

May 17, 2018

The Honorable Virginia Foxx
Chairwoman
House Committee on Education and
the Workforce
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member
House Committee on Education and the
Workforce
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Foxx, Ranking Member Scott, and Members of the Committee on Education and the Workforce:

The Disability Rights Education and Defense Fund (DREDF) appreciates the opportunity to submit this testimony on the importance of civil rights enforcement, including data collection. This hearing could not come at a more propitious time, the anniversary of the landmark Supreme Court civil rights decision, *Brown v Board of Education of Topeka* Supreme Court decision, 347 U.S. 483 (1954). In these times, it is more important than ever for this Committee to continue its traditional role of providing leadership and oversight to ensure that the civil rights of all students are protected. Despite major strides over the last several decades, the educational outcomes for racial minority and disabled children still lack behind.¹ Recent actions by this administration threaten to undo the advances and increase the inequities.

DREDF was founded in 1979 as a unique alliance of adults with disabilities and parents of children with disabilities. DREDF advances the civil and human rights of people with disabilities through legal advocacy, training, education, and public policy and legislative development. We address employment, housing, access to government services and benefits, transportation, higher education, architectural access, public accommodations, and education, focusing on civil rights issues that promote integration of people with disabilities into the mainstream of society. One-third of our work aims to protect and advance the rights of students with disabilities.

DREDF specializes in federal disability rights laws, including Section 504 of the Rehabilitation Act of 1973, prohibiting disability-based discrimination by recipients of federal funds; the Individuals with Disabilities Education Act of 1975 (IDEA), guaranteeing appropriate education services in the “least restrictive environment” for children with disabilities; and the Americans with Disabilities Act of 1990 (ADA).

¹ See Nat’l Ctr. for Educ. Statistics, *The Nation’s Report Card: 2015 Mathematics & Reading at Grade 12*, http://www.nationsreportcard.gov/reading_math_g12_2015/#reading/groups (last visited Nov. 17, 2016).

In addition, DREDF operates a demonstrably successful federal Parent Training and Information Center (PTI) that has served three Bay Area counties for 26 years. DREDF has the expertise needed to support the role of parents in the education of children with disabilities and work with foster families and county agencies and local and state organizations focused on child welfare. DREDF's Education Advocates (who are also parents of children with disabilities) are in daily contact with California families in the disproportionately low-income and of-color communities in Alameda and Contra Costa counties. They work closely with DREDF's senior and litigation staffs, providing a marginalized community with much-needed access to skilled advocates and attorneys. DREDF's Board of Directors has a majority of parents of children with disabilities, including foster parents of youth with disabilities, aged 0 to 22, and more than half the board members are individuals with disabilities.

On the 64th anniversary of the landmark decision in *Brown v. Board of Education*,² it is critical to reaffirm our country's commitment to the civil rights of all Americans. Since *Brown*, there has been a sea-change in the status of people with disabilities. Reversing centuries of persecution, segregation and exclusion, three major civil rights statutes, the Individuals with Disabilities Act (IDEA), Section 504 of the 1973 Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) have been enacted which recognize that people with disabilities face discrimination and are entitled to an equal opportunity to participate in society to the same extent that others take for granted. As with all civil rights statutes, the federal government has a critical role to ensure that these laws are enforced. It is alarming to witness the Trump administration's withdrawal from that critical oversight role. Contrary to being an enforcer of civil rights, the Trump administration has repudiated the very essence of the underlying principles of civil rights and has set out to dismantle the federal agencies oversight and enforcement roles which have been established over the last half century.

In the area of education, *Brown* created the foundation for students with disabilities to argue that they too had a right to an education. The history and development of education programs for disabled children in this country closely parallels the struggles of other minority groups to establish their civil right to participate equally in public education. Disabled children have historically been excluded from public education, warehoused in institutions and provided inferior, segregated education.³

² 347 U.S. 483 (1954)

³ Disabled children have also been routinely exempted from state compulsory education laws. 1929 Ariz. Sess. Laws, ch. 93§21 ("physical or mental condition that made attendance unexpedient or impracticable") ' 1921 Idaho Sess. Laws, ch.215§71-1/2 ("child's bodily or mental condition does not permit its attendance at school"); Mich. Comp. Laws §5979 (c) (1915) ("physically unable to attend ").

The inherent inequality of segregated education recognized by the Supreme Court in *Brown v. Board of Education*, became a rallying call for parents of children with disabilities.⁴

To separate them from other of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. • We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

347 U.S. 483 (1954) (at 494)

The relevance of the *Brown* equal protection arguments to the education of disabled children was anticipated by John W. Davis, the attorney for South Carolina. Mr. Davis opened his argument to the Supreme Court with the following statement:

May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or **on the ground of mental capacity**. (Emphasis added)

Over fifteen years after *Brown*, analogous equal protection arguments were made with respect to mentally retarded children in *Pennsylvania Aid to Retarded Citizens (PARC) v. Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (EDPA) (1971). The consent decree in that case established the right of each mentally retarded school-age child in the state to an appropriate public education. The decision states:

It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class and placement in a special public school class is preferable to placement in any other type of program of education and training. (Emphasis added)

343 F.Supp. 279, 307 (E.D.Pa.1 1972)

A series of similar cases in the 1970's gave rise to enactment of the first comprehensive federal law to guarantee the right to a free appropriate education to all disabled children. Following *Brown*, the law also guaranteed that children with disabilities would be educated with nondisabled kids whenever possible. In enacting PL 94-142, now the Individuals with Disabilities Education Act (IDEA), Congress made the following findings:

⁴ The application of *Brown* to the constitutional right of disabled children to equal education is discussed, *infra*.

- 1) There are more than eight million handicapped children in the United States today;
- 2) The special educational needs of such children are not being fully met;
- 3) More than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
- 4) One million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
- 5) There are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
- 6) Because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;
- 7) Developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;
- 8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and
- 9) It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.⁵

The legislative history reflects Congress' view that the Constitution guarantees equal educational opportunity for disabled children. As stated by Senator Williams:

⁵ Since 1990, successive amendments to the IDEA have brought it into line with the post-ADA view of people with disabilities. The IDEA now states that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.” 20 U.S.C. § 1400(c)(1). Congress specifically designed the IDEA amendments to “[i]mprov[e] educational results for children with disabilities [as] an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency.” Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 §101, 111 Stat. 37, 38 (1997) (new § 601(c)(1)). Over the same period, amendments to the Elementary and Secondary Education Act—amendments that refer to and are referenced by the IDEA—have adopted a model of standards-based education for all students and have specifically included disabled students in that model.

The Constitution provides that all people shall be treated equally, but we know that, while all youngsters have an equal right to education, those who live with handicaps have not been accorded this right. This measure fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left behind.

121 Cong. Rec. 2043

Senator Stafford also recognized the underpinnings of the legislation:

This is the day that handicapped children and their parents can point to and say that this Congress—their Congress—recognized as a matter of national policy, the equal protection under the law that they have always deserved.

The legislative history also emphasizes the central role of integration in achieving the legislative purposes. Removal of attitudinal barriers, the key to removal of all other barriers, can only be achieved through the exposure that integration brings. Senator Stafford stressed the link between exposure and attitudinal changes.

I think that today Congress makes a very important statement. It makes a necessary statement of principle about how we intend our handicapped children to be treated in the educational process. Unfortunately, we cannot by that or any other statement, change the attitudes of those who would equate 'handicap' with 'inferior.' Attitudes and prejudices cannot be legislated away. They will only be changed by the good will of men. This statement that we make will help because it is designed to bring our children together, those with and without handicaps, to try to undo the prejudice in education.

There have been tremendous advancements in the education of disabled children since the IDEA was enacted.⁶ As problems have arisen, the Department of Education has played a leadership role in providing guidance, technical assistance and enforcement.⁷ By

⁶ See U.S. Department of Education. (2010). Thirty-five Years of Progress in Educating Children with Disabilities Through IDEA. Retrieved from <http://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf>

⁷ See OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as “the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions”), <http://www.pbis.org/school/mtss>. See OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Tier 3 Supports (“Positive behavior intervention and support is an application of a behaviorally-based systems approach Attention is focused on creating and sustaining Tier 1 (universal for ALL students), Tier 2 (targeted group support for SOME students), and Tier 3 (individual support for a FEW students) systems of support that improve lifestyle results (personal, health, social, family, work, recreation) for all children and youth by making problem behavior less effective,

withdrawing guidelines and regulations, weakening enforcement efforts, and promoting the privatization of public education, the current administration is abandoning the role of the federal government as the protector of the most vulnerable in our society – children of color and with disabilities.. This withdrawal of a commitment to educational equity is demonstrated by the proposal to delay the Equity in Education rule issued on the disproportionate suspension of disabled children, particularly those of color.^{8,9}

Attached comments submitted in response to the Notice of Proposed Rulemaking by the Civil Rights Roundtable note:

Under the IDEA (U.S.C. 14189(d)), states are required to report data to the United States Department of Education on the discipline of disabled students of color. The reason for this collection was a concern that children from racial minorities were disproportionately 1) identified as disabled, 2) placed in segregated settings, and 3) suspended. The results of the 2013-2014 Civil Rights Data Collection issued by the U.S. Department of Education's Office for Civil Rights (OCR), reflected the concerns raised in the IDEA.

The OCR data collection reflected alarming evidence that monitoring and oversight is necessary. According to the data, as noted in the CCRT comments:

- Black students are more than three times more likely than White students to be suspended or expelled from school.
- While Black students make up about 18 percent of preschool enrollments, nearly half of all preschoolers suspended more than once during the 2011-'12 school year were Black....
- [While] students with disabilities are more than twice as likely as students without disabilities to be suspended in K-12 settings and are suspended for longer duration...
- Students of color with disabilities experience the highest rates of exclusion. With the exception of Latino and Asian-American students, more than one out of four boys of color with disabilities — and nearly one in five girls of color with disabilities — receives an out-of-school suspension.

efficient, and relevant, and desired behavior more functional.”), <http://www.pbis.org/school/tier3supports> (last visited Nov. 17, 2016); *id.*, Multi-tiered System of Support (MTSS) & PBIS (“Positive Behavioral Interventions and Supports (PBIS) is a process that is consistent with the core principles of MTSS.”), <http://www.pbis.org/school/mtss>.

⁸20 U.S.C. 1418(d)--Docket ID ED-2017-OSERS-0128

⁹ For DREDF’s deep commitment to, and evidence in support of the need for these rules, please see 2016 DREDF testimony on Ending the School-to-Prison Pipeline presented to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights:

<https://dredf.org/news/publications/ending-school-prison-pipeline/>

While most suspensions are for minor infractions, the Center for Civil Rights Remedies at UCLA recently reported approximately 77 more days of lost instruction for black students with disabilities than their white counterparts.¹⁰

Suspension, exclusion, and unnecessary or excessive discipline has dire consequences for students and can lead directly to the school to prison pipeline. As noted by the Civil Rights Roundtable, students of color who are suspended, forced to repeat a grade, or drop out are at increased risk of incarceration.

It is clear that disabled students and particularly disabled students of color do not receive the same treatment, or support as their non-disabled peers, and with serious consequences. Systemic bias and injustice remains. Rescinding, or even delaying the thoughtfully constricted guidelines for states will have serious consequences for millions of students now and throughout their lives.

Every day, DREDF talks to parents who are at their wit's end because their children are being suspended for behavior that relates directly to their disabilities. The purpose of the IDEA, Section 504 and the ADA is to address these behaviors educationally, not punitively. Excessive suspensions for behavior that CAN be addressed educationally,¹¹ is not only cruel to children and families, but is also counter-productive to society by creating the school to prison pipeline. By feeding the school to prison pipeline, we, as a society, are missing the talents and contributions of untold numbers of young adults who could thrive if given the education and services they need.

In conclusion, on this 64th anniversary of the landmark Brown decision, DREDF urges this Committee to reaffirm the civil rights advances of the last half century and the achievements of the IDEA; condemn attempts to set the clock back and to exercise its

¹⁰ Losen, D.J. (2018) *Disabling Punishment: The Need for Remedies to Disparate Loss of Instruction Experienced by Black Students with Disabilities*. Los Angeles, CA: The Center for Civil Rights Remedies.

¹¹ See, <http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-FormerU.S.DeptoEduc.Officials.pdf> :See Barry M. Prizant, Ph.D., et al., *The SCERTS Model: A Transactional, Family-Centered Approach to Enhancing Communication and Socioemotional Abilities of Children With Autism Spectrum Disorder*, 16 *Infants & Young Children* 296-316 (2003), http://journals.lww.com/iycjournal/Abstract/2003/10000/The_SCERTS_Model_A_Transactional_Family_Centered.4.aspx

See Pennington & Mancil, *Functional Communication Training*, *supra* note 42; see also Cleveland Clinic, Behavioral Inter-

See *Autism Spectrum Disorders Research*, *supra* note 41, at 2-10; see also Wendy Machalicek et al., *A Review of School- Based Instructional Interventions for Students with Autism Spectrum Disorders*, 2 *Research in Autism Spectrum Disorders* 395-416 (2008) (evaluating research indicating effective methods in teaching students with ASD academic skills, communication skills, functional life skills, play, and social skills), <http://www.meadowscenter.org/files/resources/RASD-Machalicek-08.pdf>

oversight responsibilities to ensure that the agencies charged with enforcement are not undermined and depleted.¹²

Thank you for your consideration.

Sincerely yours,



Arlene Mayerson
Directing Attorney

¹² DREDF is also concerned with additional administration activities that may place the quality education of disabled students at risk, specifically: the refusal to investigate transgender civil rights complaints related to access to restrooms or school facilities; the proposal to include a citizenship question in the 2020 Census that could lead to a reduction in education funding; and a recent Department of Education policy that allows the Office of Civil Rights to dismiss cases that place an unreasonable burden on OCR's resources. So far, the fairly recent provision has resulted in the dismissal of 500 disability rights complaints. See GLSEN's 2/12/18 press release, [Department of Education Turns Back on Transgender Students](#), 4/16/18 [Washington Post article](#) on immigrant advocate concerns, and 4/20/10 [New York Times article](#) on dismissal of civil rights complaints.