has an affirmative legal duty to intervene and remedy potentially discriminatory methods of special education administration. This duty includes an obligation to consider whether less discriminatory alternatives exist whenever a district defends a policy causing a disparity as educationally necessary.<sup>77</sup> While the agency responds to private complaints, its interventions in special education practices are usually based on indices of significant disproportionality that it derives 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 with a Section 504 analysis.

As a matter of policy, OCR seeks to resolve disputes through a “partnership process” without issuing a letter of violation against the school district.<sup>78</sup> 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. However, to date this approach has failed to provide the sort of clear, widely circulated guidelines that would be provided by more direct and public enforcement efforts. Instead, the agency’s lack of clarity has apparently 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 then Assistant Secretary for Civil Rights Norma Cantú to all staff, entitled, “Minority Students and Special Education.”<sup>79</sup> This memo offers a detailed outline of how to investigate 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 cautiously recommends that the “approach . . . should be used only in selected cases” where preliminary data do not permit the investigation to be narrowed.<sup>80</sup> 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.<sup>81</sup> The memo suggests an agency preference for limiting investigations when possible because “extensive data would [otherwise] likely need to be collected.”<sup>82</sup>

However, a review of OCR resolution agreements, in addition to discussions with attorneys who have pursued complaints with the agency, 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 the comprehensiveness of the remedy sought by the OCR. Third, OCR’s rigor in subsequent monitoring appears to vary considerably.

Most important, if public dissemination of enforcement activity happens at all, the evidence suggests it is on a very small scale. Therefore, 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. 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. Furthermore, OCR presently has no system for reporting and recording minority special education cases within the agency.<sup>83</sup> This makes agency evaluation especially difficult for outsiders as well as agency officials. Such a low level of information access is particularly 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.

## COMBINING DISABILITY LAW WITH TITLE VI TO DRIVE SYSTEMIC CHALLENGES

### When Claims Might Be Linked

In cases that first establish a FAPE/LRE-based disability law violation, a Title VI claim—that is, an action grounded in § 1983 and the Title VI implementing regulations—can be added where minority children are overrepresented among those harmed by the disability violation. This is because once the FAPE

violation is established for all disabled students, overrepresentation will mean that minority students are in the class 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.<sup>84</sup> Thus, minority children are doubly at risk of discrimination in discipline, first by race/ethnicity and again by disability. 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.<sup>85</sup>

Based in part on such disciplinary concerns, the Florida Department of Education ordered a withholding or reduction of Palm Beach County's state and federal funding for students with disabilities.<sup>86</sup> Responding to a complaint on behalf of students with disabilities, filed 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.<sup>87</sup> The superintendent of the district later entered into a resolution agreement with OCR regarding a related race- and disability-based complaint. With regard to race, the OCR agreement paraphrased the complaint as follows: "[T]he 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."<sup>88</sup> 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.<sup>89</sup>

Although 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 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 law violations such as the following: a state's funding mechanism that creates incentives for restrictive placements; a state's or district's system of classification and placement that fails to consider for inclusion broad groups of students with disabilities, as in Illinois;<sup>90</sup> a district that routinely fails to meet time lines for writing and implementing IEPs for students it has deemed eligible for special education, as in Baltimore;<sup>91</sup> 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 lesser 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.

#### ADVANTAGES OF INCLUDING A DISPARATE IMPACT CLAIM

As demonstrated by the earlier survey of disability law challenges to inadequate services, misidentification, and minority overrepresentation, individuals who incurred harm within the special education system can seek direct remedies for that harm. However, this remedial approach focuses on only the most superficial symptoms of what may be serious, endemic problems. An approach that supplements disability law with Title VI's implementing regulations 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 to say, inclusion of a Title VI claim 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 the 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—goals that 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. 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 training in multicultural education for both regular and special education teachers.

Another benefit of combined Title VI/disability law litigation lies in its potential ripple effect—forcing nonparty states and districts to address their own

problems with racial disproportionality. Because of the visibility and seriousness of such litigation, observing states and districts might take proactive steps to diminish all three problems—misidentification, misclassification, and inadequate services for minority students. Otherwise, given the many nonracial compliance issues facing states, and despite IDEA's new provisions, 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 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 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 violations' remedies are provided.

A final advantage to adding a Title VI claim is unique to challenges made under Section 504. Remedies in such a combined action can include interventions in the regular education classroom, as well as changes to special education practices and policy. To the extent that minority students are disproportionately subjected to inadequate reading and math instruction, and that such instructional resource inequities are among the causes of overrepresentation,<sup>92</sup> 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, targeted to classrooms serving minority students.

#### 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. However, the reverse should also be considered. To investigate this possibility, this section uses *GI Forum v. Texas Education Agency*, a recent Title VI case involving the high-stakes testing system in Texas.<sup>93</sup> The Texas court was called on to determine the legality of the state's use of the Texas Assessment of Academic Skills (TAAS) as an exit exam in light of high dropout rates, as well as racially disparate and high failure rates for minority test-takers. Foundationally, the plaintiffs attempted to present their case in terms of the injustice of the state's denying a diploma to minority students who had already been given passing grades by the state's teachers. The defendants prevailed, in part because they were able to shift the court's attention from the disparate im-

pect to the general appropriateness and wisdom of the state's standards and testing regime.

The *GI Forum* defendants buttressed their argument by showing a dramatic increase in minority passage rate on the TAAS and a lesser but still significant increase in scores on national standardized tests of reading and math (the National Assessment of Educational Progress, or NAEP). Yet between 1994 (a year after full implementation of the TAAS as a graduation requirement) and 1998, the percentage of tested students in grade ten who were excluded from the summary of pass rates on the TAAS because they were in special education rose from 3.9 to 6.3.<sup>94</sup> Moreover, large percentages of students with disabilities did not participate in the test, suggesting that overall pass rates would be substantially lower if most students with disabilities took the test *and* had their scores reported. Specifically, the National Center for Educational Outcomes reported in 1999 that 42 percent or *fewer* students with disabilities participated in the TAAS.<sup>95</sup> Moreover, during the period from 1993–1994 to 1999–2000 the percentage of students enrolled in special education grew tremendously.<sup>96</sup>

These data were not considered by the *GI Forum* court because special education was not directly implicated by the complaint's allegations. 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, with resulting test exemptions, and with the dropout rates for students with disabilities. Texas apparently benefitted from special education and nonparticipation in testing exemptions of questionable legality to bolster its argument and undermine the Title VI claim brought by nondisabled minorities. A fuller exploration of how TAAS impacted identification and possibly drove the overrepresentation of minorities may have helped the plaintiffs' case by shedding doubt on the apparent achievement gains. The *GI Forum* court also disregarded disturbingly high dropout and retention rates, concluding that they were merely correlational. However, under IDEA, states *must* consider dropout rates along with scores on state assessments to determine whether students are benefiting from special education.

#### IDEA AND HIGH STANDARDS

The Supreme Court, back in 1982, first addressed the issue of the level of educational opportunity ensured by IDEA's mandate of a FAPE for each special education student. 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.<sup>97</sup> The placement must also confer “some educational benefit” upon the child for whom it is designed.<sup>98</sup> 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.

Important for the purposes of this chapter is the fact that the *Rowley* Court offered some helpful guidelines concerning what, at that time, constituted meaningful educational opportunity:

Such instruction and services must be provided at public expense, *must meet the State’s educational standards*, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. . . . [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.*<sup>99</sup>

But the Court in *Rowley* was interpreting IDEA before the 1997 amendments. The “State’s educational standards” are now higher and, more important, a new crucial hurdle has been placed in front of students. No longer is it sufficient for students “to achieve passing marks and advance from grade to grade.” In 1982, this statement from the Supreme Court may have summarized well what students like Amy Rowley had to do to graduate. Now, however, they must also clear hurdles linked to meeting high standards as assessed by high-stakes tests. In fact, 20 U.S.C. § 1401(c)(8)(B) expressly defines “Free Appropriate Public Education” as “special education and related services that . . . meet the standards of the State educational agency.”

Accordingly, the placement should now—in school districts and states where students’ promotion and/or graduation are tied to high-stakes tests—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.”<sup>100</sup>

CONCLUSION:  
SYSTEMIC REMEDIES FOR SYSTEMIC FAILURES

This chapter has examined persistent inequalities affecting minority students and surveyed various legal challenges to overrepresentation, misidentification, and underservicing in special education. The most straightforward challenges focus on overrepresentation and FAPE/LRE violations and are well grounded in disability law precedent. Judge Thompson's decree issued in the consolidated desegregation cases in Alabama offers one important example of comprehensive systemic remedies. Another is the recently settled *Corey H.* case in Illinois.<sup>101</sup>

U.S. public schools are justifiably praised for their noteworthy accomplishments and for pursuing a bold vision of high standards for all students. Unfortunately, many complex problems remain, and policymakers favor superficial quick fixes.<sup>102</sup> Systemic legal challenges play a critical role in bringing about more comprehensive remedies and carry the potential to leverage meaningful long-term improvements for minority children. Both the legal action of advocates and government-initiated intervention at the state or federal level are needed.

In general, the persistent and disturbing patterns of overrepresentation and underservicing cry out for stepped-up enforcement and oversight activity by both 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.<sup>103</sup> Likewise, OCR needs to exercise a wider range of enforcement measures, including seeking broader remedies and issuing letters of violations for obstinate noncompliant school districts. Further, OCR should aggressively disseminate information on its enforcement activities and maintain an easily accessible database documenting its activities. The Office for Civil Rights, the Department of Justice, and the Office of Special Education Programs would each benefit from greater exchange of information regarding minority overrepresentation in special education and related enforcement activity. All 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 for 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, since disproportionality at the school level may be masked by districtwide data, and disproportionality at the state level may not be reflected in data from school districts that are highly segregated.

The need for 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 evaluation and placement. Shining more light on the numerical disparities by collecting information from every school and district and publicly reporting these data is an important first step designed to generate public sentiment for meaningful reform. To meet their new obligations under federal law, states will need to collect and analyze data that look at race and the restrictiveness of placement, not just identification. These data should also be used at the district and school levels to help track the effectiveness of interventions.

State and federal enforcement agents responding to disproportionality should take a hard look at the numbers and not be swayed from intervention simply because school districts appear to rely on so-called objective testing and are in procedural compliance with the IDEA. But if remedies *only* seek to correct numerical disparities they will be short-sighted. Reducing the paper disparity without improving the quality of both regular and special education classrooms could result in further underservicing of students with academic and special education needs. Specifically, OCR and OSEP can carefully observe the comprehensive court-ordered remedies in places like Alabama and Illinois to help states that are out of compliance to adopt and adapt the most effective of these measures. Furthermore, the No Child Left Behind Act of 2001 requires that schools be held accountable if they fail to improve educational performance of either minority children or students with disabilities.<sup>104</sup> These new accountability requirements, if properly enforced, could provide important disincentives against inappropriately labeling students as having disabilities and either removing them from general education classrooms, or leaving them there but with inadequate supports and services.

Advocates must resist overemphasizing inputs and persist in demanding remedies that consider outcomes for children as well as inputs to the system, and then monitor remedies to adjust them accordingly. The most effective remedies will go beyond the special education evaluation process and entail regular education reforms. As 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]."<sup>105</sup>

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"; training for special and regular education teachers in the provision of challenging academic curriculum through multiple modes of instruction; smaller class

size; the use of programs of instruction that are proven effective;<sup>106</sup> 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); incentive programs to attract and keep talented, multilingual special educators and regular education teachers; and requirements that racial data are collected, reported, and used in the evaluation process.

Beneficial combinations of inputs, such as those outlined above, should drive worthwhile outcomes. But in recent years, educational policymakers have put a great deal of faith in the additional idea that the process of measuring those outcomes and holding schools accountable for meeting certain outcome objectives will itself drive better practices. In the context of the issues addressed in this chapter, 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 inputs listed above are evaluated, that adjustments will be made to maximize effectiveness, and that schools will have concrete incentives to make other changes voluntarily.

In addition, remedies should recognize that preventing misidentification and providing for more inclusion will necessarily entail improvements in general and special education. But state special education funds are often linked to identification (Parrish, this volume). Therefore, reductions in racial disparities in special education, which would also likely result in fewer students being identified, should not cause states to reduce total education expenditures in a successful district. To the contrary, state and federal law should contain rewards for reducing racial disparities while improving educational outcomes for all subgroups of students.

Advocates seeking remedies can anchor measures of effectiveness by using the states' own Title I mechanisms for determining adequate progress. As in *Corey H.*, advocates and school officials can sit down together and hammer out realistic numeric goals and create multiyear plans to ensure that the necessary inputs are employed and outcomes measured accurately.<sup>107</sup> Researchers can play a vital role in helping attorneys and school officials learn which inputs are most effective in improving regular and special education.

In line with our enforcement recommendations, collaboration with knowledgeable researchers is critical to shaping remedies with a lasting positive impact. To the extent that the best solutions may still need to be discovered, advo-

cates armed with the call for higher expectations for all can play a central role in setting up evaluative frameworks and demanding disaggregated data that can shed light on what works and what doesn't.

The legal challenges recommended above are ultimately intended to instigate meaningful education reforms as well as better federal enforcement. By moving the litigation ball forward, advocates can create incentives for educators to endorse systemic reform and collaborate with researchers and the community to find meaningful solutions. Given that the overrepresentation of minority students in unnecessarily restrictive programs has continued at high levels for over fifty years, additional litigation, especially systemic challenges combining disability law with Title VI, is sorely needed.

## NOTES

1. Kevin Welner's work on this chapter was supported by a postdoctoral fellowship granted by the Spencer Foundation and the National Academy of Education. The authors would also like to thank Sam Bagenstos, Gary Orfield, Kathleen Boundy, Sharon Soltman, Dennis Parker, Martha Minow, and Janette Klingner for their insightful comments on earlier drafts of this chapter and Delia Spencer and Vanessa Yolles for their research assistance. However, the opinions and ideas expressed herein are solely the responsibility of the authors. For a more extensively cited and detailed version of this chapter, see Daniel J. Losen and Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407 (2001).
2. According to Assistant Secretary of Education Judy Heumann, Director of the Office for Special Education and Rehabilitative Services under President Clinton, the system of both regular and private education is racially discriminatory because "[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 education is used as a place to move kids from a regular classroom out into a separate setting." *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/transcript/index.html> (last visited July 8, 2002).
3. 42 U.S.C. § 2000(d) (1994).
4. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n. for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972).
5. The Individuals with Disabilities Education Act Amendments of 1997 (IDEA), 20 U.S.C. §§ 1400-87 (1997) (1994 & Supp. V 1999) (originally enacted as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773); for a general description of the federal funding scheme under IDEA, see 147 CONG. REC. S1889 (2001) (statement of Sen. Jeffords); see also 143 CONG. REC. S4401 (1997) (statement of Sen. Gregg) (emphasizing that "the Federal Government has failed to live up to its obligation to fund 40 percent of the cost of special education").

6. 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, 465-83 (James A. Banks and Cherry A. McGee Banks, eds. 1995).
7. The Individuals with Disabilities Education Act Amendments of 1997 (IDEA) state in the congressional findings that, "Greater 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 Theresa Glennon, *Race, Education and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995).
8. 532 U.S. 275 (2001).
9. *Alexander v. Sandoval*, 532 U.S. at 281-82. These regulations are described in some detail later in this chapter. See *infra* p. 177.
10. 42 U.S.C. § 1983 (1994).
11. *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting); see also Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); Powell v. Ridge, 189 F.3d 387, 400-03 (3d Cir. 1999).
12. See *Lucero v. Detroit Public Schs.*, 160 F. Supp. 2d 767, 783 (E.D. Mich. 2001) (relying, in part, on 6th Circuit precedent, the court permitted plaintiffs to use disparate impact Title VI regulations with § 1983 to challenge opening of an elementary school on allegedly contaminated site). But see *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 274 F.3d 771, 788 (3d Cir. 2001) (rejecting the use of § 1983 to ground a private action based on Title VI regulations).
13. Readers should also note that the Office for Civil Rights (OCR) administrative complaint mechanism allows organizations, not just aggrieved individuals, to pursue both disparate impact arguments and combined disability/Title VI arguments. Technically speaking, OCR cannot order injunctive relief, only the withdrawal of federal funds. But as discussed later in this chapter, OCR can use this leverage for settlement purposes and through negotiated resolution agreements can seek the equivalent of court-ordered injunctive and declaratory relief.
14. See 20 U.S.C. § 6311(b)(1994).
15. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobbson*, 408 F.2d 175 (D.C. Cir. 1969).
16. Consent decree entered in C-70-37 RFP (N.D. Cal. 1973).
17. 793 F.2d 969 (9th Cir. 1984).
18. See *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999); *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000). As part of this same trend, school systems throughout the nation are being released from desegregation obligations. 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).
19. 29 U.S.C. § 794 (1994).
20. 42 U.S.C. §§ 12101-213 (1994).
21. 20 U.S.C. 1418(c) (Supp. IV 1998); 34 C.F.R. § 300.755; 34 C.F.R. § 300.519; 20 U.S.C. 1415(k) (Supp. IV 1998).
22. 20 U.S.C. § 1412(a)(5) (Supp. IV 1998).
23. 20 U.S.C. § 1401(c)(4) (Supp. IV 1998).

24. 20 U.S.C. § 1412 (Supp. V 1999).
25. Memorandum from Norma Cantú, Assistant Secretary for the Office of Civil Rights, U.S. Department of Education, *Minority Students and Special Education* (July 6, 1995) (on file with author). The authors are mindful that the George W. Bush administration may arrive at different interpretations of disability law.
26. 20 U.S.C. § 1411(b)(2)(C) (Supp. V 1999).
27. 20 U.S.C. § 1412(a)(5) (Supp. V 1999).
28. MICHELLE FINE, *FRAMING DROPOUTS: NOTES ON THE POLITICS OF AN URBAN PUBLIC HIGH SCHOOL* (1991).
29. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORTS* (1998) (Table on Suspensions and Expulsions per Racial/Ethnic group for 1997-1998).
30. For a full description of legal challenges to tracking, see also Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L.L.REV. 517 (1999); Kevin G. Welner and Jeannie Oakes, *(Li)ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451 (1996).
31. *BUILDING BLOCKS FOR YOUTH, AND JUSTICE FOR SOME* (2000); see also Parrish, this volume.
32. MARA SAPON-SHEVIN, *PLAYING FAVORITES: GIFTED EDUCATION AND THE DISRUPTION OF COMMUNITY* (1994).
33. For a discussion of such forces, see KEVIN G. WELNER, *LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY* (2001).
34. Individuals with Disabilities Education Act (IDEA) Amendments of 1997 § 602(3)(A)-(B), 20 U.S.C. § 1401(3)(A)-(B) (Supp. V 1999) (listing eligible categories of disability).
35. See 42 Fed. Reg. 22, 685 (1977).
36. 29 U.S.C. §§ 705(20)(B), 794 (1994); 34 C.F.R. § 104.3 (j) (2000).
37. 29 U.S.C. § 794.
38. See 34 C.F.R. 104.3(j)(2)(iii) (emphasis added).
39. 34 C.F.R. § 104.3(j).
40. 29 U.S.C. § 706(8).
41. 20 U.S.C. § 1412(a)(16) (Supp. V 1999). See, for example, the recent consent decree in Alabama described below.
42. 34 C.F.R. § 104.33 (b) (2000).
43. See NAT'L COUNCIL ON DISABILITY, *BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND* (2000), available at [http://www.ncd.gov/newsroom/publications/backtoschool\\_2.html](http://www.ncd.gov/newsroom/publications/backtoschool_2.html) (last visited July 8, 2002).
44. *Id.* at 70.
45. See *id.* at 12.
46. 20 U.S.C. § 1415(f), (g), and (l) (Supp. V 1999).
47. See *Smith v. Robinson*, 468 U.S. 992, 1021 (1984).
48. 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 had 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); see also *M. v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 124 (D. Conn. 2000) (distinguishing between substantive and structural claims as to whether administrative processes should be exhausted).

49. Wendy Parker, *The Future of School Desegregation*, 94 NW. U.L. REV. 1157, 1159 (2000).
50. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
51. See 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); KENNETH J. MEIER ET AL., *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* (1989).
52. *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), as discussed in *Georgia State Conference of Branches of NAACP v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983); *Hobsen v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1453-62 (S.D.N.Y. 1985).
53. MEIER ET AL., *supra* note 51.
54. See, e.g., *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973).
55. See, e.g., *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).
56. *Keyes*, 413 U.S. at 208.
57. See, e.g., *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).
58. *Lee v. Phoenix City Bd. of Educ.*, C.A. No. 70-T-854 (M.D. Ala. 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, *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967).
59. Jeremy D. Finn, *Patterns in Special Education Placement as Revealed by the OCR Surveys*, in *PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY* 358 (Kirby A. Heller et al., eds. 1982).
60. 574 F. Supp. 1280 (D. Md. 1983).
61. See, e.g., *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).
62. 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 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1 (1994).
63. 34 C.F.R. 104.4(b)(4).
64. 34 C.F.R. 106.1 et seq.
65. See, 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.), *rehearing denied*, 7 F.3d 242 (11th Cir. 1993).
66. E.g., *Elston*, 997 F.2d at 1407.
67. See, e.g., *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000).
68. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1422 (11th Cir. 1985).
69. *Id.*, 775 F.2d at 1421-22.
70. 793 F.2d 969 (9th Cir. 1984).
71. For a complete analysis of the many inextricable factors that cause overrepresentation, see Harry et al., this volume.
72. 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 Artiles et al., this volume; see also 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); 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); 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 AND BRUCE J. BIDDLE, THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS (1995); and JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991). 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 and behavioral issues, see Osher et al., this volume; see also, NAT'L ASSOCIATION OF BLACK SCHOOL EDUCATORS AND ILLIAD PROJECT, ADDRESSING OVER-REPRESENTATION OF AFRICAN AMERICAN STUDENTS IN SPECIAL EDUCATION: THE PREREFERRAL INTERVENTION PROCESS, COUNCIL FOR EXCEPTIONAL CHILDREN (2002) (recommending a focus on prereferral intervention to reduce overrepresentation); THE NAT'L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION, ES-3, 4 (2002) [hereinafter MINORITY STUDENTS] (specifically concluding that behavior management issues, inadequate regular education instruction, and resource inequalities are likely contributing factors to racial disparities in special education). Finally, for a more general discussion of many of these factors and how they all drive achievement, see THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks and Meredith Phillips, eds. 1998).

73. See *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475, 484-88 (2001) (holding that the "sound basic education" provision of the State Constitution requires that students need to be capable of civic engagement and sustaining competitive employment, rather than merely prepared to serve on a jury or vote).
74. *Id.* at 537-8.
75. "The evidence demonstrates that the primary causes of New York City's overreferral and overplacement in restrictive settings are a lack of support services in general education . . ." *Id.* at 538.
76. *Campaign for Fiscal Equity v. New York*, 2002 WL 1369966, at \*11; 2002 N.Y. Slip Op. 05327 (June 25, 2002).
77. See generally, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CASE RESOLUTION MANUAL, available at [www.ed.gov/offices/OCR/docs/ocrm.html](http://www.ed.gov/offices/OCR/docs/ocrm.html) (last visited, July 8, 2002).
78. U.S. COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES 209-13 (1996).
79. Memorandum from Norma Cantú, *supra* note 25, at 19.
80. *Id.*
81. Telephone interview with Timothy Blanchard, Senior Attorney at the U.S. Department of Education, Office for Civil Rights (Sept. 25, 2000).
82. Memorandum from Norma Cantú, *supra* note 25, at 19.
83. See, e.g., Glennon, this volume.

84. See Osher et al., this volume.
85. See Kevin G. Welner and 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. 2002).
86. Sch. Bd. of Palm Beach County, Order No. DOE-99-440-FOF (Fla. Dep't of Educ. Sept. 27, 1999).
87. *Id.*
88. 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).
89. 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).
90. See *Corey H.*, discussed in Soltman & Moore, this volume.
91. Vaughn G. v. Mayor of Balt., Civil Action No. 84-1911 (MJG) (D. Md. May 1, 2000) (monitoring to reduce achievement disparity includes 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).
92. See MINORITY STUDENTS, *supra* note 72, at ES-3-4.
93. *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D.Tex. 2000).
94. Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (2000), available at <http://epau.asa.edu/epaa/v8n41> (last visited July 8, 2002).
95. National Center on Educational Outcomes, *1999 State Special Education Outcomes: A Report on State Activities at the End of the Century* (Dec. 1999). Available at <http://www.coled.unm.edu/nceo/OnlinePubs/99StateReport.html> (last visited Dec. 8, 2001).
96. According to data available on the website of the Texas Education Agency (TEA), more than 12 percent of all Texas children are eligible for special education services. Based on a review of data from previous years, this percentage represents a significant increase of nearly 100,000 students between 1993-1994 and 1999-2000—a change from 10.7 percent of those enrolled to 12.1 percent. See Tex. Educ. Agency, Texas Public School Statistics, available at <http://www.tea.state.tex.us/perfreport/pocked> (last visited June 28, 2001).
97. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982).
98. *Id.* at 200.
99. *Id.* at 203 (emphasis added and footnote omitted).
100. *Id.* at 214 (White, J., dissenting).
101. See *Corey H. v. Bd. of Educ.*, 27 Individuals with Disabilities Educ. L. Rptr. 688 (N.D. Ill. 1998). See also Soltman and Moore, this volume.
102. See David Tyack and Larry Cuban, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* (1995).
103. See Hehir, this volume.
104. Pub. L. No. 107-10, 115 Stat 1425 § 1111 (2002).
105. See Hehir, this volume.
106. See generally, *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM* (Gary Orfield and Elizabeth H. DeBray, eds. 1999).
107. See Soltman and Moore, this volume.

## CHAPTER NINE

---

# Evaluating the Office for Civil Rights' Minority and Special Education Project

---

THERESA GLENNON

### INTRODUCTION

This chapter is an initial effort to evaluate the enforcement activities of the U.S. Department of Education Office for Civil Rights (OCR) related to the disproportionate representation of minority students in special education from 1994 through 2000. I review OCR's history and activities related to this problem and then evaluate its performance. Finally, I suggest improvements in OCR's protection of the civil rights of minority children pertaining to special education, including 1) increasing activities in the areas of development and dissemination of guidelines, public education, and community outreach; 2) improving the effectiveness of compliance reviews and complaint investigations through evaluation and staff training; and 3) employing a broader range of enforcement tools and eliminating administrative barriers.

Early in her tenure, Norma Cantú, the assistant secretary for civil rights at the U.S. Department of Education (DOE) in the Clinton administration, identified the disproportionate placement of minority students in special education as one of her office's three top priority areas for civil rights enforcement.<sup>1</sup> She acknowledged that OCR's failure "to find effective ways to address [this issue] has generated serious criticism of OCR's effectiveness in carrying out its responsibilities under Title VI [of the Civil Rights Act of 1964], which prohibits discrimination on the basis of race, color or national origin."<sup>2</sup>

OCR's effective enforcement of Title VI on behalf of minority students has become more urgent in light of the U.S. Supreme Court's recent ruling in *Sandoval v. Alexander*, which denies private plaintiffs a private right of action under the Title VI disparate impact regulations.<sup>3</sup> Federal Title VI regulations,

issued under Section 602 of Title VI, are not limited to situations in which there is proof of intentional discrimination. The regulations also prevent recipients of federal funds from using any apparently neutral methods or criteria that have an adverse and disparate impact on racial or ethnic groups.<sup>4</sup> OCR's effective administrative enforcement of the Title VI regulations is essential in order to establish clear guidelines, collect and evaluate data, and monitor the actions of the nation's 15,000 school districts.<sup>5</sup> This analysis is designed to encourage OCR to continue its focus on the rights of minority students regarding special education and to increase the impact of its work.

### ENFORCEMENT HISTORY OF THE OFFICE FOR CIVIL RIGHTS

OCR was originally established to enforce Title VI, which states that "no person in the United States shall, on the basis 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."<sup>6</sup> This statute empowered federal agencies to issue rules and regulations to give effect to Title VI and to terminate federal funds to recipients that refused to correct discriminatory practices.<sup>7</sup>

In 1979, OCR became part of the newly created U.S. Department of Education.<sup>8</sup> OCR is directed by an assistant secretary for civil rights, and about 20 percent of its employees staff the Washington, DC, headquarters.<sup>9</sup> The other 80 percent of OCR's staff is located at twelve regional enforcement offices across the country, which handle all complaints, pursue compliance reviews, and conduct public education, outreach, and technical assistance activities.<sup>10</sup>

In accordance with federal regulations, OCR can request compliance reports from all education entities that receive federal assistance; investigate and resolve complaints of racial discrimination by recipients; initiate compliance reviews of recipients to ensure that they are fulfilling their obligations under Title VI law and regulations; and inform recipients and beneficiaries of Title VI's protections against discrimination.<sup>11</sup>

OCR is credited with achieving the integration of numerous southern school districts that had failed to desegregate their schools in response to *Brown v. Board of Education* and the passage of Title VI.<sup>12</sup> In 1964, more than 98 percent of black students in the South were still attending segregated schools. By 1972, only about 8.7 percent of black students were attending completely segregated schools. Although some of this integration came about through litigation by private parties and the U.S. Department of Justice, the overwhelming majority of southern school districts were integrated due to OCR's enforce-

ment efforts, which involved hundreds of consent agreements and some withholding of federal funds.<sup>13</sup>

Despite this achievement, OCR was subject to criticism by civil rights advocates, who sued OCR in 1970 for failing to enforce Title VI against recalcitrant school districts. In 1977, a federal district court ordered OCR to investigate all complaints that fell within its jurisdiction and to conduct agency-initiated compliance reviews according to specific time frames and procedures.<sup>14</sup>

At the same time, OCR's jurisdiction was greatly broadened by the addition of Title IX,<sup>15</sup> which prohibits discrimination on the basis of gender by educational institutions receiving federal funds, and Section 504,<sup>16</sup> which prohibits discrimination on the basis of disability.<sup>17</sup> Already struggling to fulfill its mission under Title VI, a combination of political pressures and administrative inadequacies prevented the agency from redesigning its enforcement activities to meet this dramatic expansion of its mission.<sup>18</sup>

According to some commentators, OCR's efficacy began to be further undermined in 1981 by the political beliefs of those appointed to responsible positions within the Reagan administration.<sup>19</sup> Soon thereafter, OCR's enforcement was severely limited by the U.S. Supreme Court decision in *Grove City v. Bell*, which found that Title IX's impact was restricted to the specific program or activity within an educational institution that actually received the federal funds.<sup>20</sup> OCR strictly interpreted *Grove City* to require a determination that the specific program or activity complained about actually received federal funds prior to proceeding with an investigation under any of its antidiscrimination statutes, and the agency dropped numerous discrimination charges and terminated more than eight hundred investigations.<sup>21</sup> Until *Grove City* was reversed by congressional action expanding coverage to entire institutions in 1988,<sup>22</sup> this complex preliminary jurisdiction determination undermined OCR's ability to conduct complete investigations within the Court-ordered time limits, leading to severely limited investigations, vague remedial agreements, and pressure on complainants to withdraw complaints.<sup>23</sup>

These various factors led OCR to give little attention to attacking the widespread existence of so-called second-generation racial discrimination in school discipline, ability grouping, and placement in special education and gifted programs during four different administrations between 1972 and 1993. Congressional investigators were told by some OCR staff in 1988 that they had received the message that they were not to vigorously pursue claims regarding these forms of second-generation racial discrimination under Title VI.<sup>24</sup>

OCR neglected the overrepresentation of minority students in special education despite major lawsuits and reports that raised the profile of this issue.<sup>25</sup>

For example, one highly publicized lawsuit, *Larry P. v. Riles*, resulted in an important plaintiffs' verdict in 1979 that affected students throughout California.<sup>26</sup> Other suits successfully challenged the disproportionate representation of minority students in lower track and special education classes in recently desegregated school districts.<sup>27</sup> In addition, a blue-ribbon committee issued a national report in 1982 that analyzed and condemned this overrepresentation.<sup>28</sup>

### THE DEVELOPMENT OF OCR'S MINORITIES AND SPECIAL EDUCATION PROJECT

In 1994, the assistant secretary for civil rights designated minority overrepresentation in special education as a priority for agency enforcement and established an OCR task force to study the issue, which was given the acronym MINSPEd. As a first step, the task force prepared two important memoranda. A 1995 memorandum, authored by the assistant secretary and circulated to all regional enforcement offices, described the ways in which inappropriate placement in special education harmed minority students: limiting their access to the core curriculum, stigmatizing them, and creating significant racial separation.<sup>29</sup> The memo outlined the legal theories available to investigators, including Title VI, which prevents minority students from being disproportionately denied the opportunity to participate in the regular education program,<sup>30</sup> and Section 504, which requires schools to use validated evaluation tools to prevent misclassification, to place students in the least restrictive educational settings, and to ensure disabled students meaningful access to the benefits of the educational program.<sup>31</sup>

OCR also issued an "Investigative Guide" to data collection and analysis for MINSPEd investigators.<sup>32</sup> This report identified proactive compliance reviews and complaint resolution as the primary enforcement tools.<sup>33</sup> The memo advised investigators to focus on three phases of the special education process: referral, evaluation and placement, and the actual provision of special education services. The "Investigative Guide" contained detailed forms to be completed for each student file reviewed during an investigation. These forms were designed to help investigators identify racial disparities at a number of points in the special education process, including the availability and use of prereferral interventions, the procedures and reasons for referrals for special education evaluations, application of evaluation criteria, and the educational benefits received by students in special education.

Enforcement offices experienced difficulties with the forms, which were time consuming yet yielded highly inconsistent and limited information.<sup>34</sup> Investigators who used the "Investigative Guide" forms faced lengthy delays and

inaction on requested data analyses from OCR statisticians at headquarters. These difficulties posed significant barriers to the development of a disparate impact case. As investigators in each enforcement office developed their own data collection forms, the investigative practices of the enforcement offices diverged in important ways.

Over time, a MINSPEd National Network emerged, including at least one member from each enforcement office actively involved in MINSPEd compliance reviews. The network was sustained through periodic telephone calls<sup>35</sup> in which network members shared difficulties regarding data collection in compliance reviews and evaluation of the efficacy of the MINSPEd agreements staff entered into with state and local education agencies.<sup>36</sup>

Enforcement offices retained the discretion, subject to approval by the assistant secretary, to select MINSPEd activities. The staff created a proposed "docket" of enforcement activities in all areas for the upcoming year. In the MINSPEd area, enforcement dockets focused almost exclusively on compliance reviews and rarely contained public education or project evaluation activities. Staff selected sites for compliance reviews based on statistics in the 1994 report, "Elementary and Secondary School Compliance Report: Projected Values," and other information obtained through their own research.<sup>37</sup>

The initiation of the MINSPEd project was accompanied by an important change in all OCR case resolution procedures. Under prior administrations, every complaint and compliance review had to result in an official Letter of Finding that detailed the evidence OCR had obtained and its conclusions as to whether a recipient of federal funds had violated federal law. As part of an effort to eliminate a serious backlog in OCR's complaint caseload and accelerate the implementation of remedies, OCR began to employ a "partnership" approach in complaint resolution and compliance review activities.<sup>38</sup> Under this approach, OCR encourages states and local school districts to enter into cooperative agreements to implement measures to reduce the disproportionate placement of minority students in special education.<sup>39</sup> The partnership approach has reduced the amount of time investigators spend collecting evidence and increased the amount of time they spent talking to school personnel, community groups, and parents.<sup>40</sup> The agency also hoped that this less confrontational approach would lead school personnel to undertake the agreed-upon measures in a more positive fashion, trying to approach state and local education agencies with the recognition that they "share a common goal of providing equal opportunity and access to high-quality education for all students."<sup>41</sup>

Almost all compliance reviews ended with voluntary agreements by the local school district under review to put in place a range of measures designed to reduce the misuse of special education for students of color.<sup>42</sup> While some in-

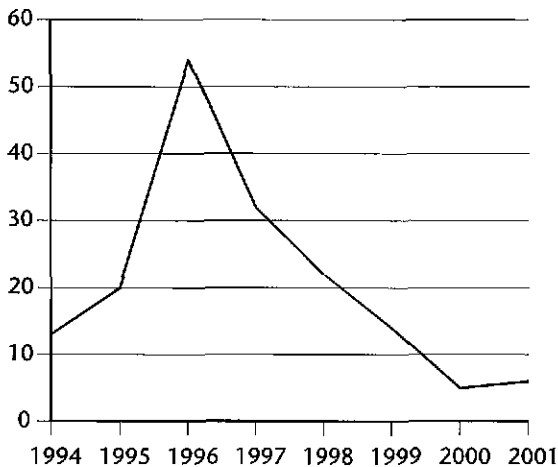
investigators described being shown agreements to use as samples, OCR has stated that there are no template or model MINSPEd agreements.<sup>43</sup> Although the contents of the agreements vary, many agreements include provisions regarding 1) development and implementation of prereferral strategies for all students experiencing learning or behavior problems prior to referral for special education evaluations; 2) in-service training of all staff members concerning teacher expectations and effective education for a diverse student population; 3) standardization of prereferral, referral, and evaluation procedures, including the use of validated testing and assurances that identification is based on a wide range of factors, not just performance on IQ tests; and 4) tracking and reporting to OCR on prereferral interventions, evaluations for need for special education, identification as disabled, and restrictiveness of placement of all special education students by race.<sup>44</sup> The agreements vary widely in the level of detail they contain, particularly with regard to required school district remedial actions and information to be provided to OCR.

Many agreements covered only MINSPEd issues, although some included issues such as minority student underrepresentation in gifted and talented classes or overrepresentation in the lower tracks of ability-grouping programs. Some of the agreements clearly led local education agencies to initiate new activities, such as teacher training on diversity or prereferral strategies for struggling students. In other cases, school districts appear to have complied by primarily reporting on existing programs or by increasing the level of uniformity in their interventions.<sup>45</sup>

None of the agreements set requirements for numerical changes. OCR staff reported that the political environment has been so hostile to "quotas" that the inclusion of *any* numerical goals has been completely discouraged. Thus, in some cases, OCR informed school districts that they had successfully completed their monitoring periods and terminated monitoring, even though the districts did not show any significant decrease in the disproportionate numbers of minority students placed in special education.<sup>46</sup>

OCR initiated only two MINSPEd compliance reviews in Fiscal Year 1993,<sup>47</sup> but it greatly increased the number of proactive MINSPEd compliance reviews beginning in fiscal year 1994. Between July 1, 1993, and June 30, 2001, OCR initiated approximately 168 MINSPEd compliance reviews.<sup>48</sup> During that same time period, OCR entered into approximately 147 agreements with individual school districts and five agreements with state departments of education based on these compliance reviews. As demonstrated in Figure 1, the initiation of compliance reviews peaked in fiscal year 1996 and has dropped off sharply since then.<sup>49</sup> OCR initiated only six MINSPEd compliance reviews in fiscal year 2001.<sup>50</sup>

FIGURE 1  
Compliance Reviews Initiated in Fiscal Years 1994–2001



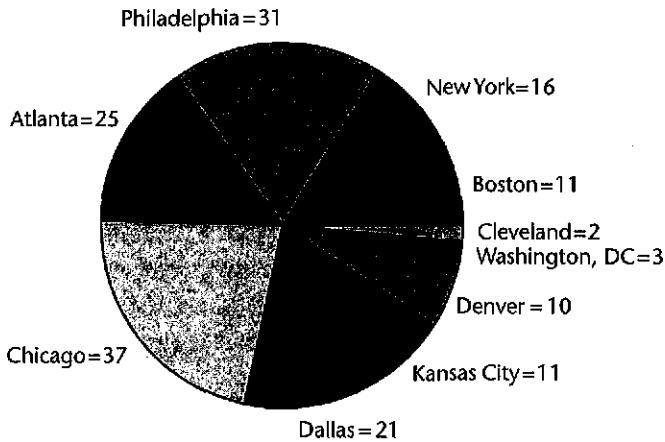
The enforcement offices varied dramatically in the number of MINSPED compliance reviews they initiated between July 1, 1993, and June 30, 2001, as depicted in Figure 2.<sup>51</sup>

While some of these differences can be explained by regional variations in demographics and priorities, these inconsistencies raise the concern that MINSPED did not receive the same level of attention across the various offices. In addition to agency-initiated compliance reviews, OCR responded to 190 complaints that raised MINSPED issues between July 1, 1993, and June 30, 2001, and “facilitated change” in approximately forty-nine cases.<sup>52</sup>

#### EVALUATING THE EFFECTIVENESS OF OCR'S MINSPED ENFORCEMENT EFFORTS

OCR's enforcement efforts raised the awareness of more than two hundred local school districts and five state education departments about the ongoing overrepresentation of minority students in special education. While this issue has received the continuing attention of scholars, some school districts informed OCR officials that they had never noticed that their minority students were overrepresented in their special education programs.<sup>53</sup> Unfortunately, OCR has not gathered the information necessary to permit an adequate assessment of the impact of its MINSPED enforcement efforts on the experiences of

FIGURE 2  
MINSPEd Compliance Reviews Initiated in Fiscal Years 1994–2001



minority students in the jurisdictions where it intervened.<sup>54</sup> However, OCR's enforcement experiences over the last eight years, if properly reviewed and evaluated, could be invaluable in effecting change in this challenging area. Based on the limited information available, such an evaluation should include questions regarding structural barriers, tactical choices, and administrative obstacles that may have prevented the agency from having a greater impact, both within and beyond the jurisdictions subject to compliance reviews. It is hoped that OCR's commitment to the civil rights of minority students in special education can be reinvigorated and its approach honed through such self-evaluation and attention to these issues.

### STRUCTURAL BARRIERS

OCR's MINSPEd project faced three major structural barriers. One important barrier is the sheer breadth of OCR's mission. OCR's jurisdiction includes race, national origin, gender, disability, and age discrimination involving sixty million students attending 109,000 elementary and secondary schools in 15,000 public school districts and 10,000 postsecondary institutions.<sup>55</sup> These educational entities vary greatly in size, demographics, finances, curriculum, and political and social environments, in part due to this nation's commitment to state and local control of public education and independence of private educational entities. The issues concerning public school districts are often quite different

from those facing postsecondary educational institutions. Achieving uniform enforcement of civil rights across this diverse, highly decentralized educational system is an extraordinary challenge.

A second structural barrier involves the limited enforcement powers OCR has under Section 602 of Title VI. OCR seeks to resolve complaints and compliance reviews by agreement, and these agreements can incorporate a variety of measures to remedy the violations found. However, where an educational entity refuses to enter into a resolution agreement, the only penalty OCR can impose is to deny *all* federal financial assistance to the recalcitrant state or school district.<sup>56</sup> Sometimes referred to as an "atomic bomb," a funding cutoff penalizes needy students along with education officials. Because this extreme penalty is politically difficult to impose, OCR's leverage in negotiations with state and local educational agencies may be lessened.<sup>57</sup> In contrast, Congress recently granted OCR greater discretion to tailor penalties for violations of the IDEA, permitting the secretary to withhold partial payments for substantial violations.<sup>58</sup> Because the IDEA now requires state education agencies to evaluate and revise its policies and practices where there is racial disproportionality in special education, DOE may be able to create a process by which OCR can request that the secretary investigate a recalcitrant school district for violations of the IDEA related to MINSPED issues, and use the new discretion to withhold partial funding to address IDEA violations in this context.<sup>59</sup>

OCR's ability to focus on the proactive MINSPED project has also been hampered by inadequate resources to proactively enforce civil rights laws and investigate every complaint received. In fiscal year 2000, OCR received 4,897 complaints and resolved 6,364 complaints.<sup>60</sup> Every complaint is initially reviewed to determine if it falls within OCR's jurisdiction. If it does, an OCR team develops a case plan and initiates case resolution and investigation procedures.<sup>61</sup> Some complaints require on-site investigations, and some are extremely complex, requiring lengthy and time-consuming investigations. In addition, many complaint resolution agreements require ongoing monitoring. In fiscal year 2000, OCR conducted monitoring activities involving 2,049 complaints.<sup>62</sup> Given current staffing levels, the requirement to respond to all complaints significantly reduces OCR's ability to conduct proactive enforcement activities.

### QUESTIONING TACTICAL DECISIONS

Once OCR identified the disproportionate representation of minority students in special education as a priority area for enforcement, it had to select strategies for achieving its enforcement goals. As an office that has traditionally viewed it-

self as a law enforcement agency, OCR has often focused on identifying the minimum legal duties of educational entities under the various civil rights statutes it must enforce. Achieving real reductions in the overrepresentation of minority students in special education, however, requires changes in educational practices and a commitment by public schools to create equal educational opportunity, not merely avoid legal violations.<sup>63</sup> This goal requires educational leadership at all levels, including the federal government. OCR initially planned to pursue a multifaceted strategy of public education, compliance reviews, and complaint reviews. In practice the agency focused on typical law enforcement activities—compliance reviews and complaint resolution—and public education measures have been minimal.

Because OCR cannot hope to reach all relevant state and local education agencies through compliance and complaint reviews, a public education strategy is also necessary. While OCR developed some informational resources for its staff, it did not produce any public documents to educate educational agencies or the public about the issue of disproportionate representation or its MINSPEd project.<sup>64</sup> OCR has posted on its website extensive policy guidance on other priority areas, such as racial and sexual harassment and the use of high-stakes testing, yet it has not posted policy guidelines about minorities and special education, and its MINSPEd project is only mentioned briefly in OCR annual reports.<sup>65</sup> OCR's planned report on promising educational practices to prevent disproportionate representation has never been issued.<sup>66</sup> OCR has done little to target those on the front lines in our nation's schools—teachers and school administrators—to inform them about the rights of students to be protected from misidentification and misplacement in special education and programmatic strategies that have been shown to be effective in reducing the disproportionate placement of minority students in special education.<sup>67</sup>

OCR has not made strong efforts to reach out to nongovernmental organizations, such as the NAACP or National Association for Protection and Advocacy Systems, on MINSPEd issues. These organizations would be able to conduct outreach and education activities for their own constituents, or to collaborate on public education activities with other related federal offices, such as the Office of Special Education and Rehabilitative Services (OSERS) or the federally funded Equity Assistance Centers, which provide technical assistance to state and local education agencies on educational strategies that promote equal educational opportunity.<sup>68</sup>

In addition, OCR has done little to publicize its compliance reviews and the agreements it has reached with state and local education agencies. Thus, much of the time and effort OCR invested in its MINSPEd project has remained hidden from view beyond those school districts or state educational

agencies it investigated. Although the existence of the reviews is mentioned in OCR's annual reports, the names of the educational entities reviewed and the existence and contents of individual agreements are only available through a Freedom of Information Act request. This means that other school districts and states cannot easily examine agreements and use them as guidance to voluntarily adopt the measures OCR has required of other state and local educational agencies.<sup>69</sup>

Another potentially effective strategy that has received little attention is action by the Department of Justice (DOJ) to seek judicial enforcement of the rights of minority students regarding special education. This strategy would require extensive cooperation from both OCR and DOJ. School districts often respond to high-profile litigation by initiating changes in their policies and practices. For example, the Third Circuit Court of Appeals' well-publicized decision mandating the provision of special education in the least restrictive environment<sup>70</sup> led to a massive inclusion effort by school districts within the circuit. Similarly, the Supreme Court's recent holdings that school districts can be liable for damages for sexual harassment has spurred great activity by school districts nationwide to develop and implement policies and practices to respond more effectively to allegations of sexual harassment.<sup>71</sup> Disproportionate representation in special education has been raised in the context of school desegregation cases, and OCR should work closely with DOJ to identify other desegregation cases in which this strategy deserves consideration.<sup>72</sup> While OCR's enforcement options may be limited, well-targeted litigation by DOJ would increase national awareness of this issue.

The narrow focus of most compliance reviews may also have limited OCR's effectiveness in reducing the disproportionate representation of minority students in special education. Compliance reviews usually focused only on the referral, evaluation, and placement of minority students in special education. They often did not include other issues, such as the racially disproportionate use of discipline, resource inequalities, significant racial gaps in performance on achievement tests, and underrepresentation in gifted and talented programs. This single-issue focus may be helpful in some instances, but it could also undermine OCR's ability to direct school districts toward more comprehensive reforms in both general and special education—reforms that may be necessary to resolve the overrepresentation problem, given the evidence that multiple factors contribute to this problem.

OCR statistics demonstrate the pervasive, negative effects of race in the educational environment. For example, OCR data show that while African American students comprise 17 percent of students in public schools, they represent 33 percent of the students who were suspended, 31 percent of the stu-

dents who were expelled, and only 8 percent of the students in gifted and talented programs.<sup>73</sup> The average scale score for math of African American fourth graders on the National Assessment of Education Performance was thirty-one points lower than the score of white fourth graders,<sup>74</sup> and thirty-three points lower for reading.<sup>75</sup>

While a broader focus in compliance reviews may increase the amount of time OCR staff spend on any one review and could discourage school districts from entering into agreements with OCR without extensive investigation, research shows that the treatment of racial minority groups in special education *and* general education are interrelated, and that a more comprehensive approach may be necessary to protect minority students from shifting forms of discrimination.<sup>76</sup> It benefits minority students little to gain protection from mistaken special education identification and/or overly restrictive placements but find their educational needs unaddressed in general education, or to be subjected to excessive discipline. For example, as the Chicago OCR office staff recognized in their 1999 report evaluating the effectiveness of their MINSPED compliance reviews, OCR's intervention was more effective when it included an emphasis on improving the ability of a school district's reading programs to serve its diverse student population.<sup>77</sup>

#### ADMINISTRATIVE OBSTACLES

OCR's MINSPED project has encountered several administrative difficulties. These obstacles include inadequate staff resources to accomplish its mission; failure to balance staff time among different types of enforcement activities; insufficient guidance in the development of compliance agreements; inadequate research and statistical information to support OCR's enforcement and education efforts; inadequate staff development and training; and barriers to sharing essential information within OCR.

Enforcement of civil rights is extremely labor intensive. OCR receives close to five thousand complaints each year, and OCR's regulations require resolution of every timely complaint within its jurisdiction, which consumes at least 60 percent of its staff time.<sup>78</sup> For every complaint, OCR must at least make contact with the complainant and the complained-against educational entity, and in most cases OCR seeks a negotiated resolution to the complaint even if it does not pursue further investigation. In addition to its unpredictable and rising complaint caseload, OCR monitors numerous complaint resolution agreements. At the behest of headquarters, OCR enforcement offices place great weight on timely processing of complaints.

At best, only 40 percent of staff time is devoted to proactive work on priority areas such as the MINSPED project. Congress should provide OCR with adequate resources to fulfill its mission. If such funds are not available, Congress should grant OCR greater discretion in its complaint response process. Certainly, greater agency discretion to refuse resolution procedures to complainants raises many concerns that such discretion will not be wisely utilized. If such a change is determined to be desirable, it must be accompanied by procedures to make the complaint review process more transparent, allowing those outside the agency to evaluate the basis for agency decisions to refuse to pursue certain complaints.

Regional enforcement offices outline their planned proactive enforcement activities in proposed enforcement dockets submitted to headquarters each fall. These dockets explain the proactive enforcement activities each office plans to undertake in the coming year concerning each of OCR's priority areas.<sup>79</sup> Once approved, the performance of the regional offices is judged by their completion of the activities described on the dockets.<sup>80</sup>

Because of the limited staff time available for proactive enforcement activities, any activities not listed on the dockets receive little attention.<sup>81</sup> During the period studied, the MINSPED portions of these dockets was reported by staff to have focused almost exclusively on proposals for compliance reviews. This left staff with little time for public education, community outreach, or improvement of OCR's ability to monitor and improve the outcomes of its enforcement efforts.<sup>82</sup> OCR staff did not recall receiving any direction from the assistant secretary's office to redirect the regional offices to a more balanced approach to their MINSPED docket development.<sup>83</sup> Many of the potential strategies that OCR did not employ in the MINSPED context, discussed above, require a great deal of time and attention from well-trained and experienced staff. Given dockets replete with compliance reviews and a rising complaint caseload, OCR staff report that they did not have time to attempt many of these other strategies.<sup>84</sup>

OCR staff also report receiving little guidance on the conduct of MINSPED compliance reviews, and in particular on the negotiation and agreement phase of the review process.<sup>85</sup> As a result, many compliance review agreements contain vague phrases and limit OCR's ability to review the quality of a school district's compliance or to seek further action from school districts when their performance of the terms of the agreement produce little effect on the school performance and special education placement of minority students.

While OCR uses statistics to help select its targets for MINSPED compliance reviews, its enforcement efforts have been hampered by a lack of coordina-

tion and adequate collection and analysis of essential statistical information. Until 2000, the agency employed a sampling method rather than collecting data from every single school district. While sampling data identified national and state trends, it did not provide regular information over time about individual school districts. OCR now gathers data from every school district and has developed a unified data collection system for special education with other agency offices. Because of the importance of effective data collection to the analysis of the MINSPED and other issues, this new data collection procedure should receive outside review to ensure that it is meeting the informational needs of the agency, state and local school officials, and student advocates.

Data collection problems have also impeded any national evaluation of the effect of OCR's MINSPED activities, and OCR has devoted few resources to such an evaluation. In 1999, OCR's MINSPED national network acknowledged that the lack of a usable, coordinated data collection system prevented an adequate assessment of the effectiveness of the agency's proactive compliance review strategy.<sup>86</sup> It recommended that the agency employ the same data collection instruments in all regional offices and produced suggested forms for this purpose.<sup>87</sup> To date, this recommendation has not received formal action, although some enforcement offices have voluntarily adopted the suggested forms. Only one office, the Chicago office, conducted an evaluation of the results of its MINSPED compliance reviews.<sup>88</sup> That report suggested that the focus of compliance reviews should be shifted from special education referral, evaluation, and placement procedures to elementary school reading programs and regular education intervention programs. OCR's failure to conduct regular self-evaluations prevents the agency from making the most effective use of its limited resources or from gathering information from the compliance review process about what works to reduce disproportion and disseminate that information to state and local education agencies.

The lack of organized self-evaluation regarding the impact of one of the agency's top priorities points to another administrative problem within OCR: lack of adequate mandatory opportunities for staff professional development. To be effective, OCR staff need to receive substantive and skills-oriented training on a regular basis. They need to understand the legal context of the enforcement efforts and stay up-to-date on research evaluating the effectiveness of educational strategies designed to increase educational opportunity. They also need professional-level training in essential skills involved in investigations, negotiations, public education, and outreach, and efficient use of computer technology. They should also be able and encouraged to participate in conferences held by other stakeholders in education.<sup>89</sup>

OCR staff is also faced with barriers to accessing helpful information. While OCR maintains a Case Information System (CIS II), it contains very limited information.<sup>90</sup> Thus, a staff member who wanted to evaluate the contents of MINSPED compliance review agreements would not be able to search the CIS II, or any other computerized system, for such information. These documents, along with all other crucial case documents, are available only in the hard-copy files and personal computers of individual investigators in the twelve enforcement offices.<sup>91</sup> OCR reports that it is working to develop a new computerized case management system that would increase the data and documentation available to its staff.<sup>92</sup> Public access to documentation also needs to be increased. For example, while OCR has created an electronic library that contains letters of findings, policy documents, and other helpful materials, this electronic library is not available to the public.<sup>93</sup>

## RECOMMENDATIONS

OCR deserves commendation for turning its attention to this form of discrimination, which so limits educational opportunities for many minority students. It is essential that OCR receive the strong support and political commitment of the federal executive and legislative branches to continue and improve its enforcement concerning the overrepresentation of minority students in special education. The following recommendations should be considered to increase the agency's effectiveness.

1. Retain enforcement of the civil rights of minority students regarding special education as a top priority.
2. Increase OCR MINSPED activities to develop and disseminate MINSPED guidelines and data to the public and conduct public education and community outreach on this critical issue.
  - a. Develop and widely publicize clear legal requirements and policy guidelines for states and school districts.
  - b. Make information on preventive educational strategies and relevant MINSPED data easily accessible on OCR's website, along with links to other sources of information on the topic.
  - c. Conduct outreach and education activities targeting education professionals and national and community advocacy organizations.
  - d. Share information about MINSPED compliance review investigations and agreements with state and local education agencies across the na-

- tion and the public, and encourage state and local officials to use the information to conduct self-evaluations and voluntarily adopt nondiscriminatory and preventive educational practices.
- e. Collaborate with other DOE offices, Equity Assistance Centers, and related nongovernmental organizations to increase public and professional knowledge about this issue.
  - f. Develop internal policies to ensure that OCR staff time is allocated to MINSPED public education and project evaluation activities in addition to compliance reviews and complaint resolution.
3. Increase active enforcement by improving the effectiveness of compliance reviews and complaint investigations.
    - a. Increase OCR initiation of MINSPED compliance reviews, which by FY 2000 had dropped to only five per year nationwide.
    - b. Expand the focus of compliance reviews to evaluate and remedy the multiple factors that lead to disproportionate representation in special education, by including, for example, evaluation of discriminatory practices in elementary school reading programs.
    - c. Improve and coordinate data collection activities at the national level and improve the collection of and dissemination of data with regard to evaluating the effectiveness of complaint resolution and compliance review agreements in reducing the disproportionate representation of minority students in special education.
    - d. Evaluate the compliance review process and resulting agreements to provide staff with clear guidelines for maximizing the results of this effort and to increase the consistency of MINSPED activities across the enforcement offices.
    - e. Organize staff professional development and training opportunities, including substantive knowledge about the MINSPED issue and investigation, negotiation, and agreement-drafting skills; maintain the MINSPED network.
  4. Employ the full range of enforcement tools.
    - a. Seek authority for partial withholding of funds or develop a protocol for referring matters, where appropriate, to OSERS for investigation and enforcement through partial withholding under the IDEA.
    - b. Collaborate with the DOJ to pursue MINSPED issues in desegregation cases. Where states and school districts refuse to change their practices to reduce disproportionality, refer those matters to DOJ for legal action.

## CONCLUSION

OCR's admirable efforts to reduce minority overrepresentation in special education have been hampered by structural, tactical, and administrative barriers. OCR's early success with desegregation shows that, given clear legal standards and the political will to enforce those standards, dramatic change is possible. The ongoing and dramatic overrepresentation of minority students in special education described throughout this volume demands that OCR, with the support of the executive and legislative branches, give this issue top priority. In so doing, it should emphasize public education and collaboration with other stakeholders, increase the effectiveness of its compliance and complaint reviews, remove administrative barriers to pursuing its civil rights goals, and employ the full range of available enforcement tools. Title VI "makes serious civil rights enforcement possible in American education, but it only works when the executive branch is committed to full implementation and when this standard is supported by the courts."<sup>94</sup> OCR can and must be effective in remedying the circumstances that lead to this serious misuse of special education.

## NOTES

1. Memorandum from Norma V. Cantú to All Staff of the Office for Civil Rights, U.S. Department of Education 1 (July 6, 1995) [1995 Cantú Memo] (on file with author). Disproportionate representation can also violate Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (West, 1999).
2. 1995 Cantú Memo, *supra* note 1, at 1.
3. 121 S.Ct. 1511 (2001). For a discussion of the implications of *Sandoval v. Alexander*, see Daniel J. Losen and Kevin G. Welner, this volume.
4. See, e.g., 28 C.F.R. § 42.104(b)(2)(2000); 34 C.F.R. § 100.3(b)(2)(2000).
5. STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 304-05 (1995).
6. 42 U.S.C. § 2000d (West 1994). While Title VI enforcement was initially conducted by staff scattered among a variety of offices at the Department of Health, Education and Welfare, in 1965 the agency established OCR, giving it enforcement authority, involving it in the development of all relevant regulations, and giving it full responsibility for interpretive guidelines. GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 324, 328 (1969).
7. 42 U.S.C. § 2000d-1. In this chapter, "recipient" refers to any educational entity that receives federal funds.
8. Department of Education Organization Act of 1979, Pub. L. No. 96-88, 20 U.S.C. § 3401 et seq. (West 2000).
9. UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES, VOL. I, at 187-90 (December, 1996) [CCR 1996 Report].
10. *Id.* at 188-89. The twelve Enforcement Offices are located in Boston, New York, Philadelphia, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco, Seattle, Cleve-

- land, and Washington, DC. They are grouped into four "Enforcement Divisions" by region.
11. 34 C.F.R. §§ 100.6, 100.7 (2000).
  12. Jeremy Rabkin, *Office for Civil Rights*, in *THE POLITICS OF REGULATION 338* (James Q. Wilson, ed. 1980).
  13. *Id.*
  14. *Adams v. Califano*, No 70-3095 (D.C.D.C. Dec. 29, 1977). This consent order covered three actions then pending in the district court: *Adams v. Califano*, No. 70-3095 (brought by representatives of racial minorities in seventeen southern and border states; representatives of national origin minorities, women, and handicapped persons intervened); *Women's Equity Action League v. Califano*, No. 74-1720 (brought by representatives of women); and *Brown v. Califano*, No. 75-1068 (brought by representatives of racial minorities in the thirty-three other states).
  15. Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (West 2000)
  16. Rehabilitation Act of 1973, 29 U.S.C. § 794.
  17. In addition, OCR has enforcement responsibility for The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (West 1995) and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12, 131-12, 134 (West 1991 & Supp.). OCR also helps implement civil rights provisions in Title V, part A, of the Elementary and Secondary Education Act, the magnet schools assistance program. 20 U.S.C. §§ 7201-13 (West 2000).
  18. HALPERN, *supra* note 5, at 84-91, 106-07, 287-88; Rabkin, *supra* note 12, at 344-45.
  19. HALPERN, *supra* note 5, at 194-200.
  20. 104 S. Ct. 1211 (1984)(holding that Title XI applied only to particular college programs that received federal financial assistance; in this case, the financial aid office).
  21. HALPERN, *supra* note 5, at 198-200.
  22. Civil Rights Restoration Act, 102 Stat. 28 (1988). The Act was passed over a veto by President Reagan. HALPERN, *supra* note 5, at 202.
  23. Committee on Education and Labor, U.S. House of Representatives, A Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights U.S. Department of Education 28 (December 1988)[1988 House Report].
  24. *Id.* at 35.
  25. While this chapter focuses on the efforts of OCR, it should be noted that the Office of Special Education and Rehabilitative Services [OSERS] of DOE also failed to provide school districts with guidance and incentives to reduce the overrepresentation of minority students in special education prior to 1994.
  26. *Larry P. v. Riles*, 495 F. Supp. 926, 989-90 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984). For discussion of *Larry P. v. Riles* and other litigation challenging the disproportionate representation of minority students in special education, see Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WISC. L. REV. 1237, 1263-86.
  27. See, e.g., *Little Rock Sch. Dist. v. Pulaski City Special Sch.*, 778 F.2d 404, 410, 422, 427-28 (8th Cir. 1985); *McNeal v. Tate County Sch. Bd.*, 508 F.2d 1017, 1020 (5th Cir. 1975); *Anderson v. Banks*, 520 F. Supp. 472, 500-01(S.D. Ga. 1981); cf. *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 753-54 (5th Cir. 1989).
  28. *PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY* (Kirby A. Heller et al., eds. 1982).

29. 1995 Cantú Memo, *supra* note 1, at 1-3.
30. *Id.* at 1.
31. *Id.* For a more detailed discussion of the legal theories related to this issue, see Losen and Welner, this volume.
32. Statistical/Analytic Investigative Procedures, Over-Representation of Minorities in Special Education Placement, Investigative Guide, Office for Civil Rights, Surveys and Statistical Support Branch, April 1994 [Investigative Guide].
33. Compliance reviews are investigations of state or local education agencies relating to one or more issues that OCR has identified to be of concern. They are described as proactive because OCR selects the issues and educational entities that will be the subject of compliance reviews. "Complaint resolution" describes OCR's efforts to resolve complaints concerning alleged discriminatory practices that have been filed with the agency, and OCR's complaint resolution activities are thus primarily reactive in nature. CCR 1996 REPORT, *supra* note 9, at 206-07.
34. This and other information cited in this chapter were gathered through interviews with OCR staff and Megan Whiteside Shafer, a former member of the OCR staff.
35. OCR staff reported that there was no regular schedule, but that these telephone calls occurred approximately every month or two.
36. While members of the MINSPEd Network reported that it was difficult to specifically assess the benefits of the network, they expressed the belief that this rather informal sharing of information assisted staff in improving the specificity of the monitoring requirements in their agreements, learning about educational strategies to reduce disproportion and overall special education placement rates, and developing a list of available educational consultants to recommend to local school districts.
37. The biennial Elementary and Secondary School Civil Rights Compliance Reports, which report data from a sample of U.S. school districts, are the best (and often only) available source of racial, ethnic, and gender information on rates of corporal punishment, suspension and expulsion, identification in the categories of mental retardation, serious emotional disturbance, and specific learning disability, receipt of high school diploma, English Language Learners, Gifted and Talented, and AP Math and Science in public schools. This major data collection effort has had its own difficulties. The 1996 data proved unusable, and the report on the 1998 data was not made available until August 2000. For the first time in 2000, OCR collected data from all local school districts. It also developed an electronic data submission program and worked with other agency offices to develop a single, unified data collection system regarding students with disabilities. These are important steps toward improving the quality of the data available to OCR and the public. Accessibility of the data continues to be a problem. The 1994 and 1998 Civil Rights Compliance Data have not been posted on the agency's website; they are only available from the Office for Civil Rights by written request. As of January 2002, the 2000 data have not been made available.
38. CCR 1996 REPORT, *supra* note 9, at 209-12.
39. *Id.* at 209. This approach is outlined in U.S. Department of Education, Office for Civil Rights, Case Resolution Manual, available at <http://www.ed.gov/offices/OCR/doc/cocrm.html> (last visited Jan. 16, 2002).
40. *Id.* at 211.
41. *Id.* at 210 (quoting Norma Cantú).

42. See *supra* note 34.
43. Letter from Rebekah Tosado, Attorney, Office of the Assistant Secretary, to Theresa Glennon, p. 2 (October 11, 2000) (on file with author).
44. This description is based on a review of more than fifty compliance-review agreements between OCR and state or local education agencies furnished to the author in response to a Freedom of Information Act ("FOIA") Request, Letter from Theresa Glennon to Nicole Huggins, Attorney, Office for Civil Rights, July 21, 2000[FOIA Request](on file with author).
45. *Id.*
46. See, e.g., Memo from Megan Whiteside to Brenda Wolf and Monitoring Letters received through FOIA Request, which show such results in several school districts, including Laurel Public School District, MS; Montgomery County, MD, and Appoquinimink, VA.
47. U.S. CIVIL RIGHTS COMMISSION, EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH DISABILITIES: FEDERAL ENFORCEMENT OF SECTION 504, Table 3.11, p. 75 [CCR 1997 Report].
48. These data are based on documentation provided in response to Freedom of Information Act Requests. This documentation lists all complaints raising MINSPEd issues filed with OCR between July 1, 1993, and June 30, 2001, and all compliance reviews concerning MINSPEd issues initiated by the agency in that same time period [Complaint Summary and Compliance Review Summary](on file with the author).
49. Compliance Review Summary, *supra* note 48.
50. *Id.*
51. *Id.*
52. Complaint Summary, *supra* note 48.
53. These statements were made by local school district officials to Megan Whiteside Shafer in the course of her work on compliance reviews. In 1997, Congress required state education agencies to collect and examine "data to determine if significant disproportionality based on race is occurring in the State" regarding the identification and/or placement in particular educational settings, and if such a disproportionality is found, the State must review and revise its policies, practices, and procedures to ensure that they comply with statutory requirements. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, § 618 (c); 20 U.S.C. § 1418(c) (West 2000).
54. For a discussion of the efforts OCR has made to evaluate its enforcement efforts, see *infra* text. While the author requested all compliance reviews concerning MINSPEd issues, it is possible that some compliance reviews that affected minority students in special education, such as reviews concerning compliance with the least restrictive education requirement in predominantly minority school districts, were not listed on its data collection system under MINSPEd and therefore were not available for this analysis.
55. CCR 1996 REPORT, *supra* note 9, at 164.
56. 34 C.F.R. § 100.8. Complex procedures, including express findings on the record, thirty days notice to Congress, opportunity for an administrative hearing and judicial review, must be followed for every funding termination. *Id.* at §§ 100.9-100.11. OCR can also make a recommendation to the Department of Justice that it bring an action against a noncompliant educational entity. *Id.* at § 100.8(a).
57. Rabkin, *supra* note 12, at 342-43; HALPERN, *supra* note 5, at 294-95.

58. The 1997 Amendments to the Individuals with Disabilities Education Act permit the secretary of education to "withhold, in whole or in part, any further payments to the State, for substantial violations of the IDEA. 20 U.S.C. § 1416(a)(West 2000).
59. Individuals with Disabilities Education Act Amendments of 1997; Pub. L. 105-17, 20 U.S.C. § 1408 (West 2000).
60. Office for Civil Rights, Fiscal Year 2000 Annual Report to Congress [2000 OCR Annual Report].
61. *Id.*
62. *Id.* The majority of complaints filed with OCR, 55 percent in fiscal year 2000, involved allegations of discrimination on the basis of disability. *Id.*
63. HALPERN, *supra* note 5, at 304.
64. For example, OCR's Investigative Guide and 1995 Cantú Memo have not been easily available to the public. Nor have OCR's Title VI handbook, which included a section on MINSPEd, or a comprehensive report on the issue prepared by Project FORUM of the National Association of State Directors of Special Education (NASDE) for OCR and the Office of Special Education Programs (OSEP) at DOE, been made easily available to the public. The Project FORUM report, one of five reports NASDE has conducted on the disproportionate representation of minority students in special education, is available for sale on the NASDE website, but that information is not prominently displayed on the OCR website.
65. *See, e.g.*, The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers (December, 2000)(archival file) and Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001 (*available at* <http://www.ed.gov/offices/OCR>). The OCR 2000 Annual Report, *supra* note 60, does not even mention minorities in special education as a priority area.
66. The National Academy of Sciences has just completed a two-year study of the disproportionate number of students from minority backgrounds placed in special education. The publication of this study provides OCR with an excellent opportunity to step up its public education efforts. NATIONAL RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION (M. Suzanne Donovan and Christopher T. Cross, eds. 2002) National Academy Press, Washington, DC.
67. In 2000, OCR staff with whom the author spoke could only recall one conference OCR sponsored for educational professionals and advocates for students. Held in New Orleans, it targeted the southern tier of the country and included several workshops on legal issues and best practices related to disproportionate representation. The Access to a Quality Education conference, September 20-22, 2000, held in New Orleans, Louisiana, was sponsored by the Southern Division of the Office for Civil Rights and the U.S. Department of Education-funded Equity Assistance Centers. This conference, which was attended by numerous education professionals and the author, provided participants with excellent resources on disproportionate representation and other educational equity issues.
68. Information about the federally funded Equity Assistance Centers, which were originally funded to assist school districts in their desegregation efforts but now focus on other educational equity issues as well, can be found at <http://www.ed.gov/EdRes/EdFed/equity.html>.

69. The need for greater public dissemination of information regarding OCR enforcement was identified by the Civil Rights Commission as well. CCR 1996 REPORT, *supra* note 9, at 205.
70. *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993).
71. *Davis v. Monroe Country Bd. of Educ.*, 119 S. Ct. 1661 (1999).
72. See Losen and Welner, this volume.
73. OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, 1998 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORT, PROJECTED VALUES FOR THE NATION at 1 (2000) (available on request from the Office for Civil Rights; data on file with author).
74. National Center for Education Statistics, *The Nation's Report Card: Mathematics 2000* at 59 (2001).
75. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading Highlights 2000* at 6 (2001).
76. See Beth Harry et al., this volume. African American boys may be especially vulnerable to discrimination across a wide range of educational practices. See, Theresa Glennon, *Knocking Against the Rocks: Evaluating Institutional Practices and the African-American Boy*, 5 J. HEALTH CARE L. & POLY 601 (2002).
77. Increasing OCR's Impact: Draft Report of the Chicago Office Minorities and Special Education Team 37-42, 45-6 (June 30, 1999)(on file with author).
78. Office for Civil Rights, Fiscal Year 1999 Annual Report to Congress, [1999 OCR Annual Report].
79. CCR 1996 REPORT, *supra* note 9, at 207-08.
80. This performance review process was explained to the author by Megan Whiteside Shafer.
81. The 1999 OCR Annual Report, *supra* note 78, describes the goal of 40 percent allocation of staff time to proactive enforcement activities. Some staff reported that complaint investigations and monitoring often consumed closer to 80 percent of the time of regional enforcement staff. In addition, some staff complained that there was simply too much work given the number of staff available. Certainly, OCR increased its handling of complaints and conducting of compliance reviews between fiscal years 1993 and 1999. In fiscal year 1993, OCR had 854 full-time equivalent employees in action. Those employees received approximately 5,090 complaints, resolving 4,484 of those complaints, and initiated approximately eighty-nine compliance reviews during that fiscal year. By fiscal year 1999, OCR staff had diminished to 737 full-time equivalent employees. They received 6,628 complaints, resolved 5,369, and initiated seventy-six compliance reviews. *Id.* Because OCR does not provide further information about the degree of staff time required for its various activities, it is difficult to determine whether staff shortages unduly restrict the agency's ability to pursue a more effective approach to protecting minority students from misuse of the special education system, but the adequacy of its staffing levels requires careful scrutiny.
82. The limitations on public education and outreach were reported in CCR 1996 REPORT, *supra* note 9, at 213-14.
83. Some of the information in this section is based on conversations with Megan Whiteside Shafer and current OCR staff who wished to remain anonymous.
84. See also, CCR 1996 REPORT, *supra* note 9, at 213-15.
85. *Id.* at 214-15.

86. Minorities and Special Education, Measuring Impact of OCR Compliance Reviews: A Recommended Approach developed by OCR's Minorities and Special Education National Network 1 (undated memorandum)(on file with author).
87. *Id.* at 2-3.
88. Increasing OCR's Impact, *supra* note 77.
89. For example, some of the OCR staff who wanted to attend the Civil Rights Project Conference on Minority Issues in Special Education, a topic clearly relevant to their work, informed me that they were unable to receive the funding to attend.
90. The information available through the CIS II is described in the CCR 1996 REPORT, *supra* note 9, at 215.
91. Telephone call with Nicole Huggins, July 21, 2000.
92. 2000 OCR Annual Report, *supra* note 60.
93. CCR 1996 REPORT, *supra* note 9, at 215.
94. Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 89, 128 (Bernard Grofman, ed. 2000)

I am especially grateful to Megan Whiteside Shafer for her significant assistance in conducting this analysis of OCR's enforcement activities regarding minorities in special education. Ms. Shafer was on the staff of the OCR Enforcement Office in Philadelphia for five years. She personally conducted compliance reviews concerning minorities in special education and participated in the OCR national network related to the issue and generously shared her expertise and experiences with me.

