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Testimony before Summit on Closing the Achievement Gap Convened by Hon. Robert (Bobby) Scott, D. VA, U.S. House of Representatives, December 14, 2009

Question Presented: What is the legal theory behind requiring special education students to be educated to high standards? Can you use this as an analogy that can apply to a clear and acknowledged pattern of under-educating low-income and minority children and the point that ALL children should be provided a quality education?

Today there is no doubt that students with disabilities have clearly established rights to be educated to high standards based on the equal protection and due process clauses of the 14th Amendment, the comprehensive federal Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act of 1973, the civil rights statute that bars discrimination on the basis of disability. Moreover, students with disabilities, including those who are from low-income families, are racial and ethnic minority students, and disproportionately receiving special education, as well as students from these same subgroups who do not have disabilities that impede learning but are struggling to learn to high standards, also have a right to quality education under key provisions of Title I of the Elementary and Secondary Education Act, as amended by No Child Left Behind Act.

As I'll briefly describe, key changes are necessary to help close the achievement gap for both students with disabilities and, students of color without disabilities, starting with the implementation and enforcement of federal law through effective administrative and judicial remedies for ensuring that all students receive the high quality education to which they are entitled. For example, despite students with disabilities having strong rights, implementation and enforcement of IDEA remains uneven – whether as a result of federal and state agencies' emphasis on compliance over performance, or the inability of parents, especially low-income parents, who are disproportionately parents of children of color - those most vulnerable to be being educated in low level classes - to exercise their right to complain under IDEA, to bear the burden of proof necessary to challenge the quality of their children's programs without access to expert witnesses or the ability to retain counsel as a result of the Supreme Court decisions in *Schaeffer*, *Murphy* and *Buckhannon*. Moreover, targeted oversight and enforcement of key rights to high quality education under Title I for all students, including low-income, racial minorities, ELLs without disabilities, as well as students with disabilities, are barely acknowledged, never-mind enforced, and they are difficult to access for parents as well as advocates.

Constitutional and Statutory Basis for Educating Students with Disabilities

[As we have heard] the impetus for enacting PL 94-142 (the Education for All Handicapped Children Act of 1975 or the predecessor to IDEA) came from two federal court decisions, *PARC v Pennsylvania* (E.D. Pa. 1971) (consent decree) and *Mills v. Board of Education* of the District of Columbia (D.D.C. 1972) which recognized that all children, including children with mental retardation, can learn, and thus, exclusion of children with disabilities from the public schools is unconstitutional under the equal protection clause. As significantly, the Mills court held that due process requires that a full and fair hearing precede exclusion *from or placement in a special education program*.

P.L.94-142 incorporated the major principles of the right to education cases in establishing the grant-in-aid program under both the Spending Clause of the Tenth Amendment and the Fourteenth Amendment. Expressly acknowledging that “it is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of ... children [with disabilities] in order to assure equal protection of the law,” Congress explicitly conditioned receipt of federal monies under the statute that became IDEA upon the commitment of each participating state to provide each student with a disability within its jurisdiction a free appropriate public education (FAPE)..

The Right of SwDs to a Quality Education

IDEA contains an unequivocal directive to state and local educational agencies to provide all eligible children with disabilities with a full free appropriate public education (FAPE), defined by the statute as special education and related services 1) without cost to the parent that are 2) consistent with the student’s individualized education program (IEP) designed to meet the student’s unique needs, 3) include an appropriate preschool, elementary or secondary education in the state involved, and 4) meet the standards of the State educational agency.

Based on this definition, the goals and content of a child’s special education or specialized instruction cannot be designed in a vacuum but, rather, they must be developed in reference to the meaning and content of education for all students in that state, school district and school. The right of children with disabilities to a free appropriate public education must be consistent with

"standards of the state educational agency." Regulations promulgated by US ED under IDEA explicitly define "special education" as "specially designed instruction," which involves "adapting, as appropriate to the needs of an eligible child... the content, methodology, or delivery of instruction...to ensure access of the child to the general curriculum, so that the child can *meet the educational standards within the jurisdiction of the public agency that apply to all children.*"

Whether reflecting increased knowledge and understanding of how individuals with diverse needs learn, or perhaps, a commitment to principles of equal protection, equity and excellence for all students, amendments to the IDEA in 1997 and 2004 and specifically to Title I of the Elementary and Secondary Education Act in 1994 and 2001, which apply to all students, raised expectations for improved educational achievement for students with disabilities.

The 1997 amendments to IDEA expressly required all students with disabilities to have access to the general curriculum adopted for all other students. Each student's individualized education programs (IEPs) must describe how the child's disability affects participation and progress in the general curriculum, include specialized instruction, supportive services, and supports for teachers to enable the student to learn and to progress in the general education curriculum, be reviewed periodically and revised to address any lack of expected progress in the general curriculum, and describe how . students with disabilities were to be included in general state and district-wide assessments, with appropriate accommodations or alternate assessments as necessary to ensure accountability of states, districts and schools to students with disabilities and their parents.

Other changes to IDEA expressly addressed issues of concern for economically disadvantaged students, racial minorities and English language learners, who are still disproportionately classified as having certain intellectual and behavioral disabilities and being in need of special education.

Changes made to IDEA in 1997 and 2004 authorized states to provide specialized instruction and support services to children from 3 to 9 years who are identified as developmentally delayed – instead of classifying them as having a particular disabling condition. Changes to the law allow local school districts to use up to 15% of Part B IDEA funds to provide "comprehensive early intervening services" to students from k through 12 (with an emphasis on k-3) who have not been identified as having a disability and needing special education, but who need additional academic and behavioral support services to succeed in the general curriculum. Of note, LEAs found to have a

significant disproportion of students of color classified as in need of special education, are required to use the 15% of funding to provide coordinated early intervening services targeted to children in the subgroup significantly over-identified.

The 2006 IDEA regulations also encourage use of Response to Intervention methods as part of the evaluation process for students suspected of having learning disabilities. RTI is a methodology that promotes improved outcomes for all students through a systematic integration of both general and special education services. Instead of a reactive model that waits to serve children until they have experienced failure and significant achievement gaps result, RTI, as a methodology, incorporates preventive efforts with reactive efforts, such as using data to identify struggling learners and to provide targeted instruction to ensure that all children are provided the opportunity to attain success. Properly implemented, RTI may be a critical tool for ensuring that struggling general education students receive more effective instruction and interventions and that racial and language minority students are not misclassified as needing special education services.

IDEA Aligned with NCLB or Quality Education for All Students

The 2004 reauthorization of IDEA expressly aligned IDEA with Title I/NCLB making sure that students with disabilities, as a subgroup, were included in the same state accountability system as all other students. NCLB requires all states to establish a single state accountability system and to adopt challenging academic content standards and challenging academic achievement standards. The explicit language of IDEA and NCLB is quite clear in requiring the adoption and use of the same standards for all students in the State, without exception. For example, IDEA requires that State performance goals for children with disabilities be “the same as the State’s definition of adequate yearly progress [under NCLB] including the State’s objectives for progress by children with disabilities.”

By including all students in the single state accountability system and requiring disaggregation of assessment data by subpopulation groups, Title I/No Child Left Behind Act focused attention for the first time on the academic achievement of children with disabilities, as well as to children of color, English language learners and low-income students. As the largest federal education program (\$14 Billion for basic grants), serving more than 12 million students in about 48000 schools

(majority elementary) and 96% of all schools with low-income populations exceeding 75%, Title I seeks to hold states accountable by mandating that they provide students with the elements of a quality education and intervene in schools where students do not meet state achievement goals.

Schools receiving federal funds under Title I are required to provide their students with key elements of a high-quality education that will enable them to master those high standards. Since 1994, Title I has required schools to provide students with an accelerated and enriched curriculum aligned with challenging state standards for all students, not a slower, watered down one. Teachers must be "highly qualified," use effective instructional strategies, and regularly get intensive training on how to provide this kind of enrichment. Struggling students must also be provided timely interventions whenever they are having difficulty mastering any of the standards and intervene with timely, effective extra help.

Yet, despite requirements mandating the provision of high quality education for all students, the law is commonly understood, and as it is being implemented, only focuses on intervention in underperforming schools that have been identified based on students' test performance. The sole focus of Title I, as reauthorized and amended as NCLB, seems to be on "Accountability for results" – i.e., test scores. While public attention is fixed on this goal, little or no consideration is being placed on the key provisions of the Act from 1994 that mandate provision of quality education for low-income, African-Americans, Latinos, ELLs, and students with disabilities who are all part of the single accountability system.

These key provisions of Title I properly implemented and enforced, should enable all students, including racial and language minority students and students with disabilities, to overcome barriers to learning. However, as I've already alluded to, the Title I program quality provisions are under the radar and virtually invisible to those with federal and state oversight responsibilities. Moreover, unlike IDEA where the parent of an eligible child with a disability has the right to complain about any matter concerning their child's identification, evaluation, programming, or placement pertaining to the child's right to FAPE, there is no explicit provision in Title I authorizing individual parents/students to challenge the school's failure to implement the core set of educational quality program elements. Any notion that private parties could file an action using §1983 was dampened by the 2002 Supreme Court decision in *Gonzaga University v. Doe* (2002) in which the Court held that the obligations of recipients of federal funds under the Family Education Rights and Privacy Act

which contained no express right of action were not enforceable by students or parents using §1983. Rather, these obligations could only be enforced by the U.S. Department of Education.

The Civil Rights Statutes – Section 504 and Title VI

To improve the achievement of students with disabilities and, I would suggest low-income and racial/ethnic minority students, it is critical to bring together implementation and enforcement of the civil rights statutes –namely Section 504, barring discrimination based on disability, and Title VI of the Civil Rights Act of 1964, which bars discrimination based on race, color or national origin.

For example, states or school districts that set lower standards for certain students based on disability, depriving them of the skills and body of knowledge expected to be learned by all other students without irrefutable proof that giving students with disabilities access to the same level of knowledge and skills is pointless, violate §504. Furthermore, a State that adopts lower standards (i.e., less challenging, modified standards at reduced levels of difficulty) for a group of students with disabilities whom they are incapable of narrowly defining with certainly creates an intentional classification based on disability and one that has the effect of subjecting those overly included students to lower standards in violation of §504 and the 14th Amendment.

The regulations promulgated under §504 also prohibit schools from affording qualified students with disabilities "an opportunity to participate in or benefit from...[an] aid, benefit or service that is not equal to that afforded others," providing "an aid, benefit, or service that is not as effective as that provided to others," or providing "different or separate aid, benefits, or services unless...necessary to provide...aid, benefits, or services that are as effective as those provided to others." If students capable of participating, with or without appropriate services, are denied educational opportunities designed to allow them to learn in the general curriculum and attain the standards set for all students, they are provided instead an "aid, benefit or service that is not equal to that afforded others," that "is not as effective as that provided to others," and that is unnecessarily "different or separate," in violation of the §504.

The §504 regulations also make it illegal for school systems running programs to utilize written policies or practices: (i) that have the effect of subjecting qualified persons with a disability to

discrimination on the basis of disability or (ii) that have the effect of defeating or substantially impairing accomplishment of the objectives of the program (e.g., learning what all students are expected to learn as set out in the state standards with which the general education curriculum is aligned).

In essence, these same regulatory provisions are available to protect students on the basis of race, color or national origin under the regulations implementing Title VI of the Civil Rights Act of 1964. However, in its 2001 decision in *Alexander v. Sandoval*, the Supreme Court made access to those rights more difficult. The Court in *Sandoval* acknowledged that the regulations under Title VI, including those requiring recipients of federal funds to either justify or modify actions which have a racially disparate impact, may prescribe acts that go beyond those that bar intentional discrimination; The Court held, however, that a private citizen has no private cause of action to enforce the disparate impact regulations promulgated under §602 of the statute. Rather, a private citizen may only sue to enforce a violation of the disparate impact regulations to the extent the violation simultaneously violates §601, which permits a private cause of action but requires specific intent to discriminate. Thus, while parents cannot bring actions in court to challenge, for example, denial of effective interventions to students within the protected classes of Title VI or their placement in classes that fail to provide them opportunities to learn to the same standards expected to be met by all, the federal and state agencies with oversight responsibility must be held accountable for implementation and enforcement of Title I and Title VI.

In sum, students with disabilities do have rights and protections to help ensure they receive the same high quality education expected to be provided all other students. These rights and protections are not self actuating; especially for low-income, racial/ethnic minority families whose children are disproportionately identified among students with intellectual, emotional and behavioral disabilities. These rights must be effectively implemented and enforced. It is equally important that among racial and ethnic minority children who have not been classified as having a disability that impedes learning but who may be struggling to learn, that the state and federal agencies focus on what matters - effective implementation of the core elements of a quality education under Title I – and that the US ED proactively examine policies and practices contributing to the achievement gap and having a disparate impact under Title VI.