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Symposium

Sharing the Short Bus: Eligibility and Identity under the IDEA

WENDY F. HENSEL*

INTRODUCTION

The landscape of education in the United States for those with physical and mental disabilities has changed dramatically in the last century. Prior to 1975, the opportunities for formal education available to students with disabilities were extremely limited. Many students were precluded from attending public school altogether, either by resistant local officials or by force of law. Those fortunate enough to gain entrance through the front door were likely to be restricted to minimal learning environments that lacked interaction with typical students. Being labeled as “disabled” in an educational setting, therefore, resulted in severe stigma which substantially limited a child’s opportunity for educational advancement.

In the late 1960s and early 1970s, however, the emerging disability rights movement challenged this status quo. Energized by the success of

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1. North Carolina, for example, imposed criminal penalties on parents who insisted that a child be educated in public school once the superintendent concluded that the child should be excluded. See Act of May 18, 1965, 1965 N.C. Sess. Laws 641, 643-44; see also Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. DAvis L. REV. 349, 355-56 (1990) (discussing “legislative, administrative, and judicial activity either permitting or requiring the exclusion of these children from public education” prior to 1975).

2. See, e.g., David Egnor, Individuals with Disabilities Education Act Amendments of 1996: Overview of the U.S. Senate Bill (S.1578), 11 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 194, 194 (Winter 1996) (noting that prior to 1975, “[m]ost children with disabilities who went to school were segregated from their peers, and most young people with severe disabilities were destined to spend their lives in an institution”); Antonis Katsiyannis et al., Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act, 22 REMEDIAL AND SPECIAL EDUC. 324, 324-25 (2001).
minorities and women in advancing anti-discrimination legislation, as well as early court victories in the seminal cases of Pennsylvania Association for Retarded Children v. Pennsylvania and Mills v. Board of Education; advocates placed Congress on notice of the demand for improved access to and the integration of public schools for children with disabilities. Congress responded positively by passing the Education for All Handicapped Children Act of 1975 ("EAHCA"), which guaranteed children with disabilities access to public schools and to the support and services necessary to achieve a free and appropriate public education once admitted. To facilitate compliance with this mandate, Congress also gave parents of each student with a disability the right to participate in the development of an individualized education plan for their child and the right to seek judicial review in due process hearings and federal court if school districts failed to comply with the mandates of EAHCA.

More than thirty years and several amendments later, EAHCA, now referred to as the Individuals with Disabilities Education Act ("IDEA"), unquestionably has opened the door to education for children with disabilities. Few voices in American discourse openly challenge the right of these children to attend public school, and those that do are confronted by vociferous objectors. Commentators increasingly challenge the right of students with disabilities to access education is assured thirty years after EAHCA's passage; Thomas Rentschler, No Child Left Behind: Admirable Goals, Disastrous Outcomes, 12 Widener L. Rev. 637, 639 (2006) ("Today, the fight over educational access [for children with disabilities] has been won.").

4. 334 F. Supp. 1257 (E.D. Pa. 1971) (holding that state was required to provide each student with mental retardation with a "free public program of education and training appropriate to his capacities").
10. See, e.g., Katsiyannis, supra note 2, at 332 (concluding that "the right of students with disabilities to access education is assured" thirty years after EAHCA's passage); Thomas Rentschler, No Child Left Behind: Admirable Goals, Disastrous Outcomes, 12 Widener L. Rev. 637, 639 (2006) ("Today, the fight over educational access [for children with disabilities] has been won.").
11. An interesting experiment in this regard took place in May 2006. Kevin Bartol, School Board Member of Baraboo County, Wisconsin, publicly argued that "[t]here are some people in this country that cannot be educated ... They may have their eyes open, but there's no one awake upstairs." See Christina Beach, Board Member Stirs Controversy, Baraboo News Republic, May 25, 2006, available at http://www.wiscnews.com/archives/read.php?info=bnr/2006/05/25/85132.php. Bartol added that "[p]ublic school systems are not a baby-sitting service or a nurse care service for children such as those ... [t]hey're a place to educate students." Id. The public protest against Bartol's comments was immediate and significant. The Wisconsin Education Association Council, for example, quickly released a statement calling Bartol's comments "abhorrent," and a local columnist noted that Bartol "needs a lesson on compassion." See Susan Lampert Smith, School Board Rookie Needs Some
arguing, however, that the door to special education services has opened too widely and too indiscriminately, placing at risk the ability of school districts to respond to the needs of students in general education. The indisputable fact underlying such arguments is that the number of children receiving services under the IDEA has skyrocketed over the last three decades. The growth of students in special education has surpassed the growth of the general student population, resulting in heightened demand for often expensive services in a time of limited growth in education funding generally. Scholars have proffered a variety of reasons for this population explosion, ranging from misdiagnosis by professionals and the failure of school systems generally, to improved diagnostic techniques and rising incidence rates of autism.

12. See, e.g., Wade F. Horn & Douglas Tynan, Time to Make Education “Special” Again, in Rethinking Special Education for a New Century 23, 26 (Chester E. Finn, Jr., et al., eds., 2001) (discussing the “extraordinary growth” of special education “often at the expense of regular education”); Gregory F. Corbett, Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Act Violate a General Education Student’s Fundamental Right to Education?, 40 B.C. L. Rev. 633, 634 (1999) (noting that studies demonstrate that “the share of all spending received by general education declined from approximately eighty percent in 1967 to fifty-six percent in 1996” while the “expenditures devoted to special education more than quadrupled from four percent to seventeen percent”).


14. See Parrish et al., supra note 13, at 8 (explaining that total student enrollment between 1994-1999 increased by 6%, while special education enrollment increased 11% for the same time period); Robert A. Garda, Jr., The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education, 56 Ala. L. Rev. 1071, 1072-73 (2005) (noting that special education numbers increased by 35% in the “last decade . . . while school enrollment grew only 14%”).

15. In the 1999-2000 school year, for example, the cost of educating a child in general education averaged $6,556, while the cost of educating a child in special education averaged 91% higher at $12,525. See Jay G. Chambers et al., Special Educ. Expenditure Project, Ctr. for Special Educ. Fin., Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability 4 (2005).

16. Compare Seligmann, supra note 13, at 761 (“The increasing number of children identified as needing special education should be viewed not as a failure of special education, but as a warning about the inability of traditional classrooms to meet the needs of many children.”), with Sheldon Berman et al., Rising Costs of Special Education in Massachusetts: Causes and Effects, in Rethinking Special Education for a New Century, supra note 12, at 183, 183 (identifying the “root causes” of the increase in special education students in Massachusetts and nationally as “advances in medical technology, the deinstitutionalization of children with special needs, privatization of services, and
Some pundits have alternatively speculated that highly educated and affluent parents are fueling the rise in numbers by aggressively seeking eligibility for modestly impaired children as a way to secure from districts expensive services that are not otherwise available to children in the general school population.\footnote{14} Despite the disparate nature of such explanations, a common theme among them is that eligibility under the IDEA is too expansive and no longer serves the "truly disabled" as Congress intended.\footnote{18} Because the majority of growth has occurred at the margin among students with more moderate disabilities,\footnote{19} calls to restrict eligibility to the more substantially impaired are increasingly common,\footnote{20} economic and social factors including increases in the number of children in poverty and the number of families experiencing social and economic stress\footnote{13}, and Raymond F. Palmer et al., Environmental Mercury Release, Special Education Rates, and Autism Disorder: An Ecological Study of Texas, 12 HEALTH & PLACE 203, 207 (2006) (concluding that study showed "that school district autism and special education rates are significantly associated with environmentally released mercury").

17. See, e.g., Horn & Tynan, supra note 12, at 30 (attributing the rise in special education students in part to "[t]he fact that being found eligible for special education brings with it entitlement to an array of often expensive services and accommodations"); cf. Daniela Caruso, Bargaining and Distribution in Special Education, 14 CORNELL J.L. & PUB. POL’Y 171, 174, 179 (2005) (explaining that parents who have "financial and educational resources" are likely to secure Individualized Educational Programs (IEPs) which are "better written . . . contain more clearly measurable goals . . . and [are] more easily enforceable against non-compliant districts").

18. See, e.g., H.R. REP. No. 108-77, at 84 (2003) ("The overidentification of children as disabled and placing them in special education where they do not belong . . . takes valuable resources away from students who truly are disabled."); see also SALVATORE PIZZURO, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE NATURE OF AMERICAN POLITICS: A HANDBOOK ON PUBLIC POLICY 141 (2001) ("The inevitable political backlash of [the growth in special education] is already occurring. Critics of special education programs have launched the argument that the increasing numbers are indicative of the 'false identification' of many children as having special needs."); Garda, supra note 14, at 1074 (arguing that special education must be "reclaim[ed]" and "plac[ed] . . . back in the hands of the genuinely disabled").

19. See, e.g., Horn & Tynan, supra note 12, at 26 (explaining that of the "more than 10 percent of all school children in grades K-12" in special education, "approximately 90 percent have been classified as having relatively mild disabilities"); Rentschler, supra note 10, at 658 ("Of the 6.6 million students currently receiving special education services, sixty-seven percent have a specific learning disability, speech, or language impairment. Fewer than twelve percent have disabilities that present significant cognitive impairments such as mental retardation or traumatic brain injury."); Seligmann, supra note 13, at 768 ("The largest disability category, and the one in which the most growth has occurred, is that of learning disabilities.").

20. See, e.g., Horn and Tynan, supra note 12, at 37 ("With the number of persons believed to have learning disabilities approaching 20 percent of the population, can society afford this canopy of protective services and accommodations?"). Horn and Tynan propose that rather than providing special education to students with "mild forms of neurological disorders" like learning disabilities, mild mental retardation, and ADD, society "should re-construct regular education so as to maintain these students more effectively in the regular classroom." Id. at 41-42; see also Garda, supra note 14, at 1131-32 ("The strict definition [of child with a disability] will reserve eligibility for high-need children, the primary concern of the IDEIA, and prevent low-need children from displacing or draining resources from those truly in need."); Mark C. Weber, Reflections on the New Individuals with Disabilities Education Improvement Act, 58 FLA. L. REV. 7, 22 (2006) ("When federal money is provided for special education with too few eligibility strings attached, general education absorbs it and the federal goal of helping children with disabilities is frustrated.").
and more courts and administrative hearing officers are requiring evidence of serious academic failure before eligibility is deemed appropriate under the IDEA. 21

At the heart of the eligibility debate is the question of which children are "disabled enough" to qualify for protection and services under the statute, or, as the title of this Article implies, which children are appropriately placed on the "short bus," an immediately recognizable symbol of children with disabilities in public school. 22 Many disability scholars have explored the definition and imagery of disability embraced by the Americans with Disabilities Act 23 and the Rehabilitation Act, 24 using both social disability theory and historical conceptions of stigma to explain how statutory definitions have driven litigation outcomes and societal resistance to expansive rights. 25 Legal scholars have paid scant attention, however, to the imagery of disability embraced by the IDEA and its impact on the definition of "child with a disability," the statutory precursor to coverage. 26 This is perhaps explained by a sense that the former statutes are more radical, placing governmentally-imposed positive obligations of accommodation and anti-discrimination on private business in contrast to state and local governments via school districts. As the cost of IDEA compliance increasingly leads the public to view the statute as forcing the transfer of wealth between the general student population and students with disabilities, however, public scrutiny of the protected class is likely to increase, as well as calls for retrenchment of rights and privileges for students with disabilities. 27 It is critical, then, to

21. See discussion infra Part II.
22. The term "short bus" is used despite its negative connotation for children with disabilities because it is a powerful image representing the division between typical and disabled students. Many in society have a clear image of the children they believe belong on the bus and those that do not. Children who look and act like typical peers in any meaningful respect are generally placed in the latter category. This Article explores why that is so, and why society's inability to understand disability as a common trait shared by many children could lead to restricted eligibility and funding under the IDEA.
27. See, e.g., Pizzuto, supra note 18, at 141 ("[T]he dramatic growth of special education has resulted in a siphoning of funds from regular education programs, resulting in the alienation of parents of non-disabled children and regular educators."); Caruso, supra note 17, at 193 ("Funding special education involves a leap of faith, and such leaps are especially vulnerable to political pressure. When costs rise beyond politically acceptable levels, administrators are bound to redefine both identification and service standards to make ends meet."); Mark Kelman, The Moral Foundations of Special Education Law, in Rethinking Special Education for a New Century, supra note 12 at 77, 82 ("In a world of limited resources, it is plainly not enough to say that children with learning disabilities
understand whether the legislation's current approach to disability and eligibility enhances the integration and advancement of children with impairments or reinforces the stigma of difference and inequality.

This Article evaluates this important question and explores the legal and social implications of the rising number of special education students on the perimeters of the protected class. Part I examines the legislative evolution of eligibility from passage of EAHCA through each successive reauthorization of the statute. Part II then explores current trends in eligibility determinations, looking to judicial and administrative decisions interpreting the meaning of "child with a disability." This section highlights and critically evaluates the ways in which courts and hearing officers have used the vagueness of the statutory terms to endorse an increasingly narrow view of disability. Finally, Part III evaluates the legal and public policy implications of the shift towards restrictive eligibility under the IDEA. It concludes that although the special education population increasingly includes students with more moderate, intangible impairments, this growth is positive in some respects and consistent with early Congressional intent to bring all students, regardless of functioning, into the mainstream of American education. Calls to restrict the protected class to the "truly disabled," as defined to include only those children with the most severe impairments, represent a retrenchment of the medical model of disability and would erode the gains made in reducing the stigma of disability in American education. As a result, the debate over the growth of special education is more appropriately focused on the extent of services available to students with disabilities rather than the characteristics of the students who are receiving services.

I. LEGISLATIVE INTERPRETATION OF "CHILD WITH A DISABILITY"

The legislative history of EAHCA and its subsequent amendments provide insight into Congressional understanding of disability and its relationship to eligibility under the statute. What follows is a brief discussion of the original legislation and each subsequent amendment as it relates to identifying the class of children protected under the Act.

A. THE EDUCATION FOR HANDICAPPED CHILDREN ACT OF 1975

Although Congress provided incentives to States prior to 1975 to encourage the provision of special education, 28 its passage of EAHCA stands as a watershed moment in the history of disability legislation. 29

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29. Egnor, supra note 2, at 195 ("Disability advocates, parents, educators and community leaders..." , "deserve' more resources; their claims inevitably compete with claims that could be made by other "deserving" pupils.")

The statute was conceived of as a spending measure conditioning States’ receipt of federal funds on the provision of a “free appropriate public education” to “all handicapped children” between the ages of three and twenty-one. The final bill defined the protected class to include the “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.”

The legislation in its earliest form was not eagerly embraced by all. President Ford was known to oppose the bill, which he called “the potentially most expensive piece of legislation for disabled people ever passed by Congress.” At the time of the debate, it was believed that “approximately 12 percent” of children between the ages of five and seventeen had “some type of handicap.” The floor debate and conference reports reflect concerns that this number could potentially rise even higher as the result of the mislabeling and over-identification of children as being disabled. The Senate Labor and Public Welfare Committee, for example, recommended that the bill pass, but acknowledged that members were deeply concerned . . . about the practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions.

At least three major issues are of concern with respect to problems of identification and classification: (1) the misuse of appropriate identification and classification data within the educational process.
itself; (2) discriminatory treatment as the result of the identification of a handicapping condition; and (3) misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition.\textsuperscript{35}

Several members of Congress were particularly concerned with the inclusion of specific learning disabilities (SLD) as a categorical disability in the final bill, believing it to be too expansive and amorphous.\textsuperscript{36} The category was added by amendment in committee hearings,\textsuperscript{37} a fact that scholars have identified as a "major coup for disability advocates."\textsuperscript{38} Even supporters acknowledged concerns that the amended bill would protect not only children with "serious" disabilities, like "those in wheel chairs, those totally deaf or blind and needing special education," but also children with "borderline cases . . . [such as] aphasia, dyslexia, and minimal brain dysfunction, all of which are sometimes difficult to diagnose."\textsuperscript{39} Members worried that the resulting eligibility "definitions [would be] broad or narrow, depending on who is defining them."\textsuperscript{40}

In response to these concerns, Congress made clear that states should give first priority under the Act to securing an education for those children not currently receiving one, and second to serving the most severely handicapped children within each disability category.\textsuperscript{41} In addition, the final version of the bill included a provision that precluded states from identifying more than 12\% of the school age population between five and seventeen as handicapped children for purposes of securing funding\textsuperscript{42} and capped the number of children who could be identified as SLD at 2\% of that amount.\textsuperscript{43} To further alleviate concerns with the SLD category, Congress revised the bill to provide that the category specifically excluded children who have "learning problems that [are] primarily the result of... environmental, cultural or economic

\textsuperscript{35} S. REP. NO. 94-168, at 26–27 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1450. Some of Congress' concerns were based on the belief that some of the tests used to identify disabilities were biased and discriminatory. See 121 CONG. REC. 25526, 25539 (1975) (statement of Rep. Miller).

\textsuperscript{36} 121 CONG. REC. 25526, 25531 (1975) (statement of Rep. Quie).

\textsuperscript{37} Id.

\textsuperscript{38} Tyce Palmaffy, The Evolution of the Federal Role, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, supra note 12, at 1, 8.

\textsuperscript{39} 121 CONG. REC. 23701, 23705 (1975) (statement of Rep. Bauman).

\textsuperscript{40} Id.

\textsuperscript{41} 20 U.S.C. § 1412(3) (Supp. V 1975). The Conference Report clarified that "[t]he Conferes wish to make very clear that, with respect to the second priority, it is not intended that any one or two categories of disabilities be recognized . . . as the 'most severe' categories, but rather that an attempt must be made to reach and provide appropriate services to children with the most severe handicaps without regard to disability category." S. REP. NO. 94-455, at 37 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1480, 1491.

\textsuperscript{42} 20 U.S.C. § 1411(a)(5)(A)(i)-(ii) (Supp. V 1975); see also 121 CONG. REC. 23701, 23703, 23705 ("This cap would not allow States to define everyone in the State as sort of handicapped so they could get more aid and share in the educational funds.").

disadvantage.”

The final bill enjoyed widespread bipartisan support and was passed by a large margin. Although states thereafter were free to either accept or reject federal funding pursuant to the statute, virtually every state moved quickly to accept the financial support and the legal ramifications attached thereto. Congress has never fully funded the Act, however, and to date has not reached its goal of paying for 40% of the costs incurred by states in educating students with disabilities.

B. 1975–1996

The years following passage of EAHCA saw an expansion of eligibility to young children and to children with impairments not originally conceived of in the initial debates. Although some in Congress were quick to recognize the desirability of early intervention services, EAHCA as enacted did not focus on the needs of very young children. Congress rectified this situation with the passage of the Education of the Handicapped Act Amendments of 1986. The Amendments added Part H to the statute, giving children between birth and the age of two who displayed disabilities or developmental delays the ability to receive early intervention services and family assistance. Congress believed that expanding eligibility in this way would ultimately “minimize[e] the need for special education and related services after [handicapped] infants and

44. 20 U.S.C. § 1401(30)(C) (2000). The Senate Report clarified that the “term does not include children who may be slow learners.” S. REP. No. 94-168, at 10 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1434. Hoping to develop additional clarification on the issue, Congress also directed the Commissioner of Education to develop regulations within one year that “establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability,” and to “describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities.” Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 620(b)(1), 89 Stat. 773, 794 (1975); see also 20 U.S.C. § 1411 (2000) (detailing prior provisions in section).

45. Palmaffy, supra note 38, at 6 (“The final vote was 375 to 44 in the House, 83 to 10 in the Senate.”).

46. All but one state, New Mexico, had elected to participate through receipt of federal funds by 1979. See Rosalie Levinson, The Right to a Minimally Adequate Education for Learning Disabled Children, 12 Val. U. L. Rev. 253, 277 n.135 (1978).

47. See, e.g., Katsiyannis et al., supra note 2, at 329 (“The actual levels of funding to the states... have usually amounted to approximately 8% to 10% of states’ total expenditures on special education.”). Congress has, however, stepped up its funding of the IDEA over time. A recent report concluded that “[t]otal federal appropriations increased from approximately $252 million in 1977–78 to $7.5 billion in 2002–03. The federal share increased from $72 per special education child in 1977–78 to $1,159 per special education child in 2002–03, while the [average per pupil expenditure] increased from $1,403 to $7,499.” Parrish et al., supra note 13, at 3.


49. Id. Part H was reclassified as Part C as a result of the 1997 reauthorization of the IDEA. See 20 U.S.C. §§ 1431-1445 (2000).
toddlers . . . reach school age,” “maximize the potential for individuals
with disabilities to live independently,” and “enhance the capacity of
families to meet the special needs” of these children.59 The Act also
created a new grant program generating incentives for states to develop
preschool special education programs for children between the ages of
three and five.51

The Education of the Handicapped Act Amendments of 1990 went
still further in expanding eligibility under the statute.52 The nomenclature
of the protected class was changed from “handicapped children” to
“children with disabilities,”53 and the statute was renamed the Individual
with Disabilities Education Act in recognition of the changing dynamics
of special education and the emergence of “people-first” terminology.54
Congress expanded the categorical disabilities identified in the act by
adding autism and traumatic brain injury to the list,55 and changed the
language of the statute to mandate that those seeking eligibility show
they “need” special education and related services rather than that they
“require” the same.56 Congress also requested public input on “the
appropriate components of an operational definition . . . of ‘attention
deficit disorder’” (“ADD”) in response to the growing number of
children receiving this diagnosis.57 Shortly thereafter, the Department of
Education issued a Policy Clarification Memorandum on Attention
Deficit Disorders stating that children with ADD may qualify for
services under the disability category of other health impaired (OHI),58 a
position it later codified in the regulations interpreting the IDEA.59

1145 (1986). Importantly, “[s]tates already serving children from birth continued to be bound by Part
B for these children for the first four years of the program.” WEBER, supra note 30, at 2:1. Congress
enhanced and strengthened these services pursuant to the Individuals with Disabilities Education Act
Amendments of 1991 to create a “seamless web” of service delivery for children from birth to age five.
56. Id. § 1401(3)(A)(ii).
58. 18 IDELR 116 (U.S. DOE 1991); see also Palm affy, supra note 38, at 2 (noting that a 280%
increase in the category occurred over approximately ten years).
C. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997

The most sweeping overhaul of the Act since its passage occurred when the 105th Congress passed the Individuals with Disabilities Education Act Amendments of 1997. Although the most significant changes related to disciplinary placements and accountability, Congress also meaningfully amended the definition of “child with a disability” by giving states the discretion to include children between the ages of three and nine experiencing “developmental delays” in the coverage of the statute. By some accounts, this expanded the pool of children potentially eligible under the IDEA by an estimated 10%. Congress was motivated in part by the recognition that young children do not always fall neatly within a category of disability identified in the Act. By adding the broad category of “developmental delay” for younger children, it hoped that states could avoid problems associated with early mislabeling.

Eligibility issues also took prominence in the 1996 and 1997 committee hearings preceding the Amendments’ passage. The Senate Committee on Labor and Human Resources made clear that the eligibility determination must be “comprehensive” and “include information on the cognitive, emotional, social and behavioral factors in addition to physical or developmental factors, if necessary, to establish that a child is eligible for special education and related services.” This emphasis in part derived from the continued concern with the existence of a “growing problem [of] ... identifying children as disabled when they might not be truly disabled,” particularly among African-American males. Congress attributed the problem in part to the funding formula under the IDEA at that time, which allocated money based on an annual child count rather than a population-based method. The final bill included a new weighted formula to be applied to appropriations in excess of the $4.9 billion made for fiscal year 1999, awarding 85% of funding based on the number of students identified as eligible for services in the appropriate age range and 15% based on student poverty

63. S. REP. No. 105-17, at 6 (1997).
64. Id. 
66. Id.
rates. Congress also directed states to "provide for the collection and examination of data to determine if significant disproportionality based on race is occurring . . . with respect to particular disability categories or types of educational setting."70

Congress did not limit its concern to misidentification based on race. Committee reports from both the House and Senate also expressed the belief that there are "substantial numbers of children who are likely to be identified as disabled because they have not received proper academic support previously," or because of "limited English proficiency . . . cultural or environmental factors or by economic disadvantage."71 The House urged the Department of Education and state agencies to give such considerations "the utmost emphasis in every evaluation."72 The final bill, moreover, amended the definition of "child with a disability" to provide that "a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency."73 The Senate Committee articulated its belief that this change would "lead to fewer children being improperly included in special education programs where their actual difficulties stem from another cause . . . [and encourage] schools to focus greater attention on these subjects in the early grades."74

Notwithstanding these general concerns with expansive eligibility, Congress again articulated its commitment to the inclusion of ADD in the OHI category of disability.75 Recognizing that many parents were experiencing difficulty with eligibility determinations, the committee reports stated that Congress intended that children with this disorder should "be eligible for assessment to no lesser extent than other children"76 and should "be fully and properly served" once identified as eligible under the IDEA.77


70. Individuals with Disabilities Education Act § 618(c); see also S. Rep. No. 105-17, at 32 (1997).


D. THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004

Concerns with the improper eligibility determinations came to the forefront of the committee hearings and legislative debate preceding the passage of the Individuals with Disabilities Education Improvement Act of 2004. The House Committee on Education and the Workforce alone held at least three hearings specifically relating to these issues, concluding that "[t]he overidentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students . . . [and] takes valuable resources away from students who truly are disabled." Congress reaffirmed its earlier finding that this problem had arisen "largely because the children do not have appropriate reading skills" and concluded that it could be alleviated by making funds more generally available to help struggling children. Congress thus amended the statute to permit local education agencies to use up to 15% of their funding for "early intervening services" for students "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." Congress believed these changes would "help differentiate between students who have different learning styles and students that have disabilities, especially learning disabilities," reduce referrals to special education, and "benefit[] . . . the regular education environment . . . by reducing academic and behavioral problems." Congress took more radical action with respect to the definition of specific learning disabilities in the statute. The IDEA has always defined specific learning disabilities to mean "a disorder in one or more of the

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79. H.R. Rep. No. 108-77, at 79-80 (2003). Those hearings included: (i) "Overidentification Issues Within the Individuals with Disabilities Education Act and the Need for Reform" on October 4, 2001; (ii) "Learning Disabilities and Early Intervention strategies: How to Improve the Special Education Referral and Identification Process" on June 6, 2002; and (iii) "IDEA: Focusing on Improving Results for Children with Disabilities" on March 13, 2003, which included a discussion of the "overidentification of minority children as having disabilities . . . and improving the identification process of determining whether a child has a specific learning disability." Id.
83. H.R. Rep. No. 108-77, at 104 (2003). The House Committee on Education and Workforce made clear that "[s]pecial 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." Id. at 106; see also Weber, supra note 20, at 22 (noting that Congress' authorization of pre-referral funds "responds to critics who contend that eligibility standards under the law may be artificial and keep many children who need special attention from obtaining federally funded services").
basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.\textsuperscript{36} Prior to the reauthorization, the regulations provided that in order to find a specific learning disability, the IEP team must identify "a severe discrepancy between achievement and intellectual ability" in at least one of the enumerated areas.\textsuperscript{36} Some educators and scholars had decried the "severe discrepancy" standard as requiring students to fail before they could establish eligibility.\textsuperscript{87} Still others argued that this standard placed artificial emphasis on intelligence testing and insufficient attention on the child's contextual performance in the classroom.\textsuperscript{88} The Senate Committee on Health, Education, Labor and Pensions ultimately concluded that "there is no evidence that the IQ-achievement discrepancy formula can be applied in a consistent and educationally meaningful (i.e., reliable and meaningful) manner."\textsuperscript{91}

As a result of such criticism, Congress amended the statute in 2004 to provide that districts "shall not be required" to use the severe discrepancy model previously mandated.\textsuperscript{91} Instead, the statute permits and the regulations require local education agencies to allow the use of "a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures."\textsuperscript{91} This

\textsuperscript{36} 20 U.S.C. § 1401(30)(A) (2004). Specific learning disabilities do not include "a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." Id. § 1401(30)(C).

\textsuperscript{36} Assistance for the Education of Children with Disabilities, 71 Fed. Reg. 46,755 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300). The enumerated areas included (i) oral comprehension; (ii) listening comprehension; (iii) written expression; (iv) basic reading skill; (v) reading comprehension; (vi) mathematics calculation; or (vii) mathematics reasoning. Id. For a general discussion of the history and foundation of this regulation, see Nicole Ofiesh, Response to Intervention and the Identification of Specific Learning Disabilities: Why We Need Comprehensive Evaluations as Part of the Process, 43 PSYCHOL. IN THE SCHOOLS 883, 884-85 (2006).


\textsuperscript{87} See, e.g., H.R. REP. No. 108-77, at 107 (2003) (comments by Dr. Robert Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education) ("We know that using IQ discrepancy between the test and performance is not always an indicator of a learning disability... [This] approach may clearly result in some children who need services not getting them while others who do not need them will receive them."); Weber, supra note 20, at 26-27 (explaining that this change "arises from distrust over conventional methods, such as IQ testing, for finding learning disabilities, as well as questions about the integrity of the learning disabilities category itself").

\textsuperscript{88} S. REP. No. 108-185, at 26 (2003).


methodology, commonly referred to as "RTI," or Response to Intervention, is triggered when a student experiences academic delays in the classroom, at which point teachers implement a series of research-based interventions to remediate the difficulties. Because students without disabilities are believed to be able to make satisfactory progress when presented with quality instruction and remedial services, a student's failure to respond to the interventions is viewed as evidence that an underlying learning disability exists. Congress believed that the RTI method would allow "eligibility for special education services [to] focus on the children who, even with these services, are not able to be successful" and facilitate the availability of "a continuum of intervention options—regular and special educators and related service providers working together as part of a coherent system that is accountable for educational outcomes for students with SLD."

Once again, however, Congress did not believe that reading problems were the only cause of improper eligibility determinations. The committee reports emphasized Congress' concern with the "disproportionate number of minority students . . . wrongly placed in special education rather than being provided positive behavioral interventions and supports and intensive educational interventions." Congress deemed it particularly problematic that large numbers of African-American students were being identified as mentally retarded and emotionally disturbed. As a result, Congress amended the statute to require states to have in place "policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities." Congress also provided that it shall be "a priority" of the Secretary of Education and States to monitor for "[d]isproportionate representation of racial and ethnic groups in special education . . . to the extent the representation is the result of inappropriate identification." When the Secretary determines that a "significant disproportionality based on race and ethnicity is occurring," the Secretary shall require the local educational agency to reserve 15% of its funding "to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly children in those groups that

96. Id.
97. Id.
99. Id. § 1416(a)(3).
were significantly overidentified.

The House also for the first time identified potential concern with the variations in eligibility criteria between the states. The bill approved by the House Committee on Education and Workforce included a provision requiring the Comptroller General of the GAO to review “the disparity between the different interpretations of the subcategories of ‘child with a disability’” in each state so that Congress could consider how to “increase uniformity of application” and ensure “that every child receive[s] the education most appropriate for their particular needs.”

Neither the Senate bill nor the final version of the amendments, however, included this provision.

II. JUDICIAL AND ADMINISTRATIVE INTERPRETATION OF “CHILD WITH A DISABILITY”

The legislative history of the term “child with a disability” largely reflects an expansion of coverage over the last thirty years, coupled with concerns that children who are not “truly disabled” are being mislabeled and over-identified. Such concerns, however, have not translated into clear eligibility criteria to assist school districts in determining coverage under the statute. The vagueness of the statutory terms allows the ideological and political motivations of the eligibility team to potentially play prominent roles in eligibility determinations. As a result, much of the imagery of disability underlying the IDEA has developed in the context of administrative decisions and judicial opinions evaluating challenges to the denial of eligibility.

As detailed above, the statute itself nominally defines “child with a disability” as a child between the ages of three and twenty-one who has an enumerated impairment and, “by reason thereof, needs special

100. Id. § 1418(d).
103. See, e.g., Horn & Tynan, supra note 12, at 26 (“Within states, and between school systems, there exists enormous variability regarding which students are found to be eligible for special education services.”); cf. Valerie Leiter & Marty Wyngaarden Krauss, Claims, Barriers, and Satisfaction: Parents’ Requests for Additional Special Education Services, 15 J. DISABILITY POL’Y STUD. 135, 143 (2004) (noting in a study of parental satisfaction in special education that “[s]ome of the parent-reported data are suggestive regarding school systems’ attempts to restrain the size and scope of the special education system”). Ideological and political motivations also can influence the delivery of services once eligibility is established. See, e.g., Martha Minnow, Learning to Live with the Dilemma of Difference: Bilingual and Special Education, 48 L. & CONTEMP. PROBS. 157, 178 (Spring 1985) (explaining that “the ambiguity preserved by [the IDEA’s] statutory commitments to both the ‘least restrictive’ and the ‘appropriate’ education permit the incentives of teachers, the desires of parents, and the pressures of budgets to give content to the law”).
104. 20 U.S.C. § 1412(a)(3)(A) (2004). A state need not provide public education services to children between the ages of three and five and eighteen and twenty-one, however, unless it does so for typical children in these age ranges. Id. § 1412(a)(1)(B)(i).
education and related services.

The regulations further mandate that all children seeking eligibility, with the exception of those claiming coverage for SLD, demonstrate that the enumerated impairment "adversely affects educational performance" in order to establish a qualifying disability. Taken together, a child must show three things to qualify under the IDEA: (1) an enumerated impairment which (2) adversely affects educational performance and creates (3) a need for special education and related services. Failure to establish any of these requirements is sufficient to derail eligibility under the IDEA. The remainder of this section explains each of these legal prerequisites to eligibility and critically evaluates administrative and judicial attempts to use these requirements to endorse a restrictive understanding of disability under the IDEA.

A. CATEGORICAL IMPAIRMENTS

Unlike the broad qualification standards employed in the ADA, the IDEA has always defined disability categorically. The list of protected impairments currently includes "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." The regulations promulgated by the Department of Education add the categories of "deaf-blindness" and "multiple disabilities" to this list. The regulations also provide definitional guidance by identifying those characteristics necessary to establish eligibility in each enumerated category.

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105. Id. § 1401(3)(A).
107. Many courts continue to identify the two-part test set forth in the statute as the sum total of the eligibility determination. See Robert A. Garda, Jr., Untangling Eligibility Requirements under the Individuals with Disabilities Education Act, 69 Mo. L. Rev. 441, 459 n.95 (2004) (discussing relevant case law). Because the implementing regulations of nine of the ten categorical impairments require a showing that the impairment "adversely affects educational performance" as a threshold matter, scholars who have addressed this issue conclude this is a separate requirement for eligibility. Id. at 459.
108. In order to establish an actual disability under the ADA, an individual must show that he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (2000). An individual may also establish a disability by demonstrating "a record of such impairment" or by "being regarded as having such an impairment." Id. § 12102(2)(B)-(C). Because the IDEA only protects actual disabilities, it has no corollary to the latter two ADA definitions of disability.
110. 34 C.F.R. § 300.7 (2006).
The three categories of impairment which are most intangible to the casual observer serve most often as the subject of eligibility disputes: OHI, SLD, and serious emotional disturbance (SED). Few eligibility disputes in the OHI category challenge whether the child has an underlying medical impairment; instead, most disputes center on whether the impairment has a sufficient adverse effect on educational performance for the child to qualify for coverage under the statute. In contrast, because the SED and SLD categories are defined by vague statutory and regulatory criteria, administrators are more likely to dispute whether the child actually has a medical impairment that is covered by the IDEA.

I. Serious Emotional Disturbance (SED)

Many scholars have argued that children in the SED category are often under-identified and underserved, and Congress has acknowledged as much. The regulations provide that to be eligible for services as SED, a child must demonstrate:

- a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

  (A) An inability to learn that cannot be explained by intellectual, sensory or health factors.

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112. “Other health impairment” is defined in the regulations to mean:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child’s educational performance.

Id. Tourette syndrome was added to this list in 2006 by the Department of Education. Id.

113. A December 15, 2006, search of reported special education decisions in the IDELR and LRP publications revealed that eligibility challenges were most common in relation to the categories of SED (151 cases), SLD (113 cases), and Attention Deficit Disorder (66 cases), the most litigated impairment under the OHI category. See Special Ed Connection Website, http://www.specialedconnection.com (last visited April 20, 2007).

114. See, e.g., Alvin Indep. Sch. Dist. v. A.D., Civil Action No. G-05-678, 2006 WL 2880513, at *5-7 (S.D. Tex. Oct. 6, 2006) (finding that child had ADD but was ineligible under the IDEA because he did not “need special education”); Conroe Indep. Sch. Dist., 39 IDELR 17 (Tex. SEA 2003) (finding that child had ADD but was ineligible under the IDEA because he did not need special education).

An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

Inappropriate types of behavior or feelings under normal circumstances.

A general pervasive mood of unhappiness or depression.

A tendency to develop physical symptoms or fears associated with personal or school problems.1

Both the duration and the severity requirements noted in the regulations are undefined and give significant discretion to the eligibility team.17 Because the causes of SED and its manifestations may diverge significantly from child to child, even well-meaning decision makers can find it challenging to identify the children intended to be served by this category.18

The regulations make clear that although children with schizophrenia are covered, children who are “socially maladjusted” are not unless they demonstrate the characteristics of emotional disturbance identified in the regulation.19 This limitation allows bias relating to mental illness and conduct disorders to potentially play a key role in eligibility decisions.20 Conduct that is disruptive and antisocial can easily be characterized as the product of intentional choice and poor character rather than the manifestation of a mental impairment.21 When this interpretation dominates, even children with significant emotional issues that manifest in the school environment are denied eligibility under the IDEA on the grounds they have no covered disorder.


117. See Shum, supra note 115, at 240 (noting that these requirements are “completely subjective”).

118. See, e.g., Julia C. Dimoff, The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health, 6 DEPAUL J. HEALTH CARE L. 319, 323 (2003) (“[T]he identification of these disorders is made more difficult because there is such a wide spectrum of diagnostic choices,” making “[t]he diagnosis process… erratic and inaccurate at times resulting in over-diagnosis as well as under-diagnosis.”); Shum, supra note 115, at 239.


120. Cf. Dimoff, supra note 118, at 338 (arguing that “decisions concerning the evaluation and treatment of any child are highly dependent on social and cultural issues, and judgments made by individuals in the child’s environment, usually the teacher”); Hensel, supra note 25, at 1168–70 (describing a judicial tendency to characterize behavior as voluntary when it springs from a mental rather than physical impairment).

121. See, e.g., Glennon, supra note 115, at 327 (arguing that many cases involving SED eligibility decisions “demonstrate school officials’ belief that misbehavior is an issue of control of the school environment, not an issue of learning. School officials catalog the misbehavior of the child in close detail. Little information is given about the child’s history, learning goals, or the relationship between the child’s disability and the behavior problems discussed by the decisionmaker”); Shum, supra note 115, at 244–46 (discussing relevant case law).
2. **Specific Learning Disability (SLD)**

Although the subject of fewer eligibility disputes, the SLD category has received the most attention from scholars and the media. Some scholars have credited EAHCA's initial success to the confluence of interests and advocacy between civil rights proponents and a group of largely middle class white parents who desired to secure assistance for their children's academic difficulties.\(^\text{122}\) It quickly became the largest enumerated category following passage of EAHCA, and almost as quickly came under attack as a "bogus" disability.\(^\text{3}\) Critics have argued both that the designation is not scientifically based, and that, unlike students with severe physical and mental impairments, students with SLD do not have a history of stigmatization and outright exclusion from school warranting legislative protection.\(^\text{124}\)

As discussed *supra*, the class of children intended to be protected as SLD came to the forefront of the debate during the 2004 reauthorization. Although Congress did not amend the definition of SLD in the statute,\(^\text{125}\) it significantly altered the method of identifying whether a child has a qualifying SLD. The statute provides that states may not require districts to use IQ-achievement discrepancy tests and must permit the use of the RTI method in diagnosing learning disabilities.\(^\text{126}\) Accompanying this major shift in methodology was an equally significant shift in the focus of legislators. The discussion in the 2004 debates made clear that concerns about access to public school for children with disabilities no longer dominate policy discussions; instead, the focus has shifted to policing more carefully who is identified as eligible under the statute.\(^\text{127}\)

Although the RTI method promises a more contextual evaluation of the existence of learning disabilities, it also has the potential to eliminate

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122. See Palmaffy, *supra* note 38, at 3; see also Mark Kelman & Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Disabilities* 4 (1997) ("[T]he movement to secure rights for children with learning disabilities had its genesis in the grass-roots mobilization of largely white, middle-class parents in the late 1950s and early 1960s to gain resources for what they perceived as their 'underachieving' children.").


124. See, e.g., Herr, *supra* note 87, at 338 (concluding that "[s]chool administrators and editorial writers probably get it right" that some children identified with learning disabilities "simply need a good reading teacher"); Ofiesh, *supra* note 86, at 885 (explaining that the aptitude-achievement discrepancy formula historically used as the definition of specific learning disabilities "served to erroneously increase the number of students who have learning disabilities"); cf. Kelman & Lester, *supra* note 122, at 4 ("Advocates for children with learning disabilities sought to persuade lawmakers that at least some students among those considered 'slow' learners were in fact suffering from a . . . 'specific learning disability' that concealed their true abilities.").


126. Id. § 1414(b)(6)(A)-(B).

large categories of children from eligibility. Significantly, this method
does not recognize that "[i]ntelligent people can have SLD." Because
intervention is triggered only by poor performance, students who are
capable of performing adequately in the classroom but who nevertheless
are limited in their achievement by the existence of a "disorder in one or
more of the basic psychological processes" will not be identified for
services. Moreover, RTI does not and cannot answer the question of
why a student is failing in his performance. Because this method focuses
exclusively on how to correct such failure, it threatens to collapse any
meaningful distinction between children with impairments and low
performers generally. Although this mass grouping could potentially
diminish the stigma associated with labeling a child SLD, it threatens the
ability of children with cognitive impairments to secure the due process
and individualized education promised by IDEA eligibility. The RTI
approach therefore may result in a significant reduction in the number of
children deemed eligible under the IDEA.

3. Other Categorical Impairments

There have been relatively few cases reported that identify eligibility
disputes based on the existence or nonexistence of the other categorical
impairments included in the statute. Congress conceivably could restrict
the number or scope of the eligibility categories in the future if it desired
to limit the number of children receiving services under the IDEA. The
imagery of disability embraced in the IDEA, however, is largely that of
the medical model. As such, an expert's verification of internal functional
limitation is likely to continue to be sufficient to establish a qualifying
impairment in these categories.

128. Nancy Mather & Nadeen Kaufman, Introduction to the Special Issue, Part Two: It's About the
129. Id. at 747. Mather and Kaufman argue that as a result of exclusive reliance on the RTI
method of identification, "high-ability students with SLD would not be identified for services because
they would partially compensate for their difficulties through the use of their verbal and intellectual
strengths and not be the lowest performers in the classroom. Thus, they would be denied the
individualized instruction that would enable them to make progress that is consistent with their high
abilities." Id. at 749.
130. Id. at 750 ("Without the use of cognitive assessments, the SLD construct is in danger of
disappearing altogether, leading to a bin called 'high-incidence disabilities.' From this vantage point,
SLD would be reconceptualized as a failure to respond to validated treatments and thus viewed as an
unnecessary diagnostic category."). It is worth noting that the stigma of being grouped in the category of
"slow learner" could in fact be worse than bearing the SLD label because learning difficulties are
attributed to a lack of innate ability in the former and medical impediments in the latter. Indeed, it was
this difference in stigma that motivated middle-class white parents to seek the creation of the SLD
category in the first instance. See Kelman & Lester, supra note 122, at 4-5.
131. See, e.g., Garda, supra note 14, at 1078 (arguing that "[d]iagnosing a child with low-incidence
disabilities is typically an objective determination" that few school officials will question).
B. "ADVERSE EFFECT ON EDUCATIONAL PERFORMANCE"

Although each categorical impairment has a distinct list of regulatory requirements, all categories, with the exception of SLD, require the impairment in question to "adversely affect[] a child's educational performance" in order to establish eligibility.\textsuperscript{3} Put differently, any child experiencing physical or mental limitations may be able to demonstrate the existence of a categorical impairment under the statute. Only those with impairments that adversely affect educational performance in a demonstrable way, however, will be able to establish a qualifying disability.\textsuperscript{3}

Unfortunately, beyond the regulatory terms themselves, there is little agreement as to what this requirement means. There is confusion both as to what counts as "educational performance" and the point at which such performance will be deemed "adversely affected." Although states have the ability to define these terms as a matter of state law, many have not done so.\textsuperscript{3} Such ambiguity opens the door to restrictive eligibility determinations that refuse to recognize a covered disability in the absence of academic failure.\textsuperscript{3}

1. "Educational Performance"

A few courts and hearing officers have construed the concept of educational performance broadly to cover both academic and non-academic performance, recognizing that the "purpose of education is not merely the acquisition of academic knowledge but also the cultivation of skills and behaviors needed to succeed generally in life."\textsuperscript{36} A few courts


\textsuperscript{133} See id.

\textsuperscript{134} See, e.g., Garda, supra note 107, at 467 (noting that many states do not define eligibility criteria as a matter of state law).

\textsuperscript{135} Id. at 465 ("[T]hese vague definitions leave eligibility teams without any standards to draw lines between non-academic problems that qualify and those that don't."); cf. Kelman, supra note 27, at 80 ("The distinctions that we draw between the eligible and ineligible are both arbitrary and biased by class, race and gender."). In a study performed with Gillian Lester, Professor Kelman discovered that "it was not uncommon" for administrators "to refuse to classify children with Attention Deficit Disorders (ADD) as eligible for special education services" because of "the fear that, if a potentially disruptive student were classified as disabled, it would be impossible down the road to suspend or expel him for misbehaving." Id. Kelman concluded that "[t]he administrator may covertly resist the status designation because it might entail more than he thinks is justified." Id. at 81.

\textsuperscript{136} Mr. and Mrs. I v. Me. Sch. Admin. Dist., Civ. No. 04-165-P-H, 2005 WL 1389135, at *18 (D. Me. Jun. 13, 2005); see also Mary P. v. Ill. Bd. of Educ., 919 F. Supp. 1173, 1180 (N.D. Ill. 1996) ("'Educational performance' means more than a child's ability to meet academic criteria. It must also include reference to the child's development of communication skills, social skills, and personality, as the Code, itself, requires."); cf. C.J. v. Indian River County Sch. Bd., 41 IDELR 120 (11th Cir. 2004) (stating in dicta, despite finding student ineligible because of good academic performance, that "[w]e recognize that emotional, social, and behavioral problems may be intertwined with and adversely impact educational performance and we thus do not rule out the possibility that a student who gets
have gone much farther, concluding that the term "includes not only the narrow conception of instruction . . . but embraces all forms of human experience,"37 covering any need or service that "would contribute [to the student's] development as a human being."38 If this expansive interpretation became popular, the "adverse effect" requirement would add no real hurdle to the eligibility determination because the existence of a categorical impairment would, in most cases, be sufficient by itself to establish an impact on some aspect of a child's development.39

More commonly, however, courts have taken a narrow approach and equated "educational performance" strictly with "academic performance." If a student is able to achieve satisfactory grades, perform the required classroom work, or demonstrate the ability to learn in any respect, courts conclude that he or she does not possess a qualifying impairment regardless of other performance difficulties in school.40 In those districts following this approach, children with impairments that primarily affect their behavioral, social or emotional abilities are routinely denied eligibility even in the early years of education when related skills are regularly taught in the classroom.41

excellent grades could have behavioral problems that rise to a level where they interfered with her learning process or educational performance""); In re Lori B., 506 IDELR 101 (Ala. SEA 1985) (rejecting district's limitation of "schooling" to "intellect, cognition and speech," reasoning that "[i]t is the normal function of schools to respond to the totality of a child to which intellect, cognition, and speech bear a part-whole relationship. Children go to school, not their cognition; children go to school, not their language. Looking at these parts independently of the whole is an evaluator's convenience").

137. In re Kristopher H., 507 IDELR 185, 187 (Wash. SEA 1985) (quoting definition of education in FUNK & WAGNALL, NEW STANDARD DICTIONARY 790 (1946)).

138. Quintana ex rel. Padilla v. Dept' of Educ., 30 IDELR 503, 506 (P.R. Cir. Ct. App. 1998); see also Dighton Rehoboth Regional Sch. Dist., 45 IDELR 146 (Mass. SEA 2006) (rejecting argument that student ineligible because of academic achievement where "[t]he ability to attend class on a daily basis, to behave appropriately, to participate in group learning and class discussions, and to interact with teachers and peers both in and outside of class are all skills that are fundamental to the educational experience" and which "may quite properly constitute an IEP goal or objective, and may be addressed by specialized instruction and/or a related service"); Seguin Ind. Sch. Dist., 106 LRP 6647 (Tex. SEA 1995) (rejecting argument that academic performance equated with educational performance, reasoning that "educational needs do not involve just the academic and behavioral domains. They include all aspects of his education, including social skills, developmental skills and functional skills").

139. For a critique of this approach, see Garda, supra note 107, at 465 arguing that this liberal construction of "educational performance mean[s] that the mere existence of a disability fulfills the 'adversely affects educational performance' prong and essentially reads the limitation out of the IDEA."

140. See, e.g., C.J. v. Indian River County Sch. Bd., 41 IDELR 120, 125 (11th Cir. 2004) (finding no adverse effect where "despite [student's] behavioral problems, she had a strong academic record, is an A's and B's student, and successfully progressed from grade to grade"); Doe ex rel. Doe v. Bd. of Educ., 753 F. Supp. 67, 70 (D. Conn. 1990) (finding student who was hospitalized for depression and aggression ineligible where grades were satisfactory before and after hospitalization).

141. See Glennon, supra note 115, at 343. At least one scholar has argued that courts and hearing officers should defer to individual states in defining "educational performance," looking both to the official state curriculum and the areas of performance that states require schools to track. Garda, supra
This position is clearly inconsistent with that taken by the Office of Special Education Programs, which has stated that eligibility teams “must consider non-academic as well as academic” performance when “determining whether a child's impairment adversely affects educational performance.” Under any meaningful definition, the concept of “education” encompasses more than the restricted domain of academic functioning, as reflected in the educational standards of many states. A narrow focus on academics to the exclusion of every other aspect of a child's development at school would seem to be a parsimonious interpretation of this requirement that is inconsistent with the broad legislative intent of Congress.

2. Adverse effect

Evaluating whether an impairment “adversely affects” educational performance can be equally difficult. It is unclear what degree of impact a child must demonstrate to establish an adverse effect. It is also uncertain whether the remedial impact of services provided to the child outside of the IDEA is relevant to answering that question. The case law reveals that many courts and administrative hearing officers faced with these questions have endorsed a restrictive understanding of disability and required strong evidence of near complete academic failure before awarding eligibility under the statute.

Neither the statute nor the regulations contain qualifying language concerning the degree of impact a child must demonstrate to establish an adverse effect on education. Nevertheless, many courts and hearing officers have refused to find an adverse effect unless a child demonstrates a “significant” or “substantial” negative impact on educational performance. Even low grades and poor overall

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142. The Office of Special Education Programs is a division of the U.S. Department of Education and has statutory responsibility for implementing the IDEA. 20 U.S.C. § 1402(a) (2004).
143. Letter to Pawlisch, 24 IDELR 959, 961 (OSEP Wis. 1996).
144. See, e.g., Garda, supra note 107, at 465–67 (proposing that courts define “educational performance” by state education standards).
145. See, e.g., Mr. and Mrs. I v. Me. Admin. Sch. Dist., 480 F.3d 1, 12 (1st Cir. 2007) (concluding that “‘there is nothing in the IDEA or its legislative history that supports the conclusion that ... ‘educational performance’ is limited only to performance that is graded’”) (quoting Robert A. Garda, Jr., Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act, 60 Mo. L. Rev. 441, 471 (2004)).
146. See, e.g., Ashli C. ex rel. Sidney C. v. State of Hawaii, No. 05-00429 HG-KSC, 2007 WL 247761, at *9 (D. Haw. Jan. 23, 2007) (holding that “adverse effect” language requires evidence of more than a “minimal” impact on education); cf. R.B. v. Napa Valley Unified Sch. Dist., 43 IDELR 188, 192 (N.D. Cal. 2005) (acknowledging that the district's creation of a behavior intervention plan “indicated that [student’s] behavior was impeding her learning” but nevertheless did not satisfy the regulatory language because “it is not clear to what extent”); see also Garda, supra note 107, at 484–85 (detailing case law and concluding that “[m]any decision-makers ... require] that the disability significantly affect performance to qualify”).
achievement may be insufficient to satisfy this exacting standard.\textsuperscript{47} If this understanding of adverse effect becomes widespread or is formally adopted by each state, any child achieving even modest academic success would be unable to establish eligibility under the IDEA.

Recognizing this, some courts and hearing officers have adopted a more flexible approach, finding the standard satisfied when an impairment makes performance more difficult for the child in any material aspect, or where performance would be enhanced or improved with the addition of supports and services.\textsuperscript{48} The court in \textit{Corchado ex rel. Corchado v. Board of Education} was particularly thoughtful in explaining the justification for this approach:

The [hearing officer's] reasoning, in effect, precludes a child whose academic achievement can be described as "satisfactory" from being able to demonstrate that documented disabilities adversely affected the student's academic performance. This should not and cannot be the litmus test for eligibility under the IDEA. The fact that a child, despite a disability, receives some educational benefit from regular classroom instruction should not disqualify the child from eligibility... Each child is different, each impairment is different, and the effect of the particular impairment on the particular child's educational achievement is different. [Denying] special education benefits because [a student] is able to pass from grade to grade despite documented impairments that adversely affect his educational performance is wrong.\textsuperscript{49}

Significantly, these courts consider the level of a child's academic performance to be an important factor in determining whether an adverse effect has been established but do not require academic failure or near academic failure as a mandatory precursor to eligibility.\textsuperscript{50} Instead, children with impairments causing academic difficulty in some

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\item[48.] See, e.g., \textit{Johnson v. Metro Davidson County Sch. Sys.}, 108 F. Supp. 2d 906, 918-19 (M.D. Tenn. 2000) (overruling ALJ's determination that child's "reasonable progress in school" negated her ability to show her impairment adversely affected her educational performance where she was repeatedly expelled from school while in a regular learning environment); \textit{Dighton Rehoboth Regional Sch. Dist.}, 45 IDELR 146 (concluding student could establish an adverse effect on educational performance despite receiving good grades where student was unable to attend school and received tutoring at home); see also \textit{Garda}, supra note 107, at 483-85 (detailing relevant case law).
\item[50.] See, e.g., Mr. and Mrs. I \textit{v. Me. Sch. Admin. Dist. No. 55}, No. 04-165-P-H, 2005 WL 1380135, at *20 (D. Me. June 13, 2005) (explaining that "a child's impairment need not necessarily manifest itself in academic failure" to establish an adverse effect on educational performance), aff'd, 480 F.3d 1, 12 (1st Cir. 2007) (agreeing that "adverse effect" requirement imposes no "quantitative limit, 'significant' or otherwise, on the disability"); \textit{Venus Indep. Sch. Dist. v. Daniel S.}, No. CIV.A. 301CV1746P, 2002 WL 550455, at *11 (N.D. Tex. Apr. 11, 2002) (finding an adverse effect despite above average academic performance because "a true measure of a child's educational performance is not strictly limited to an evaluation of his performance in academics").
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meaningful respect can generally establish the requisite adverse effect on education, thus establishing a qualifying disability under the statute.

Further complicating the matter, courts do not agree whether the extent of the impairment's impact should be evaluated in the mitigated or non-mitigated state. Some conclude that if a child performs adequately with supports and services in the classroom that do not technically meet the definition of "special education" detailed infra, then the child cannot establish an "adverse effect" on educational performance as a matter of law. Inexplicably, no account is given to the fact that the child's impairment must have affected educational performance in some negative respect in order to trigger the need for the supports and services in the first instance. The irony of this position is further evidenced by the fact that it is often eligibility under the Rehabilitation Act, which requires a child to show that he or she has an impairment that substantially limits a major life activity, which triggers the provision of such services. It also appears to be inconsistent with an opinion letter issued by the Office of Special Education Programs stating that when an eligibility team evaluates a student who is passing from grade to grade, it is "appropriate" to consider the supports and services provided to the child in order to assess whether "the child's current educational achievement reflects the service augmentation [and] not what the child's achievement would be without such help." One might nevertheless defend the contrary approach by reference

151. See, e.g., R.B. v. Napa Valley Unified Sch. Dist., 43 IDELR 188, 192 (N.D. Cal. 2005) (finding no adverse effect on educational performance in part where plaintiff's performance improved following the implementation of a behavioral support plan under section 504); George West Indep. Sch. Dist., 35 IDELR 287, 288 (finding no adverse effect on educational performance where student was capable of performing well academically in the classroom as the result of an amplification system provided pursuant to § 504); Fenton Area Pub. Sch., 44 IDELR 223, 224 (Mich. SEA 1995) (finding student ineligible where significant outside tutoring resulted in good academic performance, acknowledging that "[i]t is because Student X has been able to achieve in school, possibly in part because of this remediation, that she is not eligible for special education") (emphasis added). But see In re Joshua E., 507 LRP 8339, 8341 (Mass. SEA 1985) (finding student eligible despite district's argument that student was "progressing effectively within the regular education setting without OT" because district "ignore[d] the undisputed fact that the parents have been providing the necessary OT services that the school has not").

152. 29 U.S.C. § 794(a) (2002) provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Like the ADA, the Rehabilitation Act defines disability to mean "a physical or mental impairment that . . . substantially limits one or more major life activities." 29 U.S.C. § 705(9) (1998). Unlike the IDEA, it does not require a child to show an adverse affect on educational performance. Id. Children with disabilities in public school may be eligible for accommodations under the Rehabilitation Act, the IDEA, or both. However, only those who can demonstrate an impairment that impacts educational performance will receive the procedural guarantees and due process protection of the IDEA. 20 U.S.C. § 1401(3)(A) (2004).

153. See cases cited supra note 148

to the Supreme Court’s interpretation of disability under the ADA. In *Sutton v. United Airlines, Inc.*, the Supreme Court held that when evaluating whether an individual is substantially limited in a major life activity as a result of an impairment, courts must consider all mitigating measures taken by a plaintiff to alleviate the impairment’s effects. For example, if the use of medication controls or corrects an individual’s disorder, he or she is not disabled within the meaning of the statute in the absence of showing effects from the medication which are substantially limiting.

Even assuming that this position is defensible in an ADA Title I context, however, its extension to the eligibility determination under the IDEA is circular and fundamentally flawed. If this interpretation controls, a school district has the power to restrict eligibility under the IDEA simply by providing, voluntarily or otherwise, some minimal supports and services to struggling students. Although these accommodations may help student performance, they often will be modest or inadequate in comparison to the substantive and procedural guarantees that Congress extended to students with disabilities under the IDEA. In the ADA context, this would be akin to an employer voluntarily providing accommodations to an employee in the workplace and then using the effectiveness of those accommodations to argue that the employee has no substantially limiting impairment and thus no protection under the ADA. That the actor, whether employer or school district, is willing to provide some assistance to an individual with disabilities, either willingly or pursuant to other statutory obligations, does not negate the individual’s right to insist on the full protection that the law provides. To find otherwise would restrict Congress’ power to define the scope of services that will be provided by law.

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156. *Id.*

157. Most scholars have concluded that this approach is fundamentally flawed under the ADA as well. See *supra* note 25 and accompanying text.

158. Students eligible under the IDEA, for example, are entitled to related supports and services that may not be available under the Rehabilitation Act, such as transition support. See, e.g., 20 U.S.C. § 1401(14) (2004); see *also* A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 31–32 (D. Conn. 1988) (“While both the Individual with Disabilities Education Act, . . . and section 504 mandate that local education agencies provide a FAPE to children with disabilities . . . section 504 provides relief from discrimination, whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination.”) (internal citations omitted).

159. *Cf.* Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996) (rejecting school district’s argument that student received adequate support under section 504, reasoning that “[u]nder the statutory scheme, the school district is not free to choose which statute it prefers”); Muller *ex rel. Muller v. Comm. on Spec. Educ.*, 145 F.3d 95, 105 n.9 (2d Cir. 1998) (“Although the provisions of an IEP under the IDEA will sometimes satisfy a district’s § 504 obligations, the converse is not generally true.”) (internal citations omitted).
C. Needs Special Education

The existence of an enumerated disability is a necessary requirement for coverage, but not sufficient to secure eligibility. In order to fall within the perimeters of the IDEA, a child must also demonstrate that as a result of having a disability, he or she "needs special education and related services." It is this second requirement, along with the overlapping "adverse effect" regulatory mandate, that distinguishes coverage under the Rehabilitation Act from that of the IDEA. Although children with impairments may qualify under either or both statutes, only those who possess disabilities which necessitate intervention in the educational arena will secure the protection offered by the IDEA, a requirement often sufficient to derail eligibility claims.

I. "Special Education"

The definition of "special education," as well as the scope of services that fall under its umbrella, is relatively ambiguous and a subject of debate. The statute defines special education as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability[.]" The regulations further elaborate that "specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to meet the unique needs of a child with a disability." Despite the statute's thirty year existence, there is little agreement among courts and scholars as to what type of services fall under this umbrella.

The Office of Special Education Programs has stated that "[t]he plain meaning of the words 'specially designed instruction' is education planned for a particular individual or 'individualized instruction.'" Some courts and states have further elaborated that such "specially designed instruction must go beyond the services and programs that a student would receive as part of general education." Where that line is drawn, however, is unclear. Few courts or hearing officers explicitly compare the supports and services available to children in general education with those extended to the child seeking eligibility. Instead,

161. See, e.g., Roane County Sch. Sys. v. Ned A., 22 IDELR 574 (E.D. Tenn. 1995) (explaining that "although the Rehabilitation Act is broader than the IDEA, the IDEA is the specific act encompassing education for persons with disabilities").
164. For a broad discussion of this topic, see Garda, supra note 14, at 1106–1124 (evaluating "special education" case law).
166. Troy Area Sch. Dist., 30 IDELR 5678 (Penn. SEA 1999) (citation omitted).
most cases simply recite the services provided and conclude, often without explanation, that the services either do or do not qualify under the statutory definition.\textsuperscript{167}

Those attempting to draw more definitive lines have encountered mixed success. Some districts have taken the position, explicitly or implicitly, that services provided to children pursuant to the Rehabilitation Act necessarily do not qualify as "specially designed instruction" under the IDEA, an argument similar to that employed in the "adverse affect" context.\textsuperscript{168} Although there is some judicial support for this position,\textsuperscript{169} at least one court has rejected this theory outright, concluding that a service may be mandated by both the Rehabilitation Act and the IDEA simultaneously.\textsuperscript{170} Still others have concluded that if the services an impaired child requires can be provided in a general education setting, they necessarily are not "special" enough to warrant

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\item \textsuperscript{167} Compare Mr. I v. Me. Sch. Admin. Dist., 480 F.3d 1, 20 (1st Cir. 2007) (affirming that "social-skills and pragmatic-language instruction are 'specially designed instruction'"), Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996) (concluding that child with cerebral palsy was receiving "special education" services where her "teachers shortened or modified the length and nature of her writing assignments, provided her with copies of their notes, and taught her how to type using only her left hand and the first finger of her right hand"), \textit{and} Birmingham and Lamphere Sch. Dists. v. Superintendent of Pub. Inst. Mich., 328 N.W.2d 59, 63 (Mich. Ct. App. 1982) ("We find no reason to question the local hearing officer’s conclusion that the proposed summer enrichment activities (camping, field trips, swimming, other sports, playground and recreational activities, gardening and work skills training) fall within the broad definitions of ‘special education’ and ‘related services.’"), with St. Clair County Bd. of Educ., 29 IDELR 688, 690 (Ala. SEA 1998) (finding that services received by student with orthopedic challenges, including the services of an aid to assist with mobility, were not "specially designed instruction"); Nagle v. Wilson Sch. Dist., 21 IDELR 794, 795, 798 (E.D. Pa. 1994) (finding by eligibility team that student did not need special education upheld despite team’s development of a Notice of Recommended Assignment extending student accommodations, including monitoring her progress on “benchmark dates” to determine the success of the IEP), \textit{vacated}, 70 F.3d 751 (3d Cir. 1995); \textit{In re Laura H.}, 509 IDELR 242 (Mass. SEA 1988) (explaining that correspondence course, individual tutoring, and guidance services deemed “regular modifications of school curriculum” for student with multiple chemical sensitivity); Berkeley Unified Sch. Dist., 507 IDELR 435 (Cal. SEA 1988) (denying eligibility “because modifications in the regular school program are feasible and have a good chance of ameliorating her difficulties”), and \textit{In re S.F. Unified Sch. Dist.}, 505 IDELR 155 (Ca. SEA 1983) (holding that emotionally disturbed student’s treatment in an adolescent day treatment program would qualify as a related service but not as “specially designed instruction” because “the focus of the program is to provide psychological and emotional therapy”).
\item \textsuperscript{168} See infra Part II.B.
\item \textsuperscript{169} See, e.g., George West Indep. Sch. Dist., 35 IDELR 287, 288 (Tex. SEA 2001) (finding that amplification system provided to hearing-impaired student pursuant to § 504 was not "special education" in concluding student not eligible under IDEA, reasoning that “[a]lthough she works hard at her studies, and although 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”).
\item \textsuperscript{170} Yankton, 93 F.3d at 1376; \textit{see also} Tucson Unified Sch. Dist., 30 IDELR 1000, 1000-02 (Ariz. SEA 1999) (rejecting district’s argument that accommodations provided to student pursuant to § 504, including “preferential seating . . . and the teacher’s special individualized instruction, attention and guidance in his classroom efforts” precluded his eligibility under the IDEA).
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There has not been wide support for this position, however, and it seems to conflict directly with the IDEA's mandate that children with disabilities be educated in the least restrictive environment "[t]o the maximum extent appropriate." If this position were taken to its logical conclusion, any service which enabled a child to secure academic success in general education would be deemed sufficient to negate his IDEA eligibility.

As is apparent, the open-ended nature of "special education" gives considerable discretion to the eligibility team. That discretion may be expanding as a result of the passage of the No Child Left Behind Act ("NCLB"), which emphasizes an individualized approach to meeting the needs of each child in the classroom. This trend is laudable in that it works to ensure the success of all children, whether disabled or not, and rejects the one-size-fits-all approach to education which has dominated in prior decades. It opens the door, however, to those who would restrict eligibility to students with more severe impairments. As the individualization trend blurs the line between "special" education and general education, virtually any accommodation provided in a general classroom setting could theoretically be classified as a routine accommodation rather than special education. This may be true even if a child receives more accommodations in the aggregate than typical children in the classroom. If this shift occurs, students receiving accommodations in general classrooms will have a difficult time establishing eligibility under the IDEA. The educational supports secured by NCLB are unlikely to make up for the loss of IDEA eligibility, moreover, because NCLB does not require districts to consult with parents in devising adequate educational plans and bestows no

171. See, e.g., Troy Area Sch. Dist., 30 IDELR at 5678; cf. Bd. of Educ. v. Ambach, 453 N.Y.S.2d 895, 896–97 (N.Y. 1982) (rejecting district's argument that child's resource room instruction did not qualify as special education because student was otherwise able to attend regular classes).


173. Id.

174. See, e.g., 20 U.S.C. § 6311(b)(3)(C)(xii) (2000) (requiring states to "produce individual student interpretive, descriptive, and diagnostic reports" after assessments are completed so as to "allow parents, teachers, and principals to understand and address the specific academic needs of students"); see also Stephen A. Rosenbaum, Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind, and Getting Outside of It All, 15 HASTINGS WOMEN'S L.J. 1, 27 (2004) ("If [NCLB] is truly working, this law would permit educators and parents to tailor their instructional approaches to individual students who are not making progress under the standardized curriculum—for a variety of reasons."). But see Philip T.K. Daniel, No Child Left Behind: The Balm of Gilead has Arrived in American Education, 206 W. EDUC. L. REP. 791, 804 (2006) (criticizing NCLB as inflexible because "[a] one-size-fits-all approach is used and subject matter content is in the hands of the states and away from teachers, administrators, and even the local school board"); Rentschler, supra note 10, at 639 (describing the "conflict between the individualized nature of special education and the NCLB focus on mass testing and systemic accountability of schools and school districts").
enforceable individual rights when disagreements arise.\textsuperscript{175}

2. "Needs"

Assuming that the student can demonstrate that the supports and services in question qualify as special education, he or she still must demonstrate that there is a "need" for such services. Congress has provided no definition for this term, leaving the eligibility team with "a wholly subjective standard."\textsuperscript{176} Once again, courts and hearing officers regularly conclude that any child capable of academic success cannot establish the requisite need for services under the statute.\textsuperscript{177} Even acknowledged disabilities that require the child to work significantly harder than a typical student in order to achieve comparable success may be deemed insufficient to satisfy this part of the eligibility determination.\textsuperscript{178}

Other courts, however, have rejected this "bright line rule," concluding that the Supreme Court "clearly repudiated the notion that grades can serve as IDEA's litmus test"\textsuperscript{179} in Board of Education of Hendrick Hudson Central School District vs. Rowley.\textsuperscript{180} In Rowley, the Supreme Court held that a child's ability to advance from grade to grade

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\item[\textsuperscript{175}] Daniel, \textit{supra} note 174, at 805 (noting that remedy under NCLB is "limited to the possible loss of federal funds when the Office of Education renders a finding of failure to comply with the law or compliance cannot be secured through voluntary means").
\item[\textsuperscript{176}] Garda, \textit{supra} note 14, at 1125.
\item[\textsuperscript{177}] See, e.g., Alvin Indep. Sch. Dist. v. Patricia F., No. G05-678, 2006 WL 2880513, at *6 (S.D. Tex. Oct. 6, 2006) (finding child with ADD ineligible despite disciplinary problems where student achieved passing grades and passed standardized testing); C.J. v. Indian River County Sch. Bd., 39 IDELR 186, 188 (S.D. Fla. 2003), aff'd, 41 IDELR 120 (11th Cir. 2004) (denying eligibility where students' "performance in the classroom indicates that she requires neither specially designed services nor related services for her to benefit from education"); Fenton Area Pub. Schs., 44 IDELR 223, 225 (Mich. SEA 1995) (holding that student with admitted "severe discrepancy between ability and achievement" could not establish eligibility where she nevertheless "has been able to succeed in school"); In re Laura H., 509 IDELR 242 (Mass. SEA 1988) (concluding student with history of absenteeism and "access difficulties" did not "need special education" under the IDEA where there was "no indication that she cannot continue to make effective educational progress in the regular education program, particularly with the modifications (including regular education guidance services) offered"); Berkeley Unified Sch. Dist., 507 IDELR 435 (Ca. SEA 1986) (finding that student did not need special education although there was "no question" that her emotional problems adversely affected her educational performance where modifications in the regular school program, like pre-selecting the student's teachers, were "feasible" and "had not been explored").
\item[\textsuperscript{178}] See, e.g., Fenton Area Pub. Schs., 44 IDELR at 223, 225 (admitting that "[i]t must be very difficult [for petitioner] to understand why the reward for working so hard is that she is not eligible for special education and related services"); \textit{But see} W. Chester Area Sch. Dist. v. Bruce, 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002) (finding that student demonstrated a need for special education despite receiving passing grades in part because of "the extensive amount of time Chad spent out of class receiving remedial and supplement assistance from his mother").
\item[\textsuperscript{180}] 458 U.S. 176 (1982).
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is strong evidence that a child is receiving a Free Appropriate Public Education (FAPE) under the statute.\textsuperscript{181} It clarified in a footnote, however, that such evidence is not definitive and does not result in an automatic finding that the child is receiving FAPE.\textsuperscript{182} Some courts have reasoned that if passing grades are insufficient to establish FAPE, they are even less definitive in determining initial eligibility under the statute.\textsuperscript{183} Such courts look to indicators of “educational need” above and beyond academic performance, including “behavioral progress and the acquisition of appropriate social skills,” in evaluating whether a child is eligible for services.\textsuperscript{184}

D. The Fruits of Eligibility: A Free Appropriate Public Education

Each child who meets the eligibility criteria detailed above is entitled to FAPE, which includes the delivery of special education and related services\textsuperscript{185} tailored to meet the “unique needs” of the child.\textsuperscript{186} Districts are required to provide FAPE in the “least restrictive educational environment” to the “maximum extent appropriate”\textsuperscript{187} in order to ensure that children with disabilities are not segregated from

\textsuperscript{181} Id. at 203.
\textsuperscript{182} Id. at 203 n.25.
\textsuperscript{183} See Venus Indep. Sch. Dist. v. Daniel S., No. CIV.A. 301CV1746P, 2002 WL 550455, at *12 (N.D. Tex. Apr. 11, 2002) (“As the Supreme Court noted, the achievement of passing marks and the advancement from grade to grade is an important factor in determining educational need, but it is only one factor in this analysis.”) (citation omitted); Mary P. v. Ill. State Bd. of Educ., 919 F. Supp. 1173, 1180 (N.D. Ill. 1996) (“Because the Supreme Court explicitly rejected the notion that the sole test for an appropriate education was advancement from grade to grade, or, in other words, academic achievement, the court finds no authority from Rowley to impose such a requirement on the test for eligibility in the present case.”); cf. Mr. and Mrs. I v. Me. Sch. Admin. Dist. No. 55, No. Civ. 04-165-P-H, 2005 WL 1389135, at *18 (D. Me. June 13, 2005) (“Relevant Maine regulations—which fill the IDEA regulations’ definitional void with respect to the term ‘educational performance’—make clear that a student’s eligibility for special-education services in this state does not hinge on whether his or her disability adversely affects an academic area . . . .”).
\textsuperscript{184} Venus, 2002 WL 550455, at *11 (finding educational need despite superior academic performance where “the documentary evidence showed that [the student’s] behavior was a constant challenge to himself, his teachers . . . and his parents”); cf. Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46,547, 46,580 (Aug. 14, 2006) (“[C]hildren do not have to fail or be retained in a course or grade in order to be considered eligible for special education and related services.”).
\textsuperscript{185} “Related services” are defined in the statute as “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, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(26)(A) (Supp. IV 2004). Typical services provided under this statute include speech-language pathology services, occupational therapy, psychological services, and health services performed by someone other than a physician. Id.; see also Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 892-93 (1984) (holding that the Secretary of Education’s interpretation of the “medical services” exclusion in § 1401 to refer only to services performed exclusively by a physician is a reasonable interpretation of the statute).
their typical peers. One of the most significant aspects of eligibility is the procedural protection extended to students and parents. The statute requires districts to consult with parents in forming a student’s individualized education plan and permits parents to seek administrative and judicial review in the event that agreement cannot be reached. Studies have shown that a credible threat of litigation can motivate otherwise indifferent administrators to thoughtfully consider parental input and reach compromises that are acceptable to parents and the district.

III. Public Policy Implications of “Child with a Disability”: The Rising Crisis in Special Education

There is little doubt that the students Congress intended to be eligible for services when it enacted EAHCA look somewhat different than the majority of those served under the IDEA today. As the legislative history reveals, the primary goal in the early years of the legislation was to provide educational opportunities to children with relatively severe impairments who historically had been shunned or subjected to discriminatory treatment. Few at that time would have anticipated that the largest number of children served under the statute would be those with the least severe impairments. Some have viewed this trend with suspicion, calling for renewed attention to the eligibility criteria out of fear that the numbers of qualifying children will overwhelm the resources allocated under the IDEA and render meaningless any distinction between general and special education. As the prior section demonstrates, many courts and administrative hearing officers have heeded this call by adopting restrictive interpretations of the statutory eligibility terms.

Although the rising number of special education students inevitably will present challenges to school districts, the remainder of this Article argues that this increase is a positive reflection of the IDEA’s success in reducing the pervasive stigma attached to disability, at least as it relates to children. By defining disability broadly and contextually, the IDEA has avoided the entrenched problems created by the ADA’s coverage of

190. Martin A. Kotler, The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change, 27 U. Mich. J.L. Reform 331, 341 (1994). Affluent and educated parents are in the best position to secure district cooperation because they can most credibly make a threat of litigation. See id. (“Procedural protections all too often have been reduced to mere empty ritual for all but the most educated and wealthy.”).
191. See sources cited supra note 19.
192. See sources cited supra note 20.
only "substantially limiting" impairments. Because calls for restricting IDEA eligibility to the "truly disabled" would return the focus to the severity of a child's internal medical limitations rather than the contextual need for assistance, they are ill-advised and represent an undesirable return to the medical model of disability.

A. SEVERITY AS PROXY FOR FUNDING ENTITLEMENTS

Throughout history, society has relegated people with disabilities to the margins of the community. The existence of any impairment, whether physical or mental, has been sufficient to place an individual into the category of "other" and well outside the normal social order. In the medical model of disability, there is no recognition of a continuum of human ability or the potential for changing status across time. To put it simply, either one is disabled, or one is not. Because disability arises from internally generated medical limitations which naturally separate people, society is neither responsible for the exclusion of people with disabilities from the mainstream nor concerned with this population outside of the benevolent desire to bestow charity on the less fortunate.

The requirement in EAHCA and IDEA to educate children with disabilities in the least restrictive environment reflected a monumental shift toward a social model of disability, which acknowledges the role of cultural attitudes and environment in shaping the experience of impairment. Congress explicitly recognized that "[d]isability is a natural part of the human experience" rather than an aberrant state. In requiring educators to meet the individual needs of these children, Congress acknowledged that institutional arrangements and disability stigma may pose greater obstacles to their educational success than their internal medical limitations. Mandating the inclusion of children with disabilities into mainstream classrooms simultaneously expanded the educational opportunities of these children and diminished the stigma of

193. Cf. Richard K. Scotch, Models of Disability and the Americans with Disabilities Act, 21 BERKELEY J. EMP. & LAB. L. 213, 219 (2000) (explaining that in the medical model of disability, internal functional limitations are "typically linked to incapacity and dependence, which, in turn, may lead to social and economic isolation").

194. This concept is readily evident in the universally accepted image of disability: a wheelchair.

195. For a general discussion of the medical model of disability, see Wendy F. Hensel, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, 40 HARV. C.R.-C.L. L. REV. 141, 146-47 (2005), and Deborah Kaplan, The Definition of Disability: Perspective of the Disability Community, 3 J. HEALTH CARE L. & POL'Y 352, 353 (2000) ("Society has no underlying responsibility to make a 'place' for persons with disabilities, since they live in an outsider role waiting to be cured.").


otherness and isolation that formerly served as the hallmarks of public education.

The calls to restrict the IDEA to the “truly disabled” and insistence on academic failure prior to eligibility represent subtle but distinct challenges to the normalization of disability in education and recognition of disability as a social construct. When the label is attached only to those children with the most severe impairments incapable of any meaningful academic success, the view of disability as a medical state suffered only by unfortunate individuals outside of the norm is reinstated. Disability is no longer viewed as part of the natural variation in human functioning, but instead as a destination reserved for those unable to function alongside “normal” peers. The medical model of disability is resurrected, and the contextual experience of disability as a social construct is, at best, given secondary consideration. Under such circumstances, the stigma attached to disability will inevitably rise.

This change in the imagery of disability and return to a medical model of disability represents more than a troublesome theoretical shift for scholars to ponder. Once this view becomes widespread, it may have a significant substantive impact on the inclusion of children with disabilities into general education classrooms and the exposure of typical peers to children with impairments. Children with less severe impairments are likely to have the best opportunity for meaningful integration into mainstream classrooms. Many children with learning disabilities, for example, can succeed in general education when provided with additional individualized instruction or alternative methods of delivery that often enhance the learning opportunities of other children in the classroom. Limiting the reach of the IDEA to only those with serious impairments threatens to transform special education into a place rather than a set of services. Because children with more significant impairments may be less likely to secure an appropriate education in an integrated setting, the severity-linked identification of disability becomes irrevocably associated with a self-contained classroom separate and apart from the general school population. Whatever the cost savings generated by restricted eligibility, they come at a steep price to the community of people with disabilities and to society at large.

One need look no further than the Americans with Disabilities Act for a cautionary tale in this regard. When the ADA was passed in 1990,

198. See, e.g., Horn and Tynan, supra note 12, at 42.
199. See, e.g., Chambers et al., supra note 15, at 7–9. The data on district expenditures shows that the categories of disability with the highest percentage of expenditures on general education services are specific learning disabilities (SLD), speech-language impairments (SLI), and other health impairments (OHI). The authors conclude that “the disability categories associated with the highest total spending (i.e., generally, the lower incidence categories) tend to spend relatively more on special relative to regular education services, and vice versa.” Id. at 9.
disability advocates celebrated what they believed to be the beginning of the end of society’s marginalization of millions of Americans with physical and mental impairments.200 Many believed that the ADA would facilitate the integration of people with disabilities into all facets of life.201 Today, however, a broad consensus has emerged concluding that the legislation has failed to achieve these goals,202 and most scholars lay blame at the feet of the definition of disability adopted in the statute.203 The ADA, unlike other civil rights litigation, requires all litigants to establish in the first instance that they are members of the class protected by law. The legislation’s anti-discrimination and reasonable accommodation mandates do not arise unless and until an individual demonstrates that he or she has an impairment which substantially limits a major life activity.204 The Supreme Court has repeatedly endorsed a restrictive definition of disability, and lower courts have followed suit.205 As a result, the focus of most ADA employment cases has been not on


201. See id. at 271–72.

202. See, e.g., Linda Hamilton Krieger, Afterword: Socio-Legal Backlash, 21 BERKELEY J. EMP. & LAB. L. 476, 476 (2000) (noting that society “just do[es]n’t get it,” and theorizing that “the ADA, at least as its drafters conceived it, somehow got too far ahead of most people’s ability to understand the social and moral vision on which it was premised”); McGowan, supra note 25, at 36 (“If the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA’s employment title has been nothing less than a betrayal of the ADA’s promise.”).

203. See, e.g., Eichhorn, supra note 25, at 1408 (“Although the ADA has been hailed as the chief accomplishment of a civil rights movement on behalf of people with disabilities, the way in which ‘disability’ is defined in the statute has undercut its effectiveness as a guarantor of civil rights.”); Bonnie Poitras Tucker, The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages, 52 ALA. L. REV. 321, 321 (2000) (stating that recent Supreme Court decisions addressing interpretation of the definition of disability in the ADA “drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination”.

204. 42 U.S.C. § 12102(2)(A) (2000). Litigants may also establish membership in the protected class by demonstrating a record of disability or that they are regarded as having a disability. Id. § 12102(2)(B)-(C). Even under these prongs, however, a litigant must show either an actual or imagined impairment which substantially limits a major life activity. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

205. See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200-02 (2002) (holding that an employee who could not perform repetitive manual tasks on the job was not disabled because she nevertheless could perform manual tasks at home like brushing her teeth); Sutton, 527 U.S. at 488 (holding that courts must take into account all mitigating measures employed by plaintiffs in determining whether plaintiff is disabled within the meaning of the ADA); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (holding that courts must take into account all mitigating measures employed by plaintiffs in determining whether plaintiff is disabled within the meaning of the ADA). For a general discussion of how these cases have restricted the definition of disability under the statute, see Lisa Eichhorn, The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC’s “Disability” Regulations Under the ADA, 39 WAKE FOREST L. REV. 177 (2004).
the defendant’s allegedly discriminatory behavior or failure to accommodate a plaintiff with impairments, but instead on the extent of the plaintiff’s internal limitations, consistent with a medical model of disability. The drive to limit the ADA to the “truly disabled” has resulted in court findings that individuals with epilepsy, cancer, and diabetes are insufficiently impaired to be disabled within the meaning of the statute. Courts have viewed an individual’s ability to overcome difficulties posed by internal limitations as evidence that no disability existed in the first place instead of a reflection of achievement and progress.

The ADA’s focus on the severity of medical limitations rather than the contextual nature of disability and discrimination ignores the impact of disability stigma on employment opportunities and the barriers that institutional arrangements may pose to successful integration. Particularly troubling, it has shifted society’s focus from defendants’ discriminatory behavior to an evaluation of the crippling nature of plaintiffs’ internal impairments. The image of disability left in the ADA’s wake is pathetic and extreme, placing those sad individuals unfortunate enough to possess such characteristics squarely into the category of other. This was hardly a result anticipated by the legislation’s supporters. In the ultimate irony, those individuals with disabilities who are most employable and likely to benefit from an anti-discrimination mandate are those least likely to receive assistance or protection from discrimination.

206. See, e.g., Eichhorn, supra note 25, at 1407 (citing Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403–05 (1998)) (explaining that “a significant percentage of ADA discrimination claims are dismissed on summary judgment because plaintiffs cannot prove the prima facie elements, which include disabled status”); Wendy F. Hensel & Gregory Todd Jones, Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes, 73 TENN. L. REV. 47, 61 (2005) (theorizing that “because litigants with mental impairments have more difficulty establishing class membership, less attention is paid to defendants’ potentially discriminatory actions”).


208. See, e.g., Gillon v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 22 (1st Cir. 2002) (overturning district court’s holding that amputee with one functioning arm was not substantially limited in the major life activity of lifting based on appellant’s “optimistic self-assessment of her capabilities” because “[t]he key question is not whether a handicapped person accomplishes her goals, but whether she encounters significant handicap-related obstacles in doing so”); cf. Hensel & Jones, supra note 206, at 56 (noting that periods of well-being for people with mental illness are viewed as evidence of malingering and “concrete proof that no disability existed in the first place”).

209. This is true even of the “regarded as” prong of the disability definition. Some litigants initially argued that they need only show an impairment in order to establish membership in the protected class. The Supreme Court subsequently clarified that to state a “regarded as” claim, plaintiffs must show instead that the employer “believe[s] either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.” Sutton, 527 U.S. at 489.
Limiting IDEA eligibility to those incapable of academic success is equivalent to imposing a "substantial limitation" requirement like that of the ADA. Students who look and act like typical peers in any meaningful respect necessarily are deemed not disabled enough to qualify for charitable intervention. No consideration is given to the challenges a student must overcome to secure academic competence or to his ability to succeed at other critical life skills and tasks routinely addressed in the school environment. In the absence of complete failure, this model acknowledges no need to reflect on the unstated assumptions of normalcy and attitudes of administrators that may have contributed to the impaired student's difficulties. Instead, it is the student's crippling internal limitations that are the source of the problem and the foundation for intervention, reinforcing a medical model of disability.

Although there are significant parallels between the IDEA and the ADA, critics could argue that the differences between them call into question the relevance of the comparison. ADA plaintiffs, unlike children seeking eligibility under the IDEA, are given the Herculean task of establishing a substantially limiting impairment while simultaneously demonstrating qualifications for the position in question, a tension which often is sufficient to derail class membership. The anti-discrimination focus of the ADA, moreover, conceivably creates some distance from the IDEA. Because disability animus is not limited to impairments which are substantially limiting, scholars have argued it makes little sense to restrict the ADA's protection to this category rather than broadly prohibiting discrimination based on any physical or mental limitation. Because the IDEA is largely focused on identifying eligibility for governmental services rather than prohibiting bias on the basis of disability, strict class delineations in order to ensure legitimate service delivery may not only be defensible, but necessary in the context of that statute.

Unlike other civil rights laws, however, the ADA not only proscribes discriminatory conduct, but also imposes positive obligations of accommodation on private employers. Discrimination is defined in part in the statute as the failure to provide "reasonable accommodations" to members of the protected class. It is this provision that is most akin to the IDEA. Both statutes require a third party, once an impairment is

210. The ADA only protects "qualified individual[s] with a disability." 42 U.S.C. § 12112(a) (2000). An individual with a disability will be deemed "qualified" when capable of performing "the essential functions of the employment position" in question "with or without reasonable accommodation." Id. § 12111(3); see also Hensel, supra note 25, at 1188–89.
211. Eichhorn, supra note 25, at 1474 ("The wrongness of [disability discrimination] does not depend upon how severe the impairments are . . . . Instead, the wrongness stems from the decision-makers' stereotyping and the vicious circle of isolation it causes.").
identified or suspected, to actively engage in an interactive process to
determine how the person can best function in an environment tailored
to meet the needs of the "typical" worker or student. Because this can be
interpreted as bestowing a benefit upon an individual rather than simply
withholding a negative, scrutiny of the protected class is likely to be
intense to ensure that only the "truly disabled" are the recipients of
benefits.\footnote{A number of scholars have rejected characterizing the reasonable accommodation
requirement as a "special benefit" for the disabled, arguing instead that it is an antidiscrimination
 provision which removes barriers to equal opportunity. See, e.g., Mary Crossley, Reasonable
(discussing the benefits of "[r]ecognizing the essential kinship between the obligation to provide
reasonable accommodation and other strands of antidiscrimination law").}

One could argue that Congress and the courts have paid more
exacting scrutiny to the delineation of disability in the ADA because the
imposition of positive obligations on private industry is more
problematic than bestowing unfunded mandates on school districts. As
special education enrollment rises and schools are required to comply
with NCLB without adequate funding, however, the competition for
scarce education dollars will increase, and with it, scrutiny of the class
receiving services under the IDEA. Such scrutiny may lead to a
reduction in funds available for special education students generally, not
only for those with more moderate impairments. Tying eligibility to the
severity of impairment undermines the recognition of disability as a
social problem for which the public is at least partly responsible. As calls
to restrict the protected class rise, public debate and court scrutiny will
increasingly focus on the characteristics of those receiving services rather
than the quality of the education extended to them, similar to the ADA
context.\footnote{See, e.g., Kelman, supra note 27, at 78 (arguing that society must consider whether there are
"groups or individuals other than the disabled (for example, children of color; children with low IQs
who are not dubbed educable mentally retarded; and children facing harsh conditions at home) who
might deserve these incremental resources as much or more than those now given priority by federal
mandates in the Individuals with Disabilities Education Act").}

A narrow definition of disability is also likely to generate heightened
suspicion of and anger toward all individuals with disabilities, particularly
those with hidden impairments. Few are likely to debate whether the
child who has Down syndrome is eligible for services within the meaning
of the statute, or whether the child who is blind requires individualized
attention within an educational setting. Even casual observers can
appreciate the nature of such limitations, which comfortably fall within a
medical understanding of disability. Children who look and act like
typical peers, regardless of their academic struggles, are a different story
altogether. Because these children are not easily cabined within the
stereotypes of disability, their receipt of an individualized education and
scarce educational resources appears suspect.\textsuperscript{215} The enhanced services and parental input deemed necessary to the education of the severely impaired is positioned as unfair advantage and largesse in the context of children with moderate impairments. Schools may be chastised for indiscriminately bestowing scarce resources reserved for “real” disabilities on typical children, leading for calls to reduce funding for special education generally in an attempt to force administrators to stop unnecessary spending.\textsuperscript{216}

Indeed, the seeds of this funding backlash are already present in public discourse. Massachusetts, convinced that schools were over-identifying students with disabilities and too lax in containing the costs associated with special education, changed its state funding formula in the early 1990s.\textsuperscript{217} Rather than allocating funds based on actual enrollment of special needs students in a district, the state instead based funding “on a preset percentage of children in special education set at a rate lower than the state average”\textsuperscript{218} and “allocated less than half of what would be required to pay for services for these students.”\textsuperscript{219} Eligibility, moreover, was changed to require not only the presence of a disability, but also a “determination that a child was not making effective progress in regular education.”\textsuperscript{220} The legislature believed that these disincentives would cause districts to more rigorously police eligibility and placement decisions.\textsuperscript{221}

Despite the financial disincentives imposed by the legislature, the number of children in special education in the state declined by less than 1\% of the student population over the next decade.\textsuperscript{222} The funding available to serve their educational needs, on the other hand, indisputably declined as a result of the revised formula.\textsuperscript{223}

\textsuperscript{215} Cf. Perry A. Zirkel, Will “ODD” be the Next Epidemic After “ADD”?\textsuperscript{,} 110 EDUC. L. REP. 1, 1 (1996) (calling the increase in eligibility of students with Attention Deficit Disorder an “epidemic”).

\textsuperscript{216} See Horn & Tynan, supra note 12, at 33 (concluding that as the number of children deemed eligible increases, “there may be a gradual erosion of the public’s confidence in the entire special education system,” resulting in “a weakening of public support for special education”).

\textsuperscript{217} Berman et al., supra note 16, at 187–89. At the time of the funding change, Massachusetts employed its own standards in defining categorical disabilities. See id. at 207. It has since adopted the federal definition of specific learning disability and emotional learning disability, however, and moved from a “maximum feasible benefit” standard of services to the federal Free Appropriate Public Education (FAPE) standard. Id. at 206–07.

\textsuperscript{218} Id. at 189.

\textsuperscript{219} Id. at 187.

\textsuperscript{220} Id. at 188.

\textsuperscript{221} Id. at 189.

\textsuperscript{222} See id. at 189–90.

\textsuperscript{223} Id. at 206 ("Rather than helping school districts adequately address special education cost increases, Massachusetts’ education reform foundation formula exacerbates the problem by underestimating the percentage of children in special education ... "). Although the state ultimately revised its funding formula to assume a larger share of the responsibility for special education expenditures, the study’s authors argue that “it is still far from the formula recommended by [many
evaluating the shift in funding concluded that the rise in special education eligibility experienced in the past and predicted for the future did not flow from lax enforcement of eligibility standards, but instead from a variety of social, medical and economic sources outside the control of school districts. Despite the study’s finding, children in other states may face a similar reduction in resources if increased challenges to eligibility result in a more restrictive definition of disability at the federal or state level. Challenges to the eligibility criteria for children on the margins thus have the potential to place at risk the funding needed for all children with disabilities in education.

As this trend progresses, moreover, the stigma associated with disability will rise. Tying assistance to academic failure and impaired functioning creates perverse incentives to emphasize the significance of a child’s impairment in his life. Because eligibility is all or nothing, parents and students are encouraged to characterize a child’s functioning as negatively as possible to the eligibility team. They may be reluctant to share a child’s strengths and abilities with educators out of fear that the same will result in a refusal of services. This characterization is damaging both to a parent’s perception of his child and the child’s perception of himself to the extent that he is involved in the evaluation process. Children with disabilities will increasingly be viewed as a bundle of problems to solve rather than as individuals with strengths and weaknesses in need of educational redress. The moral foundation of supporting these children is no longer the educational system’s failure to meet their needs, but instead the extent of the children’s internal impairments. The resources and educational services schools allocated to this population look more like benevolent charity and less like the equitable distribution of resources to all children in society. The medical model of disability, eroded by the passage of EAHCA, is resurrected as the dominant paradigm in American special education.

B. THE PROBLEM OF RESOURCE ALLOCATION

Regardless of the desirability of an inclusive definition of disability
under the IDEA, it is indisputable that the world of education funding is limited, and that the need to draw attention to difference as a funding mechanism may outweigh the harms of a restrictive definition. Some scholars have pointed out that relaxed eligibility guidelines will permit general education to absorb special education, with the result that children with disabilities are no longer served as Congress intended.\textsuperscript{226} In contrast, other commentators argue that eligibility must be restricted to prevent special education from draining the resources available to general education students.\textsuperscript{227} Both positions make clear that a tight line must be drawn to secure funding from Congress in the first instance.

Drawing that line at academic failure or near failure as a precursor to eligibility, however, is misguided and inappropriate in light of the statutory eligibility requirements. The IDEA makes clear that the eligibility team must “use a variety of assessment tools and strategies” in evaluating whether a child qualifies for protection under the Act.\textsuperscript{228} There is little point to this requirement if even modest academic performance automatically trumps all other indicators of educational need. A child who, as the result of an impairment, is capable of securing a passing grade only with significant supports in place and only with the expenditure of significant effort is no less “adversely affected in educational performance” than a child who is ultimately unable to overcome such obstacles. In both cases, internal functional limitations impair the ability to learn and achieve commensurate with typical children. In both cases, internal functional limitations are exacerbated by the social imagery of disability which does not acknowledge or recognize that impairment need not be synonymous with failure.

Underlying pundits’ complaints that special education is “taking away” dollars from general education, moreover, is the implicit assumption that typical children are presumptively entitled to all educational funding. Education is conceived of not as a public good to which every child is entitled, but instead as a privilege reserved for those fortunate enough to fall within the mainstream. Any shift from this starting point requires special justification and is immediately suspect.\textsuperscript{229} The designation “special” education itself is clearly reflective of this view and reinforces the lesser social standing of children with disabilities. The

\textsuperscript{226} See, e.g., Weber, supra note 20, at 22.
\textsuperscript{227} See Robert Worth, The Scandal of Special Ed, WASH. MONTHLY, June 1999, at 34 (arguing that “[i]n order to pay for special ed’s enormous, ineffectual bureaucracy and skyrocketing enrollments, school districts are being forced to cheat their conventional students”).
\textsuperscript{229} Cf. Minow, supra note 103, at 204 (“[F]or there to be an assignment of deviancy, it must be from the vantage point of some claimed normality; for there to be a position of inequality, there must be a contrasting position, not of equality, but of superiority. In short, the idea of difference depends on the establishment of a relationship between the one assigned the label of ‘different’ and the one used as the counterexample.”).
more justification that is required to secure funding, the more funding for all students becomes suspect.  

If the purpose of restricting eligibility is merely to contain costs and transfer wealth to the general student population, moreover, such calls ignore a significant fact: students struggling academically as a result of moderate impairments will still be in the classroom whether or not they are officially labeled as "disabled" under the IDEA.  

These children have not been, and are not likely in the future to be, successful under the one-size-fits-all approach employed in general education. A disability label does not alter their educational needs or the level of funding necessary to meet such needs. It may have a direct impact, however, on a school district's responsiveness to parental demands. In the absence of due process guarantees, a school district may ignore the parents of children with disabilities with impunity because they have no enforceable rights to the contrary. This is true even with respect to IDEA funding for newly available pre-referral services, as Congress made clear that children served in that program do "not have the same rights and protections as students that are identified as eligible for services" under Part B.  

The extent of savings generated by restricting the definition of disability thus would depend significantly on the intentions of the school district in question. In those districts committed to meeting the needs of students with moderate impairments, the costs associated with this population are unlikely to change dramatically. Certainly, there would be

230. See, e.g., Caruso, supra note 17, at 193. Caruso argues that "[f]unding special education involves a leap of faith, and such leaps are especially vulnerable to political pressure. When costs rise beyond politically acceptable levels, administrators are bound to redefine both identification and service standards to make means meet ends." Id.

231. See, e.g., Berman et al., supra note 16, at 208 (concluding that the cost savings of restricted eligibility "will be modest" because "children who might no longer qualify for special education services still have educational issues that will need to be addressed"); Mather & Kaufman, supra note 128, at 750 ("Regardless of changes in legal mandates, students with SLD will still exist and challenge school resources with their need for intensive and systematic interventions."); Seligmann, supra note 13, at 761 (arguing that policymakers must "recognize that most children with disabilities are already members of our classrooms today").

232. Berman et al., supra note 16, at 209 ("Learning disabilities do not disappear just because a child is not classified as a special education student. These are realities that policymakers need to face.").

233. See, e.g., Palmaffy, supra note 38, at 15 ("Because the law gives specific, legally enforceable rights to certain individuals, schools face powerful incentives to provide the necessary services to eligible children. Administrators need to stay abreast of the law or they can find themselves in court."). Although the No Child Left Behind Act mandates school accountability for all children, it does not expressly give enforceable individual rights outside of those granted to the general student population. See, e.g., Melanie Natasha Henry. No Child Left Behind? Educational Malpractice Litigation for the 21st Century, 92 CAL. L. REV. 1117, 1119 (2004) (arguing that a private right of action should be available for violating NCLB pursuant to 42 U.S.C. § 1983).

fewer costs associated with eligibility determinations if certain students were clearly excluded from coverage. Conceivably, moreover, such districts will save the administrative expenses attributable to due process challenges and the development of individualized education plans otherwise associated with these students. The savings attributable to the former are unlikely to be substantial, however, because formal legal challenges under the IDEA are rare even in inferior school districts and represent less than 0.3% of all special education expenditures.\textsuperscript{235} In order to remediate the learning difficulties experienced by moderately impaired students who are not IDEA-eligible, moreover, educators necessarily will be required to investigate the nature of academic failure and devise a plan for individualized remedial instruction not unlike an IEP.\textsuperscript{236}

Presumably, those school districts experiencing the largest savings would be those that are the least sincere and capable of educating students with disabilities, as well as those with the fewest resources. If students who are struggling receive educational intervention only if mandated by law under the IDEA, then clear cost savings will result from limiting the number of eligible students with disabilities. To the extent that hostility to individualized education can be generalized, these districts are also most likely to experience cost benefits as a result of being insulated from legal challenges.

Accordingly, the debate over the perimeters of special education eligibility should not focus on whether the additional costs associated with educating the moderately impaired should be incurred; instead, the focus should be on who is going to bear these costs and when. To the extent school districts are granted permission to treat these students indifferently, costs are merely transferred from the district to society at large. Students whose educational needs are ignored will have a difficult time finding employment, resulting in dependence on government benefits and welfare programs. These principles motivated passage of EAHCA in 1975 and remain equally relevant today.\textsuperscript{237}

One may nevertheless argue that restricting eligibility under the IDEA will result in a more equitable distribution of scarce resources

\textsuperscript{236} Some educators have complained about the paperwork requirements associated with IEPs, and this “cost” would be diminished by reducing the number of children eligible under the Act. Notably, however, Congress is already attempting to reduce these administrative burdens by allowing the Secretary of Education to designate up to 15 states to participate in pilot paperwork reduction programs. See 20 U.S.C. \$ 1414(d)(5) (2004).
\textsuperscript{237} See, e.g., 20 U.S.C. \$ 1400(c)(1) (2004) (finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities”).
because it will impair the ability of highly educated and affluent parents to manipulate the system by classifying academic failure as a medical problem. Although the diminished stigma attached to learning disabilities and moderate disorders is positive, some contend that it has simultaneously encouraged a subset of parents to seek eligibility as a way of securing entitlement to services not otherwise forthcoming. In this view, services under the IDEA are provided not to rectify disadvantage, but instead to create unfair advantage for the politically powerful. The laudability of the shift in the imagery of disability thus may be complicated by the regressive distributive consequences of focusing scarce resources on those with more marginal impairments.

There is little evidence, however, establishing that the number of children identified as IDEA-eligible in wealthy districts reflects improper classification rather than a heightened awareness of rights and acceptance of disability in education. Disability stigma is often highest in communities that do not have access to professional support and informational services, which leads to "self-exclusion ... at the early stages of identification." It is equally plausible that such numbers reflect administrators' unwillingness, for cost reasons or otherwise, to provide the supports or services mandated by law in the absence of genuine accountability, which is often lacking in poor districts.

Parental input under the IDEA is desirable precisely because school systems, focused on the costs of services, "may propose what they can do as

239. There is some evidence to reflect that "white students are overrepresented among students with disabilities seeking accommodations for the SAT." Daniel J. Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 HARV. C.R.-C.L. L. REV. 407, 419 (2001) (citing Thomas Hehir, Statement at the American Youth Policy Forum Congressional Briefing (Mar. 2, 2001) (transcript on file with authors)). At least some scholars who argue that parents have contributed to the eligibility crisis, however, primarily rely on anecdotal evidence relating to a single school district. See, e.g., Horn & Tynan, supra note 12, at 30 (noting that "[t]he fact that being found eligible for special education brings with it entitlement to an array of often expensive services and accommodations may help explain why nearly one in three high school students is officially designated as disabled in affluent Greenwich, Connecticut").
240. Caruso, supra note 17, at 181. Scholars have found that African-American parents are particularly likely to resist special education eligibility for their children. See, e.g., Theresa Glennon, Race, Education, and the Construction of a Disabled Class, 1995 WIS. L. REV. 1227, 1227 (1995) (quoting BETH HARRY, THE DISPROPORTIONATE REPRESENTATION OF MINORITIES IN SPECIAL EDUCATION 59 (1994)). "While insufficient research exists about the opinions of African-American parents, there is some evidence that while parents often agree that their children are not performing adequately, they do not agree with the school's diagnosis of the problem, and are far less likely than school officials to identify children as having 'mild' disabilities." Id.
241. Cf. Caruso, supra note 17, at 179 (explaining that when there is "no pressure from the family, the definition of entitlements is likely to be determined not only by the relevant administrators' understanding of the FAPE standard, but also by budget and resource considerations. The district will therefore offer the family a set of educational services that can be provided with little financial strain").
opposed to what they should do" for a child with disabilities.242 In a recent study, for example, 14% of the parents identified reported that school staff refused to test their child for disabilities because they did not believe the child needed any services.243 Parents living in poverty have reported even more difficulty in securing assistance from school districts.244 As one scholar has explained,

Since the law is phrased in terms of highly flexible standards, strategic bargaining is encouraged rather than discouraged, and families will have incentives to engage not only in norm-centered argumentations (invoking rules, citing precedents and producing reasoned elaborations) but also in strategic behavior involving "the exercise of power, horse trading, threat, and bluff." This is where having power and plenty of horses to trade makes all the difference, because the threat of litigation is more credible when it comes from well-off families. Therefore, the chance for such families to win a better bargain is much higher.245

In the wake of recent Supreme Court decisions making it more difficult for poor and middle class parents to pursue due process challenges, this trend is likely to be exacerbated in the future.246

Scholars also have demonstrated that the services secured by affluent parents willing to force disputes into litigation have at least some beneficial effect on other children with disabilities in a school district.247 School administrators intent on fairness between students and parents aware of districts' treatment of similarly situated students will work to ensure that one child's gain is replicated by others.248 It may be, then, that the appropriate conclusion is not that affluent and educated parents are manipulating the system, but rather that their counterparts are insufficiently educated and empowered to ensure similar results. Greater

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242. Leiter & Krauss, supra note 103, at 136 (citations omitted). Leiter and Krauss report that "there is near unanimous acceptance of the premise that [parent participation in children's schooling] leads to positive child outcomes." Id. at 137 (citations omitted).
243. Id. at 144.
244. Id.
245. Caruso, supra note 17, at 180-81.
246. See, e.g., Arlington Cent. Sch. Dist. v. Murphy, 126 S.Ct. 2455, 2458 (2006) (holding that expert witness fees are not recoverable by parents as "costs" under the IDEA's fee shifting provision); Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005) (holding that the party seeking relief has the burden of proof in due process hearings). One recent Supreme Court decision, however, should facilitate due process challenges by parents. See Winkelman ex rel Winkelman v. Parma Sch. Dist., 127 S.Ct. 1994 (2007) (rejecting the argument that parental representation of children in due process hearings is barred as the unauthorized practice of law).
247. See, e.g., Palmaffy, supra note 38, at 15 (arguing that "the availability of legal action as a recourse is not just a boon to wealthy, pushy parents"); cf. Rosenbaum, supra note 174, at 30 ("In contrast with other federal education policy, parents have been the catalyst in seeing that schools address the needs of students with disabilities.").
248. See Caruso, supra note 17, at 182. Caruso notes, however, that because special education is a world of limited resources, the well educated and affluent will still be better off because "it is inevitable that resources will be diverted away from children of less forceful parents." Id.
education and outreach programs for parents who are less knowledgeable about the system of special education and greater access to professionals would permit parents without resources to secure the benefits extended by law.

It is equally important to note that many of the instances of alleged abuse by wealthy parents noted in the popular press do not revolve around whether a student is sufficiently impaired to be eligible for assistance, but instead on the level of assistance to which he is entitled. A recent article in one newspaper, for example, criticized parents for seeking "extra-special" education in the form of "private day schools, boarding schools, summer camps, aqua therapy, horseback therapy, travel costs, personal aides and more." Because education funding is neither limitless nor elastic, a robust public debate should occur on the types of services and aids available to assist children with disabilities. Well intentioned people must address whether cost is or should be a more relevant and explicit factor in administrative decision making. That is a distinct issue, however, from the question of who is eligible as a child with disability under the statute in the first instance.

C. THE PROBLEM OF STIGMATIZATION

Not all advocates for people with disabilities would support a call for liberal eligibility guidelines under the IDEA. Although identification as a child with a disability provides service entitlement, it may also stigmatize the child, lead to harassment by peers, and diminish self-esteem and expectations. Accordingly, a compelling argument can be made that children with moderate impairments are best served when they receive appropriate educational services without the label of special education. Indeed, many of the interventions and strategies that work best for children with moderate impairments are employed in general education classes,


250. Former Secretary of Education Roderick Paige has testified that "[t]he stigma of being misclassified as mentally retarded or seriously emotionally disturbed, or as having a behavioral disorder, may ... have serious consequences in terms of the student's self-perception and the perception of others, including family, peers, teachers, and future employers." H.R. REP. No. 108-77, at 98 (2003); see also Rice, supra note 196, at 172 (discussing how "[t]he act of labeling itself can create a self-fulfilling prophecy; when children are labeled 'slow' they tend to live up to (or down to) that expectation"); Weber, supra note 20, at 23 ("A possible side benefit of providing services outside the conventional special education eligibility determination framework is that students might be subject to less of the stigma that can accompany identification as having one of the disabilities specified in the law.").

251. Garda, supra note 14, at 1073-74 ("It 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."); Horn & Tynan, supra note 12, at 42.
difficult time articulating distinctions between “special education” and regular interventions.\textsuperscript{252} If this position is correct, then children with moderate impairments may be better served by changing the delivery of instruction to general education classes and improving teaching generally than by requiring individuals to acquire a special education label. In this way, different learning styles become part of the norm, diminishing the stigma attached to such struggles.\textsuperscript{253}

The social difficulty and victimization experienced by many children with disabilities is a serious problem that requires serious contemplation by policy makers. The root of this problem does not reside, however, in the legal identification of impairment. Instead, it lies in the overt hostility and discomfort that many continue to feel toward individuals who diverge from the norm in any meaningful respect, reflecting the continued significance of the social model of disability.\textsuperscript{254} The harassment and stigmatization of these children did not begin with EAHCA’s passage and will not end with restricted eligibility criteria. Using that stigma to deny children with impairments the protection that the law extends to them is fundamentally unsound; it is precisely because of the stigma that the law was necessary in the first place. Neither adults nor children need official labels to identify and target difference, although labeling admittedly can facilitate their efforts.\textsuperscript{255} This is true even with respect to “invisible” impairments that are not immediately identifiable, like dyslexia.\textsuperscript{256} Children outside the norm will continue to be the victims of bullying and harassment unless and until school districts clearly communicate that such behavior will not be tolerated in any form. In addition, laws prohibiting bullying and providing real remedies when such conduct occurs are needed to ensure that schools will take these issues seriously.\textsuperscript{257} Restricting eligibility rather than dealing with the

\textsuperscript{252} See supra Part II.

\textsuperscript{253} Cf Allan H. Macurdy, Rights Respiration: Disability, Isolation and a Constitutional Right of Interaction 3 (Boston University School of Law Working Paper Series, No. 06-40, 2006), available at http://www.bu.edu/law/faculty/scholarship/workingpapers/2006.html (arguing that “[t]he subordination of individuals with disabilities in our society begins with their differentiation, with the application of a label that reduces them to a single characteristic”).

\textsuperscript{254} See, e.g., Mark C. Weber, Disability Harassment in the Public Schools, 43 WM. & MARY L. REV. 1079, 1081 (2002) (noting that “much disability discrimination is the overt expression of hostility and the conscious effort to subordinate members of a group with less power and social standing than the majority”).

\textsuperscript{255} See, e.g., Barbara Riddick, An Examination of the Relationship Between Labeling and Stigmatisation with Special Reference to Dyslexia, 15 DIS. & SOC'Y 653, 657-58 (2000) (discussing how hidden disabilities like dyslexia are identifiable by other students in the absence of labeling and the subject of stigmatization).

\textsuperscript{256} Id. at 661 (explaining that in prior studies “[m]any children and adults with dyslexia reported being informally labelled [sic] as lazy, careless or stupid before they were given a formal label”).

\textsuperscript{257} See, e.g., Weber, supra note 254, at 1155 (arguing that “[s]chool personnel, parents and others should act voluntarily to establish a climate in which harassment is not tolerated, but the legal system operates as the ultimate tool to ensure equal participation in school without harassment for children
underlying conduct is a short-sighted and ineffectual solution to this very troubling problem.

The argument that children referred to special education will unnecessarily suffer from diminished self-esteem likewise deserves serious consideration by policymakers. Any action that causes a child to be less motivated or confident in school should be scrutinized carefully. Nevertheless, it is inescapable that this problem, like harassment and bullying, derives in large part from the treatment children receive from society once they are identified as students with disabilities. Presumably, children with moderate impairments are referred for eligibility determinations at least in part because they are struggling in the general classroom, which itself is not conducive to high self-esteem. It is likely, moreover, that they are aware of negative labels attributed to them by teachers and fellow students prior to the eligibility referral and recognize that they are different from typical peers. As one scholar has noted, "when someone gets to the point of saying about a child 'I don't want to label him or her' they are already informally labeling the child as a worry, troublesome, odd, vulnerable, puzzling, etc." If the labeling process results in automatic transfer into a self-contained classroom where teachers communicate the message of diminished status and expectations, there is little doubt that the student's self-image will suffer significantly from the eligibility determination. If eligibility instead is the gateway to improved educational services and the identification of difficulty as intended by Congress, however, this outcome is neither predetermined nor inevitable. Studies have shown that in these circumstances, identification can actually improve self-esteem for some students, particularly those with intangible impairments, because it identifies the source of difficulty as something other than poor motivation and ability.

258. See, e.g., Garda, supra note 14, at 1083 (noting that "[p]eers and teachers significantly lower their expectations for labeled students").
259. Nancy K. Barga, Students with Learning Disabilities: Managing a Disability, 29 J. LEARNING DISABILITIES 413, 415 (1996) (finding that SLD students "sensed something was different about their learning ability before they were ever identified as having a learning disability").
261. See, e.g., Marcia C. Arceneaux, The System and Label of Special Education: Is It a Constitutional Issue?, 32 S.U. L. REV. 225, 243-44 (2005) (discussing the stigmatizing effects of the special education label); Barga, supra note 259, at 415 (discussing study finding that being labeled as learning disabled in school was a negative experience for students "when it created conditions of being set apart from peers or receiving differential treatment from others").
262. See, e.g., Barga, supra note 259, at 415 (describing study finding that labeling could be "a positive experience when it led to getting help from the schools").
263. See Barga, supra note 259, at 415 (finding that "students described labeling [as learning disabled] as a positive experience when it made sense out of their academic struggles and involved getting help"); Riddick, supra note 255, at 659 (explaining that children with dyslexia often feel that...
It is important to recognize that the advancement of people with disabilities will not be achieved by conceding that the stigma attached to this status is so great that any reasonable person would do anything to avoid such a label, including foregoing services designed to foster educational success. It is in such concessions that the imagery of disability as an unnatural and pathetic state is reinforced and entrenched. It is only by normalizing the concept of impairment, rather than restricting disability status to the most severely impaired, that the stigma of disability will be reduced. If students capable of even modest academic success are deemed insufficiently "special" to qualify for assistance, this will not occur. It is not the legal identification process itself that harms the student, but rather the negative imagery of disability that is communicated by teachers, administrators and fellow students in the wake of labeling.

Despite these limitations, it is important to acknowledge that the separation of special education and general education does highlight the differences between students rather than the common ground among all learners. A commitment to serve all struggling students would reduce the administrative complexity of the current "patchwork" system of federal aid based on student characteristics. Parents would not be required to jump through legal eligibility hoops to ensure their child's educational needs are met, and the focus would shift to the level of educational services being provided rather than the characteristics of the recipient. This approach would also address those who question whether there is a moral basis for concluding that students with disabilities deserve assistance while other struggling students do not.

Few would disagree that each and every child is entitled to receive the services that he or she needs to become a successful and productive adult. It is questionable, however, whether it is possible for schools to effectively meet the needs of all learners without any type of labeling or identification process as this approach suggests. Some scholars have argued that this kind of generalized approach to academic difficulty is

"having the label dyslexia countered the more general negative attribution that they were slow or stupid and they were therefore positive about the label at both private and a public level of usage").

264. See Rice, supra note 196, at 174.

265. See, e.g., Rosenbaum, supra note 174, at 5 ("The common sense notion that integrated laws and practices addressing the needs of all children at risk of educational failure stand a better chance of succeeding than a patchwork of policies pigeonholing different classes of students."); see also Seligmann, supra note 13, at 761 (arguing that advocates "should not square off and fight over funds or services, playing tug of war between 'regular' and 'special' education or 'regular education kids' and 'special education kids.' Instead, we should use available funds in inclusive ways"); cf. Kelman, supra note 27, at 78 (arguing that "we should be ... wary of a system that forbids us from counting the educational interests of 'mainstream' students just as worthy as those of pupils with disabilities").

266. See, e.g., Kelman & Lester, supra note 122, at 6 ("[A]s a society, we must make decisions about which students deserve resources beyond those devoted to their classmates.").
overly simplistic and “assumes that simply observing behavior is a
reliable way of identifying children’s disabilities.” This fact, in
combination with the reality that education has never and may never
receive adequate funding to allow for the widespread individualization
of instruction, negates the wisdom of restricting special education in order
to individualize education generally, at least at this point in time. As one
scholar concluded,

[c]alls to merge special education with regular education, or to make
categorical cut backs in eligibility for special education services are
premature. They would require as a predicate a more extensive
modification of the general education system than either exists now, or
could be expected to occur on a systemic scale without a true national
commitment, both legal and financial, to the education of every child."

To create a world where disability does not matter, educators and
policy makers must begin with the recognition that it does. Schools have
not demonstrated an impressive track record of providing services to
children with impairments in the absence of federal mandates. Although
much has changed since 1975, the stigma attached to this population still
thrives and continues to present challenges to people with disabilities.
Significantly, that stigma is disproportionately greater than that
experienced by other minority groups in society, particularly in the
context of mental disabilities. In a world of equivalent educational
dollars for each child, children with disabilities will inevitably lose. It is
not a level playing field from which these children begin, both because of
societal attitudes and internal impairments, and a level playing field in
education will only relegate these children to perennial status in last

267. Riddick, supra note 255, at 656 (arguing that “the idea that each child’s needs could be
identified without reference to a body of knowledge arranged around an existing label or category” is
“optimistic and idealistic”). Riddick points to past studies in which “it was found that with out some
prior knowledge of specific learning difficulties[,] teachers were not able to construct an accurate
model for themselves which would effectively inform their mode of intervention.” Id. at 657.

268. Seligmann, supra note 13, at 767; cf. Kelman & Lester, supra note 122, at 157. Kelman and
Lester argue that “[s]hould markedly higher levels of resources be available,” all students, rather than
only SLD students, should received individualized education plans whenever academic performance
falls below potential. Id. They acknowledge, however, that the assumption of increased resources may
be “too optimistic.” Id.

269. See, e.g., Jean Campbell, Unintended Consequences in Public Policy: Persons with Psychiatric
Disabilities and the Americans with Disabilities Act, 22 POL’Y STUD. J. 133, 137 (1994) (citing N. Colbert
et al., Two Psychological Portals of Entry for Disadvantaged Groups, 34 REHAB. LIT. 194 (1973))
(describing study finding that employers’ willingness to accept someone as an employee “decreased on
a continuum ranging from ethnic background, physical disability, and prison affiliation, to mental
instability”). Although critics contend that students with SLD do not belong in this category, there is
little doubt that children with this diagnosis have experienced and will continue to experience
significant stigmatization by peers. See, e.g., Barga, supra note 259, at 429 (concluding that “[l]abeling,
stigmatization, and gatekeeping [are] common experiences in formal schools and college among the
students with learning disabilities”). Although this population may not have experienced the level of
stigma attached to more severe and tangible disabilities, outward aversive animus can be less
troublesome in some settings than thoughtless assumptions about abilities and limitations.
place.

D. THE PROBLEM OF OVER-IDENTIFICATION

Although scholars may legitimately argue over the boundaries of eligibility, few, if any, would argue that there is any positive aspect to the misidentification of children as disabled. Some scholars have argued, as has Congress, that many children in this category end up in special education because of poor regular classroom instruction rather than the existence of internal medical limitations.\(^2\)\(^7\)\(^0\) There is a great deal of concern in particular over the number of African-American children that are being referred to special education. It is beyond dispute that children improperly identified as eligible can suffer “significant adverse consequences, particularly when these students are being removed from regular education settings and denied access to the core curriculum.”\(^2\)\(^7\)\(^1\)

The over-identification of children of color is of such significance to the special education system because it lies at the intersection of race, class and disability prejudice. African-American children in particular not only are statistically more likely to be identified as eligible for special education, but they are also more likely to be assigned to self-contained classrooms once eligibility is established.\(^2\)\(^7\)\(^3\) Most scholars and commentators agree that this occurs in large part because of racial discrimination and the poor expectations often associated with people of color.\(^2\)\(^7\)\(^3\)

Although scholars agree that this issue is serious, the tenor of the conversation here is revealing. Many commentators acknowledge but do not focus on districts’ failure to strictly implement the least restrictive environment requirement so that eligibility is not an automatic referral to a self-contained classroom.\(^2\)\(^7\)\(^4\) It is in the self-contained classroom that

\(^2\)\(^7\)\(^0\). See, e.g., Horn & Tynan, supra note 12, at 42 (arguing that with respect to students with moderate impairments, what is needed “is not so much different interventions but good teaching, albeit perhaps with greater consistency, intensity and slower pacing than other students require”); Losen & Welner, supra note 239, at 455 (arguing that “the problems of minority overrepresentation and isolation in special education are rooted in the inadequacies of regular education”); Palmaffy, supra note 38, at 2 (discussing the comment by G. Reid Lyon, of the National Institute of Child Health and Human Development, calling the LD category a “sociological sponge to wipe up the spills of general education”).


\(^2\)\(^7\)\(^2\). For a general discussion of disproportionate representation, see Glennon, supra note 240, at 1251–52, 1255; Losen & Welner, supra note 239, at 412–13.

\(^2\)\(^7\)\(^3\). Glennon, supra note 240, at 1317–18; Losen & Welner, supra note 239, at 421.

\(^2\)\(^7\)\(^4\). See, e.g., Garda, supra note 14, at 1094. Garda acknowledges that one solution to the problem of overrepresentation “may be not to prevent African-American disproportionality, but to ameliorate its harms by strictly enforcing the IDEIA’s least restrictive environment requirement.” Id. He concludes, however, because the LRE provision is “drafted as strictly as possible in favor of mainstreaming . . . but the harms of . . . disproportionality persist,” the focus is better placed on restricting eligibility. Id.
children are the most segregated from typical peers and least likely to follow the general curriculum. Instead, most commentators focus on the disability identification in the first instance, which suggests that at least some of the objection to eligibility springs from a rejection of association. There is a hierarchy of prejudice in the United States, and individuals with disabilities, particularly those identified as mentally impaired, are at the bottom of the pecking order. Although such prejudice does not transform improper eligibility determinations into positive accomplishments, it reveals that the heart of this debate once again is on the identity of disability in American education rather than on the quality of the services that children with disabilities receive once eligibility is established.

The fact that minorities are overrepresented in special education strongly supports a major thesis of this Article—that loose guidelines enable eligibility determinations to be subject to political capture. The appropriate answer is not to restrict eligibility to only those with the most extreme impairments, but instead to adopt principled guidelines that minimize the effects of prejudice on the eligibility determination and to enhance federal monitoring and enforcement mechanisms. There is some early evidence, for example, that the inclusion of children in special education under the reporting and accountability requirements of NCLB may be improving educational outcomes, particularly for children of color and children who live in poverty. Despite the disability community’s mixed reaction to standards-based expectations, early reports in at least some districts are reflecting significant gains for students with disabilities, in part as a result of increased placement in inclusion rather than self-contained settings. At least some leaders in the community, moreover, have voiced their support for NCLB, concluding that “it is the institutional embodiment of the high

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275. See Hensel & Jones, supra note 206, at 48.
276. See, e.g., Palmaffy, supra note 38, at 16 (explaining that the characteristics needed for LD eligibility vary between wealthy districts, which “tend to ignore the legal definition of LD . . . in favor of serving any low achievers who might benefit from extra help” and “[w]orking class districts,” which tend to employ definitions which “keep their special education rolls down”).
277. See, e.g., H.R. Rep. No. 108-77, at 99 (2003) (identifying the “rigorous methods of evaluation and classification of disability to ensure that the evaluation procedures provide consistent results rather than subjective decisions” as a “positive and proactive method” of dealing with the problem of overidentification).
278. See, e.g., Joyce Koballa, Test Scores for Special Education Students on Rise, THE HERALD STANDARD, Jan. 2, 2007 (noting that as a result of integrating special education students into regular education pursuant to NCLB, state test “scores have dramatically increased across the board in reading and math” in one district and improved in others receiving Title I funding); cf. Losen & Welner, supra note 239, at 411 (“Standards-based reforms, while often problematic, provide a compelling new means for advocates to strengthen the entitlement claims of minority students and leverage comprehensive, outcome-based remedies for all students subjected to discriminatory school practices.”).
expectations that students with disabilities need to succeed," and as a result of its enactment, "we have finally started to see the systems change that is necessary for IDEA to be fully implemented for all children with disabilities, regardless of race, ethnicity or socioeconomic status." To the extent that eligibility carries with it additional assistance and placement in inclusion classrooms, there are significantly fewer negative consequences attributable to the misdiagnosis and overidentification of disability.

If, in contrast, the only answer to the problem of over-identification is that of reduced numbers in special education, what goal is served thereby? Perhaps these children will more readily remain in general education classrooms and benefit from the higher expectations of their teachers. If the source of the referral is at least in part attributable to race discrimination, however, it seems implausible to argue that the stigma attributed to these children simply disappears when the referral can no longer be made. The end result, moreover, is a child who no longer has any procedural protection or enforceable way to secure a free, appropriate education. Although special education programs are often inadequate, no account is taken of the child's failure to succeed in general education, and no explanation is offered as to how the status quo is likely to change outcomes for these children.

In a very meaningful way, the problems of over-identification are at their zenith when special education is treated as a destination for problem students rather than as a set of services to assist children with impairments. This is an unacceptable end point regardless of the perimeters of the protected class. There will always be a need for thoughtful administrators to rigorously apply eligibility criteria. States must provide clarity and consistency so that the eligibility determination will not be subject to capture by politically-driven and resource-strapped eligibility teams. Such insight, however, does not alter the fact that educational performance is broader than mere academic performance, and that impairments may adversely impact a child's school performance in meaningful ways even when he or she is capable of achieving passing grades. However significant these issues, they do not mandate the conclusion that fewer children are entitled to services.


280. See, e.g., Glennon, supra note 240, at 1317–21 (discussing the existence and effect of conscious and unconscious racism on African-American children in public schools); Losen & Welner, supra note 239, at 419–20 (arguing that "the cause of the systemic bias [toward African-American children] is not rooted in the system of special education itself but in the system or regular education as it encompasses special education").
A distinction must be made between the children who are entitled to receive services and the quality of services they are entitled to receive. As the President’s Commission on Excellence in Special Education has stated, “qualifying for special education [should be]...a gateway to more effective instruction and strong intervention” rather than a dead-end for children deemed dispensable. The early legislative debates surrounding EAHCA’s passage acknowledged as much. Concerned with the mislabeling and overidentification of children with disabilities pursuant to the Act, the Senate Committee on Labor and Public Welfare concluded:

In the educational process, the appropriate identification of handicapping conditions must take place in order to assure that a child receives appropriate services designed to meet his or her needs. Such identification must also take place in order that a State or local educational agency may plan for the provision of appropriate services to meet the child’s unique needs.

In the absence of this process and without the provision of appropriate services, the educational process for a handicapped child is totally inadequate. There is nothing in this process, however, which justifies or necessitates the carrying over of these classification ‘labels’ into the classroom educational process itself such that the child becomes thereby labelled [sic] as having a particular ‘handicap’ which for that reason, sets the child apart as being ‘different.’

This same point was confirmed by disability activists testifying before the Committee who made clear that “they recognized the need for the identification and labeling [sic] of their handicapping conditions, if that identification and label meant that appropriate educational services would be forthcoming.” The very purpose of the IDEA and other federal legislation is to remedy the discrimination and exclusionary treatment of people with disabilities. Legislators should not use the fact that such ideals are neither universally embraced nor fully implemented in American public schools as the basis for restricting eligibility rather than aggressively pursuing solutions to flaws in service delivery that follow. Congress has acknowledged that the IDEA has yet to reach its goal of “improving educational results for children with disabilities” because of the “low expectations” attached to these children. Such expectations will never alter if those impaired students who may be best able to maximize opportunity as a result of special education are routinely deemed those insufficiently impaired to qualify for intervention.

283. Id.
CONCLUSION

As disability scholars have argued for several decades, disability is an inevitable and natural part of the continuum of human ability. There is no clear demarcation between the able and the disabled, particularly in the context of developing children. Calls to restrict IDEA benefits to the "truly disabled" would return disability to a classification reserved for those with severe and pervasive impairments clearly outside of the norm. This characterization both enhances the stigma of disability and reinforces a medical model wherein people with disabilities are largely the source of their own problems.

The rise in the number of special education students has created real challenges for school districts and policy makers. Creating clear eligibility standards will assist in insulating these important decisions from the political and ideological positions of the eligibility team. No line should be drawn, however, at academic failure on the pretense that children capable of any success necessarily cannot be disabled for purposes of the IDEA. To continue on a contrary path both enhances the stigma of disability and trivializes the struggles that many public school children encounter as a result of their impairments.

The disability community must look beyond the obvious argument of restricting eligibility in order to protect the limited resources extended to the class. This argument exploits the natural divisions present in the community because of the divergent impairments experienced by group members. Historically, the most effective path to achieving social change and integration has been to insist on the rights of all people with disabilities. A collective commitment to the equitable treatment of all children with impairments has been and will continue to be the most effective way to achieve social acceptance of disability and integration into the public schools. The fight will not be won when the typical student agrees without hesitation to ride the short bus with his disabled classmate; it will come when society fails to notice the length of the bus at all.