



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

## ***Disabling Inequity:*** **The Urgent Need for Race-Conscious Resource Remedies**

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### **EXECUTIVE SUMMARY**

Among the most critical pre-pandemic inequities that have not received sufficient attention is the fact that many districts are not meeting their legal and moral obligation to educate students with disabilities, which must include providing needed mental health services, behavioral supports and educationally sound interventions by well qualified staff. This report begins by revealing serious pre-existing conditions of inadequate support that are likely to be exacerbated by the current pandemic. We also summarize the pandemic's disparate impact, which is resulting in greater losses of instructional time amidst increasing experiences of trauma. This report argues that post-pandemic we will need to do much more than return to the pre-pandemic efforts in order to avoid serious and continuing hardship to students, and especially to students of color with disabilities. This includes, but is not limited to, additional steps to ensure that all students with disabilities who need supports and services to receive a free appropriate public education (FAPE) have those needs met, and that they are not excluded because of behaviors caused by their disability.

This report has three parts. **Part I** demonstrates that there is a large subgroup of students with disabilities who have a right to receive supports and services but whose needs appear to be ignored in many large districts all across the nation. When most people think about students with disabilities they think of the roughly 7 million students that are deemed eligible for special education, as required by the Individuals with Disabilities Education Act (IDEA). But there is another large and growing group of nearly 1.4 million students with disabilities that districts are supposed to identify and support, even though they do not necessarily require specialized instruction. Another federal anti-discrimination law, Section 504 of the Rehabilitation Act of 1973, protects both types of students from disability discrimination: those who need special education and those who do not. Section 504 requires all public

schools that receive federal funds to identify those that do not require specially designed instruction, but do have a disability that substantially limits one or more major life activities. Districts must provide a wide range of supports and services to these students known as "504-only" students, to ensure that they, too, receive a FAPE.

The 504-only students often include those with ADHD, depression, anxiety disorders, students who have experienced trauma, and many others who may need mental/behavioral health services on a regular basis. Some 504-only students may need a wide range of supports and services, in and out of the classroom including modifications in their classroom from their teacher to help them with attention, organization, processing or behavioral challenges. Others may only need regular assistance from a school nurse for conditions like diabetes, asthma or food allergies. Although 504-only students typically do not include students with the most severe needs, the range of disability types and extent of needed supports and services is quite broad.

For example, some students with ADHD might be deemed eligible for special education pursuant to an evaluation for eligibility under the IDEA, and for those students the IEP team would proceed to develop an individualized education plan (IEP). For other students with ADHD the evaluation team might determine that they do not need special education in order to ensure that the student receives a free appropriate public education (FAPE). However, if the team finds that their ADHD "substantially impairs a major life activity," the district would be required to provide whatever supports and services the team determined that the student needed in order to receive a FAPE and the team would develop a 504 Plan. But, if the team determines that their condition does not "substantially" impair a major life activity, the district would not be required to provide any supports or services.

The last reported count of 504-only eligible students was for the 2017-18 school year as part of the Civil Rights Data Collection (CRDC). This report reveals that they are at least 2.7% of all public-school students, which represents more than a quadrupling of their share of the nation's student body since 2000. However, state-level rates vary widely, from Mississippi, at 0.65%, to New Hampshire, at 6.32%.

We find strong evidence suggesting that hundreds of large districts could be failing to identify 504-only students. Our findings show that in 3,298 districts, serving nearly 1.8 million students (1,781,962), not one 504-only student is identified. When all the districts with at least 1,000 enrolled students are examined, one can see that in 306 districts serving nearly one million students not one 504-only student is identified.

Our review of the data also shows that students from certain racial/ethnic groups are more likely to attend school in districts that identify 504-only students at low rates. This report

further examines only those districts that enrolled at least one hundred students of their respective racial/ethnic groups. The percentage of each racial/ethnic group attending a district where not one student from their group was identified as 504-only is as follows: Native American: 22%; Black: 6%; Latinx: 4%; White: 3%. Our analysis also reveals the percentage of each group enrolled in districts where students from their respective group are identified for 504-only at or below the rate of 0.4%, which we deem a "low rate" (based on statistical methods) as follows: 39% of all Native American students, 23% of all Latinx students, and 16% of Black students attend districts with low 504-only rates. White students are consistently the racial group with the highest identification rates for 504-only.

**Part II** of this report focuses on the school experiences of students with disabilities who are eligible for special education and related supports and services under the IDEA and who constitute close to 14% of all public-school students in grades K-12. We examine three outcome areas: disciplinary exclusion, referral to law enforcement, and chronic absenteeism. In each area we find glaring disparities, which are far worse for non-White students receiving special education. The key Part II findings are:

**1. Students with disabilities (IDEA) have far higher rates of lost instruction due to discipline than their non-disabled peers:** Due to out-of-school suspensions, across all grade levels nationally, students without disabilities lost 19 days per 100 students enrolled while students with disabilities (IDEA) lost 41 days per 100 students enrolled. When we focused on secondary students in large districts, we found many districts with much higher rates and wider disparities, including 30 districts where students with disabilities (IDEA) lost at least 90 more days per 100 students than were lost by their peers without IEPs. In five large districts, the difference was at least 149 days more.

**2. Profound racial differences among students with disabilities (IDEA) exist in students' risk for being suspended out-of-school at least once:** Nationally, among secondary students with disabilities (IDEA), 24% of Black students, 15% of Native American students, and 11% of White students were suspended out of school at least once in 2017-18. These disparities are even greater in many large districts highlighted in the report, where the risk for suspension for Black secondary students with disabilities was well above 40% for Blacks and 33% for Native American students.

We also find large differences when the data are broken down by discipline category. For example, students with emotional disturbance, a category in which Black students are over-represented, have a 37% risk for being removed for discipline and the highest risk for being educated in a correctional facility. The extraordinarily high rates and wide disparities featured in this report raise grave questions about the quality of educational supports and services that are provided to students with disabilities to address their social and emotional

needs and challenges pre-pandemic. Further, to the extent that students with disabilities are being denied access to school for disability-caused behaviors, these descriptive findings also raise questions about possibly unlawful, discriminatory discipline on the basis of race and/or disability status.

**3. Students with disabilities experience high and racially disparate rates of referrals to law enforcement:** We consider it to be a serious problem that in 2017-18, 61% of districts with at least 1,000 secondary students reported zero school-related arrests. This represents a slight increase over 60% in 2015-16. Districts reporting zero students arrested included New York City, Pittsburgh, PA and several other large cities. In some cases, police reported data to other agencies, proving that the zeros are not true. These data discrepancies raise concerns that non-compliance with federal civil rights collection and/or reporting requirements may be masking over serious problems of excessive policing in some districts. Therefore, to illustrate concerns with policing, this report focuses just on the referrals to law enforcement, which covers all calls to police to address specific instances of student misconduct, and includes all arrests.

We reveal that in 811 districts rates of referral to law enforcement for secondary students with disabilities (IDEA) were at least 2% in 2017-18. Altogether these 811 districts enrolled 619,372 secondary students with disabilities (IDEA) from 48 states and the District of Columbia. Each of these districts had rates of referral to law enforcement for students with disabilities (IDEA) that were between 2% and 45%. Included among these districts were many in Texas, Chicago, Illinois, and in California, both the San Diego and Los Angeles Unified School Districts.

Given concerns about racism in policing directed at Blacks, our findings highlight that in 38 of the large districts that enrolled at least 100 Black secondary students with disabilities (IDEA), 10% or more of these students were referred to law enforcement. Austin, Texas, had the highest rate for these students, an astonishing 32.3%! In seven of these 38 districts, including Los Angeles, the rate of referral to law enforcement for Black secondary students with disabilities (IDEA) was higher than their rate of out-of-school suspension! We also found that in 53 districts, among secondary students with disabilities (IDEA), the Black risk for referral to law enforcement was at least five percentage points higher than it was for their White peers with disabilities (IDEA).

**4. Students receiving special education experience high and disparate levels of chronic absenteeism:** One additional outcome measure that flags a wide set of factors and has recently been added to most statewide accountability systems is chronic absenteeism. This is defined in the CRDC as the percentage of students who missed 15 or more school days in a given year for any reason. In 2015-16 we found that, nationally, 22.5% of students with

disabilities (IDEA) were chronically absent, compared to 14.9% of students without disabilities. According to our analyses, high school students with disabilities (IDEA) had a rate of 28%, compared to 20% for students without disabilities.

When we further disaggregate the data for 2018-19 from the state of California, this report finds that racial disparities persist. Among low-income high school students with disabilities in California, the rates of chronic absenteeism disaggregated by race are as follows: African American, 37%; Native Americans, 40%; Asian, 16%; Latinx, 28%; and White, 22%. Given that the economic fallout from the pandemic has resulted in an increase in evictions and homeless families, it is important to note that pre-pandemic data showed that chronic absenteeism among homeless high school students with disabilities were the highest of all. The rates ranged from 59% chronically absent for Native Americans to 29% for Asian students. Viewed together, these pre-pandemic data raise concerns about the racially disparate impact of inadequate special education and related supports and services, and the likelihood of even worse outcomes in the future if we return to the inadequate status quo once schools fully re-open in person.

**Part III** reviews the evidence that the pandemic is exacerbating the pre-existing inequitable conditions and concludes with recommendations for federal policymakers. It begins by examining the rising incidence of childhood trauma and mental health problems, which have likely created additional racially disparate burdens during the pandemic. These include greater exposure to violence or abuse in the home, loss of family members to COVID-19, parents losing jobs, and evictions. According to the Centers for Disease Control and Prevention (CDC), there has been a steep increase in depression and anxiety disorders, and these adverse experiences can contribute to the development of a disability. Part III also summarizes findings from studies demonstrating that, mid-pandemic, students with disabilities are losing much more instructional time than their non-disabled peers.

The purpose of providing this analysis now is to suggest that the magnitude of the inequities that students with disabilities experience is being overlooked, especially those experienced by children of color. Part III concludes by documenting the pre-existing grossly inadequate federal (and state) funding that leaves us poorly prepared to cope with the additional disparate burden from the pandemic. For FY 2021, Congress allocated only \$13.8 billion for the IDEA, which is approximately 13% of the total additional costs of providing education to students who need special education. A truly equitable remedy would begin by fulfilling the original promise of meeting 40% of the additional costs, which would require an additional \$20 billion, for a total of over \$33 billion annually for IDEA alone. Ideally full funding would start next year, but a more realistic goal would aim to reach the 40% mark with incremental budget increases.

However, more funding is needed because fully funding the IDEA still leaves no federal funding earmarked for the 504-only students.<sup>i</sup> Nor did we find any states that earmarked state funds to provide supports and services to 504-only eligible students. We conclude that under federal law the 504-only students have rights, but there are no resources specific to meeting their needs. We recommend beginning with at least one billion dollars per year with some of those funds dedicated to more accurate counts and estimates of the additional costs of meeting the needs of 504-only students. State educational agencies should also earmark additional funding to meet the needs of 504-only students. Legislative solutions might include amending the Every Student Succeeds Act, or creating a new statute that would specify additional funds to provide mental health services and effective behavioral supports and interventions for students who have a disability pursuant to 504-only, as well as for students who have experienced trauma.

A long-term remedy will also need to boost efforts to remedy the impact of race and disability bigotry. Left unaddressed, biases could easily influence the flow of any additional funds. Confounding any federal remedy is also a looming crisis in state funding caused in part by the pandemic, but also due to the history of state tax cuts and an incomplete recovery in state funding for education from cuts made during the last recession.

Part III concludes with specific federal policy recommendations based on this report's research findings including the following:

- 1) **Bolster civil rights enforcement and the capacity to bring about substantive change when responding to systemic discrimination:** Reinstate the federal DOJ/OCR school discipline guidance issued in 2014, and add explanations and examples of how disparate impact also applies to the discipline of students with disabilities and the disparate impact that burdens students of color with disabilities from unsound discipline policies and from the failure to provide required behavioral supports; create a system to flag for possible investigation those large districts that report enrolling no 504-only students; collect, publicly report and review civil rights education data annually, starting with 2019-20; boost civil rights investigations into systemic discrimination; provide additional incentives and technical support to ensure that accurate data are reported to the public, especially the data on school policing, and used to investigate high rates and large disparities in referrals to police by race, disability and the confluence of the two.
- 2) **Expand federal funding to eliminate the shortages of counselors, social workers, nurses, school psychologists and well trained fully certified special education teachers:** Provide incentives for state funding to cover students experiencing trauma and for 504-only students; include accountability for states like Ohio that have not provided adequate or equitably distributed resources and have been found in violation of their own state constitutional mandates.

These are just some of the important steps that the federal government will need to take so that the pandemic recovery does not simply return students with disabilities to the gross inadequacies and racial inequities of the pre-pandemic status quo.

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<sup>i</sup> None of the additional funding that Congress has suggested for COVID-19 relief has been specifically earmarked for students with disabilities who are not eligible for special education, but still entitled by law to receive supports and services. See email correspondence with Ron Hager, Managing Attorney for Education and Employment, and Eric Buehlmann, Deputy Director for Policy Director, National Disabilities Rights Network (2021, January 12) [on file with author].