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## Racial Perspectives on Eligibility for Special Education for Students of Color Who are Struggling, is Special Education a Potential Evil or a Potential Good?

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# RACIAL PERSPECTIVES ON ELIGIBILITY FOR SPECIAL EDUCATION: FOR STUDENTS OF COLOR WHO ARE STRUGGLING, IS SPECIAL EDUCATION A POTENTIAL EVIL OR A POTENTIAL GOOD?

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## INTRODUCTION

The thirty-fifth anniversary of the Individuals with Disabilities Education Act (IDEA) is largely cause for celebration. In November of 2010, the House of Representatives passed a resolution to recognize this anniversary, proclaiming that the law extends “the promise of full participation in society of children with disabilities.”<sup>1</sup> The Secretary of

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Education, Arne Duncan, declared,

for thirty-five years, IDEA has guaranteed students with disabilities their civil right to a free, appropriate public education . . . . The law was a major civil rights victory. We must never lose sight of the history here. In 1975, [when the legislation was enacted,] more than one million children with disabilities were being turned away from school altogether.<sup>2</sup>

As a result of this legislation, such children are now guaranteed the right to education under federal law.<sup>3</sup>

Duncan pointed to some of IDEA's additional accomplishments: "Today, students with disabilities are learning alongside their peers. Ninety-five percent of students with disabilities attend a neighborhood school. Sixty percent of them spend at least 80 percent of their day within the regular school environment."<sup>4</sup>

Duncan also cited "progress on outcomes. In 2007, nearly 60% of students with disabilities graduated high school with a regular diploma. That's almost twice the percentage just twenty years earlier. Almost half of students with disabilities enroll in post-secondary education."<sup>5</sup>

Indeed, IDEA guarantees students who qualify for services a "free appropriate public education,"<sup>6</sup> which must be provided in the "least restrictive environment,"<sup>7</sup> and afford them access to the general curriculum to the "maximum extent possible."<sup>8</sup> Since 1990, the law has also required that classified students receive highly individualized "transition services" to help them make the leap from the school environment to the world that awaits them after graduation.<sup>9</sup>

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School of Education, University of Rochester. B.A. Oberlin, J.D. New York University. Above all, I am grateful to my colleagues at the Empire Justice Center, particularly Jane Gabriele, Bryan Hetherington, and Trilby de Jung, for helping me to work on, and think about, special education cases. I am also grateful to Michael A. Schwartz, James E. Ryan, Mark C. Weber, Joseph B. Tulman, Margaret J. McLaughlin, Ruth Colker, and Torin Togut, for their valuable input, and to Kayann Williams and Shaina Kovalsky for excellent research assistance. Special thanks to Mary Helen McNeal, Juan Cartagena, and Kara S. Finnigan for their ongoing support and encouragement. This Article is dedicated to Denise C. Morgan and her legacy.

1. H.R. Con. Res. 329, 111th Congress (2010).

2. Arne Duncan, Secretary, U.S. Dep't of Educ., Fulfilling the Promise of IDEA: Remarks on the 35th Anniversary of the Individuals with Disabilities Education Act, ED.GOV (Nov. 18, 2010), *available at* <http://www.ed.gov/news/speeches/fulfilling-promise-idea-remarks-35th-anniversary-individuals-disabilities-act>.

3. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006).

4. Duncan, *supra* note 2.

5. *Id.*

6. § 1412(a)(1).

7. § 1412(a)(5)(A).

8. §§ 1400(c)(5)(A), 1414(d)(1)(A)(i).

9. §§ 1400(c)(14), 1414(d)(1)(A)(i)(VIII).

To be sure, the legislation's promise has not always been realized—many guarantees remain under-enforced, and a wide gap in academic outcomes still separates special education students from their general education peers.<sup>10</sup> Nevertheless, any perceived shortcomings in the law have not stopped parents—particularly educated and affluent parents, who are often white—from seeking eligibility for their children.<sup>11</sup> As more and more parents seek services, school districts have attempted to “stem the tide” by viewing eligibility more restrictively.<sup>12</sup>

Generally speaking, to be found eligible for services under the IDEA, “a child must show three things . . . : 1) an enumerated impairment which 2) adversely affects educational performance, and creates 3) a need for special education and related services.”<sup>13</sup> In arguing that students with “moderate” impairments should not be found eligible, school districts have often pointed to the second prong in asserting that only abject education failure should be seen as satisfying the “adverse impact” test. Some courts have agreed, but others have refused to read this language so restrictively.<sup>14</sup> In the latter circumstance, parents have prevailed in establishing that their child is entitled to special education under the IDEA.

Against this backdrop of parents resolutely pursuing services and school districts aggressively pushing back, a completely different dynamic has been introduced by the “disproportionality perspective.” This perspective looks critically at the fact that students of color are over-represented in special education on a national scale. For example, although 15% of students nationwide are African-American, African-American children comprise 20% of the special education population.<sup>15</sup>

The disproportionality perspective turns the aforementioned paradigm on its head. Rather than parents pursuing services and districts resisting, the disproportionality thesis posits that it is schools that are unjustifiably

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10. See Alfredo J. Artiles et al., *Justifying and Explaining Disproportionality, 1968-2008: A Critique of Underlying Views of Culture*, 76 EXCEPTIONAL CHILD. 279, 292 (2010).

11. See Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1150, 1166 (2007); see also Daniel J. Losen & 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, 419 (2001) (explaining that special education is “use[d] by white parents to gain additional resources and advantages for their children”).

12. Hensel, *supra* note 11, at 1150-51.

13. *Id.* at 1163.

14. See *id.* at 1170-72; see also Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 116-17 (2009).

15. Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL'Y L. 181, 184 (2009).

pushing students of color toward special education, whereas parents are resisting (or should be resisting) such classification to avoid the stigma and lower academic outcomes associated with special education. Under this view, fewer students of color should be found eligible for special education, so that such students are no longer classified disproportionately to their numbers.

This Article argues that, while the disproportionality perspective makes valuable contributions to our understanding of the issues facing students of color, the perspective is of limited utility, particularly in urban districts, where the vast majority of students are often students of color. In such districts, students with disabilities need all the help they can get, and special education can potentially serve as a valuable source of educational services and rights. Because large urban districts contain so many students who truly need services, students of color might well be *under*-represented, rather than over-represented, in special education. Given this phenomenon, therefore, special education eligibility should be afforded the most generous interpretation, as intended by Congress.

#### I. THE DISPROPORTIONALITY PERSPECTIVE EXAMINED

In stark contrast to the glowing view of special education espoused by Arne Duncan, those concerned with disproportionality view special education with suspicion and even with outright hostility. Arguing that students of color are already subjected to greater scrutiny and lower expectations than other students, disproportionality adherents contend that special education imposes the additional burden of stigmatization, with the result that these students are doubly disadvantaged.<sup>16</sup> Furthermore, academic outcomes for students with disabilities fall substantially below outcomes for non-classified students, leading to skepticism among disproportionality adherents that students of color will truly benefit from special education.<sup>17</sup> Thus, for those who subscribe to the disproportionality perspective, the perception of special education is far more negative than the rosy view articulated by Duncan.

This perception is firmly grounded in the historical reality; whites and blacks were historically treated completely differently in the special education process. Whereas white students who received special education were often the subject of a beneficent impulse, African-American students were placed in special education almost as a punishment, with the aim not of helping them but of keeping them away from whites.<sup>18</sup> In the wake of

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16. See, e.g., Losen & Welner, *supra* note 11, at 427.

17. See, e.g., Artiles et al., *supra* note 10, at 296; Vallas, *supra* note 15, at 192-96.

18. See Artiles et al., *supra* note 10, at 296; Vallas, *supra* note 15, at 192-96.

*Brown v. Board of Education*,<sup>19</sup> school districts hostile to integration used special education as a means to exclude students of color, explaining in condescending terms that “retarded Negroes should be given special attention in classes for slow children, so they would not burden the regular classes.”<sup>20</sup> With such patently offensive and discriminatory behavior still fresh in recent memory, disproportionality adherents strongly suspect that institutionalized racism drives the special education referral process today. The adherents argue that students of color are taught disproportionately by white teachers, and when students of color deviate from “white norms” in the classroom, either academically or behaviorally, teachers who are culturally insensitive interpret the deviation as a deficiency that should be addressed through special education.<sup>21</sup> Since the referral process is tainted by racism, according to the disproportionality perspective, students of color are erroneously found eligible for special education, with the consequence that eligibility standards should be tightened.<sup>22</sup>

## II. THE LIMITATIONS OF THE DISPROPORTIONALITY PERSPECTIVE: A CRITIQUE

To help students of color succeed without having to resort to special education, disproportionality adherents propose a range of other supports, both educational and non-educational. In the education arena, early intervention supports and early childhood programs can stave off the need for special education in many instances.<sup>23</sup> Thinking more broadly, devoting resources to improving health care and stemming lead poisoning in children can similarly avert the need for special education.<sup>24</sup> Whether or not one fully agrees with the disproportionality perspective, these proposed interventions make a great deal of sense and should be pursued without hesitation.

In the eligibility arena, however—i.e., the question of whether fewer students of color should be found eligible for special education—the disproportionality perspective is less helpful, and arguably misses the mark,

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19. 347 U.S. 483 (1954).

20. Vallas, *supra* note 15, at 194.

21. Artiles, *supra* note 10, at 286; Carla O’Connor & Sonia DeLuca Fernandez, *Race, Class, and Disproportionality: Reevaluating the Relationship Between Poverty and Special Education Placement*, 35 EDUC. RES. 6 (2006); Vallas, *supra* note 15, at 189.

22. See, e.g., Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005); Vallas, *supra* note 15, at 202-05.

23. See, e.g., Vallas, *supra* note 15, at 198-99.

24. See, e.g., Artiles, *supra* note 10, at 283 (“[Solutions] must also focus on . . . meso and macro levels . . .”).

for the reasons explained below.

*A. The benefits of special education*

At its core, special education is a governmental benefit affording students access to educational services. Moreover, the rights conveyed are both singular and, potentially, extremely meaningful. Children who are found eligible under IDEA are afforded “a status that, unlike being served under section 504, NCLB, or Title I, gives the children clear rights to appropriate education and gives their parents explicit procedural protections to enforce those rights.”<sup>25</sup> Indeed, “at the present time, the only [educational] system that confers an entitlement to services and the procedural protections to enforce the entitlement is the special education system.”<sup>26</sup> And these procedural protections are particularly helpful when classified students are subjected to disciplinary proceedings.<sup>27</sup>

Granted that the African-American experience with special education pre-IDEA was often horrific, the rights conferred by IDEA have potentially changed the landscape.<sup>28</sup> Disproportionality adherents often point to the gap in academic outcomes between regular education and special education in arguing that students of color should not be consigned to a system that produces inferior results.<sup>29</sup> A true test of whether special education is beneficial, however, would ask whether *similarly situated* students who were struggling would do better if found eligible for services. If students with disabilities are denied services, “no explanation is offered as to how the status quo is likely to change outcomes for these children.”<sup>30</sup> In other words, while a classified student’s academic performance might fall short of her general education peers, her performance might well be higher than if she were to remain in general education with no supports.

Indeed, special education services often benefit students of color.<sup>31</sup> If

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25. Weber, *supra* note 14, at 102.

26. *Id.* at 149; *see also* Hensel, *supra* note 11, at 1178-79 (explaining the process of eligibility for special education services).

27. *See* Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 322-23 (2011) (identifying the exceptions in school discipline procedure created for special education students).

28. *See* Donald L. MacMillan & Daniel J. Reschly, *Overrepresentation of Minority Students: The Case for Greater Specificity or Reconsideration of the Variables Examined*, 32 J. SPECIAL EDUC. 15, 23 (1998) (positing that there is less likelihood of overt discrimination in the post-IDEA world because, in contrast with the pre-IDEA paradigm, “the specific diagnostic category into which a given child is placed has no specific programmatic or placement consequences”).

29. *See, e.g.,* Vallas, *supra* note 15, at 192 (showcasing the harmful results that African American students can face from special education programs, including high drop-out rates, higher teen birth rates, and higher felony conviction rates).

30. Hensel, *supra* note 11, at 1200.

31. *See, e.g.,* MacMillan & Reschly, *supra* note 28, at 23 (“we must be . . . on

their outcomes fall below general education outcomes, one must ask whether the outcomes would be worse still if eligibility were denied. And in a number of cases, special education supports have not simply enabled students of color to avoid failure, but to achieve dramatic educational success.<sup>32</sup>

To be sure, if eligibility for services results in overly restrictive placements (and this danger still persists for students of color),<sup>33</sup> the benefits of classification could be erased. Yet inappropriate placements are not the fault of the law; rather, since IDEA calls for appropriate placements in the least restrictive environment, inappropriate placements are the result of the misapplication or inadequate enforcement of the law. As explained below, if parents of color are fully empowered, they will be able to insist upon appropriate implementation of the law and thus reap the benefits of IDEA.

If parents of color are able to unleash the law's power, the potential benefits to their children strongly suggest that IDEA eligibility should be not constrained for these students. Furthermore, if students of color receive *appropriate* services disproportionate to their numbers, the end result could well be a disproportionate *benefit* that is conferred, rather than a disproportionate harm.

*B. The limitations of the disproportionality perspective in segregated urban school systems*

While disproportionality comparisons at the national level are instructive (looking at the percentage of students who are classified overall), fundamentally, disproportionality must be measured at the school district or school level. Eligibility determinations are made at the school district level, and "true disproportionality" only arises, as a statistical matter, if students of color within a given school or school district are classified at a higher rate than white students.<sup>34</sup>

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guard to prevent the *denial* of access to services for which [students of color] do qualify and from which they are likely to benefit . . ."); see also Kenneth A. Anderson & Camelia I. Sadler, *The Effects of School-Based Curricula on Reading Achievement of African American Males in Special Education*, 78 J. NEGRO EDUC. 333, 334-36 (2009) (proposing new methods for boosting reading achievement of African-American students in special education, proceeding from the assumption that, if correct approach is employed, such students can reap benefits from special education).

32. My support for this proposition is drawn largely from my own cases, but for more support see MacMillan & Reschly, *supra* note 28, at 22 (the programs and services available to classified students, including students of color, under IDEA "on the surface appear ideal").

33. See Torin Togut, *The Gestalt of School-to-Prison Pipeline: The Duality of Over Representation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U. J. GENDER SOC. POL'Y & L. 163 (2011).

34. See Hensel, *supra* note 11, at 1161-62; Weber, *supra* note 14, at 144-45



Large urban school districts, however, are growing increasingly segregated, which means that, as a statistical matter, disproportionality concerns are becoming increasingly irrelevant. Put another way, disproportionality concerns only come into play when students of color are treated differently, or are perceived to be treated differently, than white students in the classification process. In a school in which 15% of the students were African-American, one would be greatly alarmed if African-Americans comprised 98% of the special education population. But in a school in which 95% of the students were African-American, a special education population that was 98% African-American would not be statistically significant.

Sadly, the move toward total segregation is becoming the rule, not the exception, in urban school systems throughout America. In the Detroit school system, 96% of students are African-American or Latino.<sup>35</sup> In Hartford, the figure is 95%; in Newark, 91%; and in Chicago, 89% of students are African-American or Latino.<sup>36</sup> Indeed, “in 2006-2007, about 40% of black children and 40% of Latino children attended schools where 90-100% of their classmates were black or Latino.”<sup>37</sup> For school districts that contain virtually no white students, there is no basis for comparing special education classification rates along racial lines, and the disproportionality perspective loses its moorings. Nevertheless, state education departments continue to monitor and scrutinize disproportionality in such districts,<sup>38</sup> when their energies might be better directed at fostering greater opportunities for racial integration between these districts and their suburban neighbors.<sup>39</sup>

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(describing IDEA provisions which require states to monitor disproportionality at the school district level); *see also* Togut, *supra* note 33, at 166-68 (describing statistical issues affecting the disproportionality inquiry).

35. Susan Eaton, Research Director at Charles Hamilton Houston Inst. for Race & Justice, *Still Separate, Still Unequal: Race, School, and Solutions for the 21st Century*, Presentation at Harvard Law School Symposium: Passing the Torch: The Past, Present, and Future of Interdistrict School Desegregation (Jan. 17, 2009).

36. *Id.*

37. *Id.* at 8 (citing GARY ORFIELD, CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE (2009), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>).

38. *See, e.g.*, Memorandum from the N.Y. State Educ. Dep’t, to District Superintendents re: IDEA Part B State Performance Plan 2005-2010, at 5 (Dec. 2005) (on file with author) (detailing the NYSED’s plan to monitor school district data for disproportionality).

39. *See, e.g.*, An Act Enhancing Educational Choices and Opportunities, Pub. L. No. 97-290, 1997 CONN. ACTS 1113 (codified as amended in scattered sections at CONN. GEN. STAT. § 10-4 *et seq.* (2011)) (providing that Connecticut adopts measures to further “the educational interests of the state,” including the aim of “reduc[ing] racial, ethnic, and economic isolation” between neighboring school districts).

*C. The referral process for students of color is driven, by and large, not by racism, but by legitimate concerns on the part of teachers and parents*

As noted above, disproportionality adherents ascribe special education referrals to the cultural insensitivity of teachers, who relegate students of color to special education when they depart from “white norms” in academics or behavior. While this certainly might have been the case historically, there is less evidence today that racism is the motivating factor underlying the referral of students of color to special education. Rather, according to a detailed survey of teachers by the Indiana Disproportionality Project, teachers

almost universally viewed [special education] as a valuable, and sometimes the only, resource for students with learning and behavior problems. If anything, teachers preferred to err on the side of over—rather than under—referral, in order to ensure that needy students received any and all resources they might qualify for.<sup>40</sup>

Indeed, teachers “viewed the availability of special education in a highly positive light, almost a lifeline in the face of a general scarcity of resources.”<sup>41</sup> Thus, recognizing that, as described above, special education can potentially confer a powerful set of services and rights, teachers who refer students of color to special education are often seeking to maximize benefits for these students, rather than seeking to punish or harm them.

Similarly, disproportionality concerns are seriously undercut when it is parents of color themselves who are seeking special education services for their children. The Indiana study found that, in response to pressures imposed by standardized testing, parents of color sought special education services for their children at a greatly increased rate.<sup>42</sup> And anecdotally, the parents of color I have represented have invariably sought special education services for their children, as opposed to seeking to block the provision of services.<sup>43</sup>

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Professor Margaret J. McLaughlin has observed insightfully that special education in urban districts most clearly confers a benefit when it is linked to a successful regular education program. Margaret J. McLaughlin, Prof., Assoc. Dir., Inst. for the Study of Exceptional Child., Dep’t of Special Educ., Univ. of Md., Address at Keeping the Needs of Students with Disabilities on the Agenda: Current Issues in Special Education Advocacy Symposium (Feb. 25, 2011). To ensure that special education is truly beneficial for urban students, it is imperative that urban districts be capable of delivering a quality education overall. Toward this end, instituting parity in funding between urban and suburban districts can help. *See, e.g., Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

40. RUSSELL J. SKIBA ET AL., THE CONTEXT OF MINORITY DISPROPORTIONALITY: LOCAL PERSPECTIVES ON SPECIAL EDUCATION REFERRAL 43 (2003).

41. *Id.* at 31.

42. *Id.* at 23.

43. To be sure, stigma does sometimes arise as an issue, especially for older children, but the desire for support services almost always “trumps” this concern for

Indeed, while justifiably controversial in many respects, the recent documentary *Waiting for "Superman"* seems unassailable on the point that many African-American and Latino parents in urban districts are fully engaged in seeking better educational opportunities for their children.<sup>44</sup> In light of the potentially powerful benefits of special education described above, it seems reasonable to assume that such parents will seek out special education if their children would be likely to benefit.

By assigning the "blame" for special education referrals to schools and failing to acknowledge a grass-roots endeavor among parents of color to reap the benefits of special education, the disproportionality perspective might unwittingly have a "disempowering effect" upon such parents. The call to resist special education services seems misdirected, when it is parents themselves who are demanding them.

### III. CASE STUDIES ON ELIGIBILITY FOR SPECIAL EDUCATION

In light of the observation that special education can provide valuable services and rights to students of color, and in view of the fact that parents of color who seek such services are often rebuffed, I contend that *under-representation* in special education poses the greatest risk to students of color—not under-representation in comparison to white students, but under-representation in comparison to the percentage of African-American and Latino students who truly need and could benefit from special education services. Indeed, "one prominent critic of over-representation concedes that 'in high-poverty districts, strict numeric proportionality may mean that some children in need are not receiving services.'"<sup>45</sup> The two case studies presented below illustrate this phenomenon.

These case studies involve students of color in the Rochester City School District who sought special education and were initially denied. I represented both students, and while both were eventually classified, they each encountered substantial obstacles. These cases illustrate the injustice that can result when students of color are denied special education services for which they clearly qualify.

With a demographic profile that resembles Chicago, Rochester is a

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parents and students.

44. See Diane Ravitch, *The Myth of Charter Schools*, THE N.Y. TIMES REV. OF BOOKS, Nov. 11 2010, <http://www.nybooks.com/articles/archives/2010/nov/11/myth-charter-schools.html> (reviewing WAITING FOR SUPERMAN (Electric Kinney Films, Participant Media, Walden Media 2010)) (discounting many of the film's claims and emphasizing the need for fact checking).

45. Weber, *supra* note 14, at 151 n.312 (quoting Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUITY IN SPECIAL EDUCATION 219, 235 (Daniel J. Losen & Gary Orfield eds., 2002)).

highly segregated district, both racially and economically. Approximately 87% of students are African-American or Latino, and 82% of students qualify for free or reduced lunch.<sup>46</sup> The academic outcomes for all students in the district are among the lowest in the state,<sup>47</sup> and academic performance for classified students is even lower.<sup>48</sup> Nevertheless, the students profiled here suffered in the absence of special education services, and they benefitted when services were finally provided.

#### A. Case Study One: "Anjelica B."

"Anjelica" was an African-American teenager who experienced significant psychological turmoil, which prevented her from functioning in school. Although she sat quietly in the classroom, she was failing all of her classes, for her psychological issues prevented her from focusing on her work. She lived with her grandmother, who was her legal guardian and sought special education to provide support for Anjelica's psychological and academic needs.

In seeking to have Anjelica classified as "emotionally disturbed," we submitted a statement from her psychiatrist, "Dr. L." In this statement, Dr. L. found that Anjelica was abused as a child and, consequently, suffered from Post-Traumatic Stress Disorder. This diagnosis had remained consistent over the previous four years. In Dr. L.'s view, Anjelica was

externalizing behavior which I believe has been a maladaptive response to the core difficulty of Post-Traumatic Stress Disorder . . . . She has been unwilling to participate fully in therapy due to her *own protective hyper vigilance, stemming from early abandonment and betrayal*. She has a history of *hearing intrusive voices and having flashbacks associated with her abuse*. At her cognitive level of development she is unable to discern who can be trusted so she turns to a hyper vigilant stand towards everyone. *This distortion contributes significantly to her poor social judgment, i.e., associating with people who can easily lead her into a path of motherhood and even criminality.*<sup>49</sup>

Recently, Anjelica had issued suicidal threats that required hospitalization. Because she left her grandmother's house at night and

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46. N.Y. STATE EDUC. DEP'T, THE NEW YORK STATE DISTRICT REPORT CARD: ACCOUNTABILITY AND OVERVIEW REPORT 2008-09 3 (2010), *available at* <https://www.nystart.gov/publicweb-rc/2009/2b/AOR-2009-261600010000.pdf>.

47. See *Paynter v. State*, 797 N.E.2d 1225, 1228-29 (N.Y. 2003) (recognizing that New York State cannot be forced to remedy the de facto segregation existing between city schools and suburban schools, even if this segregation and poverty concentration has contributed to the "inadequate educational results" in the Rochester school district).

48. See *J.G. v. Bd. of Educ.*, 193 F. Supp. 2d 693, 705 (W.D.N.Y. 2002) (acknowledging allegation of "devastatingly poor results on standardized tests taken by special education students in the Rochester City Schools").

49. Statement by Dr. L. (on file with author) (emphasis added).

engaged in dangerous behavior, the Family Court placed her in a non-secure detention facility in Rochester. She lived there and attended school there, and she appeared to respond well to the high level of support and structure in that school.

Remarkably, despite the seemingly dramatic evidence of psychological trauma and the direct proof that Anjelica would benefit from a highly supportive educational setting, the Rochester School District refused to find her eligible for special education. Instead, it pointed to her non-threatening demeanor when she had attended classes and argued that she was capable of working and simply chose not to work.

We maintained that her psychological issues completely interfered with her ability to function in the classroom, and we filed for an impartial hearing to overturn the Individualized Education Program (IEP) team's finding of non-eligibility. While our request was pending, however, the Family Court transferred Anjelica to a more secure detention facility, which was located in a different school district. Because of the change in location, the Rochester School District no longer had jurisdiction over her special education case, and Anjelica no longer had standing to pursue an impartial hearing in Rochester City.

Fortunately, however, the detention facility maintained its own "in-house IEP team," which promptly classified Anjelica as eligible for special education and provided her with a range of supports. Anjelica's grandmother reported that, while she was initially upset by the Family Court's decision to place Anjelica in the new facility, she was ultimately pleased by the outcome, and Anjelica was responding well to the special education supports.

#### *B. Case Study Two: "Antonio C."*

"Antonio" was a Latino fourth-grade student who had recurrent seizures in the classroom, spelled and wrote at a first-grade level, was required to repeat the second grade, and experienced difficulties with speech, including stuttering.<sup>50</sup> Two evaluation teams, one from a hospital-based team that performed an independent evaluation and one from the district's school team, opined that Antonio was indeed disabled within the meaning of IDEA, and they recommended that he be found eligible for special education.<sup>51</sup> These recommendations, however, were rejected by the district's IEP team, which determined that he was not eligible.<sup>52</sup> We

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50. *Corchado ex rel. Corchado v. Bd. of Educ.*, 86 F. Supp. 2d 168, 170 (W.D.N.Y. 2000). Although the family did not seek to proceed anonymously, I am using fictitious first names to afford the family as much privacy as possible.

51. *Id.* at 170-71.

52. *Id.* at 171.

challenged this decision through litigation, but the IEP team's decision was upheld by an Impartial Hearing Officer (IHO) and the State Review Officer (SRO).

The IHO and SRO both found that Antonio was ineligible for special education because, in their view, his acknowledged disabilities did not have an "adverse educational impact," as required under the IDEA eligibility test. Both agencies employed a "classroom peer" definition of adverse impact (i.e., they asked whether Antonio's performance fell below that of his classmates). In appealing to federal court, we argued that this was the wrong standard, and that adverse impact should be determined on an individualized basis (i.e., by asking whether a student's disabilities have depressed his or her academic performance, relative to his or her expected performance).

Antonio's seizure disorder was particularly serious, and it clearly affected him in the classroom. All of the teachers who testified at the impartial hearing reported that they had witnessed seizures. These seizures ranged from relatively "silent" episodes where Antonio appeared "spaced-out" and unable to focus to episodes where Antonio went limp and had to be removed from the classroom by wheelchair. For example, one teacher testified,

[O]n many occasions he had silent episodes where the seizures were so unnoticeable that the kids would not notice that he was having a seizure, but he was, I would describe it like *he was spaced out and just staring* for a few minutes and then he would regain his composure and, and then *he wouldn't know what we were talking about in class* so I would repeat, I would repeat what we, we were discussing rather it was math or science or social studies for his benefit.<sup>53</sup>

Our expert witness, Dr. H. from the hospital-based evaluation team, herself, observed a seizure during the evaluation process. During this episode, Antonio's writing hand shook significantly for thirty seconds when he was charged with a writing exercise.<sup>54</sup> Similarly, one of Antonio's teachers reported that his hands shook constantly.<sup>55</sup>

Dr. H. opined that, in addition to those seizures that are witnessed, Antonio could be having additional "silent" seizures which would not be apparent to an observer but which would affect his concentration and absorption of information.<sup>56</sup> She also testified that even seizures of relatively short duration can cause significant disruptions to memory and

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53. *Id.* at 174 (emphasis added).

54. *Id.* at 173.

55. *Id.* at 174.

56. *Id.* at 173-74.

one's ability to focus,<sup>57</sup> and a doctor confirmed that after a two to three minute seizure, Antonio needed to "sleep for the rest of the day."<sup>58</sup>

In federal court, we argued that employing the "classroom peer" test for determining adverse educational impact not only violated the legal standards imposed by IDEA, it also had the effect of discriminating against students with disabilities who happen to attend low-performing schools. Antonio did attend a low-performing school, and denying him access to special education because, in essence, he was performing no less poorly than his classmates, created a double standard for determining special education eligibility: under the administrative agencies' formulation, students in low-performing urban schools must experience far more serious academic failure than students in high-performing suburban schools to be found eligible for special education.

In arguing that the classroom peer standard for measuring adverse impact imposed a double standard for determining special education eligibility, we pointed out that the "average" student in Antonio's school performed far below the "average" student in neighboring suburban schools. On a statewide fourth-grade English Language Arts test, for example, only 19% of fourth-graders in Antonio's school passed—compared with 77% and 85%, respectively, in two nearby suburban schools.

We argued that if Antonio had attended these suburban schools, his seizure disorder and first-grade academic performance in spelling and writing would surely have stood out, and his eligibility for special education under a classroom-peer definition would be assured. In his inner-city school, however, a student who consistently failed his spelling tests could apparently still be considered "average" when compared to his classroom peers—for, as Antonio's teacher testified, "He's not the only one, *I have other children that are failing spelling . . .*"<sup>59</sup> A teacher also reported that Antonio takes "a long time to complete assignments and daydreams," but that "is not significantly different from *all . . . [the] other students*" in the class."<sup>60</sup>

If urban students with disabilities are denied special education because their nondisabled classroom peers are also failing, we argued, the students with disabilities will fall further and further behind, and will be deprived of the assistance needed to graduate from high school. In our view, the

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57. *Id.* at 173.

58. Transcript of Record, Volume One, at 73, *Corchado*, 86 F. Supp. 2d 168.

59. Transcript of Record, Volume One, at 69, *Corchado*, 86 F. Supp. 2d 168 (emphasis added).

60. Transcript of Record, Volume One, at 15-16, *Corchado*, 86 F. Supp. 2d 168 (emphasis added).

discriminatory effects of employing a “classroom peer” eligibility test reinforced the importance of instead applying the proper, individualized tests for determining special education eligibility.

Fortunately, the District Court agreed and issued a decision embracing our call for an individualized approach to determining adverse impact.<sup>61</sup> Antonio’s seizure disorder and other disabilities, the court found, clearly affected *his* classroom performance and prevented him from being academically successful.<sup>62</sup> This federal decision has been well-received among scholars who believe that special education eligibility should be construed generously.<sup>63</sup> On remand to the IEP team, Antonio was classified as eligible for special education services. He was provided with a range of “inclusion supports” to help him succeed without removing him from the regular classroom, and his parents reported that these supports were beneficial.

### C. Lessons from the case studies

In reflecting upon Anjelica’s case, a refusal to classify students with significant psychological issues is a systemic problem that is not confined to urban districts.<sup>64</sup> Particularly where students are not “acting out” in the classroom and their psychological issues are more internalized, it is often very difficult to convince school districts, whether urban or non-urban, that an affected student’s academic failure is due to mental illness or emotional turmoil, rather than a “bad attitude.”

Nevertheless, the inability of urban students in particular, to access essential therapeutic supports might well have a disparate impact on students of color. To the extent that race is correlated with poverty or with residing in a high-poverty neighborhood,<sup>65</sup> the emotional and psychological

61. *Corchado*, 86 F. Supp. 2d at 176.

62. *Id.* (emphasis added).

63. See, e.g., Hensel, *supra* note 11, at 1171-72.

64. *Id.* at 1164 n.115 (citing Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 303 (1993)) (“Notwithstanding the IDEA and efforts by the United States Department of Education, fewer than one-half of this nation’s children with serious emotional disabilities are being identified and provided special education services.”); Lucy W. Shum, *Educationally Related Mental Health Services for Children with Serious Emotional Disturbance: Addressing Barriers to Access Through the IDEA*, 5 J. HEALTH CARE L. & POL’Y 233, 233-34 (2002) (“[M]any factors contribute to the under-identification and inconsistency in identification of children with [Serious Emotion Disturbance].”).

65. See, e.g., Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in LAW SCHOOL AND REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 205, 229-30 (Jay P. Heubert ed., 1999) (noting the high poverty rate among minorities and explaining that higher rates of disabilities are expected because lack of prenatal care, low birth weight, and exposure to lead, all strongly correlated to disability, are far more likely among the poor).



stressors that often accompany poverty mean that students of color are more likely to need and qualify for therapeutic supports. Students who cannot access such supports can easily spiral downward, with disastrous results for their academic performance and future life prospects.

In both Anjelica and Antonio's cases, we also see evidence of an urban system's fear of the "slippery slope": where so many students potentially have serious obstacles in their lives, districts try to draw a line in the sand, lest they are overwhelmed with special education students. The districts are also "responding to state education department regulators who are eager to decrease the number of special education children by any means possible."<sup>66</sup> Yet, as clearly shown in Antonio's case, it is patently unfair (and unjustly imposes a double standard for eligibility *vis-a-vis* suburban students) to deny services to urban students with disabilities just because their non-disabled peers are having difficulty too. The harm to these students if they are not provided with services is paramount and should outweigh any concerns about "keeping the special education numbers down" to a manageable level.<sup>67</sup>

#### IV. A RECOMMENDATION FOR REFORM

To ensure that students of color in urban districts receive the supports to which they are entitled, the federal court's approach in Antonio's case should be widely adopted. Whereas that court viewed eligibility from the affected individual's perspective and asked whether the student's disabilities had a meaningful impact on his or her educational performance, some courts have required abject academic failure before they will find that a child's disability has had an "adverse impact" on his or her performance.<sup>68</sup> Other courts have essentially required a *substantial* adverse impact before they will find that a child is eligible for IDEA.<sup>69</sup>

Neither approach is justified, either by the plain language of the statute or the intent of Congress. While Congress has at times expressed some concern about the expansion of eligibility, its actions have nevertheless significantly expanded eligibility, through amendments incorporating Attention Deficit Disorder (ADD) within the Other Health Impairment

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66. Weber, *supra* note 14, at 154.

67. See MacMillan & Reschly, *supra* note 28, at 23 ("Efforts to 'correct' overrepresentation by denying services to children of a particular ethnic group that is 'at quota' when one of those children needs the services and supports provided are . . . repugnant and constitute educational malpractice."). It is particularly objectionable to artificially depress the classification rate when, due to poverty, the incidence of actual disability in urban areas is often greater than in non-urban settings. See Hehir & Gamm, *supra* note 65, at 229-30.

68. See Hensel, *supra* note 11, at 1170-72.

69. See Weber, *supra* note 14, at 116-17.

(OHI) classification category and through the addition of the new category of “developmental delays” to the list of qualifying disabilities.<sup>70</sup>

To ensure that eligibility standards in general, and “adverse educational impact” in particular, are given the most generous reading, Congress should declare that the approach in Antonio’s case conforms to the congressional intent. The statutory language need not be changed,<sup>71</sup> rather, Congress can simply declare its intent that the existing language be read broadly.

The recent amendments to the Americans with Disabilities Act (ADA) provide a model for such a congressional declaration. As summarized by Professor Weber,

[t]he ADA Amendments Act, passed in 2008 and effective January 1, 2009, explicitly disapproves the two major Supreme Court cases limiting the coverage of the ADA, and by extension, section 504. It provides that the definition of disability [whose language remains largely intact] ‘shall be construed in favor of broad coverage of individuals,’ and declares that the intent of Congress is ‘that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations,’ rather than whether the claimant’s impairment meets the definition of a disability.<sup>72</sup>

So, too, should Congress declare that IDEA eligibility and “adverse impact” be construed broadly and that the judicial decisions to the contrary be rejected.

### CONCLUSION

Disproportionality adherents remind us that special education is not necessarily a panacea for students of color, and in the not-too-distant past it was anything but. They also rightfully point out that special education should not be the *only* method to help students of color who are struggling. If such students can be helped without resorting to special education, whether through early intervention education strategies or through measures such as eliminating lead poisoning, such steps should always be pursued.

However, when the disproportionality perspective maintains that fewer students of color should be found eligible for special education, the perspective should be questioned. If affluent white parents are beating

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70. See Hensel, *supra* note 11, at 1157-58.

71. See Weber, *supra* note 14, at 152 (arguing, *inter alia*, that the statutory language requiring an adverse impact upon educational performance need not be revised, for the current requirement contains no language that would require a *significant* adverse impact).

72. Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 2, 7 (2010).

down the door to obtain special education services for their children, this door should not be closed to parents of color. While students of color might be over-represented in special education overall, it is *white* students with disabilities who are over-represented in such measures as seeking accommodations for the SAT and in college admissions.<sup>73</sup> This tells us that special education need not be a “dumping ground,” but can provide essential supports enabling students to succeed and enter post-secondary education. Parents of color should demand that their children be found eligible for services and that the same high-level supports sought by white parents be made available to students of color as well. In so doing, they can ensure that the promise of the law—guaranteeing exposure to a high-level curriculum, inclusion supports, and transition services facilitating post-school success—be fulfilled for their children.

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73. See Hensel, *supra* note 11, at 1191 n.239 (citing Daniel J. Losen & 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, 419 (2001)); see also Artiles, *supra* note 10, at 286 (explaining that white students with learning disabilities are over-represented in college admissions compared with non-white students).