

THE NEW IDEA: SHIFTING EDUCATIONAL PARADIGMS TO ACHIEVE RACIAL EQUALITY IN SPECIAL EDUCATION

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INTRODUCTION

Since the landmark decision of *Brown v. Board of Education*¹ mandated desegregation in public schools, African-American students have been re-segregated within public schools through their over-placement in special education classes.² The enforcement of *Brown* coincided with schools classifying African-American students as disabled and placing them in special education classes as a pretense for discrimination.³ The disproportionate identification of African-American children with disabilities for special education under the Individuals With Disabilities Education Act (IDEA)⁴ persists today to the extent that the IDEA is viewed as a tool of racial discrimination and a dumping ground for minority students.⁵ African-American students are identified as disabled under the IDEA in numbers that so exceed their proportion in the general population that the Department of Education considers it a “national problem”⁶ and experts proclaim it a “crisis.”⁷

The long history of African-American overrepresentation in special education is now accompanied by a recent explosion in the overall number of children identified as IDEA-eligible.⁸ The last decade witnessed a 35%

1. 349 U.S. 294 (1954).

2. Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, in DANIEL J. LOSEN & GARY ORFIELD, RACIAL INEQUITY IN SPECIAL EDUCATION 39 (2002) [hereinafter RACIAL INEQUITY]; Lauren Katzman, *Minority Students in Special and Gifted Education*, 73 HARV. EDUC. REV. 225, 226 (2003), available at 2003 WL 55851225 (noting that as early as 1965, certain California school districts allegedly used special education classes as a cover for segregation within schools); see also *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1453-62 (S.D.N.Y. 1985) (holding that “the historically discriminatory operation of the Special Education program continued to have discriminatory effects”).

3. 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, 434 (2001) (“Once desegregation began in earnest . . . schools experienced a wave of second-generation discrimination taking the form of . . . special education placements in substantially separate classrooms.”); Tamara J. Weinstein, Note, *Equal Educational Opportunities for Learning Deficient Students*, 68 GEO. WASH. L. REV. 500, 517 (2000).

4. 20 U.S.C. §§ 1400-87 (1997).

5. See, e.g., Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1242 (1995) [hereinafter Glennon, *The Construction of a Disabled Class*]; Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in Hiring Special Educators*, 2001 BYU EDUC. & L.J. 179, 179 (2001); Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 347 (1999) (discussing that special education classes often become holding operations for minority students and others found intractable in regular classes); Joseph A. Patella, Note, *Missing the “IDEA”: New York’s Segregated Special Education System*, 4 J.L. & POL’Y 239, 256 (1995) (stating that teachers use special education as a dumping ground for poor readers and unruly students); H.R. REP. NO. 108-77, at 153 (2003).

6. Jane Burnette, *Reducing the Disproportionate Representation of Minority Students in Special Education*, ERIC/OSEP Digest #E566 (1998).

7. Marilyn Milloy, *Truth in Labeling*, NEA TODAY, Jan. 2003, at 8 (stating that minority disproportionality in special education is a “crisis”); Donald P. Oswald et al., *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, in RACIAL INEQUITY, *supra* note 2, at 1 (identifying the “crisis in minority student education”); Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REP., Dec. 13, 1993, at 46.

8. James Jeffords, *Foreword*, in RACIAL INEQUALITY, *supra* note 2, at xi (stating that “[s]pecial education enrollments have spiraled in the past decade”); Tara L. Eyer, Comment, *Greater Expectations:*

increase in the number of children served under the IDEA, while school enrollment grew only 14%.⁹ Currently, over six million children are served under the IDEA, or 11.5% of the school-age population.¹⁰ Many of these students are merely “instructional casualties” rather than students with genuine disabilities.¹¹ As former Secretary of Education Rod Paige explains, “[O]ur educational system fails to teach many children fundamental skills like reading, then inappropriately identifies some of them as having disabilities, thus harming the educational future of those children who are misidentified and reducing the resources available to serve children with disabilities.”¹²

In short, the IDEA is suffering an eligibility crisis on two intersecting fronts: African-American overrepresentation and an overall eligibility increase resulting from special education sweeping up students from a broken general education system. Congress’s new IDEA, the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA),¹³ embodies a dramatic educational paradigm shift to resolve these problems. For the first time, Congress has recognized that special education eligibility is directly linked to the general education system. Through the IDEIA, Congress reaches into the general education system to remedy the overidentification crises by legislating a certain level of individualized instruction. This model of individualized instruction in general education departs significantly from the one-size-fits-all educational model embodied in the old IDEA, wherein specialized instruction is exclusively the domain of special education that is provided only to disabled children. The IDEIA favors the individualization model almost out of necessity, as today’s increasingly diverse students require a certain level of individualized instruction in the general classroom. It

How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities, 103 DICK. L. REV. 613, 627 (1998) (stating that “over-identification of children as disabled has become a significant problem in recent years”).

9. COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC. OF THE NAT’L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1-2, 18 (2002) [hereinafter NRC REPORT]; Elena Gallegos, *Thirty Years of Special Education Law: The Long and Winding Road*, 6 SPECIAL EDUC. L. UPDATE 1, 10 (2002); HERT, *supra* note 5, at 376.

10. Lynn Olson, *Enveloping Expectations*, EDUC. WK., Jan. 8, 2004 (indicating that there are 6.6 million children in special education); U.S. DEP’T OF EDUC., ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, xxiii, II-21 (2002) (noting the figures for the 2000-01 school year) [hereinafter 24TH ANNUAL REPORT]. Special education expenditures are estimated at fifty billion or roughly 14% of public education spending. Katzman, *supra* note 2, at 225-39; Thomas Parrish, *Racial Disparities in the Identification, Funding and Provision of Special Education*, in RACIAL INEQUITY, *supra* note 2, at 15.

11. PRESIDENT’S COMM. ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 26 (July 1, 2002) [hereinafter PRESIDENT’S COMMISSION], available at <http://www.ed.gov/inits/commissionsboards/whspecialeducation>; H.R. REP. NO. 105-95, at 89 (1997) (“Today, the growing problem is over identifying children as disabled when they might not be truly disabled.”).

12. H.R. REP. NO. 108-79, at 7 (2003); see also H.R. REP. NO. 108-77, at 137 (“The overidentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students. Worse, the misidentification takes valuable resources away from students who truly are disabled.”).

13. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 (H.R. 1350), 118 Stat. 2647 (2004) (enacted). The IDEIA was signed by President Bush on December 3, 2004.

is better to address diverse needs in the general education classroom than to classify children as disabled and rely on special education to address their unique learning styles, cultural backgrounds, and different abilities. Special education's swelling rolls and the disproportionate representation of African-Americans reveal particular shortcomings of the general education system that the IDEIA seeks to reform.

The IDEIA will inevitably fall short of solving the dual eligibility crisis, however, primarily because its incremental reforms merely adopt—but do not embrace—its new pedagogy. It will not ensure a low level of individualized instruction to all students, as opposed to merely IDEIA-eligible students, and it will not insure that students will receive appropriate services in regular education before placement into special education. The IDEIA simply cannot redefine regular education without first redefining “special education” and who “needs” it in the stagnant thirty-year-old eligibility criteria that the IDEIA employs.¹⁴

Eligibility under the IDEIA and all of its predecessor statutes hinges on finding that the child has an enumerated disability and “needs special education.”¹⁵ The broad definition of “special education”—the adaptation of instructional content, methodology, or delivery—permits some decisionmakers to find that children requiring *any* adaptation to the general education environment need special education and are eligible, while other decisionmakers limit special education to significant and unique adaptations. The nonexistent definition of “need” leads to diverging views as to what level of services a child must be provided in general education before a need for special education is found. With little statutory guidance, decisionmakers apply their own pedagogical beliefs about what constitutes special education and who needs it—resulting in subjective eligibility determinations influenced by bias rather than uniform application of eligibility criteria.

This Article proposes that without fundamental changes to, and a proper understanding of, the “needs special education” eligibility criteria, the educational paradigm adopted in the IDEIA cannot take root, and the eligibility problems will persist. Reclaiming special education from overrepresented African-Americans and instructional casualties and placing it back in the hands of the genuinely disabled cannot occur until special education relinquishes its exclusive grip on individualized instruction, thus allowing certain unique student needs to be served in regular education without IDEIA eligibility attaching. To do so, the definition of “special education” must be limited to only significant instructional adaptations that are not provided to all students, regardless of disability. A child should also not be found to be

14. NRC REPORT, *supra* note 9, at 18, 20.

15. Pub. L. No. 108-446, § 101 (amending § 602(3)). The progenitor of special education law defined an eligible child as one with an enumerated disability that “require[s] special education.” Pub. L. No. 91-230 § 602(a) (1975). The language remained until the 1990 re-authorization of IDEA, which only changed “requires” to “needs.” Pub. L. No. 101-476, § 101(a) (1990). For discussion of the legislative history of the “needs special education” requirement, see Robert A. Garda, *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 491-93 (2004).

in need of special education until all available accommodations and regular education interventions have proven ineffective. These circumscribed definitions prohibit the placement of students into special education if their individual needs can properly be served through general education. The result will be consistent eligibility decisions. It is only by limiting the definition of "special education" and when it is "needed" that general education can be redefined to embrace the paradigm of individualized instruction, and uniformity can be brought to eligibility determinations.

While changing the eligibility criteria alone cannot remedy minority disproportionality and rising special education rolls, it is a necessary first step. Part I of this Article explores the nature of African-American overrepresentation in special education, its negative effects, and its controversial causes. Part II critiques the IDEIA's solutions to its dual eligibility crisis. Part III explores the division in authority interpreting the term "special education" that will persist under the IDEIA and proposes a new definition. Part IV discusses the division in authority interpreting when a child "needs" special education that will continue under the IDEIA and proposes that a child should not be found to be in need of special education until all available regular education interventions and supports have proven ineffective for the child.

I. THE NATURE, HARM, AND CAUSES OF THE DISPROPORTIONATE REPRESENTATION OF AFRICAN-AMERICAN STUDENTS IN SPECIAL EDUCATION

It is beyond dispute that African-Americans are represented in special education disproportionately to their representation in general education.¹⁶ But solutions to African-American overrepresentation cannot be developed without knowing its causes, and its causes cannot be ascertained without understanding its nature. Before assessing the propriety of the IDEIA solutions, it is therefore necessary to explore these issues.

A. *The History and Nature of Disproportionate Representation*

African-Americans have long been overrepresented in special education. Researchers in the 1960s recognized that African-Americans were disproportionately represented in programs for the mentally retarded, emotionally disturbed, and learning disabled.¹⁷ Children in these programs were

16. Congress explicitly found that minority overrepresentation exists when reauthorizing the IDEA in 1997, 20 U.S.C. § 1400(c)(7) (1997), and in the IDEIA, Pub. L. No. 108-446, § 601(c)(9); see also Katzman, *supra* note 2, at 225-39.

17. Mitylene Arnold & Marie E. Lassmann, *Overrepresentation of Minority Students in Special Education*, 124 EDUC. 230, 230 (2003); John L. Hosp & Daniel J. Reschly, *Referral Rates for Intervention or Assessment: A Meta-Analysis of Racial Differences*, 37 J. SPECIAL EDUC. 67, 67 (2003); Theresa Glennon, *The Stuart Rome Lecture Knocking Against the Rocks: Evaluating Institutional Practices and the African-American Boy*, 5 J. HEALTH CARE L. & POL'Y 10, 38 (2002) [hereinafter Glennon, *The*

segregated from the general education population and placed in separate special education classrooms. Minority overrepresentation in these segregated programs persisted through 1975, when Congress passed the IDEA's progenitor, the Education of All Handicapped Children Act (EAHCA).¹⁸ At that time, the mislabeling of students was considered "the major controversy in special education."¹⁹ In response, Congress mandated that the National Academy of Sciences conduct a study on the factors accounting for the overrepresentation of minorities in special education programs for the mentally retarded.²⁰ The resulting 1982 study by the National Research Council (NRC) concluded that African-Americans were represented in the mentally retarded category disproportionate to their numbers in general education.²¹ Between 1978 and 1992, there was no significant change in the statistics establishing disproportional representation of African-Americans in special education.²² By 1992, African-Americans were twice as likely to be classified as mentally retarded as their white peers, and 1.46 times more likely to be classified as emotionally disturbed.²³

African-American overrepresentation did not go unnoticed by federal courts during this time period. In the landmark case of *Hobson v. Hanson*,²⁴ Judge Wright found that African-American students were disproportionately represented in the mentally retarded education track, which denied them equal educational opportunity. In *Larry P. v. Riles*,²⁵ the court enjoined the use of Intelligence Quotient (IQ) tests as part of special education eligibility determinations because IQ tests led to the overidentification of minority students as mentally retarded.

Congress took note of African-American overrepresentation in special education when it reauthorized the EAHCA as the IDEA in 1990.²⁶ But Congress did not formally recognize African-Americans' disproportionate representation until 1997, when it amended the IDEA to expressly provide

Stuart Rome Lecture]; David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 760-61 (1973); NRC REPORT, *supra* note 9, at 22-23.

18. Pub. L. No. 94-142 (1975). NRC REPORT, *supra* note 9, at 18; Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUITY, *supra* note 2, at 219. The EAHCA has been amended and renamed numerous times, including in 1977, 1983, 1986, 1988, 1990, 1991, 1994, and 1997. 20 U.S.C. § 1400 (1997).

19. H. GOLDSTEIN ET AL., 2 ISSUES IN CLASSIFICATION OF CHILDREN 4-61 (Nicholas Hobbs ed. 1975).

20. NRC REPORT, *supra* note 9, at 18.

21. NRC REPORT, *supra* note 9, at 1; Losen & Welner, *supra* note 3, at 41.

22. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1251; Shapiro et al., *supra* note 7.

23. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1252; see also Donald Lash & Jennifer Weiser, *Disproportional Representation*, 96 PLI/NY 299, 320-22 (2001).

24. 269 F. Supp. 401, 442, 448, 456-57, 514 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1968).

25. 495 F. Supp. 926, 942-44, 955-56 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (discussed in Kirp, *supra* note 17, at 705 n.226); see also *Diana v. State Bd. of Educ.*, C-70-37 RFP (N.D. Cal. 1970) (discussed in Herr, *supra* note 5, at 337 n.42); *Covarrubias v. San Diego Unified Sch. Dist.*, No. 70-394-T (S.D. Cal. July 31, 1972) (discussed in Herr, *supra* note 5, at 337 n.42).

26. See, e.g., *Reauthorization of Discretionary Programs—Education of the Handicapped Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 101st Cong., 1st Sess. 9, 33 (1989); H.R. REP. NO. 101-544 (1990).

that “[m]ore minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.”²⁷ Congress also recognized that “[p]oor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart[s] Although African-Americans represent sixteen percent of elementary and secondary enrollments, they constitute twenty-one percent of total enrollments in special education.”²⁸ Congress responded by, among other things, mandating that the NRC again study minority children in special education.²⁹

In its 2002 study, the NRC verified that African-Americans are disproportionately represented in special education.³⁰ Over 14% of African-American children were identified for special education, compared to only 12% of whites.³¹ Furthermore, while African-American students constitute 15% of the school population, they represent over 20% of the students referred for special education eligibility.³²

The nature of African-American overrepresentation sheds light on its causes, as overrepresentation is not uniform throughout the IDEA’s disability categories. To be eligible, a child must have one of the following qualifying disabilities: “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”³³ For children between the ages of three and nine, states may ignore the enumerated disabilities and find children eligible that experience developmental delays in physical, cognitive, communication, social, emotional, or adaptive development.³⁴

27. Pub. L. No. 105-17, § 601(c)(8)(B) (1997); *see also* Hehir, *supra* note 18, at 219 (stating that it was not until the 1997 reauthorization process that the IDEA directly addressed racial disproportionality).

28. Pub. L. No. 105-17, §§ 601(c)(8)(C)-(D) (1997).

29. NRC REPORT, *supra* note 9, at vi.

30. NRC REPORT, *supra* note 9, at 1-2, 357. Numerous scholars and researchers reach this same conclusion. *See, e.g.*, RACIAL INEQUITY, *supra* note 2, at 219; Arnold & Lassman, *supra* note 17, at 230; Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 17-18 (noting that African-American males are grossly overrepresented in special education).

31. NRC REPORT, *supra* note 9, at 1-2, 61; *see also* Alfredo J. Artiles, *Special Education’s Changing Identity: Paradoxes and Dilemmas in Views of Culture and Space*, 73 HARV. EDUC. REV. 247, 247 (2003), available at 2003 WL 55851226.

32. Pub. L. No. 108-446, § 101 (amending § 601(c)(12)(D)); *see also* Dierdre Glenn Paul, *The Train Has Left: The No Child Left Behind Act Leaves Black and Latino Literacy Learners Waiting at the Station*, 47 J. ADOLESCENT & ADULT LITERACY 648, 648 (2004).

33. Pub. L. No. 108-446, § 101 (amending § 602(3)(A)(i)); 20 U.S.C. § 1401(3)(A)(i) (2002).

34. Pub. L. No. 108-446, § 101 (amending § 602(3)(B)(i)); 20 U.S.C. 1401(3)(B)(i) (2002); 34 C.F.R. § 300.7(b) (2003). The “developmental delay” category allows states increased flexibility for this age group by eliminating the need for finding that the child has a particular disability before eligibility attaches because “it is sometimes difficult to pinpoint a child’s disability during the early developmental years.” TERRY OVERTON, ASSESSMENT IN SPECIAL EDUCATION: AN APPLIED APPROACH 37 (2d ed. 1996).

These qualifying disabilities can be divided into high-incidence and low-incidence categories. Students with low-incidence disabilities—hearing impairments, visual impairments, orthopedic impairments, autism, traumatic brain injury, and other health impairments—constitute only 12% of the IDEA-eligible population.³⁵ These medical model or “non-judgment” disabilities are “clearly identifiable disorders of the central nervous system, sensory status, or neuromotor capabilities that can be said to cause the disability.”³⁶ Diagnosing a child with low-incidence disabilities is typically an objective determination, and “few would question the . . . accuracy of a diagnosis in these cases.”³⁷

African-American students are not overrepresented in these low-incidence or non-judgmental categories in which the problem is observable outside of the school context.³⁸ Rather, African-American overrepresentation occurs in the high-incidence categories of mental retardation (MR), severe emotional disturbance (SED) and to some extent in specific learning disability (SLD)—“categories in which the problem is often identified first in the school context and the disability diagnosis is typically given without confirmation of an organic cause.”³⁹ Children with these disabilities constitute roughly 88% of IDEA-eligible students.⁴⁰ These “social system” or “judgmental” disabilities are not biologically based, there is no uniform test to determine their presence or agreement on how to diagnose them, and their definitions are open to discretion in application.⁴¹ Unlike the low-

35. 24TH ANNUAL REPORT, *supra* note 10, at II-22; PRESIDENT’S COMMISSION, *supra* note 11, at 21 (stating that only 10% of IDEA-eligible students have low-incidence disabilities); Lynn Olson, *Enveloping Expectations*, EDUC. WK., Jan. 8, 2004, at 8; NRC REPORT, *supra* note 9, at 220.

36. NRC REPORT, *supra* note 9, at 220. Congress defines “low incidence disability” in the IDEIA as a visual or hearing impairment, or simultaneous visual and hearing impairments . . . ; a significant cognitive impairment; or . . . any impairment for which a small number of personnel with highly specialized skills and knowledge are needed in order for children with that impairment to receive . . . a free appropriate public education.

Pub. L. No. 108-446, § 664(c)(3).

37. NRC REPORT, *supra* note 9, at 54-55; *see also* Parrish, *supra* note 10, at 24-25.

38. NRC REPORT, *supra* note 9, at 1-2, 54-61; *see also* Parrish, *supra* note 10, at 16; Paul, *supra* note 32; Arnold, *supra* note 17, at 231. Not surprisingly, these disability categories have not been at issue in court cases regarding minority overrepresentation. NRC REPORT, *supra* note 9, at 55.

39. NRC REPORT, *supra* note 9, at 1, 20, 222; *see also* Paul, *supra* note 32, at 248; Arnold, *supra* note 17, at 231-32; Pub. L. No. 108-446, § 101 (amending § 601(c)(12)(C)); H.R. REP. NO. 108-77, at 137 (2002) (noting that the “proportion of minority students identified in some disability categories is dramatically greater than their share of the overall population”); POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, THE ROLE OF READING INSTRUCTION IN ADDRESSING THE OVERREPRESENTATION OF MINORITY CHILDREN IN SPECIAL EDUCATION IN THE UNITED STATES, available at http://www.reading.org/downloads/positions/ps1063_minorities.pdf [hereinafter POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION].

40. NRC REPORT, *supra* note 9, at 220-21; 24TH ANNUAL REPORT, *supra* note 10, at II-22 (stating that mental retardation accounts for 10% of all IDEA eligible children and severe emotional disturbance accounts for 8%). Specific learning disability and speech language impairments alone account for roughly 70% of IDEA-eligible children. POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra* note 39; *see also* NRC REPORT, *supra* note 9, at 1-2, 19, 47-48. The specific learning disability category has also seen the largest growth rate over the last decade. *Id.* at 47. There has been a 28.4% increase in children classified as severely learning disabled since 1992. 24TH ANNUAL REPORT, *supra* note 10, at II-24.

41. Parrish, *supra* note 10, at 24-25; Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative*

incidence disabilities, diagnosing a child with a high-incidence disability is a subjective clinical judgment that merely reflects social and cultural beliefs about appropriate learning and behavior in the school setting.⁴²

The recent findings that African-American children are overrepresented in the MR and SED classifications are to be expected considering the long-standing overrepresentation of African-Americans in these categories. School districts historically overclassify African-American students as MR in comparison to their white peers.⁴³ The most recent data shows that African-American children are nearly three times more likely to be identified as MR than are white children.⁴⁴ While only 1% of white students are designated MR, a remarkable 2.6% of African-American students receive the MR designation.⁴⁵ Overall, African-Americans account for nearly 33% of MR enrollment but only around 15% of the student population.⁴⁶ The MR category far and away represents the greatest degree of African-American disproportionality.⁴⁷

The statistics are similarly stark for African-Americans in the SED category. African-Americans are historically and currently at higher risk of SED classification than any other group.⁴⁸ They are 1.59 times more likely to be identified as SED than their white counterparts.⁴⁹ Only .91% of white students are identified as SED, compared to 1.56% of African-American

Methods to Investigate Disproportionality, in RACIAL INEQUITY, supra note 2, at 76-77; Glennon, The Construction of a Disabled Class, supra note 5, at 1259, 1302-03 (noting that MR, LD, and SED are not biologically based and their definitions are vague and changeable); see also Laura E. Naistadt, Understanding Learning Disabilities, 42 S. TEX. L. REV. 97, 100 (2000); Herr, supra note 5, at 387; MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 17-20, 29 (Harv. Univ. Press 1997); Pamela Smith, Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children, 42 HOW. L.J. 133, 190, 194-97 (1999).

42. Glennon, *The Construction of a Disabled Class, supra note 5, at 1302-03; see also Harry et al., supra note 41, at 71-72, 77* (“[T]he point at which differences result in one child being labeled disabled and another not are matters of social decisionmaking.”); Arnold, *supra note 17, at 231-32; Glennon, The Stuart Rome Lecture, supra note 17, at 18* (explaining that MR, SED, and SLD classifications are “open to subjective decision making”); Linehan, *supra note 5, at 183; Parrish, supra note 10, at 24-25.*

43. NRC REPORT, *supra note 9, at 45-46; see also Glennon, The Stuart Rome Lecture, supra note 17, at 18.*

44. NRC REPORT, *supra note 9, at 44, 82; H.R. REP. NO. 108-77, at 137, 147, 154, 169-70 (2002); Parrish, supra note 10, at 21-24; Milloy, supra note 7* (stating that African-Americans are three times more likely to be found MR than whites); POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra note 39* (stating that African-Americans are 2.88 times more likely to be found MR than whites); *see also Losen & Welner, supra note 3, at 413.*

45. NRC REPORT, *supra note 9, at 2.*

46. *Id.* at 44; Matthew Ladner, *Minorities Overrepresented in Special-Ed*, PATRIOT NEWS, Feb. 27, 2004, at A13.

47. NRC REPORT, *supra note 9, at 251; Parrish, supra note 10, at 15, 21.*

48. NRC REPORT, *supra note 9, at 48-49, 51, 82, 261; see also H.R. REP. NO. 108-77, at 137, 154 (2002)* (noting that African-Americans are overrepresented in the SED category); David Osher et al., *Schools Make a Difference: The Overrepresentation of African America Youth in Special Education and the Juvenile Justice System, in RACIAL INEQUITY, supra note 2, at 100.*

49. NRC REPORT, *supra note 9, at 57; H.R. REP. NO. 108-77, at 147, 169-70 (2002); POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, supra note 39* (stating that African-Americans are 1.92 times more likely to be found SED than whites); Paul, *supra note 32, at 248* (concluding that African-Americans are identified as SED at over 1.5 times the rate of white students).

students.⁵⁰ African-Americans constitute 27% of the SED population, but only 15% of the overall school population, firmly establishing their disproportionate representation in the SED category.⁵¹

African-Americans are also disproportionately represented in the broad developmental delay (DD) category for three to nine year olds. While DD is not found in a high-incidence of the population,⁵² it shares the subjective diagnosis hallmark of high-incidence disabilities. Diagnosing DD does not require the finding of a specific disability; instead, the child's development needs only to be below expectation. African-Americans are 2.06 times more likely than whites to be classified as DD.⁵³ While there is only a .05% chance that an African-American will be classified DD, whites are only classified as DD at a rate of .02%.⁵⁴ Despite the low numbers of children served under the DD category, African-American students' disproportionate representation in this category is dramatic.

There is disagreement as to whether African-Americans are disproportionately represented in the SLD category—the most populated disability category. The NRC concluded that African-Americans are identified at 1.08 times the rates that whites are identified—or roughly the same—and that no national overrepresentation exists.⁵⁵ Other researchers disagree, finding that African-Americans are significantly more likely to be classified as SLD than whites.⁵⁶ Even assuming the NRC to be correct on a national scale, it is undisputed that African-Americans are vastly overrepresented in the SLD category in certain states. For example, African-Americans in Delaware have a 12.19% chance of being identified as SLD, but only a 2.33% chance in Georgia.⁵⁷ Similar discrepancies exist between the states in the SED and MR classifications.⁵⁸

Disparities exist among the states in the total number of children found IDEA-eligible, and in the number of children identified under each disability category, because the states employ significantly different eligibility standards.⁵⁹ The IDEIA continues the practice of establishing only broad

50. See NRC REPORT, *supra* note 9, at 57.

51. *Id.* at 42. The rate at which risk of identification for SED has increased is more rapid for African-Americans than for whites. *Id.* at 51.

52. 24TH ANNUAL REPORT, *supra* note 10, at II-22 (noting that children classified with developmental delay comprise only .5% of the IDEA population).

53. NRC REPORT, *supra* note 9, at 59, 61.

54. *Id.*

55. *Id.* at 47-48, 83.

56. See, e.g., Fierros & Conroy, *supra* note 2, at 41; Losen & Orfield, in RACIAL INEQUALITY, *supra* note 2, at xvi, xx; Smith, *supra* note 41, at 194-97 (concluding that African-Americans are disproportionately represented in the SLD category); POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra* note 39 (determining that African-Americans are 1.32 times more likely to be classified SLD than whites).

57. NRC REPORT, *supra* note 9, at 67; see also *Hearing on IDEA, Focusing and Improving Results for Children with Disabilities Before the House Subcomm. on Education Reform*, 108th Cong. (2003) (statement of Dr. Douglas Carnine, Professor, University of Oregon), available at 2003 WL 11716331.

58. NRC REPORT, *supra* note 9, at 37, 39-41, 62-70, 270-71 (identifying significant variability among states in identification of African-American students in the SED and MR categories).

59. Losen & Welner, *supra* note 3, at 434; Lynn Olson, *Enveloping Expectations*, EDUC. WK., Jan.

definitions of the qualifying disabilities, allowing states to provide the precise criteria for their application.⁶⁰ For example, the regulations define mental retardation as “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior.”⁶¹ One state may require that a child’s IQ fall below eighty to establish subaverage intellectual functioning, another state may require an IQ below seventy, and yet another state may not employ any IQ cut-off.⁶² State variations in defining the enumerated disabilities are one significant cause of the inconsistency among states as to which children they identify as IDEA-eligible and under which category.

The incongruity also results from states employing varied definitions of the second eligibility criterion—that the child with an enumerated disability “needs special education.”⁶³ As discussed in detail below, the IDEA continues the practice of only broadly defining “special education”—which states can alter—and provides no definition of “need.” This leads to a significant division among the states, courts, and hearing officers as to what constitutes special education and when a child needs it. Differing eligibility and identification practices, coupled with the highly subjective nature of eligibility determinations, compound the variability in minority representation across the states.⁶⁴

Despite state variability, particularly for the SLD category, it is certain that African-Americans historically and currently are disproportionately represented on a national level only in the high-incidence or judgmental disabilities of SED, MR, DD, and likely SLD. This begs the critical question: Is placement into special education harmful?

B. *The Harm of Misplacement in Special Education*

Calling African-American overrepresentation a crisis appears contradictory, as eligibility for special education is intended to yield educational benefit.⁶⁵ The impetus for enacting the EAHCA in 1975 was to ensure that disabled children accessed appropriate education.⁶⁶ The EAHCA and its

8, 2004, at 8.

60. IDEA, Pub. L. No. 108-446, § 101, 118 Stat. 2647 (2004) (amending § 602(3)(A)(i)). The statute defines only “specific learning disability.” Pub. L. No. 108-446, § 101 (amending § 602(29)). The regulations broadly define the remaining disabilities. See 34 C.F.R. § 300.7(c) (2003). While the states define the disabilities differently, most require a medical diagnosis or certification before finding that a child has a specific disability. PRESIDENT’S COMMISSION, *supra* note 11, at 22-23.

61. 34 C.F.R. § 300.7(c)(6).

62. NRC REPORT, *supra* note 9, at 38.

63. See *id.* at 222-23 (citing 34 C.F.R. § 300.125).

64. See *id.* at 39-40, 223.

65. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1240, 1311 (“[C]lassification as disabled is widely viewed as a two-edged sword, bringing both benefit and stigma.”); NRC REPORT, *supra* note 9, at 20 (“[W]e recognize the paradox inherent in a charge that posits disproportionate placement of minority students in special education as a problem.”).

66. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 1, 89 Stat. 773 (1975). The historical underpinnings of the EAHCA are extensively discussed in the scholarship and caselaw. See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-204 (1982); Susan Smith Blakely, *Judicial*

successors, including the IDEIA, entitle eligible children to a “‘free appropriate public education,’ [which] means special education and related services that [confer educational benefit].”⁶⁷ Because the IDEA and now the IDEIA entitle eligible children to more benefits than general education students, some question whether African-American overrepresentation is actually a problem.⁶⁸ But courts,⁶⁹ scholars,⁷⁰ and the NRC⁷¹ conclude that significant harm results from misidentifying African-Americans for special education eligibility.

Congress finds in the IDEIA that “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.”⁷² The House Report regarding the IDEIA stated that the overidentification of minorities as eligible for special education is a primary concern.⁷³ It concluded that the mislabeling of minority students has “significant adverse consequences”⁷⁴ because of the stigma attached to labeling a child with a disability, the decreased self-perception of the labeled child, and the reduced curriculum that eligible children often receive.⁷⁵

The negative stigma attached to being labeled “disabled” can be traumatic. As noted by the Third Circuit, “stigma, mistrust and hostility . . .

and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped, 40 OHIO ST. L.J. 603, 606-13 (1979).

67. Pub. L. No. 108-446, § 101 (amending § 602(8)); 20 U.S.C. § 1401(8) (2000); *Rowley*, 458 U.S. at 200. For a general discussion of the educational and procedural benefits the IDEA provides to eligible children and their parents, see Garda, *supra* note 15, at 441-51.

68. See Alfred & Artiles et al., *Culturally Diverse Students in Special Education: Legacies and Prospects*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 716 (James A. Banks & Cherry A. McGee Banks eds., 2d ed. 2004); Artiles, *supra* note 31, at 172.

69. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401, 443, 514-15 (D.D.C. 1967) (holding that the racially disproportionate placement of African-American students in special education denied them an equal educational opportunity); *Larry P. v. Riles*, 495 F. Supp. 926, 979-80 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984); *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831, 834 (N.D. Ill. 1980) (concluding that improperly placed students suffer severe harm and “educational tragedy”). More recently, in *Lee v. Butler Co. Bd. of Educ.*, No. 70-T-3099-N, 2000 WL 33680483 (M.D. Ala. Aug. 30, 2000), the court entered a consent decree addressing Alabama’s persistent problem of minority student overrepresentation in special education. For a discussion of courts considering minority overrepresentation, see Losen & Welner, *supra* note 3, at 434-35.

70. See, e.g., Losen & Welner, *supra* note 3, at 412; Kirp, *supra* note 17, at 761-62; Hosp & Reschly, *supra* note 17, at 67.

71. See NRC REPORT, *supra* note 9, at 20.

72. Pub. L. No. 108-446, § 101 (amending § 601(c)(12)(A)); see also 20 U.S.C. § 1400(c)(8)(A) (1997).

73. H.R. REP. NO. 108-77, at 91 (2003) (“The Committee is concerned that there continues to be a problem with the overidentification of children, particularly minority children, as having disabilities.”); see also *id.* at 84 (stating that one purpose of the reauthorized IDEA is “reducing the overidentification or misidentification of nondisabled children, including minority youth”); *id.* at 89 (noting that the bill adds provisions “[t]o address the issue of over- and under-inclusion of students in special education”); *id.* at 99 (showing that the Committee is “very concerned about the problem of overidentification and disproportionate representation of minority children in special education”); *id.* at 122 (indicating that the Committee wants to see “the problems of overidentification of minority children strongly addressed”).

74. H.R. REP. NO. 108-77, at 84, 98 (2003) (“[T]he misplacement of students in special education stigmatizes and denies students the opportunity of a high quality education.”).

75. *Id.*

have traditionally been harbored against persons with disabilities.”⁷⁶ Researchers and scholars have long recognized the isolating consequences that result from special education eligibility.⁷⁷ Once labeled, the child’s “value in the eyes of others”⁷⁸ is reduced.⁷⁹ Peers and teachers significantly lower their expectations for labeled students.⁸⁰ For example, “teachers [will often] focus on the negative behaviors of students who are considered to have behavior problems, even if the behaviors are not significantly different from . . . other students in the same classroom.”⁸¹

Labeled students also lower their own expectations, as they understand what their disability label means.⁸² In the end, the children often fulfill the low expectations accompanying the disability label, making it a self-fulfilling prophecy.⁸³ The stigmatizing effect of the label alone is so great that Professor Smith, himself diagnosed with SLD, believes that shedding the outsider status of being disabled, and not the actual disability, is the most “daunting barrier.”⁸⁴

The negative labeling effects on children identified for special education are compounded by their placement in classes separate from their peers with less demanding curriculums.⁸⁵ The result is further performance disparities between eligible students and their general education peers, and many IDEA-eligible children are left behind academically.⁸⁶ This is particu-

76. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 n.24 (3d Cir. 1993); *see also* *Larry P. v. Riles*, 495 F. Supp. 926, 979-80 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (finding that the stigma resulting from placement in MR classes results in feelings of racial inferiority).

77. *See, e.g.*, Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 181 (1985) (“Identification as handicapped . . . labels the child as handicapped and may expose the child to attributions of inferiority for this labeling with the attendant risks of stigma, isolation, and reduced self-esteem.”); Artiles, *supra* note 31, at 172 (showing that “special education placement is a highly consequential decision, as disability labels carry visible stigma and have other high-cost repercussions”); Andrew Weis, *Jumping to Conclusions in “Jumping the Queue,”* 51 STAN. L. REV. 183, 199-200 (1998) (stating that people with specific learning disabilities suffer social rejection and isolation); Linehan, *supra* note 5, at 187; Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1240, 1315-17 (concluding that IDEA eligibility “stigmatizes and severely limits educational opportunities”); Losen & Welner, *supra* note 3, at 407 (noting that mislabeled children feel “unnecessarily isolated, stigmatized, and confronted with fear and prejudice”).

78. Kirp, *supra* note 17, at 733-37.

79. *Id.*; Linehan, *supra* note 5, at 187; Weis, *supra* note 74, at 200-01 (finding that teachers consider children with LD to have negative and bothersome characteristics).

80. *See* Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1240; NRC REPORT, *supra* note 9, at 2, 20; Shapiro et al., *supra* note 7.

81. Hosp & Reschly, *supra* note 17, at 68.

82. *See* Armantine M. Smith, *Persons with Disabilities as a Social and Economic Underclass*, 12 KAN. J.L. & PUB. POL’Y 13, 19, 24-25 (2002); Linehan, *supra* note 5, at 187; Kirp, *supra* note 17, at 733-37; NRC REPORT, *supra* note 9, at 2, 20.

83. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1308; Linehan, *supra* note 5, at 187.

84. Smith, *supra* note 78, at 24.

85. NRC REPORT, *supra* note 9, at 20; Linehan, *supra* note 5, at 187; *see also* *Larry P. v. Riles*, 495 F. Supp. 926, 945 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (concluding that mentally retarded classes are dead-end classes).

86. H.R. REP. NO. 108-77, at 83 (2003). The academic progress of IDEA eligible children often ceases and sometimes regresses. Patella, *supra* note 5, at 259; Herr, *supra* note 5, at 346-47. Arguably, the No Child Left Behind Act (NCLBA) solves this problem by requiring equal standards for special education and regular education students. In essence, it eliminates the two-track system and requires

larly true for students with high-incidence disabilities. While eligibility has proven effective for severely disabled children, it has often had negative consequences for children with mild disabilities such as SLD, SED, and MR.⁸⁷ This problem is exacerbated by the fact that once children are inappropriately placed in self-contained special education programs, it is difficult for them to return to the regular classroom.⁸⁸

While IDEIA eligibility negatively impacts all misidentified students, the effects are particularly damaging to African-Americans. Minorities in general do not have positive outcomes from special education,⁸⁹ and special education programs do not help African-Americans in particular.⁹⁰ Professor Artiles summarized the negative effects of improper identification: "It adds another layer of difference to racial minorities, restricts their access to high-currenty educational programs and opportunities, and further limits their long-term educational outcomes, as special education populations have lower graduation, higher dropout, and lower academic achievement rates than their general education counterparts."⁹¹

African-American students are more likely to have poor outcomes from special education for several reasons. First, eligible black students are typically instructed by lower-quality special education teachers.⁹² Poor schools where African-Americans are concentrated have less-qualified special education teachers and fewer resources, leading to poor eligibility results.⁹³

Second, parent advocacy—critical to the success of eligible children—is less likely to occur in high-poverty school districts where African-American children are concentrated.⁹⁴ The IDEIA and its predecessors rely heavily on parental advocacy to ensure that eligible children receive appropriate educational services and placements.⁹⁵ African-Americans, however, are less likely than whites to avail themselves of the IDEIA's protections

equal performance. Lynn Olson, *Enveloping Expectations*, 23 EDUC. WK. 8, 8 (2004); Losen & Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, in RACIAL INEQUITY, *supra* note 3, at 187. How the NCLBA is implemented and its effect on special education remain to be seen.

87. KELMAN & LESTER, *supra* note 41, at 138-52 (noting that special education is not effective for LD students); Linehan, *supra* note 5, at 187-88; Arnold, *supra* note 17, at 230-31; Kirp, *supra* note 17, at 728 (demonstrating that special education classes help severely disabled children but not moderately disabled children).

88. Patella, *supra* note 5, at 243.

89. Arnold, *supra* note 17, at 230-31; Losen & Welner, *supra* note 3, at 418-19 (concluding that the benefit of special education to minorities is "meager").

90. See generally James Patton, *The Disproportionate Representation of African Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, 32 J. SPECIAL ED. 25, 25-31 (1998) (stating that special education programs for African-Americans are ineffective); Losen & Welner, *supra* note 3, at 419; Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 20; Osher et al., *supra* note 48, at 101.

91. Artiles, *supra* note 31, at 176; see also Donald P. Oswald et al., *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, in RACIAL INEQUITY, *supra* note 2, at 1.

92. See NRC REPORT, *supra* note 9, at 6.

93. NRC REPORT, *supra* note 9, at 339-40; Osher et al., *supra* note 48, at 102-03.

94. NRC REPORT, *supra* note 9, at 6.

95. Herr, *supra* note 5, at 351, 359; Losen & Welner, *supra* note 3, at 429.

and are less likely to prevail if they do.⁹⁶ They are less likely to contest a finding that their child is eligible or dispute the educational services provided to their child. They are often ostracized from the advocacy process, leaving their children ineffectively represented and with inappropriate placements and services.⁹⁷

One final explanation for African-American students' poor outcomes from special education is that eligible African-American children are more likely than their white counterparts to be placed in restrictive, segregated settings apart from general education students and the general curriculum.⁹⁸ Such segregated special education classes are less likely to provide a rigorous and appropriate education.⁹⁹ Moreover, African-American students find it particularly difficult to extricate themselves from these special education placements.¹⁰⁰

In summary, African-American children experience poor educational results from special education placements because they receive "inadequate services, low-quality curriculum and instruction, and unnecessary isolation from their nondisabled peers."¹⁰¹ Irrespective of the reason, it is clear that African-American children improperly identified as eligible for special education do not receive its guaranteed educational benefits but instead suffer poor outcomes. African-American overrepresentation in special education is undoubtedly a problem requiring a solution, but solutions can only be judged after the causes are examined.

C. *The Causes of African-American Disproportionality*

While there is general agreement as to the existence and nature of African-American overrepresentation in special education, there is great controversy about its causes.¹⁰² Some conclude that African-Americans need special education more than their peers because of biological and socioeconomic differences. In other words, African-Americans are not overrepresented but instead have a higher incidence of actual disability. Others conclude that racial and cultural biases are the root of special education's racial imbalance, and once bias is eliminated, equity will be restored.¹⁰³ These

96. Losen & Welner, *supra* note 3, at 430; NRC REPORT, *supra* note 9, at 186-88.

97. NRC REPORT, *supra* note 9, at 338-339; Herr, *supra* note 5, at 366-67; Losen & Orfield, *supra* note 56, at xxvi.

98. Parrish, *supra* note 10, at 26-28; Fierros & Conroy, *supra* note 2, at 40-42; Losen & Orfield, *supra* note 56, at xxi; Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 20; Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1255; Smith, *supra* note 41, at 197-98; Losen & Welner, *supra* note 3, at 418, 427.

99. Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 20; Hosp & Reschly, *supra* note 17; Fierros & Conroy, *supra* note 2, at 42; Losen & Welner, *supra* note 3, at 171; Hehir, *supra* note 18, at 219.

100. Paul, *supra* note 32, at 648.

101. RACIAL INEQUITY, *supra* note 2, at xv, xxi.

102. Artiles, *supra* note 31, at 172 ("Although few question whether overrepresentation exists, there is some disagreement about the causes and magnitude of the problem . . ."); Losen & Orfield, *supra* note 56, at xvi.

103. Osher et al., *supra* note 48, at 1-4 (explaining competing hypotheses as to the causes of minority

theories are not mutually exclusive, as socioeconomic differences, biological differences, educational differences and bias all combine to cause the disproportionate representation of African-American students in special education.

The cause of the racial imbalance is certainly not biological or genetic differences based on race alone, as there is no correlation between race and disability.¹⁰⁴ However, there is a strong correlation between race and poverty, and poverty and disability.¹⁰⁵ Socioeconomic status is closely tied to race, and correlates directly with educational outcomes.¹⁰⁶ Poverty leads to biological and social deficits, which in turn lead to a higher need for special education in African-Americans who are disproportionately underprivileged.

The biological effects of poverty that contribute to an achievement gap in cognition and behavior include lower birth weight, poor nutrition, and increased exposure to toxins (for example, lead, alcohol, tobacco, and drugs), all of which correlate to educational performance.¹⁰⁷ Some of these risk factors disproportionately affect African-Americans beyond the poverty effect. Specifically, African-American students are more likely to have low birth weight and to be exposed to harmful levels of lead across all income groups, both of which lead to achievement gaps upon entering school.¹⁰⁸

The social and environmental effects of poverty also contribute to African-American students' greater need for special education. Low socioeconomic status homes display less optimal educational environments, as they have less language stimulation, less direct teaching, higher incidences of maternal depression, lower quality child care and less stimulating parenting practices.¹⁰⁹ The result is a further separation between the socioeconomic classes in behavior and achievement upon entering school.

The most dramatic concept to emerge from the recent focus on the IDEIA's racial imbalance is that the inadequate education received by children from low socioeconomic status homes contributes to eligibility.¹¹⁰ More African-Americans attend substandard schools, and such schools create students that need special education.¹¹¹ African-Americans attend schools with larger classes, less funding, and less qualified teachers, so their

overrepresentation).

104. H.R. REP. NO. 108-77, at 99 (2003).

105. Osher et al., *supra* note 48, at 7 (stating that the general consensus "is that increased poverty is associated with increased risk of disability").

106. Fifteen percent of whites live in poverty while up to 45% of African-Americans live in poverty. NRC REPORT, *supra* note 9, at 30, 118-32.

107. *Id.* at 4, 97-117, 162.

108. *Id.* at 4.

109. *Id.* at 118-140, 163.

110. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1285; NRC REPORT, *supra* note 9, at 4-6, 27; Losen & Orfield, *supra* note 56, at xvi, xxv (concluding that special education overidentification is tied to general education).

111. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1285; see also NRC REPORT, *supra* note 9, at 6, 27 (noting that "key aspects of the context of schooling itself" contribute to the identification of students as disabled); Osher et al., *supra* note 48, at 96-97.

overplacement in special education necessarily follows.¹¹² The factor of teacher quality is telling. The quality of instruction and behavior management in the classroom are both important contributors to student behavior and achievement.¹¹³ Children referred for special education eligibility assessments often come from classrooms in which teachers exhibit poor behavior management and instructional skills.¹¹⁴ The teachers that are unable to teach or control their students often dump poor performers and unruly students into special education, as they cannot make the improvements necessary to serve these children.¹¹⁵ Because African-Americans are twice as likely as whites to have ineffective teachers, they are misidentified as IDEA-eligible simply because they do not receive effective instruction in the general education classroom.¹¹⁶

Poor reading instruction is of particular note, because it leads not only to the overidentification of African-American students, but also to the recent spiraling special education rolls. Many children are referred to special education because of reading difficulty.¹¹⁷ Eighty percent of children classified as “learning disabled” are classified because of reading difficulties, meaning that 40% of the overall IDEA population is eligible due to reading deficits.¹¹⁸ As the House Report recognized, there is a “practice of overidentifying children as having disabilities, especially minority students, largely because the children do not have appropriate reading skills. Special education is not intended to serve as an alternative place to serve children if the local educational agency has failed to teach these children how to read.”¹¹⁹

In summary, the low socioeconomic status of many African-American students leads to biological and social differences that result in a need for special education at a higher incidence than their white counterparts.¹²⁰ But their unequal representation in the IDEA cannot be explained by socioeconomic factors alone.¹²¹ In fact, there is a stronger relationship between race

112. NRC REPORT, *supra* note 9, at 173-80; Losen & Orfield, *supra* note 56, at xxvii (determining that overrepresentation stems from shortcomings in general education).

113. NRC REPORT, *supra* note 9, at 170; Harry et al., *supra* note 41, at 88 (noting that the quality of instruction and classroom management are “crucial variables”).

114. NRC REPORT, *supra* note 9, at 170-71.

115. Fierros & Conroy, *supra* note 2, at 40; Patella, *supra* note 5, at 256; Linehan, *supra* note 5, at 191.

116. Olson, *supra* note 86, at 8; NRC REPORT, *supra* note 9, at 174.

117. POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra* note 39.

118. Olson, *supra* note 116, at 8; PRESIDENT’S COMMISSION, *supra* note 11, at 3.

119. H.R. REP. NO. 108-77, at 106 (2003); *see also* Lois Maharg, *Special Ed: Keeping the Numbers Down*, LANCASTER NEW ERA, June 9, 2003 (stating that children who do not know how to read are inappropriately identified as SLD).

120. NRC REPORT, *supra* note 9, at 93-140, 167 (concluding that minority children, other than Asian, “are more likely to experience multiple biological and environmental correlates of disability and low achievement”); Maharg, *supra* note 116 (discussing whether some students’ need for special education “stem[s] from being culturally and economically deprived”); Oswald et al., *supra* note 7, at 6, 10; Osher et al., *supra* note 48, at 94.

121. Oswald et al., *supra* note 7, at 6-7, 11; Losen & Orfield, *supra* note 56, at xxii-xxiii (“The studies, however, do uncover correlations with race that cannot be explained by factors such as poverty or exposure to environmental hazards.”); Hehir, *supra* note 18, at 219; Shapiro et al., *supra* note 7; Paul, *supra* note 32, at 648.

and special education placement than between poverty and special education placement.¹²² Recent studies show that overrepresentation persists even when poverty is taken into account and, alarmingly, African-American students are in fact more likely to be identified as eligible in upper- and high-income schools.¹²³ These recent studies verify court findings from the 1960s and 1970s. The court in *Larry P. v. Riles*¹²⁴ expressly rejected the argument that African-American children were properly overrepresented in special education courses because of their low poverty levels and genetically lower IQ results.¹²⁵ A similar argument was rejected in *Hobson v. Hansen*,¹²⁶ wherein Judge Wright held that the placement of African-American students in special education courses was the result of discrimination, and not actual disabilities of the students themselves.¹²⁷

The nature of African-American overrepresentation also belies the conclusion that the negative biological, environmental, and educational effects of poverty account for the entire imbalance in special education. African-American students' overrepresentation in the high-incidence or judgmental disabilities, but not in any of the low-incidence or non-judgmental disabilities, indicates that factors independent of socioeconomic status affect the eligibility process.¹²⁸ The most evident factor is that bias, whether intentional or unconscious, enters the highly subjective eligibility determinations. Bias permeates both the diagnosis of high-incidence disabilities as well as the determination that a child "needs special education."

The mere mention of bias in special education referral and assessment invites controversy. The NRC circumnavigated the storm by finding that there is insufficient data to determine if discrimination or bias occurs in eligibility decisions.¹²⁹ It simply did not consider how race influenced eligibility decisions.¹³⁰ While the NRC is unwilling to enter the fray, most scholars and researchers dive headlong into it, finding that bias—whether conscious or unconscious, intentional or benign—dramatically affects minority representation in special education.¹³¹

122. Parrish, *supra* note 10, at 16, 25, 32-33.

123. The IDEIA finds that "schools with predominantly white students and teachers have placed disproportionately high numbers of their minority students into special education." IDEIA, Pub. L. No. 108-446, § 101, 118 Stat. 2647 (2004) (amending § 601(c)(12)(E)); *see also* Oswald et al., *supra* note 7, at 8-9; Losen & Orfield, *supra* note 56, at xxiv; Milloy, *supra* note 7; Matthew Ladner, *Minorities Overrepresented in Special-Ed*, PATRIOT NEWS, Feb. 27, 2004, at A13; Shapiro et al., *supra* note 7.

124. 495 F. Supp. 926, 955-56 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984).

125. *Id.*

126. 269 F. Supp. 401, 443, 514-15 (D.D.C. 1967); *see also* P.A.S.E. v. Hannon, 506 F. Supp. 831, 834 (N.D. Ill. 1984).

127. *Id.*

128. *See, e.g.*, Parrish, *supra* note 10, at 16, 25.

129. NRC REPORT, *supra* note 9, at 5, 78.

130. Katzman, *supra* note 2, at 225-39.

131. *See, e.g.*, Smith, *supra* note 41, at 196-97; Linehan, *supra* note 5, at 212; Milloy, *supra* note 7; Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 35-41; Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1317-25; Losen & Welner, *supra* note 3, at 413-16 (2001) (arguing that statistics establish systemic discrimination).

It is difficult to conclude any longer that African-American children are intentionally and systematically segregated into special education classrooms. Desegregation lawsuits are on the wane, and teachers and administrators have proven to be among the least prejudiced professions in the United States.¹³² But the remnants of intentional discrimination continue to affect classrooms, and a cultural divide exists between today's predominantly white teachers and the increasingly diverse student body, particularly African-American students. While one-third of the students in public schools are minorities (15% are African-American),¹³³ only 13% of teachers are minorities (7.5% are African-American) and 60% of teachers are white females.¹³⁴ The trend over the last decade showing an increase in the proportion of minority students but a decrease in the proportion of minority teachers promises that the cultural gap in the classroom will widen in the future.¹³⁵

The racial imbalance in today's classrooms leads to a lack of cultural synchronization between students and teachers of different races, particularly black students.¹³⁶ The cultural mismatch leads to teachers' "spiraling misunderstanding"¹³⁷ of their diverse students, and to misidentification of black students as eligible for special education.¹³⁸ Professor Glennon explains:

[T]eachers and administrators usually do not perceive themselves to be racially prejudiced or engaged in overtly racist actions. Since overt racial hostility is the only definition of racism readily available to them, they would not see racial meaning in their actions. Unnoticed are the pervasive but more insidious effects of unconscious and structural racism, which are not limited to one moment, such as the use of culturally biased IQ tests, but pervade the school lives of African-American students and all aspects of their identification as disabled.¹³⁹

132. NRC REPORT, *supra* note 9, at 185. *But see* Katzman, *supra* note 2, at 225-39 (stating that teachers are biased against minority youth).

133. 20 U.S.C. § 1400(c)(9)(E) (1997).

134. Linehan, *supra* note 5, at 189; Hosp & Reschly, *supra* note 17, at 67; NATIONAL CENTER FOR EDUCATION STATISTICS, MINI-DIGEST OF EDUCATIONAL STATISTICS tbl. 17 (2003).

135. 20 U.S.C. § 1400(c)(9)(E).

Ten years ago, 12 percent of the United States teaching force in public elementary and secondary schools were members of a minority group. Minorities comprised 21 percent of the national population at that time and were clearly underrepresented then among employed teachers. Today, the elementary and secondary teaching force is 13 percent minority, while one-third of the students in public schools are minority children.

Id. The IDEA recognizes that "[m]inority children comprise an increasing percentage of public school students." Pub. L. No. 108-446, § 101 (amending IDEA § 601(c)(10)(C)); *see also* NRC REPORT, *supra* note 9, at 175.

136. Linehan, *supra* note 5, at 180, 188-89; Paul, *supra* note 32.

137. NRC REPORT, *supra* note 9, at 185.

138. *Id.*

139. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1317; *see also* JACQUELINE J.

She concludes that the cultural disconnect between white teachers and black students leads to unintentional bias in eligibility determinations.¹⁴⁰ Social scientists agree, as the “most commonly cited factor”¹⁴¹ for the disproportionate placement of black students into special education is the cultural difference between white teachers and African-American students.

Bias initially plays a role in who is referred for IDEIA eligibility. The eligibility process usually begins when the general education teacher refers a student for evaluation to determine eligibility.¹⁴² Bias rarely enters the referral process for children with low-incidence disabilities, because these children typically enter school with the disability already identified and eligibility established.¹⁴³ For high-incidence disabilities, however, where African-American overrepresentation is significant, teacher referral is a critical aspect of the eligibility process as such children rarely enter school with a disability determination. Instead, these children are typically identified as disabled after school begins by a referral from their teacher.¹⁴⁴ The teacher’s decision to refer a child for IDEIA eligibility virtually seals the child’s educational fate, as 90% of students referred by teachers are found eligible for special education.¹⁴⁵

But which student a teacher decides to refer for special education is a subjective determination infused with bias.¹⁴⁶ Teachers exercise vast discretion in determining which students to refer for special education evaluation.¹⁴⁷ “The referral is a signal that the teacher has reached the limits of his

IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES AND PRESCRIPTIONS 63-79 (1991) (noting that even well meaning teachers respond less favorably to contributions from African-American students than white students).

140. Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 35-41; Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1317-25.

141. Hosp & Reschly, *supra* note 17, at 67; *see also* Oswald et al., *supra* note 7, at 2 (“[A] significant portion of the overrepresentation problem may be a function of inappropriate interpretation of ethnic and cultural differences as disabilities.”); Losen & Orfield, *supra* note 56, at xviii, xxii-xxiii (“[T]he research does suggest that unconscious racial bias, stereotypes, and other race-linked factors have a significant impact on the patterns of identification . . . particularly for African American children.”); Osher et al., *supra* note 48, at 106 (“Cultural discontinuity within classroom learning environments has been identified as a significant contributing factor in the overclassification of children of color as disabled.”).

142. 20 U.S.C. § 1414(a)-(c) (1997); 20 U.S.C. § 1412(a) (1997); 34 C.F.R. §§ 300.125(a)(1), 320 (2002). The statutory procedures schools must follow to find a child eligible are clear-cut. 20 U.S.C. § 1414(a)-(c) (2003); 34 C.F.R. §§ 300.530-.543 (2003). The Local Education Agency must provide full and individualized evaluation and assessment of each child suspected of a disability. 20 U.S.C. § 1414(a)(1) (2002); 34 C.F.R. § 300.531 (2003). Once the evaluations are complete, an eligibility team determines whether the child has an enumerated disability and needs special education and is therefore eligible. 20 U.S.C. § 1414(b)(4) (1997); 34 C.F.R. § 300.534 (2003).

143. NRC REPORT, *supra* note 9, at 224.

144. *Id.* at 209, 224.

145. B. Algozzine et al., *Probabilities Associated with the Referral to Placement Process*, in TEACHER EDUCATION AND SPECIAL EDUCATION 5, 19-23 (1982); Linehan, *supra* note 5, at 184, 188; NRC REPORT, *supra* note 9, at 4, 167-68, 226 (finding that teachers refer a majority of children in special education); Harry et al., *supra* note 41, at 77-78.

146. Linehan, *supra* note 5, at 184; NRC REPORT, *supra* note 9, at 5, 227; Osher et al., *supra* note 48, at 100; Harry et al., *supra* note 41, at 78 (demonstrating that teacher referral judgments display gender and ethnicity bias).

147. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1324-25; NRC REPORT, *supra* note 9, at 5; Patella, *supra* note 5, at 256.

or her tolerance of individual differences, is no longer optimistic about his or her capacity to deal effectively with a particular student in the context of the larger group, and perceives that the student is no longer teachable by him- or herself.”¹⁴⁸ Bias inherently enters these highly subjective referral determinations.

Teachers, like all of us, are simply less understanding of behaviors that are not part of their cultural experience.¹⁴⁹ White teachers, therefore, view the traditional socialization practices of African-American students to be incongruent with classrooms permeated with white culture.¹⁵⁰ African-Americans are viewed as unruly and more hyperactive than whites, instead of merely employing different learning styles.¹⁵¹

For example, white teachers perceive certain conduct by African-Americans to indicate behavior problems—one of the most common reasons for special education referral.¹⁵² African-American students display “verve,” or a propensity for “accompanying their cognitive involvement with affective and physical involvement,”¹⁵³ which some white teachers view as disruptive or distracting. African-Americans also devote significant time to “stage setting” that precedes performance of a task, yet white teachers perceive this to be lack of attention or wasting time.¹⁵⁴ These behaviors can be productive, but instead are viewed as a hindrance to the child and the class.

Even more alarming is the fact that teachers view the exact same behavior by white and black students differently. Teachers judge behavioral

148. N. Zigmond, *Learning Disabilities from an Educational Perspective*, in G.R. LYON ET AL., *BETTER UNDERSTANDING LEARNING DISABILITIES: NEW VIEWS FROM RESEARCH AND THEIR IMPLICATIONS FOR EDUCATION AND PUBLIC POLICY* 262-63 (1993). “The general education teacher makes the determination that the child’s academic progress . . . or their behavior is unacceptable.” NRC REPORT, *supra* note 9, at 226.

149. Hosp & Reschly, *supra* note 17, at 67.

150. Artiles, *supra* note 31, at 247; A.W. Boykin, *The Triple Quandary and the Schooling of Afro-American Children*, in *THE SCHOOL ACHIEVEMENT OF MINORITY CHILDREN*, 57-92 (Ulrich Neisser ed. 1986); M.E. Franklin, *Culturally Sensitive Instructional Practices for African-American Learners With Disabilities*, in 59(2) *EXCEPTIONAL CHILDREN* 115-22 (1992); S.E. GILBERT & G. GAY, *IMPROVING THE SUCCESS IN SCHOOL OF BLACK CHILDREN IN CULTURE, STYLE AND THE EDUCATIVE PROCESS* 275-91 (Robinson Shade ed. 1989); J.J. IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS* (1990).

151. NRC REPORT, *supra* note 9, at 197.

152. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1318-20; NRC REPORT, *supra* note 9, at 7. The public school classroom adopts the white culture that often leads to a perception of African-American scholastic underachievement as well. NRC REPORT, *supra* note 9, at 183-85. It not only leads to the perception of African-American underachievement but also undermines their achievement. *Id.* at 184.

153. S.E. Gilbert & G. Gay, *Improving the Success in School of Poor Black Children*, in *CULTURE, STYLE AND THE EDUCATIVE PROCESS*, 279 (Robinson Shade ed. 1989); Boykin, *supra* note 150, at 57-92; Linehan, *supra* note 5, at 189-90.

154. SONIA NIETO, *AFFIRMING DIVERSITY: THE SOCIOPOLITICAL CONTEXT OF MULTICULTURAL EDUCATION* 115-16 (1991). Another example is disciplinary practices, which in African-American families are explicit and directive compared to the classroom where authority is camouflaged in a style that invites rather than directs students to participate in the rules. As a result, teachers assume that children know the rules and deem the student socially incompetent when they do not. L.D. Delpit, *The Silenced Dialogue: Power and Pedagogy in Educating Other People’s Children*, 58 *HARV. EDUC. REV.* 280, 280-98 (1988).

transgressions as more severe when committed by a black male student than a white student.¹⁵⁵ These cultural misperceptions become self-fulfilling prophecies as students achieve in a manner consistent with their teachers' expectations.¹⁵⁶ The result is a referral for special education assessment, and almost certainly placement, to remove the culturally different—or “disruptive”—behavior from the classroom.¹⁵⁷

The cultural disconnect is manifested by the fact that white teachers are more likely than non-white teachers to refer black students for special education evaluation.¹⁵⁸ Even before school begins, teachers are more likely to believe that an African-American will be referred for special education in the future.¹⁵⁹ They not only believe it, they are also more likely to refer African-American students to special education than white students.¹⁶⁰ African-Americans are referred for assessment as MR at 2.23 times the rate for whites, for SED at 1.68 times the rate for whites, and for SLD at 1.11 times the rate for whites.¹⁶¹ The statistics are so compelling that even the NRC concludes that referral bias is “a crucial influence in disproportionate minority representation.”¹⁶²

Prejudice also permeates the assessment phase of eligibility. The eligibility team to which the student is referred must determine first that the child has an enumerated disability, and second that the child needs special education. As discussed above, diagnosing high-incidence disability is a subjective judgment that reflects social and cultural beliefs about appropriate learning and behavior in school, thus opening the door to cultural bias. The assessment tools used to determine the existence of a disability are often culturally and racially biased, leading to overrepresentation of minorities.¹⁶³ For example, most states employ culturally and racially biased IQ tests to determine eligibility for MR and SLD.¹⁶⁴ Moreover, many of the evaluators are white and lack training in culturally sensitive assessment

155. HERBERT GROSSMAN, ENDING DISCRIMINATION IN SPECIAL EDUCATION 70 (1998).

156. NIETO, *supra* note 154, at 182; *see also* Osher et al., *supra* note 48, at 96-97.

157. Weinstein, *supra* note 3, at 517; Shapiro et al., *supra* note 7.

158. Linehan, *supra* note 5, at 190.

159. *Id.* at 181 (illustrating that teachers have negative judgments based on perceptions of race and are more likely to believe that a minority student will be referred for special education in the future). Teachers have differing opinions of their students based on their race, which reflect racial stereotypes, particularly with respect to behavior. *Id.* at 197-98; *see also* IRVINE, *supra* note 149, at 63-79 (noting that even well-meaning teachers respond less favorably to contributions from African-American students than white students).

160. NRC REPORT, *supra* note 9, at 227-30.

161. Hosp & Reschly, *supra* note 17, at 67.

162. NRC REPORT, *supra* note 9, at 234.

163. Linehan, *supra* note 5, at 181; Milloy, *supra* note 7; Shapiro et al., *supra* note 7; J.M. Patton, *supra* note 90, at 25-31.

164. *Id.*; Harry et al., *supra* note 41, at 82-84; *see also* Larry P. v. Riles, 495 F. Supp. 926, 942-44, 955-56 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (enjoining the use of IQ tests as part of special education eligibility determinations because they led to the overidentification of minority students as mentally retarded); Hobson v. Hansen, 269 F. Supp. 401, 442, 448, 456-57, 514 (D.D.C. 1967), *cert. denied*, 393 U.S. 801 (1968). Ironically, these “objective” tests were used to avoid the bias inherent in the subjective diagnosis of these disabilities, which has clearly backfired.

techniques, resulting in improperly applied assessment and evaluation tools to diagnose disabilities.¹⁶⁵

Determining that a child “needs special education” is also a subjective determination fraught with the potential for prejudice. While subjectivity is inherent in the diagnosis of high-incidence disabilities, the subjectivity in determining that a child “needs special education” is the result of scant legislative guidance and ignorance on behalf of decisionmakers of the importance of this eligibility limitation. As discussed in detail in Parts III and IV below, the open-ended definition of “special education” combined with absolutely no federal guidance as to who “needs” it does little to limit an eligibility team’s discretion in deciding these matters. Decisionmakers’ ignorance of these eligibility limitations eliminates any vestige of objectivity.¹⁶⁶

In summary, cultural bias flourishes in an eligibility landscape overgrown with subjective judgments as to who is referred for special education, who is diagnosed with a disability, and who is found in need of special education.¹⁶⁷ The bias permitted in these subjective determinations leads directly to over-referring African-American children for eligibility assessment and, consequently, their overrepresentation in special education.¹⁶⁸ To curb the bias in eligibility decisions, the unchecked subjectivity of the process must be curtailed. The House Report recognized this and concluded that minority overrepresentation can be remedied only if eligibility “procedures provide consistent results rather than subjective decisions”¹⁶⁹ and called for identification processes that are “clear, consistent and not subject to abuse.”¹⁷⁰

The causes of African-Americans’ disproportionate representation in special education are numerous and controversial. Yet any viable solution must address the negative biological and environmental effects of low socioeconomic status, particularly ineffective general education, and bias in the referral, diagnosis, and assessment that a child needs special education. The IDEA does not adequately address each of these underlying causes, particularly that of subjectivity and its attendant bias, and will ultimately

165. Patella, *supra* note 5, at 257; Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1262.

166. Patella, *supra* note 5, at 245.

167. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1324-25; NRC REPORT, *supra* note 9, at 5; Patella, *supra* note 5, at 245; Losen & Orfield, *supra* note 56, at xxv (noting that eligibility is “inescapably subjective in nature”); Harry et al., *supra* note 41, at 86 (concluding that eligibility “is subjective, if not capricious”); Losen & Welner, *supra* note 3, at 168 (stating that eligibility involves many subjective decisions).

168. Losen & Welner, *supra* note 3, at 419-20, 440; NRC REPORT, *supra* note 9, at 5; Linehan, *supra* note 5, at 185, 189-90; William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and Several Gaps of Gap Analysis*, 58 LAW & CONTEMP. PROBLEMS 7, 24 (1985).

169. H.R. REP. NO. 108-77, at 99; *see also* Parrish, *supra* note 10, at 33 (identifying “subjective identification and inconsistency in the identification process” as causes of minority overrepresentation).

170. H.R. REP. NO. 108-77, at 123.

fail at achieving both racial equality in special education and reducing the overall number of students served.

II. THE IDEIA'S RESPONSE TO AFRICAN-AMERICAN OVERREPRESENTATION IN SPECIAL EDUCATION AND THE ELIGIBILITY EXPLOSION

No matter the cause of minority overrepresentation and the recent rise in special education rolls, it is certain that policy change is needed.¹⁷¹ Scholars have made few suggestions to curb the eligibility boom but suggest numerous changes to address overrepresentation, ranging from the hiring of more minority teachers,¹⁷² to improving enforcement efforts by the Office of Civil Rights,¹⁷³ to allowing class action lawsuits under Title VI of the Civil Rights Act of 1964 based on the disparate impact school policies have on special education eligibility.¹⁷⁴ Another solution may be not to prevent African-American disproportionality, but to ameliorate its harms by strictly enforcing the IDEIA's least restrictive environment (LRE) requirement, which compels schools to educate eligible children in the general education environment to the maximum extent appropriate, rather than in segregated settings.¹⁷⁵ Proper application of the LRE requirement would prevent much, but not all, of the harm of identification for special education because mainstreamed children would not suffer the additional stigma of separate classes and the attendant watered-down curriculum. The IDEIA and its progenitors, however, are drafted as strictly as possible in favor of mainstreaming—"to the maximum extent appropriate"—but the harms of African-American disproportionality persist. In other words, the LRE requirements alone cannot prevent the negative effects of overrepresentation. Rather, students should not be found eligible and put at risk of segregated settings in the first instance. Proper application of the LRE requirement also does not address the recent explosion in eligibility, which has led to decreased resources for the truly disabled.

Each of these proposed remedies should be pursued, as there is no simple solution or quick fix to the dual eligibility crisis.¹⁷⁶ Yet the researchers

171. NRC REPORT, *supra* note 9, at 78.

172. *See, e.g.*, Linehan, *supra* note 5, at 179.

173. *See, e.g.*, Theresa Glennon, *Evaluating the Office of Civil Rights' Minority and Special Education Project, in RACIAL INEQUITY*, *supra* note 2, at 195.

174. *See, e.g.*, Glennon, *The Stuart Rome Lecture*, *supra* note 17, at 38 (arguing that the regulations to Title VI permit direct disparate impact claims); Losen & Welner, *supra* note 3, at 437 (arguing that disparate impact claims under Title VI should be combined with disability laws and brought through 42 U.S.C. § 1983 because direct disparate impact claims have been disallowed under Title VI); Losen & Welner, *supra* note 3, at 167. For an overview of potential legal challenges to overrepresentation, see Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1263-85; Losen & Welner, *supra* note 3, at 180-89.

175. IDEIA, Pub. L. No. 108-446, § 101, 118 Stat. 2647 (2004) (amending § 612(a)(5)(A)); 20 U.S.C. § 1412(a)(5) (1997); 34 C.F.R. § 300.550 (2003).

176. Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1334 (stating that "no legislative tinkering or single lawsuit will provide a remedy"); Losen & Orfield, *supra* note 56, at xxxi.

agree that legislative change is needed as a necessary first step towards a remedy.¹⁷⁷ The past alterations to IDEA, discussed in this section, failed to resolve the racial inequality and the dramatic rise in children served in special education.¹⁷⁸ The current alterations in the IDEIA will also fail to resolve the dual eligibility crisis.

A. *Additional Grants to Study Disproportionality*

The IDEIA augments grants to study the disproportionate representation of minorities in special education. In 1997, Congress authorized grants to study minority overrepresentation and mandated the NRC study.¹⁷⁹ The IDEIA bolsters the research grants and creates a National Center for Special Education Research to examine overidentification and its causes.¹⁸⁰ The Secretary of Education is also required to study the effectiveness of states in “reducing the inappropriate overidentification of children, especially minority and limited English proficient children, as having a disability.”¹⁸¹ While more study is needed, particularly on the causes and potential solutions to overrepresentation, the existing body of research is more than sufficient to enact policy changes immediately.

B. *Curbing Bias in the Diagnosis of Disabilities*

Congress also addressed the fundamental causes of African-American disproportionality in special education. Congress made minor changes in the IDEIA to curb bias in the diagnosis of disabilities. The IDEIA maintains the thirty-year-old requirement that tests and other evaluation materials used to diagnose a disability “are selected and administered so as not to be discriminatory on a racial or cultural basis.”¹⁸² It also continues the trend of diagnosing children based more on classroom performance than potentially biased standardized tests. The 1997 reauthorization moved away from diagnosing disabilities based on standardized testing to a functional assessment approach that relies on how well the child performs in the classroom.¹⁸³ This movement continues in the IDEIA, which changes the eligibility requirements for SLD by eliminating the need to find a severe discrepancy between achievement and intellectual ability, which is often measured by biased IQ tests.¹⁸⁴ While these are necessary steps, eliminating bias from the diagnosis of high-incidence disabilities is virtually impossible as such dis-

177. Losen & Orfield, *supra* note 56, at xxix.

178. Lash & Weiser, *supra* note 23, at 327; Oswald et al., *supra* note 7, at 2; Losen & Orfield, *supra* note 56, at xv-xvi.

179. 20 U.S.C. § 1472(a)(3), (b)(2)(A) (2003); NRC REPORT, *supra* note 9, at vi.

180. Pub. L. No. 108-446, § 201(a)(2).

181. *Id.*

182. *Id.* (amending § 614(b)(3)(A)(i)); 20 U.S.C. §§ 1412(a)(6)(B); 1414(b)(3)(A)(i); 34 C.F.R. § 543(a)(1)(i).

183. 34 C.F.R. § 300.532(b); NRC REPORT, *supra* note 9, at 218.

184. Pub. L. No. 108-446, § 101 (amending § 614(b)(6)).

abilities are intrinsically judgmental, and merely reflect the social and cultural beliefs of the assessors.

C. Curbing Referral and Assessment Bias

While the IDEIA addresses the bias inherent in diagnosing disabilities, it does little to address referral bias and the bias attendant to finding that a child needs special education. The IDEIA continues the fourteen-year-old practice of encouraging the hiring of more minority general and special education teachers.¹⁸⁵ Congress expects that with more minority teachers in the classroom, the myriad of behavioral and learning styles will be viewed as cultural learning differences rather than disabilities.¹⁸⁶ Yet this approach has failed to resolve disproportionality in the past—and will continue to do so in the future—as it is impossible to place a minority teacher in front of every minority student and on every eligibility team.

Congress also hopes to stem the referral and assessment bias which emanates from educators' ignorance of the eligibility criteria. Eligibility criteria are the most complex requirements in special education law.¹⁸⁷ The IDEIA requires professional development to train teachers and evaluators in understanding the identification process.¹⁸⁸ The IDEIA adds funding to train teachers to "ensure appropriate placements and services for all students and to reduce disproportionality in eligibility . . . for minorit[ies]."¹⁸⁹ Funding is also provided to train teachers on how to "teach and address the needs of children with different learning styles."¹⁹⁰ This is certainly a necessary step, as eligibility teams and teachers referring students must understand and

185. *Id.* (amending § 601(c)(10)(D)) (suggesting that "recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession" in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students); 20 U.S.C. § 1453(c)(3)(D)(viii); 34 C.F.R. § 300.382(h) (2003) (requiring states to "[r]ecruit, prepare, and retain qualified personnel, including . . . personnel from groups that are underrepresented in the fields of regular education, special education, and related services"). The Congressional push for hiring minority special educators began in the 1990 reauthorization process. *Reauthorization of Discretionary Programs—Education of the Handicapped Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor, 101st Cong., 1st Sess. 9, 33 (1989)*; H.R. REP. NO. 101-544, 101st Cong., 2d Sess. 15-17 (1990).

186. *See* Linehan, *supra* note 5, at 179 (arguing that hiring more minority teachers in general education is necessary to remove bias in the eligibility process that leads to the disproportionate representation of African-Americans in special education).

187. PRESIDENT'S COMMISSION, *supra* note 11, at 21 (finding the eligibility requirements among the most "complex" requirements in the IDEA).

188. H.R. REP. NO. 108-77, at 150 (2002).

189. Pub. L. No. 108-446, § 101 (amending § 663(c)(9)-(10)). Grants are also authorized to assist in implementing effective teaching strategies, classroom-based techniques, and interventions to ensure appropriate identification of students who may be eligible for special education services, and to prevent the misidentification, inappropriate overidentification, or underidentification of children as having a disability, especially minority and limited English proficient children.

Id. (amending § 662(b)(2)(A)(iii)). In awarding grants, priority is to be given to "projects to reduce inappropriate identification of children as children with disabilities, particularly among minority children." *Id.* (amending § 662(d)(4)).

190. *Id.* (amending § 654(a)(3)(B)(i)).

apply the “needs special education” limitation. While training can lead decisionmakers to recognize the eligibility limitations, it cannot help them understand the vague criteria. With no clear standards as to what constitutes “special education” and when a child “needs” it, no amount of training will eliminate subjective determinations that a child needs special education.

D. Early Intervening Services

While these small measures address the dual eligibility crisis, the IDEA’s primary solution is altering the concept of general education. Total racial equality in special education is not possible without either eliminating the disproportionate representation of minorities in poverty or eliminating poverty, as factors related to poverty lead to African-Americans genuinely needing special education more often than their white counterparts. Resolving these intractable problems is well beyond the scope of special education law, and apparently beyond the capabilities of Congress. But the IDEA addresses one particular negative consequence of poverty—ineffective schools—to solve both the racial imbalance in special education and its swelling rolls.

Scholars argue that solving minority disproportionality requires addressing the entire educational system, because substandard education creates children who need special education.¹⁹¹ Minority overrepresentation and growing eligibility rolls are inevitable if special education is resigned to cleaning up the pieces of a broken general education system. Congress recognizes this problem in the IDEA, which emphasizes improving regular education to prevent referral of mere instructional casualties to special education.¹⁹² But rather than simply prohibit eligibility based on lack of instruction in reading or math or limited English proficiency—as is the longstanding yet ineffective practice under the IDEA¹⁹³—the IDEA attempts to level the educational playing field by encouraging schools to provide children appropriate specialized instruction prior to finding them eligible.

To achieve this goal, the IDEA introduces the “important new concept” of early intervening educational services or “prereferral services.”¹⁹⁴ The

191. See, e.g., Glennon, *The Construction of a Disabled Class*, *supra* note 5, at 1335 (“It is through effective regular education, not special education, that we may begin to see the racial disparities reduced.”); Milloy, *supra* note 7; Losen & Orfield, *supra* note 56, at xxviii; Losen & Welner, *supra* note 3, at 187 (“The most effective remedies will go beyond the special education evaluation process and entail regular education reforms”); NRC REPORT, *supra* note 9, at 28. The NRC concluded that examination of the regular education classroom is critical to any effort to address race-linked disproportion in IDEA eligibility. *Id.* at 171.

192. H.R. REP. NO. 108-77, at 150.

193. 20 U.S.C. § 1414(b)(5) (2003); 34 C.F.R. 300.534(a)(2)(B)(1)(i) (2003). The IDEA continues this prohibition. Pub. L. No. 108-446, § 101 (amending § 614(b)(5)). The existence of SLD also cannot be the result of cultural or economic disadvantage. 34 C.F.R. § 300.541(b).

194. H.R. REP. NO. 108-77, at 153 (2002). The House version of the IDEA called the services “prereferral services” but the name was changed to “intervening educational services” in the final bill. The concept of prereferral services is not new. See 20 U.S.C. § 1400(c)(5)(F) (1997) (indicating that Congress found that “providing incentives for whole-school approaches and pre-referral intervention to

IDEIA, for the first time, requires all states to have in effect “policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities.”¹⁹⁵ The IDEIA does not identify the acceptable policies and procedures, but anticipates states will employ early intervening services.

Congress finds in the IDEIA that the education of children with disabilities can be made more effective by “providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.”¹⁹⁶ Accordingly, the IDEIA permits states and local educational agencies to use 15% of the federal funds they receive “to develop and implement coordinated, early intervening services . . . for students in kindergarten through grade 12 . . . who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.”¹⁹⁷ “Early intervening services” are not specifically defined in the IDEIA, but Congress allows these funds to be spent on training teachers to deliver scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction and behavioral supports.¹⁹⁸ In essence, the IDEIA encourages schools to provide a certain level of individualized instruction to children to avoid finding them eligible for special education.¹⁹⁹

By reaching into general education to resolve special education problems, the IDEIA departs significantly from past legislation which left general education untouched. Congress essentially recognized that today’s increasingly diverse students with a myriad of cultural backgrounds, varied learning styles, and differing needs require individualized—rather than standardized—instruction and interventions. Congress acknowledged that it is only by individualizing general education that schools “will be able to differentiate between children that have different learning styles and children that have disabilities.”²⁰⁰ But because such specialized instruction has long been

reduce the need to label children as disabled in order to address their learning needs”). But the IDEIA includes it in the substantive provisions of the Act for the first time.

195. Pub. L. No. 108-446, § 101 (amending § 612(a)(24)); H.R. REP. NO. 108-77, at 149 (2002).

196. Pub. L. No. 108-446, § 101 (amending § 601(c)(5)(F)). Congress intended to encourage the use of prereferral services before eligibility attaches. H.R. REP. NO. 108-77, at 150 (2002).

197. Pub. L. No. 108-446, § 101 (amending § 613(f) and § 613(a)(4)(A)(ii)); H.R. REP. NO. 108-77, at 137, 153 (2002).

198. Pub. L. No. 108-446, § 101 (amending § 613(f)(2)(A)-(B)).

199. This new educational model of individualized instruction in general education works in conjunction with the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified as amended in scattered sections of 20 U.S.C.), which attempts to improve educational results for all children. *Id.* While the NCLBA promotes a high level of scientifically based instruction to all children, the IDEIA encourages that the instruction be individualized through intervention services prior to referral for special education.

200. H.R. REP. NO. 108-77, at 157.

the exclusive realm of special education, today's diverse learners are diagnosed with judgmental disabilities and found to be eligible. Congress intends to curb this trend by encouraging individualized services to be provided in general education to children who need additional academic and behavioral support.²⁰¹ As the Presidential Commission on Special Education aptly concluded, "students struggle in a one-size-fits-all educational setting that may not fit their learning needs. It is time for educational systems to [apply] research-based and culturally competent practices to educating diverse students in their classrooms."²⁰²

By improving general education through the use of prereferral measures, Congress expects to end both the racial imbalances of special education and also its growing rolls.²⁰³ As one example, Congress expects to reduce the large number of children that are eligible because of reading problems, which can often be addressed without eligibility attaching. By funding prereferral measures and requiring them in limited instances, Congress anticipates that children will receive appropriate individualized reading instruction in the first instance, obviating the need for special education placement. African-Americans should see the most dramatic effect, as they are more likely to be subject to inadequate reading instruction.

But the IDEA's prereferral services are not mandatory unless a state finds that it or its local educational agencies have "significant disproportionality."²⁰⁴ Since 1997, the IDEA required states to provide data on special education eligibility organized by race and ethnicity.²⁰⁵ Based on this data, Congress directed that any state that determines it has "significant disproportionality with respect to the identification of children as children with disabilities . . . shall provide for the review, and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement."²⁰⁶ The IDEA adds that if significant disproportionality exists, then the state or Secretary of the Interior shall require that the maximum 15% of funds reserved for prereferral intervention services are used, particularly for the benefit of the overidentified group.²⁰⁷ In short, the IDEA permits states and districts to use federal funds to develop early intervening services, but only mandates their provision in states with "significant disproportionality."²⁰⁸

201. H.R. REP. NO. 108-77, at 137, 153.

202. PRESIDENT'S COMMISSION, *supra* note 11, at 57.

203. H.R. REP. NO. 108-77, at 137, 150, 153, 156.

204. Pub. L. No. 108-446, § 101 (amending § 618(d)(2)); *id.* (amending § 664(b)(2)(D)(vii)) (requiring a national assessment of the effectiveness of schools in achieving the purposes of the act by "reducing the inappropriate overidentification of children, especially minority and limited English proficient children, as having a disability"); *see also* H.R. REP. NO. 108-77, at 138, 169.

205. 20 U.S.C. § 1418(a)(1)(A)(i)-(viii), (c) (2003); 34 C.F.R. § 300.755(a) (2003).

206. 20 U.S.C. § 1418(c)(2) (2003); 34 C.F.R. 300.755(b) (2003); NRC REPORT, *supra* note 9, at 217; *see also* Hehir, *supra* note 18, at 219 (stating that the IDEA imposes "an affirmative responsibility [on states] to monitor and intervene where overrepresentation occurs. If a state does not do this, it runs the risk of losing its eligibility to receive funds under IDEA.").

207. Pub. L. No. 108-446, § 101 (amending § 618(d)(2)(B)); H.R. REP. NO. 108-77, at 138, 169.

208. States are given complete discretion to determine if "significant disproportionality" exists in

E. The Shortcomings of the IDEIA

The permissive nature of the IDEIA's prereferral measures shows that while Congress prefers an individualized general education paradigm over a generic, one-size-fits-all educational model, it is not committed to its new pedagogy. The IDEIA's half-measures will continue to allow bias and competing pedagogies to influence eligibility decisions to the detriment of African-American students and those genuinely in need of special education. Congress acknowledged that altering general education to include a certain level of individualized instruction is necessary to solve the dual eligibility crisis. But instead of redefining general education directly by redefining "special education" and who "needs" it, Congress back-doors its pedagogy through complex and permissive early intervening services, and mandates unspecified policies and procedures to prohibit minority overidentification. In short, the IDEIA attempts to remedy its eligibility crisis without reconsidering its eligibility criteria—an impossible task.

The IDEIA leaves unchanged the definition of an eligible child with a disability as well as the definition of "special education."²⁰⁹ The IDEIA also leaves unchanged the assessment provisions determining who "needs" special education.²¹⁰ This same broad eligibility requirement has been misinterpreted for years, thwarting its consistent application and opening the door for overrepresentation which the IDEIA does not shut.²¹¹ The IDEIA cannot effectively reduce minority overrepresentation because it does not limit the bias that accompanies highly subjective identification practices. While subjectivity cannot be eliminated from the diagnosis of high-incidence or judgmental disabilities no matter how their definitions are modified, it can be reduced in referral and in the determination that a child needs special education

To resolve the misidentification of students as eligible, particularly minorities, the antiquated eligibility criteria must be revisited as a necessary first step. Schools cannot fully embrace the individualized general education paradigm unless special education relinquishes its firm grasp on all individualized instruction. So long as minor instructional modifications are considered "special education" and not simply sound general education practices, today's diverse learners remain at risk of being diagnosed with a high-incidence or judgmental disability, and found to be in need of special education. While the cultural divide in the classroom and resulting bias cannot be eliminated in the short term, the bias inherent in subjective determinations

their school districts. Losen & Orfield, *supra* note 56, at xxx; Lash & Weiser, *supra* note 3, at 328-29.

209. Pub. L. No. 108-446, § 101 (amending § 602(3), (29)).

210. *Id.* § 204 (amending § 614(b)). The IDEIA continues to provide that "a child shall not be determined to be a child with a disability if the determinant factor for such determination is (A) lack of" scientifically based instruction practices and programs that contain "the essential components of reading instruction . . . (B) lack of instruction in math; or (C) limited English proficiency." *Id.* (amending § 614(b)(5)).

211. Herr, *supra* note 5, at 352.

can be curbed—and racial balance brought to the IDEA—by objectifying certain aspects of the eligibility process. Because imprecise eligibility standards lead to discretionary error and bias in finding children eligible, this discretion must be limited through precise definitions.²¹²

To reclaim eligibility for the truly disabled in “need” of “special education,” Congress must restrict these definitions. “Special education” should be limited to significant adaptations to the content, method, or delivery of instruction that are not provided to all general education students. Further, a child should not be found to “need” special education until all accommodations and prereferral interventions available in the district are attempted and proven ineffective. These restrictive definitions are necessary to limit cultural bias in eligibility assessments and implement the individualization paradigm envisioned in the IDEA.

III. “SPECIAL EDUCATION” REDEFINED

The IDEA and its predecessor statutes hinge eligibility on a finding that a child not only has an enumerated disability, but also needs “special education and related services.”²¹³ The definition of “special education” is often determinative of eligibility, as not all services provided by schools to disabled students are special education. A child with cystic fibrosis may need respiratory therapy, a child with spina bifida may need catheterization services, and a child with diabetes may need monitoring of meals, but these services are not special education, and these children are not eligible under the IDEA or the new IDEA.²¹⁴

Rather, these children typically receive services under Section 504 of the Rehabilitation Act of 1973,²¹⁵ a nondiscrimination statute that works in tandem with the IDEA.²¹⁶ While eligibility under Section 504 entitles children to a “free appropriate public education,”²¹⁷ such eligibility entitles students to a different level of services with significantly less procedural safeguards than under the IDEA. In a nutshell, states are required to do more for IDEA-eligible students than for students that are merely eligible under Sec-

212. Linehan, *supra* note 5, at 183.

213. Pub. L. No. 108-446, § 101 (amending § 602(3)); 20 U.S.C. § 1401(3)(A)(ii).

214. BONNIE TUCKER & BRUCE GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW § 8.2 (1998); *see also* PRESIDENT’S COMMISSION, *supra* note 11, at 48 (“Not every student with a disability in elementary, middle or high school receives special education services because his or her disability does not impair their ability to learn to such a degree that special education services are necessary.”); Garda, *supra* note 15, at 486-87.

215. 29 U.S.C.A. § 794 (West 1998); 34 C.F.R. § 104.4 (2002).

216. 34 C.F.R. § 104.33 (2002); Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 VT. L. REV. 71, 82 (1978) (“The two laws and their regulations reinforce and reciprocate each other.”). For a discussion of Section 504 protections, *see* Judith Welch Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part I: The Statutory Maze*, 17 J.L. & EDUC. 387, 395-404 (1998); LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 84-86 (1984).

217. Some scholars assert that the free appropriate public education under Section 504 requires a higher level of educational benefit than the IDEA, but no court has so held. *See* Daniel & Coriell, *supra* note 18, at 576.

tion 504.²¹⁸ Typically, students eligible under Section 504 receive accommodations or related services whereas children eligible under the IDEA receive special education.²¹⁹

Indeed, the need for special education is the critical distinction between eligibility under Section 504 and IDEA.²²⁰ Section 504 covers significantly more students than the IDEA because it does not consider the child's need for special education; rather, it only considers whether the child's disability impairs a major life function such as learning.²²¹ Accordingly, many IDEA eligibility decisions hinge on whether the services the child requires are in fact special education.²²² It is for this reason that the First Circuit found that

218. Hehir, *supra* note 18, at 225.

219. MARK WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE §§ 2.3, 8.1 (LRP Publications 2002); TUCKER & GOLDSTEIN, *supra* note 214, at ch. 5.

220. TUCKER & GOLDSTEIN, *supra* note 214, § 17.6 (noting that the IDEA only protects children who, by virtue of their disabilities, require special educational services). However, "Section 504 prohibits discrimination against *all* school-aged children with disabilities regardless of whether they require special education services." *Id.*; WEBER, *supra* note 219, § 2.2.

Nevertheless, some children with physical limitations or other conditions have no unique needs that call for special instruction, but cannot receive an equal education without services that IDEA classes as related services. If such a child meets the definition of an individual with handicaps found in the Rehabilitation Act of 1973, the school district must provide the services to the child.

Id.

221. Letter to Honorable Wayne Teague, 20 IDELR 1462, 1463 (1994); *see also* WEBER, *supra* note 219, § 8.1; Thomas F. Guernsey, *The Education for All Handicapped Children Act, 42 U.S.C. § 1983 and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children's Protection Act of 1986*, 68 NEB. L. REV. 564, 566 (1989) ("Section 504 is broad and general in coverage, while EAHCA is narrow and specific."). Children eligible under Section 504 often seek IDEA eligibility because the IDEA specifies additional services and rights. *See, e.g.*, Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1369 (8th Cir. 1996) (involving a child eligible under Section 504 who sought IDEA eligibility because only the IDEA required the school to provide transition services such as instruction in driver's education, self-advocacy, and independent living skills); *In re* Laura H., EHLR 509:242 (Mass. SEA 1988) (involving a child who sought IDEA eligibility because she desired closed circuit television for chemistry lab rather than merely providing an alternative biology class that was provided as a Section 504 accommodation).

222. *See, e.g.*, Delaware County v. Jonathan S., 809 A.2d 1051, 1056 (Pa. Commw. Ct. 2002). The case involved a child who was found ineligible despite orthopedic impairment:

The record . . . is bereft of any evidence that Student's gross and fine motor development delays require the adapting of content, methodology, or delivery of instruction to address Student's unique needs. Because there is no evidence of record that Student requires such specially designed instruction, he does not meet the controlling definition of a child with a disability.

Id.; West Chester Area Sch. Dist., 32 IDELR 275, 275 (Pa. SEA 2000) ("[T]he Panel concludes that Nicole is not eligible as emotionally disturbed due to the lack of preponderant evidence of the need for special education attributable to her emotional state."); Wayne Highlands Sch. Dist., 24 IDELR 476, 484 (Pa. SEA 1996).

The parents contend that Laura is in need of specially designed instruction and asserts that Laura has been receiving just such instruction The District counters that Laura simply requires accommodations to her regular education program and that these accommodations do not qualify as specially designed instruction.

Id.; Smithtown Cent. Sch. Dist., 29 IDELR 293, 297 (N.Y. SEA 1998) (stating that "I am unable to determine whether these accommodations employed by the child's teachers to address the boy's [disabilities] amounted to [special education]" and therefore whether the child needs special education and is eligible); Rochester City Sch. Dist., 31 IDELR 178, 178 (N.Y. SEA 1999).

Though his IQ scores place him in the superior range of intellectual functioning, and his academic performance is in the average range, it is not clear that the child requires special education services. The child's health concerns provide an explanation for his frequent absences,

the definition of “special education” is an “extremely important and nuanced question.”²²³ Yet there is a significant divide in the authority as to what constitutes special education, which will continue under the IDEA. This section will explore the confusion in the authority and propose a definition of “special education” which addresses the dual eligibility crisis.

A. *The Statutory Definition*

The IDEA and its predecessors define an eligible child with a disability as a child that is diagnosed with an enumerated disability, and by reason thereof “needs special education and related services.”²²⁴ Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”²²⁵ Accordingly, the definition of an eligible child with a disability is circular: a child is only eligible if he needs special education, but a child does not need special education unless he has the unique needs of an eligible child.²²⁶ Until 1999, decisionmakers were provided no further guidance than this circular definition, and generally held that “special education” means specialized or individualized instruction.²²⁷

but there is little explanation in the record for his failure to complete homework. These issues could be addressed without the need for special education services.

Id.; Old Orchard Beach Sch. Dep’t., 21 IDELR 1084, 1088 (Me. SEA 1994).

AG is now in a personalized program with a low teacher/student ratio, lots of accountability, a case manager to communicate with home on a regular basis and deal with social skills issues, and taking one course at the high school by her choice. If she were labeled, nothing would change as this program is the one described by the psychologists to meet her needs and the program serves both special education and regular education students.

Id.; Wayne Westland Comm. Schools, 37 IDELR 150, 151 (Mich. SEA 2002).

Even if this hearing officer were to assume, for the sake of argument only, the presence of a severe discrepancy between [the student]’s ability and achievement in the areas of Basic Reading Skill and Mathematics Calculation, there is a complete lack of evidence to support a finding that the purported discrepancy is not correctable without special education.

Id.

223. *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 162 (1st Cir. 2004).

224. Pub. L. No. 108-446, § 101; 20 U.S.C. § 1401(3)(A)(ii) (2000). A technical reading of the statute and regulations requires that, in order for IDEA eligibility to attach, the child must need both “special education and related services.” Pub. L. No. 108-446, § 101 (amending § 602(3)); 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.7(a)(1). In other words, if a child needs only special education, he or she is not eligible under a literal reading of the statute and regulations. Courts and hearing officers do not literally apply the “and” requirement, however, as no reported decision denies a child eligibility because he or she only needs special education but not related services. Such a literal reading is outright rejected without discussion, because the many children who need only special education and not related services would be ineligible and not receive appropriate specialized instruction.

225. Pub. L. No. 108-446, § 101 (amending § 602(29)); 20 U.S.C. § 1401(25) (1997); 34 C.F.R. § 300.26(a)(2)(i)-(iii) (2002).

226. *See, e.g.,* Jeffrey Champagne, Commentary, *Special Education Law—Sometimes Its Simple: An Examination of Honig v. Doe, Timothy W. v. Rochester, New Hampshire, Sch. Dist., Dellmuth v. Muth, and Moore v. Dist. of Columbia*, 59 ED. LAW REP. 587, 588 (1990) (noting that the eligibility standards are circular); WEBER, *supra* note 219, § 8.1 (noting that the definition of children covered under the IDEA is doubly circular).

227. *See, e.g.,* Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982); Letter to Smith, 18 IDELR 683 (OSEP 1992) (noting that the Office of Special Education Programs (OSEP) defined “special education” as education planned for a particular individual or individualized instruction); Grkman v. Scanlon, 563

Regulations were added in 1999 explaining that the term “[s]pecially designed instruction” means:

[A]dapt[ing] . . . the content, methodology, or delivery of instruction (i) To address the unique needs of the child that result from the child’s disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.²²⁸

There is no reason to believe these regulations will change with the passage of the IDEIA, which does not alter the statutory definition of “special education.” Special education, therefore, is the adaptation of the content, methodology, or delivery of instruction to address a child’s unique needs and to ensure access to the general curriculum.

“Related services,” on the other hand, are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”²²⁹ Specific examples include “speech-language pathology and audiology services, . . . psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, . . . counseling services, including rehabilitation counseling, orientation and mobility services, and medical services.”²³⁰

“Related services” are provided to eligible children only if the services are necessary to assist a child with a disability to benefit from special education.²³¹ If a child needs only related services and not special education, then the child is not eligible.²³² The Supreme Court explained that “to be entitled to related services, a child must be handicapped so as to require special education. In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create [eligi-

F. Supp. 793, 794 (W.D. Pa. 1983) (“[S]pecially designed personalized instruction, deviating from the normal routine program offered to pupils generally, and geared to the particular needs of a handicapped child.”).

228. 34 C.F.R. § 300.26(b)(3) (2003); *see, e.g.*, Katherine S. v. Umbach, 2002 WL 226697, at *10 (M.D. Ala. 2002) (“Therefore, in order to qualify as a ‘student with a disability’ pursuant to the IDEA, Katherine must require ‘specially designed instruction’ in order to have access to, and benefit from, the general educational curriculum.”).

229. Pub. L. No. 108-446, § 101 (amending § 602(26)); 20 U.S.C. § 1401(22) (2000); 34 C.F.R. § 300.24(a) (2003).

230. *Id.* The regulations add health services in schools, social work services in schools, and parent counseling and training to the list of related services, 34 C.F.R. § 300.24(a), and provide specific definitions of each of the enumerated related services. 34 C.F.R. § 300.24(b).

231. Pub. L. No. 108-446, § 101 (amending § 602(26)); 20 U.S.C. § 1401(a)(22); 34 C.F.R. § 300.24(a). It is not possible for an IDEA-eligible child to need only related services and not special education, as related services are provided only as “required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(22); 34 C.F.R. § 300.24(a) (2003).

232. 34 C.F.R. § 300.7(a)(2)(i).

bility].”²³³ In short, the enumerated related services are necessarily not special education.²³⁴

But there is one major caveat to this general rule: states are permitted to include any of the enumerated related services that are also classified as special education within their definition of “special education.”²³⁵ But the regulations do not identify which of the enumerated related services constitute special education and can be appropriately classified as such. Some states employ the narrow federal definition of special education that excludes the enumerated related services,²³⁶ while others broadly define special education by including many, if not all, of the enumerated related services.²³⁷ IDEA eligibility is greatly expanded in these latter states. For example, a child who requires only speech-language pathology is not IDEA-eligible in New Jersey, which employs the federal definition of special education (thereby excluding the related service of speech-language pathology), but the same child is IDEA-eligible in Nebraska, which includes speech-language pathology within its definition of special education. Accordingly, states control eligibility standards not only by defining the enumerated disabilities, as noted above, but also by controlling the definition of special education, potentially enlarging the group of eligible children.

In summary, in order to be eligible under the IDEA, a child with a qualifying disability must need adapting of the content, methodology, or

233. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984) (citations omitted); *see also Katherine S.*, 2002 WL 226697, at *10 (“[A] student who has an impairment, but who only needs a related service and not special education, is not a ‘student with a disability’ within the meaning of the law.”).

234. *See, e.g., Corvallis Sch. Dist.* 509J, 28 IDELR 1026, 1026 (Or. SEA 1998) (noting that related services are not special education); *Katherine S.*, 2002 WL 226697, at *10; *A.A. v. Cooperman*, 526 A.2d 1103, 1106 (N.J. Super. Ct. App. Div. 1987) (involving an orthopedically impaired child who needed only transportation and was therefore “not educationally handicapped because he has not been found to require special education”); *Hackensack Bd. of Educ.*, 18 IDELR 988, 988 (N.J. SEA 1992) (involving an asthmatic child that needed only the related service of transportation and was not IDEA-eligible because she did not need special education).

235. 34 C.F.R. § 300.26(a)(2)(i) (2003); *see also Letter to Tucker*, 1 EleCLPR ¶ 67 (OSEP 1990) (holding that states may include within their definition of “special education” any of the related services which are specially designed instruction and giving the example of a physical therapy program teaching positioning, which could be considered special education if the state defines it as such).

236. *See, e.g., DEL. C. ANN. tit. 14, § 3101(2)* (2003); *D.C. CODE ANN. § 38-2901(11)* (2003); *FLA. STAT. ch. 1003.01(3)(b)* (2002); *GA COMP. R. & REGS. § 160-4-7-.01(1)* (2003); *KA. ST. ANN. § 72-962(i)* (2003); *KY. REV. ST. ANN. § 157.200(2)* (Baldwin 2003); *707 KY. ADMIN. REGS. 1:280(49)* (2003); *MD. CODE ANN. EDUC. § 8-401(4)* (2003); *MISS. CODE ANN. § 37-23-133(i)* (2003); *MONT. CODE ANN. § 20-7-401(4)* (2003); *N.H. REV. STAT. ANN. § 186-C:2(IV)* (2003); *N.J. ADMIN. CODE tit. 6, § 14-1.3* (2004); *TX. CODE ANN. § 29.002(1)* (2004); *VA. CODE ANN. § 22.1-213* (2004).

237. *See, e.g., CONN. GEN. STAT. ANN. § 10-76a* (West 2003) (noting that special education includes all related services); *CAL. EDUC. CODE § 56031* (2003); *IDAHO CODE § 33-2001(5)* (Michie 2003); *IND. CODE § 20-1-6-1(7)* (2003); *IOWA CODE ANN. § 256B(2)* (2003); *ME. REV. STAT. ANN. tit. 20, § 7001(5)* (West 2003); *MASS. GEN. LAWS ANN. ch. 71B, § 1* (2003); *MINN. R. STAT. 3525.0200(20a)* (West 2003); *MO. ANN. ST. § 162.675(4)* (2000) (including certain related services in the definition of “special education”); *NEB. REV. ST. § 79-1125* (noting that special education includes speech-language pathology, occupational therapy, and physical therapy); *N.M. STAT. ANN. § 22-13-6(A)* (West 2004); *N.Y. EDUC. § 4401(2)* (West 2003); *N.C. GEN. STAT. § 115C-108* (noting that special education includes speech-language pathology, occupational therapy, and physical therapy); *N.D. CENT. CODE § 15.1-32-01(2)* (West 2004); *OR. R. ST. § 343.035(18)* (West 2004); *S.D. CODIFIED LAWS § 13-37-2* (Michie 2004); *TENN. C. ANN. § 49-10-102(4)*; *VT. ST. ANN. tit. 16, § 2942(2)* (2004).

delivery of instruction to address the unique needs of the child and ensure access of the child to the general curriculum.²³⁸ This broad definition is hopelessly ambiguous, however, which permits decisionmakers to employ their own pedagogical ideology when interpreting special education.²³⁹ There are essentially two competing pedagogies underlying the decisions that deal with the definition of special education: the general education paradigm embodying individualized instruction versus the generic or one-size-fits-all general education model. Decisionmakers operating under the former model find that only children requiring significant modifications in general education need special education, while decisionmakers employing the latter model find that diverse or differing student needs are the exclusive jurisdiction of special education and general educators need not modify instruction to accommodate such children. The broad definition of special education encompasses either pedagogical model, leading decisionmakers often to ignore the limitation or provide vastly divergent interpretations.

B. Special Education Ignored

The most extreme examples of decisionmakers employing the generic general education model are decisions that entirely ignore the special education limitation. These decisionmakers presume that if a child is diagnosed with a disability, then the child automatically needs special education. Professor Zirkel concludes that such oversight “is not to be faulted; these subtle distinctions are not generally recognized.”²⁴⁰ But in failing to recognize this subtle yet critical distinction, decisionmakers are implicitly concluding that disabled children necessarily cannot fit into the general education system, no matter their needs, and resign them to special education.

For example, a school district, hearing officer, and state review panel found no evidence that a child required special education or related services and denied the child IDEA eligibility in *Muller v. East Islip Union Free*

238. See, e.g., *Delaware County Intermediate Unit v. Jonathan S.*, 809 A.2d 1051, 1056 (Pa. Commw. Ct. 2002).

The record in this case, however, is bereft of any evidence that Student’s gross and fine motor development delays require the adapting of content, methodology, or delivery of instruction to address Student’s unique needs. Because there is no evidence of record that Student requires such specially designed instruction, he does not meet the controlling definition of a child with a disability . . . and is therefore ineligible for a FAPE.

Id.

The special needs of the child are what determines his entitlement to funded services, but neither the hearing officer, the Panel, nor Student have cited to any actual substantive evidence that Student requires specially designed instruction, i.e. the adaptation of the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability.

Id. at 1057.

239. Minow, *supra* note 77, at 179-80 (“[T]he statute is unclear about which children shall be included within the reach of its guarantees The substantive dimensions of the program remain ambiguous, however, especially regarding what kind of special needs should entitle the child to special placements or services.”).

240. *West Chester Area Sch. Dist.*, 18 IDELR 802, 803 n.31 (Pa. SEA 1992).

School District.²⁴¹ The Second Circuit disagreed, finding the child eligible merely because her disability adversely affected her educational development.²⁴² The court did not discuss the special education requirement. Instead, it presumed that a child with an enumerated disability could not be served in general education and required remediation through special education.²⁴³ Similarly, in *Elida Local School District Board of Education v. Erickson*,²⁴⁴ a child with a health impairment needed small-group tutoring, extended time to complete tests and assignments, use of a computer, and teacher notes. The school district declassified the child as IDEA-eligible, arguing that these services were not special education. The court never addressed this issue, instead finding the child IDEA-eligible because her disability adversely affected her educational performance.²⁴⁵ Many other courts and hearing officers likewise presume that children with disabilities cannot be served through general education and necessarily need special education.²⁴⁶

This presumption is incorrect because a child's disability may often be appropriately addressed by something other than special education.²⁴⁷ Professor Zirkel explains that it is a "circular conclusion that in light of the adverse effect [of a disability], [a student] needs special education"²⁴⁸ as the existence of a disability and the need for special education are simply not coterminous. Children with enumerated disabilities often need only related

241. 145 F.3d 95, 100 (2d Cir. 1998).

242. *Id.* at 103; *see also id.* at 104 n.6 ("The IHO's apparent belief that Treena's emotional problems were unrelated to school is of little if any relevance, so long as those problems had a significant effect on her ability to learn.").

243. *Id.* at 105. The Second Circuit's conclusion may well be correct, as the child may in fact have needed special education, but it employed an incomplete analysis by failing to expressly consider this eligibility requirement and finding by the lower review officers.

244. 252 F. Supp. 2d 476, 488 n.7 (N.D. Ohio 2003).

245. *Id.* at 491.

246. *See, e.g.,* *Greenland Sch. Dist. v. Amy N.*, No. Civ. 02-136-JD, 2003 WL 1343023 (D.N.H. 2003), *overruled on other grounds*, 358 F.3d 150 (1st Cir. 2004) (finding IDEA eligibility without addressing whether the services the child required were special education); *Corchado v. Rochester City Sch. Dist.*, 86 F. Supp. 2d 168, 171-72, 176 (W.D.N.Y. 2000) (finding eligibility without discussing the need for special education merely because the child had documented impairments); *George West Indep. Sch. Dist.*, 35 IDELR 287, 290 (Tx. SEA 2001) ("[T]he legal issue is whether that impairment adversely affects her educational performance and thus whether she 'needs' special education and related services."); *In re Kristopher H.*, EHLR 507:183 (Wash. SEA 1985) (involving a hearing officer that did not consider the district's argument that the child did not need special education, but finding that the child was IDEA-eligible because his disability adversely affected his educational performance); *Benjamin R.*, EHLR 508:183 (Mass. SEA 1986) (finding a child IDEA-eligible, despite being "gifted . . . with very superior cognitive abilities" and performing well socially and academically in kindergarten, because "perceptual deficits exist which impact on educational progress"); *Philadelphia Sch. Dist.*, 27 IDELR 447, 447 (Pa. SEA 1997) (finding a gifted child that received Ds in Spanish IDEA-eligible as learning disabled without discussing the "need" requirement).

247. *See, e.g.,* Dixie Snow Huefner, *Judicial Review of the Special Education Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483 n.63 (1991) ("The reason that the IDEA-B requires a student evaluated as disabled to need special education is that some students with disabilities can be educated successfully in the regular classroom without special education and related services.").

248. *West Chester Area Sch. Dist.*, 18 IDELR 802, 803 (Pa. SEA 1992) (finding that the child needed only family therapy, which is not special education).

services or accommodations to address their needs. Such children should not be eligible yet are assigned to special education by decisionmakers subscribing to the idea that general education should not serve disabled students, no matter what their needs may be.

The failure of courts, hearing officers, and review panels—the bodies charged with interpreting IDEA—to consider the special education limitation trickles down to eligibility teams that also fail to consider what special education the child needs before finding eligibility. This disregard for the special education limitation has slowly transformed the IDEA into a repository for LD students, especially those struggling with reading.²⁴⁹ These students' reading deficits may be addressed through something other than special education, such as regular education modifications or simply better reading instruction.²⁵⁰ The Committee on Education and Workforce reported to the House of Representatives that it was “discouraged by the practice of over identifying children as having disabilities, especially minority students, largely because the children do not have appropriate reading skills.”²⁵¹ This has led to African-American students being overidentified as SLD, at least in some states, and to the general rise in special education rolls. Recognizing the special education limitation as well as comprehending exactly what services are and are not special education, therefore, is necessary to prevent African-American overrepresentation and the eligibility explosion.

A similar and equally harmful practice by courts and hearing officers is the acknowledgement of the special education limitation, yet failure to identify the special education the child requires. In *West Chester Area School District v. Bruce*,²⁵² the court found the child IDEA-eligible and in need of special education—overturning the state review panel decision—without identifying the special education the child required. In *Blazejewski v. Allegheny Central School District*,²⁵³ the court made the same omission, ruling that the child needed special education without identifying the services required by the child. In *In re Anthony F.*,²⁵⁴ the court found that a child with

249. PRESIDENT'S COMMISSION, *supra* note 11, at 3 (noting that 50% of children served under the IDEA are learning disabled, and 40% of children identified under the IDEA are identified because of their inability to read).

250. HEIT, *supra* note 5, at 338, 340 (stating that strong incentives exist to place children that could benefit from good reading instruction into special education—many children placed in special education just need a good reading teacher); H.R. REP. NO. 108-77, at 137 (2003). It is for this reason that the IDEA encourages educationally sound methods in literacy and reading instruction. *Id.* at 153, 156. Congress recognizes the difference between reading difficulty and reading-based learning disabilities and hopes that the use of proper literacy instruction and speech therapy will help eligibility teams differentiate between children with different learning styles and students with genuine disabilities. *Id.* at 154.

251. H.R. REP. NO. 108-77, at 156 (2003); *see also id.* at 153 (children “are being inappropriately referred to special education primarily because of reading difficulties”).

252. 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002).

253. 560 F. Supp. 701, 703 (W.D.N.Y. 1983).

254. 216 A.2d 564 (N.Y. Sup. Ct. 1995); *see also* Bd. of Educ. of N.Y., 34 IDELR 216, 219 (N.Y. SEA 2000) (noting that “the boy’s emotional problems significantly interfered with his ability to benefit from his regular education program” and his failure to attend school was caused by his disability, therefore he needed special education, but not identifying the special education that was needed); Maine Sch.

speech and language deficits needed more than merely the related service of speech therapy, and was thus IDEA-eligible, but the court never specifically identified the special education the student needed. These decisions leave eligibility teams with no guidance as to what services are and are not special education, allowing bias and diverging pedagogies to influence eligibility decisions.

The first step to resolving the dual eligibility crisis is a simple acknowledgment of the special education limitation and a push for decisionmakers to specifically identify the special education the child requires when finding eligibility. Recognition of the special education limitation by courts, hearing officers, and state review panels can only be accomplished by advocates properly identifying the limitation to these decisionmakers. Once advocates press for the finding of a need for special education, courts, hearing officers, and state review panels will be forced to address the issue in their opinions. The trickle-down effect should lead to greater consideration of the special education limitation by eligibility teams.

Congress hopes to accomplish this directly in the IDEIA by requiring funds to be expended on professional development to train teachers and evaluators in understanding the identification process.²⁵⁵ Training, however, is necessary but insufficient to solve the overidentification problem. While it is possible to instruct eligibility teams that “special education” is needed before eligibility attaches, it is almost impossible to train them as to what constitutes “special education,” as there are no clear standards in the statute, regulations, or caselaw. This is best demonstrated in the great divide in authority interpreting the term “special education.”

C. *Varied Interpretations of “Special Education”*

Decisionmakers’ reticence to tackle the “special education” limitation is understandable in light of the difficult nature of concretely identifying what is and is not special education (that is, what constitutes an adaptation of content, methodology, or delivery of instruction to meet the unique needs of the child). Decisionmakers ignoring the special education limitation are the most extreme example of the generic or one-size-fits-all educational paradigm. But even decisionmakers who acknowledge the limitation find enough wiggle room within the definition of “special education” to employ the ideology that children needing any modification to the generic curriculum, content, and methodology—no matter how minor—are the responsibility of special education. On the other hand, decisionmakers adopting the individualized general education paradigm recognize that certain modifications should not be considered special education, and that the general education system—not special education—should be primarily responsible for

Admin. Dist. 49, 35 IDELR 174, 174 (Me. SEA 2001) (finding a child eligible as SED and in need of special education, yet failing to identify what special education was required).

255. H.R. REP. NO. 108-77, at 150 (2003).

diverse learning styles. This paradigm blurs the line between special education and best educational practices in the general classroom, because it proclaims that all children need individualized instruction, but not all children need special education.

Some decisionmakers recognize this dichotomy and draw a line between merely good teaching techniques for all general education students and a specific program of instruction for a particular child, while others steadfastly maintain that children needing any modifications need special education. The result is a patchwork of decisional authority interpreting “special education” that provides no firm guidance to eligibility teams. Without firm authority or certain definitions, eligibility teams are permitted vast discretion to insert their own pedagogical beliefs. Bias inevitably influences their eligibility decisions.

1. Adaptation of Content as Special Education

Children with enumerated disabilities that require adaptation to the content of instruction to meet their unique needs are IDEA-eligible. If a child needs to learn different skills or information than his or her general education counterparts, that child needs special education. Yet decisionmakers do not draw such a precise line, and often find children in need of minor curriculum modifications to be ineligible.

One seemingly clear-cut area of agreement is that instructing a child in a unique skill set is special education. A long line of decisions holds that children requiring habilitative services or training in basic life skills—skills significantly different than those taught to the general education population—require special education and are eligible.²⁵⁶ In *Yankton School District v. Schramm*,²⁵⁷ one of the most cited opinions on the issue, a student, Tracy, had weakened hand strength and dexterity as a result of cerebral palsy. Tracy was classified under the IDEA between kindergarten and eighth grade because she needed adaptive physical education, mobility assistance, copies of teacher notes, separate textbooks for home and school, and modified assignments.²⁵⁸ The district declassified her in the ninth grade,

256. See, e.g., *Padilla v. Dep't of Educ.*, 30 IDELR 503, 505 (P.R. Ct. App. 1998) (noting that teaching a severely disabled child basic communication is special education because “education for disabled children should be afforded a broader scope, to include not only traditional academic skills, but also the basic functional skills of daily living After all, a person’s development as a human being is the ultimate purpose of education.”); *In re Contra Costa County Consortium*, 1984-85 EHLR (Cal. SEA 1985) (noting that teaching a severely disabled child basic communication skills is special education, and the child is therefore IDEA-eligible); *Jenkins v. Florida*, EHLR 556:471 (M.D. Fla. 1985), *vacated and remanded in part on other grounds*, 815 F.2d 629 (11th Cir. 1987) (noting that rehabilitative services provided to a severely disabled child is special education); *Polk v. Central Susquehanna Intermediate Unit No. 16*, 853 F.2d 171, 182-83 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (noting that physical therapy and training in basic life skills are special education); *Gladys J. v. Pearland Independent Sch. Dist.*, 520 F. Supp. 869, 879 (S.D. Tex. 1981); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47, 47 (N.D. Ala. 1981).

257. 93 F.3d 1369 (8th Cir. 1996).

258. *Id.* at 1371.

reasoning that the only special education she received was adaptive physical education—which no longer needed to be provided because she had fulfilled her physical education requirements. The district continued to offer all the other assistance it previously provided under a new Section 504 plan. The parents contested the declassification because they wanted the district to provide Tracy with transition planning (that is, teaching her to drive and certain independent living skills) that is available under the IDEA but not under Section 504.²⁵⁹

The parties agreed that Tracy needed the offered services, and “[t]he legal question . . . thus [was] whether those services constitute ‘special education and related services’ under the IDEA.”²⁶⁰ The Eighth Circuit held that modifying the length and nature of Tracy’s assignments, providing teacher notes, and teaching her to type using only her left hand and the first finger of her right hand were individualized instruction and, therefore, special education.²⁶¹ The mobility assistance and provision of multiple sets of books, on the other hand, were found to be related services.²⁶² Because Tracy needed special education and related services she was IDEA-eligible.²⁶³

The holding that modified typing instruction is special education was facially correct, because Tracy was taught an entirely different typing skill set than was taught to her general education peers. Yet not all teaching of unique skill sets is special education. Speech-language pathology, audiology services, physical and occupational therapy, counseling services, and orientation and mobility services, all of which teach different skills than are taught in general education, are defined as related services and not special education.²⁶⁴ It is too simple to conclude, therefore, that the mere teaching of a different skill than is taught to the rest of the students is special education, as much depends on whether the state has included any related services in its “special education” definition.²⁶⁵ The *Yankton* court did not consult the relevant state law to determine if Tracy’s typing instruction—likely occupational therapy—was defined as a related service and not special education, possibly making her ineligible. Many courts and hearing officers make this same error.²⁶⁶

259. This case would be easily decided today as the regulations currently provide that “travel training”—that is, teaching the skills necessary to move safely from place to place—is defined as special education. 34 C.F.R. § 300.25(a)(2)(ii), (b)(4)(ii) (2003).

260. *Yankton Sch. Dist.*, 93 F.3d at 1374 n.4.

261. *Id.* at 1374.

262. *Id.* The court also identified the related services the child received: transportation to school on a lift bus, mobility assistance in school, assistance with a lunch tray, assistance in setting up her saxophone, and provision of separate textbooks for home and school. *Id.*

263. *Id.* at 1376.

264. These terms are specifically defined in 34 C.F.R. § 300.24(b).

265. See, e.g., *Pittsburgh Sch. Dist.*, 24 IDELR 1119, 1119 (Pa. SEA 1996) (finding that a child requiring a Life Skills Program, which was counseling to teach organization and responsibility, did not need special education and was not IDEA-eligible); *Radnor Township Sch. Dist.*, 25 IDELR 1229, 1231 (Pa. SEA 1997) (drug and alcohol counseling does not “constitute specialized instruction”).

266. See, e.g., *Michael P. v. Illinois Bd. of Educ.*, 919 F. Supp. 1173, 1180 (N.D. Ill. 1996), *amended*, 934 F. Supp. 989 (N.D. Ill. 1996) (holding that a child needing speech therapy needed special

The Eight Circuit also held in *Yankton* that modifying the length and nature of assignments was also special education.²⁶⁷ The court did not discuss the extent of the modifications to the assignments or whether modified assignments were available to general education students as well. Instead, the Eight Circuit employed a strict view, finding that any content modification constituted special education.²⁶⁸ While the content of instruction is modified when the nature of assignments is altered for a particular student, the deviation may be quantitative rather than qualitative, or minor rather than significant, and may be provided to all general education students irrespective of disability. In fact, best educational practices mandate individualizing assignments to fit the abilities of the child.²⁶⁹ By holding that any modification to content is special education, the Eight Circuit implicitly adopts the one-size-fits-all general education paradigm and reserves all individualized instruction—no matter how slight—exclusively for eligible children.

Hearing officers and state review panels—typically education experts and not legal experts—more willingly reject the static general education paradigm. They often hold that minor curriculum modifications, which are provided to nondisabled general education students, do not constitute special education, and deny eligibility to children requiring only limited services. For example, in *Mountain Empire Unified School District*,²⁷⁰ a learning disabled child required small group and individualized instruction, preferential seating, curriculum one year below grade level, tutoring, pull-out assistance in language arts, additional teacher time, and assistance from the special education aide in the classroom. The hearing officer denied eligibility because these services were not special education, but rather “services offered within the regular instructional program.”²⁷¹ Similarly, in *Howard County Public School*,²⁷² the school district provided the student with an adjusted spelling list, corrective reading instruction, a unique reading and spelling program, and allowed the parents to use alternative methods to complete assignments.²⁷³ It was agreed that the child needed these services, yet she was denied IDEA eligibility because these modifications were “alternative teaching methods” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA.”²⁷⁴ Finally, in *Avon Public Schools*,²⁷⁵ the child received phonologi-

education but failing to examine state standards to see if speech therapy was included in the definition of “special education”); *Natchez-Adams Sch. Dist. v. Searing*, 918 F. Supp. 1028, 1037-38 (S.D. Miss. 1996) (holding that a child needing occupational therapy needed special education but failing to examine state standards to see if occupational therapy was included in the definition of “special education”).

267. *Yankton Sch. Dist.*, 93 F.3d at 1374.

268. *Id.* at 1375.

269. See *infra* notes 316-326 and accompanying text.

270. 36 IDELR 29 (Cal. SEA 2001).

271. *Id.* However, because the child did not do well with these regular education services she required special education. *Id.*

272. 25 IDELR 771 (Md. SEA 1997).

273. *Id.* at 777.

274. *Id.*

275. 25 IDELR 778 (Mass. SEA 1997).

cal awareness training and direct instruction in the Wilson reading program, but was denied eligibility because these were deemed to be only “supplemental services.”²⁷⁶

In each of these cases, the child required either the modification of the curriculum or the teaching of unique skills, yet the decisionmakers refused to find that the child required adaptation of instructional content, that is, special education. These decisionmakers implicitly recognize that the modern classroom should, and does, make many accommodations and changes for all students, and reserve eligibility only for those requiring significant modifications not provided to all students.

The prevalent use of a behavior management plan (BMP) is illustrative. BMPs are plans designed to modify a child’s behavior—they essentially teach a child proper behavior through specified methods. Despite the fact that BMPs adapt the content of instruction, they are consistently found not to constitute special education.²⁷⁷ The implicit justification is that BMPs are simply good teaching techniques that should be applied to all students and not merely those with disabilities.²⁷⁸ Teachers must use many techniques to manage a classroom, and BMPs are just one tool in their chest.²⁷⁹

The tension between the old and new pedagogical paradigms leaves decisionmakers divided as to how much modification of content is needed to constitute special education and leaves ample room for differing pedagogical beliefs and bias to pervade the ultimate eligibility decision.

276. *Id.* at 778; *see also* Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1026 (Or. SEA 1998) (holding that “social skills” training is not special education); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 756 (Tenn. SEA 1997) (finding that a child did not get special education at a private school despite finding that he received individualized instruction); Smithtown Cent. Sch. Dist., 32 IDELR 46, 46 (N.Y. SEA 1999) (“The Section 504 accommodations designed to address the child’s hearing impairment included . . . encouraging the child to maintain appropriate physical aspects necessary for communication, such as eye contact I am unable to find that any of these accommodations constitute specially designed instruction.”).

277. *See, e.g.*, Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 756 (Tenn. SEA 1997) (noting that the provision of a behavior management plan at a private school was not special education); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1026 (Or. SEA 1998) (noting that a “strategy for managing outbursts” is not special education); *In re* K.M., 29 IDELR 1027, 1027 (Vt. SEA 1999) (noting that crisis management is an accommodation and not special education); Ludington Sch. Dist., 35 IDELR 137, 137 (Mich. SEA 2001) (finding that a child with a behavior management plan is “able to profit from regular education without special education support”); Radnor Township Sch. Dist., 25 IDELR 1229, 1231 (Pa. SEA 1997) (noting that a behavior management plan “constitute[s] specialized instruction”); Gregory-Portland Indep. Sch. Dist., 38 IDELR 168, 168 (Tx. SEA 2002) (finding that a discipline plan was Section 504 accommodation and not special education).

278. *See, e.g.*, ROBERT J. MARZANO, ASS’N FOR SUPERVISION AND CURRICULUM DEV., WHAT WORKS IN SCHOOLS 93 (2003) (“[T]he most effective classroom managers tended to employ different types of strategies with different types of students, whereas ineffective managers did not Where some students need encouragement, other students need a gentle reminder, and still others might require a firm reprimand.”).

279. NAT’L EDUC. ASS’N, I CAN DO IT! CLASSROOM MANAGEMENT 25-27, 80 (2005), *available at* <http://www.nea.org/neatoday/0302/firstfiveyears.html>.

2. *Adaptation of Method as Special Education*

It is not necessary that the content of instruction be modified to find that a child needs special education. The use of general education materials to meet a disabled child's needs may appropriately be labeled "special education," so long as the method of instruction is adapted.²⁸⁰ But decisionmakers disagree as to what constitutes mere accommodations or related services provided to students that are not special education, as opposed to modifications teachers make to their teaching method and content that are special education.

The difficulty in distinguishing between mere accommodations and content adaptation is evident in *Troy Area School District*,²⁸¹ wherein a child with physical difficulties affecting her balance and strength required significant modifications to her physical education class. The District contended that the child only needed accommodations in physical education class, but the hearing officer concluded that

what Laura need[ed] clearly qualifi[ed] as "specially designed instruction" [T]here is no lingering doubt that what Laura need[ed] because of those challenges [was] well beyond that which is provided in the regular education curriculum Equally obvious is that the level of intervention that Laura will need to participate in most of them far exceed[ed] the regular PE curriculum.²⁸²

In essence, the child's accommodations were so significant that the child was actually learning a different skill set than her peers. Therefore, accommodations, when significant and taken *in toto*, can constitute adaptation in content or methodology.²⁸³

Distinguishing accommodations from adaptations to teaching method, procedures, or technique is more difficult. There is general agreement that children needing the accommodations of oral tests or longer time periods to complete tests are not IDEA-eligible because they do not need special edu-

280. 34 C.F.R. § 300.26(b)(3) (2003); OSEP Policy Letter, 19 IDELR 494 (1992).

281. 30 IDELR 551, 552 (Pa. SEA 1999). For example, to learn how to kick a ball, "significant strengthening of various muscles would be necessary, as well as a breaking down of the task into discrete elements," and she would have to either substitute certain movements to meet the balanced curriculum or not participate at all in certain activities. *Id.*

282. *Id.* at 555-56.

283. See *Bristol Township Sch. Dist.*, 28 IDELR 330, 333, 336 (Pa. SEA 1998) (holding that preferential seating; additional time to complete written work; oral testing; special modifications to classroom texts, workbooks, and worksheets to eliminate visual complexity; an assistive communication device for writing; adaption of school materials; assistance with organizational skills; use of information on tape; and a full integration of all the services "are, in fact, special education and related services as defined by the IDEA and the PA Code" and that the issue "was 'not even close'"); *Tucson Unified Sch. Dist.*, 30 IDELR 1000, 1002 (Az. SEA 1999) (noting that where a child received "special individualized instruction, attention and guidance in his classroom efforts," he was therefore IDEA-eligible because "[w]ithout these accommodations and individualized instruction . . . [the s]tudent would not receive educational benefit in a regular classroom").

cation.²⁸⁴ Accommodating students with additional time to complete assignments is also not considered adapting the method of instruction.²⁸⁵ Decisionmakers also find that the provision of aides to assist students with mobility, handwriting, organization, or behavior is also not special education.²⁸⁶ Furthermore, the provision of additional organizational assistance or systems is not considered special education²⁸⁷ and neither is the provision of note-takers or interpreters.²⁸⁸ Likewise, the provision of technology to students, such as tape recorders and laptop computers, is also not special education.²⁸⁹ Rather, laptops, computers, and other technological devices are

284. See, e.g., Santa Ana Unif. Sch. Dist., 21 IDELR 1189, 1189 (Cal. SEA 1994) (finding that despite a need for oral instead of written tests, a learning-disabled child was not IDEA-eligible because she did not need special education); *In re* Wayne Highlands Sch. Dist., 24 IDELR 476, 478 (Pa. SEA 1996) (finding that a child with chronic fatigue syndrome who needed techniques that minimized the time she had to spend in completing assigned tasks, including oral testing, was ineligible because “these accommodations do not rise to the level of specially designed instruction”); Petaluma Joint Unified Sch. Dist., 25 IDELR 262, 262 (Cal. SEA 1996) (noting that allowing a student extra time to take tests is a modification which did not help the student, therefore he needed special education and was IDEA-eligible).

285. See, e.g., Gregory-Portland Indep. Sch. Dist., 38 IDELR 168, 168 (Tx. SEA 2002); Pennsbury Sch. Dist., 26 IDELR 1208, 1208 (Pa. SEA 1997) (finding that a visually impaired student who required more time to complete written assignments was not IDEA-eligible because she did not require special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that allowing the use of additional time to complete assignments is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Arlington Cent. Sch. Dist., 35 IDELR 205, 205 (N.Y. SEA 2001) (finding that a child that needed more time to complete assignments did not need special education).

286. See, e.g., Mountain Empire Unified Sch. Dist., 36 IDELR 29, 29 (Cal. SEA 2001) (finding that assistance from special education aides in a classroom was not special education but rather a “service[] offered within the regular instructional program”); Radnor Township Sch. Dist., 25 IDELR 1229, 1231 (Pa. SEA 1997) (finding that a one-on-one aide to assist with behavior problems did not “constitute specialized instruction”); St. Clair County Bd. of Educ., 29 IDELR 688, 688 (Ala. SEA 1998) (finding that a child with an orthopedic impairment who needed aid to load and unload from the school bus, carry books and materials, carry her lunch, and assist in restroom use was not IDEA-eligible because she did not need special education); *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500, 500 (9th Cir. 1999) (finding that use of an aide to assist in handwriting was a “modification of the regular school program” and not special education, and therefore the child was not IDEA-eligible); Monrovia Unified Sch. Dist., 38 IDELR 84, 84 (Cal. SEA 2002) (finding that the Section 504 accommodations of providing a child with aides to remind the student to stay on task and help him with writing assignments were not enough to help the student, and therefore he needed special education).

287. See, e.g., Conrad Weiser Area Sch. Dist., 27 IDELR 100, 100 (Pa. SEA 1997) (holding that a child with SLD and ADD needed the accommodation of an organizational system to address missed work assignments but he was not IDEA-eligible because he did not need special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (noting that allowing the use of “graphic organizers” is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1026 (Or. SEA 1998) (noting that the accommodations of verbal reminders, a portable file, and visual cues to address organizational problems are related services and not special education); Long Beach Unified Sch. Dist., 33 IDELR 113 (Cal. SEA 2000) (finding that the use of a daily planner is an accommodation in the regular education program and not special education).

288. Letter to Pollo, 21 IDELR 1132 (OSEP 1994).

289. See, e.g., *Norton*, 168 F.3d at 500 (noting that the use of a notebook computer was a “modification of the regular school program” and not special education, and therefore the child was not IDEA-eligible); Petaluma Joint Unified Sch. Dist., 25 IDELR 262, 262 (Cal. SEA 1996) (noting that a child required more than mere a modification to be allowed to use a notebook computer for homework, and was therefore eligible for special education); Conrad Weiser Area Sch. Dist., 27 IDELR 100, 100 (Pa. SEA 1997) (finding that a child with SLD and ADD needed the accommodation of “technological assistance” but he was not IDEA-eligible because he did not need special education); Pennsbury Sch. Dist.,

considered “assistive technology devices”²⁹⁰ and are not considered to be special education. Finally, decisionmakers often agree that preferential seating is an accommodation and not special education.²⁹¹

These accommodations provided to students to assist them in the receipt or use of instruction are properly not considered special education because the teacher is not adapting instructional methodology. Rather, the student is adapting how he or she receives or employs the instruction. Accommodations merely allow the child to access instruction and demonstrate their learning—they are not modifications in methodology by the teacher, and are therefore properly excluded from the definition of “special education.”²⁹²

26 IDELR 1208, 1208 (Pa. SEA 1997) (finding that a visually impaired student who required the use of a computer was not IDEA-eligible because she did not require special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that allowing the use of a computer to assist in spelling is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Aransas County Indep. Sch. Dist., 29 IDELR 141, 141 (Tx. SEA 1998) (finding that a child with ADD and LD required “instructional modification” of computer assistance but was not IDEA-eligible because he did not need special education); Long Beach Unified Sch. Dist., 33 IDELR 113, 113 (Cal. SEA 2000).

Appropriate modifications such as a tape recorder . . . are available through regular education. Implementing the types of accommodations previously written into STUDENT’s intervention plan will allow him to sustain his academic progress without placing unreasonable demands on him. As a result, the Petitioner fails to satisfy the second prong of the severe learning disability eligibility requirement because his disability can be accommodated in the regular education program.

Id.; George West Indep. Sch. Dist., 35 IDELR 287, 1169 (Tx. SEA 2001) (“[A]lthough she needs the amplification device to assist her in the classroom environment, these facts alone do not rise to the level of an educational ‘need’ for special education for IDEA eligibility purposes.”); Santa Ana Unified Sch. Dist., 21 IDELR 1189, 1189 (Cal. SEA 1994) (noting that even though a child required the use of a spell checker in the classroom because of learning disability in spelling, the child was not IDEA-eligible because he did not need special education).

290. 20 U.S.C. § 1401(1) (1998); 34 C.F.R. § 300.5 (2003).

291. See e.g., *Norton*, 168 F.3d at 500 (holding that a child who required preferential seating did not need special education because preferential seating is merely a “modification of the regular school program”); Gregory-Portland Indep. Sch. Dist., 38 IDELR 168, 168 (Tx. SEA 2002); Mountain Empire Unified Sch. Dist., 36 IDELR 29, 29 (Cal. SEA 2001) (noting that preferential seating is a modification of the regular education curriculum and not special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (noting that allowing preferential seating is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (“The recommendations in her report . . . include various accommodations and supportive services [including] seating preference . . . but not specially designed instruction.”); Smithtown Central Sch. Dist., 32 IDELR 46, 46 (N.Y. SEA 1999).

The Section 504 accommodations designed to address the child’s hearing impairment included seating the child close to the teacher; directing the child to move his seat at any time to insure hearing . . . I am unable to find that any of these accommodations constitute specially designed instruction.

Id.; Bd. of Educ. of the East Syracuse-Minoa Cent. Sch. Dist., 21 IDELR 1024, 1032 (N.Y. SEA 1994) (finding that even though the child required preferential seating to address an auditory processing deficit, the child was not eligible for special education).

292. The Office of Special Education Programs concludes that certain accommodations furnished to students in the regular classroom, such as the provision of an interpreter for hearing impaired students or the use of modified materials for students with visual or physical impairments, may constitute “specially designed instruction.” OSEP Policy Letter, 20 IDELR 1462 (1994). OSEP does not state that such accommodations are specially designed instruction but rather that they *may be* specially designed instruction.

But the line separating accommodations from special education is uncertain, especially for modifications in method such as modified assignments or the coordination of accommodations.²⁹³ Providing modified assignments is not only an adaptation in content, as discussed above, but is more so an adaptation in teaching method. Similar to the Eighth Circuit's holding in *Yankton*,²⁹⁴ the court in *Greenland School District v. Amy N.*²⁹⁵ held that a child requiring modified assignments needed special education. While modifying the length and nature of assignments is an adaptation of teaching method, many decisionmakers find it is not special education. They reason that modified assignments are minor modifications to the regular education setting that are available to all children.²⁹⁶

Similar reasoning is employed to find that other minor teaching modifications children need are not special education:

The Section 504 accommodations designed to address the child's hearing impairment included seating the child close to the teacher; directing the child to move his seat at any time to insure hearing; encouraging the child to maintain appropriate physical aspects necessary for communication, such as eye contact; requesting the child to repeat directions before beginning independent activities when necessary; monitoring the child during initial practice of activities; and encouraging the child to inform the speaker of his auditory needs on an ongoing basis. I am unable to find that any of these accommodations constitute specially designed instruction. The child is not in a special class, nor does he have special education teachers

293. Compare *Bristol Township Sch. Dist.*, 28 IDELR 330 (Pa. SEA 1998) (finding that the coordination of related services is special education), with *In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999) (finding that case management to coordinate a plan is an accommodation and not special education), and Ellen A. Callegary, *The IDEA's Promise Unfulfilled: A Second Look at Special Education and Related Services for Children with Mental Health Needs After Garret F.*, 5 J. HEALTH CARE L. & POL'Y 164, 170-72 (2002) (noting that service coordination is a related service).

294. 93 F.3d 1369, 1373 (8th Cir. 1996).

295. No. Civ. 02-136-JD, 2003 WL 1343023, at *8 (D.N.H. 2003), *aff'd on other grounds* 358 F.3d 150 (1st Cir. 2004) (finding that a child with ADHD and Asperberger's syndrome required modified assignments, parent checklists and contacts, behavior modification techniques, ability grouping, significant parental assistance with homework, preferential seating in the front of the class, and a tutor).

296. See, e.g., *Mountain Empire Unified Sch. Dist.*, 36 IDELR 29 (Cal. SEA 2001) (allowing take-home tests and assignments is not special education); *Conrad Weiser Area Sch. Dist.*, 27 IDELR 100 (Pa. SEA 1997) (holding that a child with SLD and ADD needed the accommodation of shortened assignments but was not IDEA-eligible because he did not need special education); *Pennsbury Sch. Dist.*, 26 IDELR 1208 (Pa. SEA 1997) (holding that a visually impaired student who required shortened written assignments was not IDEA-eligible because she did not require special education); *Long Beach Unified Sch. Dist.*, 33 IDELR 113, 113 (Cal. SEA 2000).

Appropriate modifications such as . . . reduced reading assignments, and modified class and homework demands are available through regular education. Implementing the types of accommodations previously written into [the student's] intervention plan will allow him to sustain his academic progress without placing unreasonable demands on him. As a result, the Petitioner fails to satisfy the second prong of the severe learning disability eligibility requirement because his disability can be accommodated in the regular education program.

Id.; *Monrovia Unified Sch. Dist.*, 38 IDELR 84 (Cal. SEA 2002) (finding that an accommodation of modified assignments did not assist student, and therefore he needed special education).

. . . . The accommodations set forth in the child's Section 504 plan are common strategies that apply to students in general, not just students with disabilities.²⁹⁷

Employing this analysis, decisionmakers often hold that many minor modifications to the method of instruction are not special education. For example, children that need tasks broken down into manageable pieces,²⁹⁸ written or concrete visual instructions,²⁹⁹ or visual cues³⁰⁰ are not often found to be in need of special education. The same is true for students who require additional monitoring of attendance, behavior, or homework³⁰¹ and additional communication between parents and the school.³⁰² Even students that require small classes are often not deemed in need of special education.³⁰³ Finally, the provision of a tutor or special small groups—a clear adaptation of method of instruction—is often not considered special education.³⁰⁴

297. Smithtown Cent. Sch. Dist., 32 IDELR 46, 46 (N.Y. SEA 1999) (citations omitted).

298. Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (recommending “tasks broken down into manageable pieces . . . but not specially designed instruction”).

299. Gregory-Portland Indep. Sch. Dist., 38 IDELR 168 (Tx. SEA 2002); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (recommending “written instructions . . . but not specially designed instruction”).

300. Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (recommending “visual cues . . . but not specially designed instruction”).

301. Gregory-Portland Indep. Sch. Dist., 38 IDELR 168 (Tx. SEA 2002); Pittsburgh Sch. Dist., 24 IDELR 1119 (Pa. SEA 1996) (finding that a child requiring plans to track and encourage homework and attendance did not need special education); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756 (Tenn. SEA 1997) (finding that the provision of constant monitoring of behavior at a private school was not special education); St. Clair County Bd. of Educ., 29 IDELR 688 (Ala. SEA 1998) (finding that an orthopedically impaired child who needed an adult chaperon to monitor her band activity was not IDEA-eligible because she did not need special education); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (finding that a teacher “follow-up to be sure assignments are turned in” is not special education); *In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999) (finding that daily check-ins and monitoring of academics and behavior are accommodations and not special education); Smithtown Cent. Sch. Dist., 32 IDELR 46, 131 (N.Y. SEA 1999) (“The Section 504 accommodations designed to address the child’s hearing impairment included . . . monitoring the child during initial practice of activities I am unable to find that any of these accommodations constitute specially designed instruction.”); Long Beach Unified Sch. Dist., 33 IDELR 113 (Cal. SEA 2000) (finding that nightly homework checks were accommodations to the general education program and not special education). *But see* Bristol Township Sch. Dist., 28 IDELR 330, 338-39 (Pa. SEA 1998) (finding that a mother’s monitoring of a child’s needs, in addition to numerous other services, constituted special education).

302. Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (recommending “consistent communication between school and parent . . . but not specially designed instruction”); *In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999) (finding that communication with school counselor is an accommodation and not special education); West Haven Bd. of Educ., 36 IDELR 221 (Conn. SEA 2002) (finding that increased parental contact is not special education).

303. Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 760 (Tenn. SEA 1997) (finding that the provision of small classes at a private school was not special education but rather a service offered within regular instructional programs); *In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999) (finding that the provision of small classes is an accommodation and not special education).

304. Mountain Empire Unified Sch. Dist., 36 IDELR 29 (Cal. SEA 2001) (finding that small-group placement and individualized instruction were not special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that when the district permitted a tutor to assist a student in the weekly production of written documents, it was a mere “alternative teaching method[.]” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Los Alamitos Unified Sch. Dist., 26 IDELR 1053 (Cal. SEA 1997) (finding that a

The tension is palpable between the individualized education paradigm underlying the above decisions, and the one-size-fits-all paradigm underlying the *Greenland* and *Yankton* line of decisions. Any child requiring modification to the generic educational method needs special education according to the generic educational model, while the individualized model anticipates that minor adaptations are available to all children and reserves special education for those needing significant modifications to methodology. Again, this pedagogical divide in the authority leaves eligibility teams with significant discretion to determine when a child needs special education in the form of modified methodology.

3. *Adaptation of Delivery as Special Education*

The authority is also divided as to what constitutes adaptation of delivery of instruction. The first point of disagreement is whether modifying *who* delivers the instruction is itself special education. Some states require that only certified special education teachers can provide special education.³⁰⁵ In other words, any adaptation by the regular classroom teacher, no matter how significant, cannot be considered special education in these states—the child must need modifications provided by a certified special education teacher.³⁰⁶ The IDEA and the IDEIA contain no such mandate, instead leaving personnel decisions to the states.³⁰⁷ But the IDEA and the IDEIA imply

student provided with a reading tutor offered services within the regular instructional program and not special education); Aransas County Indep. Sch. Dist., 29 IDELR 141 (Tx. SEA 1998) (finding that a child with ADD and LD required “instructional modification” of an after-school tutor and counseling but was not IDEA-eligible because he “has not demonstrated a need for special education services”); *In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999) (finding that “academic support as needed” and “supported study” are accommodations and not special education); Bellflower Unified Sch. Dist., 33 IDELR 262 (Cal. SEA 2000) (finding that a child with a reading learning disability required small-group reading sessions with a reading specialist and later a reading tutoring program and yet was not IDEA-eligible because his “recent academic progress indicates that, at this point, he remains able to learn and to remediate his severe discrepancy within the regular education system”); Ludington Sch. Dist., 35 IDELR 137 (Mich. SEA 2001) (finding that a child who received “extra help [in school]” is not IDEA-eligible because he was “able to profit from regular [learning experiences] without special education support”); Northshore Sch. Dist., 35 IDELR 144 (Wash. SEA 2001) (finding that a child who required a special reading group did not “need[] specially designed instruction”); Arlington Central Sch. Dist., 35 IDELR 205 (N.Y. SEA 2001) (finding that a child in a “reading recovery program” who later saw a private tutor was not IDEA-eligible because he did not need special education); Pennsbury Sch. Dist., 37 IDELR 267 (Pa. SEA 2002) (finding that a child performed well when he received “extra services in reading,” including small-group and individual reading services, and therefore he did not need special education). *But see* Toledo Pub. Sch. Dist., EHLR 401:335 (Oh. SEA 1989) (finding a child IDEA-eligible because he needed special education in the form of tutoring); *Greenland Sch. Dist. v. Amy N.*, No. Civ. 02-136-JD, 2003 WL 1343023 (D.N.H. Mar. 19, 2003) (finding that a child succeeded in school because he was provided a tutor, which was special education).

305. TUCKER & GOLDSTEIN, *supra* note 214, at ch. 13:17.

306. *See, e.g.*, Smithtown Cent. Sch. Dist., 32 IDELR 46 (N.Y. SEA 1999) (“I am unable to find that any of these accommodations constitute specially designed instruction. The child is not in a special class, nor does he have special education teachers.”).

307. 34 C.F.R. § 300.136(b)(2)(i) (2003) (“Each State may determine the specific occupational categories required to provide special education and related services within the State.”); 34 C.F.R. § 300.136(b)(3) (“Nothing in . . . [the IDEA] requires a State to establish a specified training standard (e.g., a masters degree) for personnel who provide special education and related services . . .”).

that only appropriately trained personnel will provide special education and related services.³⁰⁸ Despite the implication, many decisionmakers ignore who is providing the education to determine if it is special education, holding that assistance from a special education teacher is not necessarily special education, or that special education can be provided by general educators.³⁰⁹

There is also disagreement on the parallel issue of whether parents delivering instruction, typically through assistance with homework, constitutes special education. Some courts find that parental assistance, particularly if substantial, is an adaptation in delivery that qualifies as special education while other courts do not.³¹⁰

Finally, there is disagreement as to whether delivery of instruction in a unique setting alone is special education. In *Weixel v. Board of Education of the City of New York*,³¹¹ a child with chronic fatigue syndrome and fibromyalgia could not consistently attend school. The district acknowledged her qualifying disability, but denied IDEA eligibility on the grounds that the child did not need special education—she merely needed provision of the general curriculum outside of the school. The Second Circuit disagreed, holding that the child's impairment "made it impossible for her to attend school. As a result of her inability to attend classes, she required 'special education' in the form of home instruction."³¹²

In contrast, in *Katherine S. v. Umbach*,³¹³ the child needed homebound instruction and residential placement, but the court denied eligibility, finding that instruction in alternative settings does not constitute special education. Similarly, in *In re Wayne Highlands School District*,³¹⁴ the hearing

308. See, e.g., 20 U.S.C. § 1412(a)(14) (2003) (requiring states to implement a comprehensive system of personnel development "to ensure an adequate supply of qualified special education, regular education, and related services personnel"); 20 U.S.C. § 1412(a)(15)(C) (permitting states to require LEAs to "make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities"); 34 C.F.R. § 300.135(a)(1), .380(a)(2); see also 20 U.S.C. § 1435(a)(8); 34 C.F.R. § 300.380-.382. The IDEA specifically requires that early intervention services provided to infants and toddlers must be provided by qualified special educators or related service providers. 20 U.S.C. § 1432(4)(F).

309. See, e.g., *Bristol Township Sch. Dist.*, 28 IDELR 330 (Pa. SEA 1998) (finding that the fact that a special education teacher is not required did not mean the child does not need special education); *Ashland Sch. Dist.*, 28 IDELR 630 (Or. SEA 1998) (finding that a child who moved to a Learning Center and was taught by a special education teacher was not IDEA-eligible because she succeeded without special education); *Weston Pub. Sch. Dist.*, 34 IDELR 75, 76 (Mass. SEA 2001) ("Although he is receiving support from the third grade special education teacher, he does not require specialized instruction or modifications to the general curriculum and would not have difficulty accessing the curriculum without her support.").

310. See, e.g., *Conrad Weiser Area Sch. Dist. v. Dep't of Educ.*, 603 A.2d 701, 705 (Pa. 1992) (finding that a child needed special education because he needed parental assistance with homework); *Greenland Sch. Dist.*, 2003 WL 1343023, at *8 (finding that significant parental assistance constituted special education); *Toledo Pub. Sch. Dist.*, EHLR 401:335 (Oh. SEA 1989) (finding a child IDEA-eligible because he needed special education in the form of substantial parental help). *But see, e.g., West Haven Bd. of Educ.*, 36 IDELR 221 (Conn. SEA 2002) (finding that additional homework assistance is not special education).

311. 287 F.3d 138, 141-42 (2d Cir. 2002).

312. *Id.* at 150.

313. No. CIV.A. 00-T-982-E, 2002 WL 226697, at *12 (M.D. Ala. Feb. 1, 2002).

314. 24 IDELR 476 (Pa. SEA 1996); see also *Pocono Mountain Sch. Dist.*, 36 IDELR 224 (Pa. SEA

officer found that homebound instruction of the regular education curriculum is not special education, and therefore a child with chronic fatigue syndrome that required homebound instruction was not IDEA-eligible.

The division again arises from the differing pedagogies underlying the decisions. The individualized model entrusts the general educators to provide the standard curriculum to children in alternate settings, while the one-size-fits-all model resigns the duties and the children to special education.

D. "Special Education" Redefined

The division in authority as to what constitutes special education is a product of its vague statutory and regulatory definition. Those subscribing to the educational model that children who do not benefit from the generic one-size-fits-all education are the responsibility of special education alone find support in the definition of "special education" which implies that children requiring *any* adaptation of content, method, or delivery need special education. Decisionmakers adopting the individualized general education model find support in the definition of "special education" which requires that the adaptations be made to meet the unique needs of the child, as opposed to the generic needs of all students.³¹⁵ Reducing the vast discretion in eligibility determinations and the inevitable resulting bias requires a more certain definition of "special education," one that yields consistent rather than subjective results.

The best means to address these problems is to adopt the emerging educational pedagogy by redefining "special education" to mean significant adaptations in content, method, and delivery that are not provided to all general education students irrespective of disability. In other words, children with enumerated disabilities should only be eligible if they need significant individualized instruction beyond that provided to all students.³¹⁶

2002).

Tiber's physical condition required homebound instruction beginning in January 1998 and continuing through the 1998-1999 school year. This accommodation and support was clearly not an adaptation in content, methodology or delivery. Homebound instruction is not a special education placement; it is a temporary excusal from school, under general education compulsory attendance regulations, for physical, mental or other urgent reasons. Homebound instruction is distinct from the special education placement known as "instruction in the home." Instruction in the home is a particular placement for students who require full time special education services and programs outside of the regular school.

Id. at 224 (citation omitted).

315. 20 U.S.C. § 1401(25); Letter to Smith, 18 IDELR 685 (OSEP 1992) (noting that specially designed instruction is education planned for a particular individual or individualized instruction); *see also* Theresa M. Willard, Note, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1176 ("[S]pecialized services are those offered to the disabled child to address needs which cannot be served by the regular education program.").

316. This limited definition does not infringe on state sovereignty to select educational programming because it does not require any level of individualized instruction in the general education classroom. Rather, by defining "special education" as significant modifications not provided in the general classroom, states and school districts are still free to select the amount of individualized instruction they will provide all students. The new definition does not compel states to individualize general education; it

This circumscribed definition acknowledges that minor modifications to content, delivery, and instruction are not special education, but rather good pedagogy for all students. Good teaching requires adjustment to classroom instruction to meet the varying individual needs of all students.³¹⁷ Educators cannot be “enmeshed in a system geared up to treat all 1st graders as though they were essentially the same, or all Algebra I students as though they were alike.”³¹⁸ Rather, educators must “acknowledge that students learn in varied ways—some by hearing, others by doing, some alone, others in the company of peers, some in a rapid-fire fashion, others reflectively To teach well is to attend to all [of] these things.”³¹⁹

The best educational practices, for example, mandate that teachers should provide certain students and parents feedback on the student’s performance (that is, adapt their method of instruction). The use of checklists and parental contact “is the most powerful thing that a classroom teacher can do to enhance student achievement ‘The most powerful single modification that enhances achievement is feedback. The simplest prescription for improving education must be dollops of feedback.’”³²⁰ Similarly, the use of small groups “accommodates students who are strong in some areas and weaker in others This teacher knows that sometimes she needs to assign students to groups so that assignments are tailored to student need”³²¹ In addition, many regular education students receive tutoring. In fact, the No Child Left Behind Act requires that schools in need of improvement provide “supplemental educational services” including tutoring.³²²

Despite the fact that the provision of certain minor modifications is the best educational practice for all students, many decisionmakers find such modifications to be special education reserved for students with disabilities, as noted above. The limited view of general education propounded by certain courts and hearing officers inevitably influences teams determining a particular child’s eligibility. Dr. Sultana randomly sampled over two hundred Individualized Education Plans (IEPs), which delineate the services to be provided eligible students. Dr. Sultana found that the special education provided on a majority of these IEPs included only modeling, examples, feedback, encouragement, advance organizers, verbal praise, clear instruc-

merely permits schools to embrace the new model by eliminating such instruction from the definition of “special education.” For an in-depth discussion of Congress’s reticence to intrude on state sovereignty over education, see Garda, *supra* note 15, at 451-55.

317. CHARLOTTE DANIELSON, ENHANCING PROFESSIONAL PRACTICE: A FRAMEWORK FOR TEACHING 49-50 (1996).

318. CAROL ANN TOMLINSON & SUSAN DEMIRSKY ALLAN, LEADERSHIP FOR DIFFERENTIATING SCHOOLS AND CLASSROOMS 1-13 (2d ed. 2000).

319. CAROL ANN TOMLINSON, HOW TO DIFFERENTIATE INSTRUCTION IN MIXED-ABILITY CLASSROOMS 27-31 (2d ed. 2001).

320. ROBERT J. MARZANO, ET AL., A HANDBOOK FOR CLASSROOM INSTRUCTION THAT WORKS 185 (2001).

321. TOMLINSON, *supra* note 319, at 3.

322. 20 U.S.C. §§ 6316(b)(6), (e)(12)(C) (2003).

tion, clear directions, verbal and visual cues, reviews, and guided practice.³²³ Dr. Sultana further noted that such specially designed instruction methods are also accepted indicators of effective instruction for all children, not just disabled children.³²⁴ In short, Dr. Sultana discovered that many IDEA-eligible students receive merely good educational practices that should be provided to all students.

All children require certain adaptations in the regular classroom—not just children with disabilities. These modifications should be encouraged in regular education and not resigned exclusively to special education. Children are often referred for IDEA eligibility despite only needing extra support or intensified instruction.³²⁵ Such extra support and intensified instruction must be carved out of the definition of “special education,” otherwise instructional casualties, particularly minorities, will be found to be in need of special education. There simply must be alternatives to special education. “If special education is the only place where students with learning difficulties can receive supplemental help, the greater the attraction of this program will be.”³²⁶ Children who need only the minor modifications available to all should not be resigned to special education with its attendant harms. Rather, only significant adaptations in instructional content, unavailable to all other children irrespective of disability, should be considered special education. As noted above, many decisionmakers already employ a similar unwritten standard, finding that generic programs available to all or minor modifications are not special education.³²⁷

While limiting special education to only significant adaptations not provided to all students finds support in the IDEA and certain decisions, it cannot be uniformly applied without redefining “special education.” Without such change, sufficient latitude exists within the IDEA for decision-

323. Quaisar Sultana, SDI: What Is It and How Well Do We Provide It? (May 5, 2004) (presentation at the LRP Special Education Conference).

324. *Id.*

325. H.R. REP. NO. 108-77, at 153 (2002).

326. Parrish, *supra* note 10, at 34.

327. *See* Old Orchard Beach Sch. Dep’t, 21 IDELR 1084, 1084 (Me. SEA 1994) (finding that an emotionally disturbed child placed in a personalized program that was available to all at-risk kids, whether suffering from a disability or not, did not need special education); Ashland Sch. Dist., 28 IDELR 630 (Or. SEA 1998) (finding that a child placed in a Learning Center which was available to all students was not IDEA-eligible because she progressed with related services); Smithtown Cent. Sch. Dist., 29 IDELR 293, 297 (N.Y. SEA 1998) (“Teaching techniques and modifications which the child’s teacher used with all of the children in her classroom would obviously not fall within the definition of special education under either Federal or State law.”); West Haven Bd. of Educ., 37 IDELR 56, 56 (Conn. SEA 2001) (finding that a child who needed help with homework and meeting deadlines did not need special education because “[t]hese types of needs can be met in the regular education program through the progress reports and after school assistance from teachers, which is available to all students at the high school, including this student”); Long Beach Unified Sch. Dist., 33 IDELR 113, 113 (Cal. SEA 2000).

Appropriate modifications such as . . . modified class and homework demands are available through regular education. . . . As a result, the Petitioner fails to satisfy the second prong of the severe leaning [sic] disability eligibility requirement because his disability can be accommodated in the regular education program.

Id.

makers to continue to insert their diverging pedagogies, and eligibility decisions will continue to be divided, subjective, and influenced by bias. Circumscribing the definition of “special education” will limit the discretion of referring teachers and eligibility teams. Under the new definition, eligibility teams will have to determine if regular education interventions are sufficient to assist the student, rather than presuming that broadly defined “special education” is needed. Referring-teacher subjectivity will also be reduced, as they will become aware that children will not be found eligible if regular education interventions will succeed. The circumscribed definition of “special education” promotes the best educational practice of regular education with ancillary services, instead of the current default of special education placement.³²⁸

IV. DEFINING WHEN A CHILD “NEEDS” SPECIAL EDUCATION

With a more certain definition of “special education,” bias is reduced in part of the eligibility process, and special education law will not impede the individualization model in general education. Narrowing the definition of “special education,” however, is not enough to prevent minority overrepresentation and to ensure that only those truly in need of special education are found eligible. A general education teacher, without attempting any general education interventions for a child, may refer a child to special education merely because the child does not fit the generic educational model of the classroom, and the eligibility team could conclude the same and classify the child. Strictly defining “special education” only addresses half of the problem—the other half is defining who “needs” special education.

While the IDEIA (and its predecessors) at least broadly defines “special education,” it “contains no explicit guidelines for determining whether a student with an impairment needs special education.”³²⁹ Instead, states are left to determine who “needs” special education and who does not.³³⁰ The only limitation is that a state’s criteria may not “operate to exclude any students who, in the absence of the State’s criteria, would be eligible for services under [IDEA].”³³¹

Very few states define when a child “needs” special education. For example, Massachusetts provides that there is a need for special education when the child is “unable to progress effectively in regular education.”³³²

328. Herr, *supra* note 4, at 374 (noting that special education is promoted over regular education with supportive services).

329. Letter to Pawlisch, 24 IDELR 959 (OSEP 1995); *see also* J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 (2d Cir. 2000) (emphasis added).

330. Letter to Pawlisch, 24 IDELR at 959.

331. *Id.*

332. MASS. GEN. LAWS ch. 71B, § 1 (2005); *see also* MASS. REGS. CODE tit. 603, § 28.02 (2005). To “progress effectively” in regular education means to

make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual

Similarly, Colorado pronounces that a child only needs special education if the child cannot receive “reasonable educational benefit from regular education,”³³³ and Tennessee articulates that a child needs special education when the child is “unable to be educated appropriately in the general education program.”³³⁴

These standards, while better than nothing, are still vague and subject to bias. As a result, determining who needs special education has historically plagued decisionmakers.³³⁵ The need for special education is clear for the severely disabled at the far end of the continuum of cognitive and behavioral competence.³³⁶ It is difficult to draw eligibility lines, however, once one moves away from the extremes of ability.³³⁷ Some find that a child needs special education merely because the child can benefit from it. Others find that the fact a child can benefit from special education does not establish a need, and instead require that a child be failing or performing below average before finding a need for special education.³³⁸ The division in authority results in an artificial and variable line between those who do and do not require special education.³³⁹

The effect is a wholly subjective standard by which eligibility teams determine need. With the attendant bias inherent in such a subjective decision, minority children become overrepresented in special education, and the floodgates of eligibility are opened to all. Therefore, what is needed to limit overall eligibility to those truly in need and to reduce the subjectivity when deciding who needs special education is a more concrete definition of “need.”

In considering the IDEIA, Congress received numerous recommendations that children should not be considered for special education until scientifically based prereferral measures in the regular education classroom were tried and shown to be unsuccessful. The Presidential Commission reported to Congress that “[c]hildren should not be identified for special education without documenting what methods have been used to facilitate the child’s learning and adaptation to the general education classroom.”³⁴⁰ The

educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.

Id. Indicators of a student’s inability to make effective progress include not performing up to expected levels on standardized, criterion-referenced, or curriculum-based assessments, or failing to earn promotion to the next grade level at the end of the school year. MASS. DEP’T OF EDUC., ELIGIBILITY GUIDELINES FOR SPECIAL EDUC. (1994).

333. COLO. CODE REGS. § 301-8 (2005).

334. TENN. COMP. R. & REGS. § 520-1-9-.01(20) (2004).

335. NRC REPORT, *supra* note 9, at 2 (“Who requires specialized education? Answering that question has always posed a challenge.”).

336. *Id.* at 25-26.

337. *Id.* at 26.

338. See Garda, *supra* note 15, at 491-507.

339. NRC REPORT, *supra* note 9, at 25, 27.

340. PRESIDENT’S COMMISSION, *supra* note 11, at 26.

Presidential Commission recommended that interventions should be attempted before a referral for special education is made.³⁴¹

The NRC also strongly recommended that prereferral interventions be provided before children are referred or considered for eligibility. It found that “early intervention processes . . . should . . . be essential prerequisites to any consideration of student referral to special education.”³⁴² The NRC concluded that it should be “the responsibility of the teachers in the regular classroom to engage in multiple educational interventions . . . before referring the child for special education assessment.”³⁴³ It suggested a system “in which no child is judged by the school to have a learning or emotional disability . . . until efforts to provide high quality instructional and behavioral support in the general education context have been tried without success.”³⁴⁴ It concluded:

Future practices are likely to place additional emphasis on the special education need component of eligibility. This may be done by (1) strengthening interventions prior to referral and (2) determining empirically that well designed and properly implemented interventions in general education are not sufficient to enable the student to receive an appropriate education.³⁴⁵

The Committee on Workforce and Education agreed with these recommendations and reported to Congress that “[a] disproportionate number of minority students are wrongly placed in special education rather than being provided positive behavioral interventions and supports and intensive educational interventions.”³⁴⁶ The Report recognized that many minority children are inappropriately referred to special education, primarily because of reading difficulties or behavioral problems that could be remedied through appropriate regular education interventions, and that such measures have worked in some states.³⁴⁷

The success of mandatory prereferral intervention services in Alabama is of particular note. In reviewing a consent decree from a long-standing desegregation suit, the court in *Lee v. Macon County Board of Education*³⁴⁸ found that African-American students in Alabama were three times more

341. *Id.* at 21.

342. NRC REPORT, *supra* note 9, at 299. The NRC recommended numerous regular education interventions which should be attempted before referral. *Id.* at 296-99; *see also id.* at 302-03 (“We reiterate that special education should not be considered unless there are effective general education programs . . . and early high-quality interventions prior to referral.”).

343. *Id.* at 299 (citing to a 1982 NRC study).

344. *Id.* at 6. The NRC specifically recommends that eligibility ensues only when there is evidence of insufficient response to high-quality interventions in the relevant domains of functioning in the school setting. *Id.* at 7-8.

345. *Id.* at 220.

346. H.R. REP. NO. 108-77 at 137, 147 (2003).

347. *Id.* at 153, 157.

348. 267 F. Supp. 458 (M.D. Ala. 1967).

likely to be found mentally retarded than their white peers, and entered a consent decree to address the problem.³⁴⁹ The court ordered, among other measures, a new prereferral process requiring teachers to use a host of intervention strategies for at least six weeks before considering special education referral.³⁵⁰ Since the order, the number of special education students overall has dropped, and African-American disproportionality has significantly decreased.³⁵¹ The teachers' use of multiple teaching strategies (particularly in reading and math) and specialized attention to struggling students (including flexible grouping) led to zero referrals of African-American students in 2003. More importantly, the at-risk children are doing better academically.³⁵²

In summary, there is a broad consensus in the literature that prereferral interventions should be applied prior to considering special education eligibility.³⁵³ Some states follow this consensus and require that children not be found eligible until non-special education interventions are shown to fail.³⁵⁴ Hearing officers and courts, without any legislative guidance, also often hold that children whose needs can be addressed through non-special education services should not be eligible. Many decisionmakers find that a child's need for special education should be ascertained by taking into account the non-special education services the child receives, typically under Section 504.³⁵⁵ In other words, children are not eligible if their needs are adequately

349. *Lee v. Phoenix City Bd. of Educ.*, C.A. No. 70-T-854 (M.D. Ala. Aug. 30, 2000).

350. *Id.*; see also Milloy, *supra* note 7 (explaining the *Lee v. Macon County* decision).

351. Milloy, *supra* note 7.

352. *Id.*

353. NRC REPORT, *supra* note 9, at 302; see also POSITION STATEMENT OF THE INTERNAL READING ASSOCIATION, *supra* note 39 (recommending that referral for special education should not be made until the child is first put in a high quality reading program and moderate classroom interventions are employed); Losen & Welner, *supra* note 3, at 187-88.

354. California defines an eligible "individual[] with exceptional needs" as a student with an impairment that "requires instruction, services, or both, which cannot be provided with modification of the regular school program." CAL. EDUC. CODE § 56026(b) (West 2003); see also CAL. EDUC. CODE § 56337 (West 2003) (stating that a learning disability requires a severe discrepancy between ability and "[t]he discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program"). Decisionmakers applying California law consistently find that schools must provide tutoring, reading and academic assistance, handwriting assistance, preferential seating, the use of a word processor for taking notes, careful teacher selection, teacher planning to increase participation, counseling, support systems, clarification of school rules, and increased communication with parents all within general education before a child is found to be in need of special education. See, e.g., *Norton v. Orinda Union Sch. Dist.*, No. 97-17029, 1999 WL 97288 (9th Cir. Feb. 25, 1999) (finding that a child benefited from handwriting assistance, preferential seating, and the use of a word processor in general education, and therefore was not eligible for special education); *Berkeley Unified Sch. Dist.*, EHLR 507:436 (Cal. SEA 1986) (finding a child ineligible because the modifications to the regular education program such as careful teacher selection, teacher planning to increase participation, counseling, identification to the child of a support system, clarification of school rules, increased communication with parents, and assistance to promote attitude change by the student had not yet been tried); *Los Alamitos Unified Sch. Dist.*, 26 IDELR 1053, 1053 (Cal. SEA 1997) (noting that a child requiring the regular education supports of tutoring and reading and academic assistance did not need special education).

355. See, e.g., *In re West Chester Area Sch. Dist.*, 35 IDELR 235 (Pa. SEA 2001) (finding a child ineligible because the child performed well with supports); *Arlington Central Sch. Dist.*, 35 IDELR 205 (N.Y. SEA 2001) (examining a child's performance with non-special education services to determine if the child needed special education); *George West Indep. Sch. Dist.*, 35 IDELR 287 (Tx. SEA 2001).

addressed through non-special education services.³⁵⁶ Other decisionmakers, however, find that children need special education if they can benefit from it, irrespective of their success with regular education interventions.³⁵⁷

Despite the recommendations of the Presidential Commission and the NRC, and the success of prereferral interventions in some states, Congress only incrementally adopted prereferral measures in the IDEIA. It permits, but does not mandate, districts to use federal funds to provide prereferral services to students before they are identified as needing special education.³⁵⁸ Prereferral measures are only mandatory once a state determines that significant minority overrepresentation exists, which is after the harm of misidentification attaches. Congress's reticence to compel schools to pro-

Instead, the evidence showed that she is successful in the regular mainstream classroom with the assistance of the amplification device already being provided to her by the school district. She has been and will continue to be served under the school district's 504 program There is no educational need for special education and related services under these circumstances.

Id. at 287; Ludington Sch. Dist., 35 IDELR 137, 137 (Mich. SEA 2001) (finding a child not eligible because his "needs can be met in the regular education setting with some modifications, and cooperation and consistency from his parent"); *In re K.M.*, 29 IDELR 1027, 1027 (Vt. SEA 1999).

[T]he student does not require a special program of instruction in order to obtain an appropriate education despite her handicaps. She has succeeded in a regular program of instruction, but she needs considerable accommodations to her handicap in order to do so. As was pointed out by several witnesses, including the parent's own consultant, this is a distinction between 504 and special education eligibility that is often confused or misunderstood.

Id. at 1027; Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1026 (Or. SEA 1998) ("Thus, when related services and accommodations allow a student to make progress in the regular education program, as indicated by grades or performance on academic achievement test, there is no need for special education and therefore no eligibility under the IDEA."); Old Orchard Beach Sch. Department, 21 IDELR 1084, 1084 (Me. SEA 1994).

Special education and related services are only for those children who need assistance in order to benefit from their education. [The student] is now in a personalized program with a low teacher/student ratio, lots of accountability, a case manager to communicate with home on a regular basis and deal with social skills issues, and taking one course at the high school by her choice. If she were labeled, nothing would change as this program is the one described by the psychologists to meet her needs and the program serves both special education and regular education students.

Id.; Academy Sch. Dist. #20, 21 IDELR 965, 965 (Colo. SEA 1994) (concluding that a child did not need special education based on the child's performance after taking into account behavior management strategies); Toledo Pub. Sch. Dist., 401 IDELR 335, 335 (Oh. SEA 1989) ("In this case the evidence is clear that without substantial tutoring and parental help he received, he would not have passed to the next grade, for the second time. So for this child, special education is required for him to benefit from his education."); *In re Laura H.*, 509 EDLR. 242, 242 (Mass. SEA 1988) (finding a child ineligible because "[t]here is no current indication that she cannot continue to make effective educational progress in the regular education program, particularly with the modifications (including continued regular education guidance services) offered by Wellesley").

356. 34 C.F.R. § 300.106(a) (2003) ("Because many students receiving services under IDEA will also receive services under the Rehabilitation Act, it is important, in planning for their future, to consider the impact of both statutes."); Letter to Lillie/Felton, 23 IDELR 714, 718 (OSEP 1994) ("Generally, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child . . . as such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help.").

357. See Garda, *supra* note 15, at 493-98 (discussing these cases).

358. IDEIA, Pub. L. No. 108-446, § 203(a)(2)(4), (f), 118 Stat. 2647 (2004); H.R. REP. NO. 108-77, at 137, 157 (2002) ("The eligibility for special education services would focus on the children who, even with these services, are not able to be successful.").

vide individualized interventions prior to referral likely stems from its strong unwillingness to infringe on state sovereignty over instructional methodologies. Congress felt justified in mandating prereferral intervention services where significant disproportionality exists but not elsewhere. But the definition of “need” can be altered to limit subjectivity and bias in referral and assessment, while maintaining state hegemony over educational methodology.

I have argued elsewhere that a child should not be found to be in need of special education merely because the child can benefit from it—a standard many decisionmakers employ due to the lack of federal or state guidance. Rather, a child should not be considered in need of special education unless his or her educational performance is below average.³⁵⁹ But this conclusion begs the question of what services a district must provide in regular education before a child’s performance is deemed below average. A child in one school may perform below average despite receiving numerous general education supports, while a child in another school may perform below average without any such services.

To bring uniformity to “need” determinations, a child’s educational performance should not be considered below average until all regular education interventions and services available in the district have proven ineffective for the child. The IDEIA should provide that a child with a disability does not need special education until all services, accommodations, and prereferral interventions available in the school district have been tried and proven unsuccessful. In short, the IDEIA should compel teachers to “attempt a variety of educational strategies to reach students who are struggling academically or socially before referring them for special education evaluation.”³⁶⁰ Requiring districts and teachers to employ all available services, interventions and prereferral measures will force districts to maximize regular education interventions before relying on potentially damaging special education placements.

The advantages to requiring exhaustion of regular education interventions before eligibility attaches are significant. It will assist in reducing African-American overrepresentation in special education by ensuring that these students get all the educational supports the district has to offer prior to referral. It will also reduce bias, particularly referral bias, by prohibiting teachers from dumping African-American students into special education without first providing all accommodations and supports that are available to all general education students. Teachers will be required to exhaust all available proper instructional methods for “problem” children, leading to improved general education for all. By using a variety of teaching measures

359. See Garda, *supra* note 15, at 491-512 (explaining generally how “need” should be defined under the IDEIA).

360. Parrish, *supra* note 10, at 16.

in the general education classroom, rather than a one-size-fits-all approach, many referrals to special education will be prevented.³⁶¹

State hegemony over educational methodology is maintained because districts are not forced to develop and create prereferral intervention services (except in the case of significant disproportionality); rather, only all *available* services must be provided. The proposed definition of “need” does not alter the general education model; it merely ensures that districts essentially “try their best” with what they have available before referring a child to special education, which is not the current practice.

The IDEIA’s provisions permitting federal funds to be used to develop prereferral intervention services and to train teachers should certainly be retained because much more is known about effective interventions than is implemented in classrooms, and this disparity negatively impacts minorities.³⁶² The most prevalent reasons African-Americans are referred to special education are behavior and reading deficiencies. The lack of appropriate reading instruction and early reading interventions contributes to the overrepresentation of African-Americans in high-incidence disability categories of MR, ED, and, in some states, SLD.³⁶³ Appropriate general education interventions have been shown to significantly raise African-Americans’ achievement.³⁶⁴ Indeed, “a key factor in addressing disproportion in special and gifted education is support for minority student achievement in general education,”³⁶⁵ and mandatory prereferral measures ensure appropriate support. One example is the use of the RightStart method of math instruction, a general education intervention which has shown to assist disadvantaged students.³⁶⁶

Supplemental reading instruction has also been shown to assist minorities with reading difficulties. Proper reading instruction can solve a continuum of reading problems present in regular education, and minority students will be the most benefited.³⁶⁷ Tutoring also has been found to have a major impact on reading ability.³⁶⁸ With the appropriate reading instruction tailored to each child and provided in the general classroom, minority overrepresentation should be dramatically curbed.³⁶⁹ The International Reading Association summarized the solution:

If quality instruction combined with timely and appropriately intense reading interventions does not solve the reading problem that is the source of the referral, then it is time to consider alternative

361. Milloy, *supra* note 7.

362. NRC REPORT, *supra* note 9, at 337.

363. POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra* note 39.

364. NRC REPORT, *supra* note 9, at 188.

365. *Id.* at 169.

366. *Id.* at 190.

367. *Id.* at 191.

368. *Id.* at 193-94.

369. NRC REPORT, *supra* note 9, at 194, 324-25.

programs such as special education. If educators deliver excellent reading instruction to children before considering a special education placement, they will identify more of the children for whom special education is truly appropriate. If children are identified correctly, the proportions of minority children in special education in the United States most likely will reflect the proportions of minority children in the general school population, and the risk of being placed in special education will be similar for children of all racial and ethnic categories.³⁷⁰

Many prereferral regular interventions are also effective for children with behavior problems. Social skills instruction, classroom reinforcement systems, peer tutoring, and parent support are known to significantly decrease problem behaviors in the classroom and prevent referral for emotional disturbances.³⁷¹ The use of technical assistance teams to assist general education teachers in dealing with behavior problems also has been shown to reduce referral based on poor behavior.³⁷² However, “the generally inappropriate application of regular education support services to students of color”³⁷³ results in African-American overrepresentation in the SED disability category.

In sum, general education interventions in reading and behavior management reduce the number of children who fail at reading or are later identified with behavior disorders.³⁷⁴ There are numerous general education interventions available for children that could prevent their referral for eligibility.³⁷⁵ These interventions are the accommodations and minor modifications that should be excluded from the definition of “special education.” Yet these modifications are not always employed before referring a child to special education. These interventions, if available within the school district, must be mandatory rather than permissive and must be included in the IDEA’s eligibility criteria.³⁷⁶ Requiring all available in-class supports will not only decrease referral for special education, but improve the performance of all students.³⁷⁷

Requiring schools and teachers to exhaust all available general education services, supports, and accommodations prior to finding a child in need of special education will ensure that IDEA eligibility and special education is reserved to “those who truly require them and who benefit from them.”³⁷⁸ The strict definition will reserve eligibility for high-need children, the pri-

370. POSITION STATEMENT OF THE INTERNATIONAL READING ASSOCIATION, *supra* note 39.

371. NRC REPORT, *supra* note 9, at 201-04; Osher et al., *supra* note 48, at 105-106.

372. NRC REPORT, *supra* note 8, at 199.

373. Osher et al., *supra* note 48, at 108-09.

374. NRC REPORT, *supra* note 9, at 7.

375. *Id.* at 142-44, 329-33.

376. *See, e.g.*, Osher et al., *supra* note 48, at 105-06 (arguing that schools should provide necessary supports in general education to prevent overidentification in the SED category).

377. Hehir, *supra* note 18, at 236.

378. NRC REPORT, *supra* note 9, at 3.

mary concern of the IDEIA, and prevent low-need children from displacing or draining resources from those truly in need.³⁷⁹

CONCLUSION

Congress should be applauded for seriously addressing for the first time the overrepresentation of African-Americans in special education and its spiraling eligibility rolls. But a standing ovation is not warranted, as the piecemeal and incremental solutions proposed in the IDEIA will prove inadequate. The revolutionary concept embodied in the IDEIA of fixing special education by reaching into general education is the inevitable and necessary future of American schools. The IDEIA recognizes that general education's identity must be changed to remedy special education's dual eligibility crisis, yet Congress incompletely adopts its new educational paradigm, and minority overrepresentation and the rise in overall eligible children will persist.

Altering special education eligibility requirements as proposed in this Article is not the sole solution to minority overrepresentation and the rise in overall eligibility, but it is a prerequisite to any viable solution. Professor Artiles was not exaggerating when he concluded that African-American overrepresentation is one "of the most important developments in special education's contemporary history"³⁸⁰ and will transform its identity. The transformation must entail carving out certain specialized instruction from the definition of "special education" so that all students, not just eligible students, can have their diverse and individualized needs met in the general education classroom without suffering the harms of misidentification as IDEIA-eligible. The emerging educational paradigm of specialized instruction for all students cannot entrench itself in today's schools until special education relinquishes its stranglehold on individualized instruction.

Yet merely changing the IDEIA's eligibility criteria alone will not resolve the dual eligibility crisis. Mandating action does not guarantee its implementation, as best exemplified by the fifty-year-old struggle to fulfill the desegregation mandate of *Brown v. Board of Education*.³⁸¹ It is one thing to legislatively reserve IDEIA eligibility only for children needing significant modification to content, method, or delivery and that have been provided all available prereferral interventions, yet quite another for the standard to be applied in all eligibility determinations. Mere legislative change cannot—by itself—remove engrained cultural bias, but changing the eligibility criteria would have "vast influences on how disabilities are conceptualized and assessed for special education eligibility."³⁸²

379. PRESIDENT'S COMMISSION, *supra* note 11, at 30.

380. Artiles, *supra* note 31, at 247.

381. 347 U.S. 483 (1954).

382. NRC Report, *supra* note 9, at 224; *see also id.* at 270 (noting that legal eligibility standards "heavily influence" eligibility determinations).

For the changes suggested in this Article to be effective, the funding formula of the IDEA likely needs to be revisited. The IDEA and its successors are funding statutes wherein the federal government essentially covers a portion of the state's costs to educate eligible children.³⁸³ Because the amount of special education funds a state receives from the federal government hinges on the number of eligible children within the state,³⁸⁴ there is an incentive to overidentify students as eligible.³⁸⁵ There is also a strong disincentive to provide students with prereferral intervention services because there is no separate funding for such services. The financial incentive is for districts to classify a child as IDEA-eligible—which brings funding to the district—rather than provide unfunded prereferral interventions to prevent eligibility. To eliminate this incentive and encourage the use of early intervention services in general education, state and district funding should hinge on the overall number of children in public schools rather than on the number of eligible children. With this funding division, states and districts will more willingly apply the 15% of IDEA funds to prereferral intervention services rather than find children eligible to increase their funding.

Furthermore, Congress must continue to encourage, and fund, effective scientifically based prereferral intervention strategies. All schools must be provided the necessary resources to train general education teachers to effectively instruct today's diverse learners using sound, scientifically based methods. School districts and teachers will not be able to implement appropriate prereferral measures without knowledge of such measures and training on how they are implemented. Neither can occur without full funding of the IDEA, which has yet to occur.³⁸⁶ As Senator Jeffords concluded, successfully addressing special education's eligibility problems "will require an infusion of funding for higher quality teaching in both general and special education."³⁸⁷ Congress and the President have refused full funding of the IDEA, however, until the eligibility problems identified in this Article are

383. IDEA, Pub. L. No. 108-446, § 101, 118 Stat. 2647 (2004) (amending § 611); 20 U.S.C. § 1411(a) (1997). The maximum state grant is determined by multiplying the number of eligible children served by the state times 40% of the national average expenditure per pupil. 20 U.S.C. § 1411(a)(2)(B). For an explanation of the funding formula, see generally Willard, *supra* note 315, at 1179-81.

384. Pub. L. No. 108-446, § 201(a) (amending § 611); 20 U.S.C. § 1411(a) (1997). Most states also divide IDEA monies among their school districts based on how many IDEA-eligible children they are serving. Willard, *supra* note 315, at 1179-81.

385. Parrish, *supra* note 10, at 28-31; WEBER, *supra* note 219, at ch. 18; H.R. REP. NO. 105-95, at 89 (1997) (concluding that many problems of overidentification result from the IDEA's current child-count-based funding system that "reduces the proactive scrutiny that such referrals would receive if they did not have the additional monetary benefit"); Marc S. Krass, *The Right to Public Education For Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1066 (describing how the funding formula creates incentives to serve more children); Eyer, *supra* note 8, at 627. *But see* H.R. REP. NO. 108-77, at 91 (2002) (stating that "[t]he Committee does not believe that individual educators identify children in order to maximize the level of funds that flow to the school, district, or State").

386. Jeffords, *Foreword*, *supra* note 7, at x (noting that the federal government funds only 17% of special education costs); Hehir, *supra* note 18, at 228 (noting that the federal government funds only 13% of the excess costs to educate an eligible child).

387. Jeffords, *Foreword*, *supra* note 7, at ix.

resolved.³⁸⁸ Congress must recognize that it is only with full funding that African-American disproportionality and the overall eligibility increase can be remedied.

388. Losen & Orfield, *supra* note 56, at xviii.