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## Advocates, Federal Agencies, and the Education of Children with Disabilities

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# Advocates, Federal Agencies, and the Education of Children with Disabilities

ELOISE PASACHOFF\*

## I. INTRODUCTION

The aim of this essay is to highlight ways that advocates for children with disabilities can use federal agencies to improve the implementation and enforcement of federal laws protecting children with disabilities in schools—that is, the Individuals with Disabilities Education Act (IDEA),<sup>1</sup> Section 504 of the Rehabilitation Act of 1973,<sup>2</sup> and the Americans with Disabilities Act (ADA) as it relates to schools.<sup>3</sup>

Many advocates for children with disabilities, especially the larger national organizations, will likely already be familiar with these possibilities and take advantage of them liberally. At the same time, one can spend a lot of time engaging with the contemporary public conversation about the law surrounding the education of children with disabilities without seeing much about the relevant federal agencies: the Office of Special Education Programs in the Department of Education; the Office for Civil Rights in the Department of Education; and the Civil Rights Division in the Department of Justice. For example, a great deal of the scholarly and advocacy discussion about the enforcement regime for special education law focuses instead on the role of private parties in enforcing the law.<sup>4</sup> The general consensus is that the law's heavy reliance on private enforcement has led to underenforcement,

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<sup>1</sup> See 20 U.S.C. §§ 1400–1482 (2012).

<sup>2</sup> See 29 U.S.C. §§ 701–797b (2012).

<sup>3</sup> See 42 U.S.C. §§ 12131–12189 (2011).

<sup>4</sup> See, e.g., Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. TOL. L. REV. (forthcoming 2014); Eloise Pasachoff, *Poverty, Special Education, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1450–61 (2011) (describing some of this literature).

especially for poor or otherwise marginalized groups,<sup>5</sup> and especially in light of the Supreme Court's doctrinal cutbacks in both special education law<sup>6</sup> and civil litigation more generally.<sup>7</sup> In turn, this discussion frequently calls for Congress to modify the relevant statutes, especially the IDEA.<sup>8</sup> Where this conversation features the federal agencies, it is often to suggest reforms to their practices,<sup>9</sup> to discuss political or resource limitations on their actions,<sup>10</sup> or to treat them as secondary arenas in which to further national policy as compared to the purportedly more important arenas of Congress and the Supreme Court.<sup>11</sup>

This vision of the relevant enforcement universe can be misleading for advocates who are not currently taking advantage of what the federal agencies can provide. It can also be misleading for students planning to practice in this arena; the leading casebooks, like the trend in the scholarship

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<sup>5</sup> See generally, e.g., RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* (2013); COLIN ONG-DEAN, *DISTINGUISHING DISABILITY: PARENTS, PRIVILEGE, AND SPECIAL EDUCATION* (2009); Daniel J. Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, in *RACIAL INEQUITY IN SPECIAL EDUCATION* 167, 173–74 (Daniel J. Losen & Gary Orfield eds., 2002); Pasachoff, *supra* note 4; David C. Vladeck, *In re Arons: The Plight of the "Unrich" in Obtaining Legal Services*, in *LEGAL ETHICS STORIES* 255 (Deborah L. Rhode & David Luban eds., 2006).

<sup>6</sup> See, e.g., *Arlington Ctr. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006) (holding that IDEA does not permit prevailing parents to recover the cost of expert witnesses); *Shaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in a challenge to an Individualized Education Plan lies with the party seeking relief, which in most cases will be the parents).

<sup>7</sup> See, e.g., *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (restricting standards for certifying a class for class action litigation); *Buckhannon Bd. & Care Home Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (narrowing circumstances in which attorneys' fees may be awarded).

<sup>8</sup> See, e.g., COLKER, *supra* note 5, at 239–46; Pasachoff, *supra* note 4, at 1450–61 (describing literature).

<sup>9</sup> See, e.g., Theresa Glennon, *Evaluating the Office for Civil Rights' Minority and Special Education Project*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, *supra* note 5, at 195–217; Pasachoff, *supra* note 4, at 1481–88.

<sup>10</sup> See, e.g., Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, *supra* note 5, at 227–28, 231; Losen & Welner, *supra* note 5, at 179–80.

<sup>11</sup> See generally, e.g., TIINA ITKONEN, *THE ROLE OF SPECIAL EDUCATION INTEREST GROUPS IN NATIONAL POLICY* (2009).

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and advocacy material, say very little about engagement with federal agencies.<sup>12</sup>

This essay therefore takes a different tack. Instead of focusing on private enforcement, Congress, the courts, or the limitations of federal agencies, I want to capitalize on what is already possible within the agencies and explain how and why to take these possibilities seriously.

Leveraging what can already be done with the federal agencies is particularly important in the current political climate, where congressional action on any issue is difficult, and action on special education is far from imminent. Congress has been stuck on No Child Left Behind reauthorization since 2007,<sup>13</sup> and observers anticipate that Congress will turn to the IDEA (which has been due for reauthorization since 2011)<sup>14</sup> only after NCLB reauthorization is complete. At the same time, special education and other disability-related enforcement problems continue. So what can advocates do now, especially in the Obama era of "We can't wait,"<sup>15</sup> to use the agencies to advance their goals?

In the three sections that follow, I make the case that there is a lot advocates can do in this regard. I discuss each of the three relevant offices in turn, first describing what each one does, and then suggesting how advocates might consider making the office part of an advocacy strategy, whether by engaging with the process of federal oversight of grant implementation, contributing to the development of agency policy decisions, or getting the agencies involved in particular disputes. After walking through the "what" and the "how" of engaging with these agencies, I turn to the "why," offering in the conclusion to this essay some thoughts on the overall potential value of engaging with the agencies.

I organize this discussion by federal agency rather than by type of legal claim (except to indicate which office oversees which law or laws) for two reasons. First, there are other texts that ably offer a legal primer on the

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<sup>12</sup> See, e.g., DEREK BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, REFORM* 467–544 (2013); RUTH COLKER & JULIE K. WATERSTONE, *SPECIAL EDUCATION ADVOCACY* (2011); YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 446–48, 719–69 (5th ed. 2012).

<sup>13</sup> See 20 U.S.C. § 6302(a) (2012) (authorizing specific sums of money through 2007).

<sup>14</sup> See 20 U.S.C. § 1411(i) (2012) (authorizing specific sums of money through 2011).

<sup>15</sup> See, e.g., Katrina vanden Heuvel, *"We Can't Wait" for Congress*, WASH. POST (Jan. 21, 2014), [http://www.washingtonpost.com/opinions/katrina-vanden-heuvel-we-cant-wait-for-congress/2014/01/21/9a95cb46-8215-11e3-bbe5-6a2a3141e3a9\\_story.html](http://www.washingtonpost.com/opinions/katrina-vanden-heuvel-we-cant-wait-for-congress/2014/01/21/9a95cb46-8215-11e3-bbe5-6a2a3141e3a9_story.html); *Year of Action*, THE WHITE HOUSE, <http://www.whitehouse.gov/year-of-action> (last visited May. 21, 2014).

substance of special education law<sup>16</sup> and disability law more generally;<sup>17</sup> the goal (and, I hope, value) of this piece is to provide a guide to agency structure and jurisdiction that will help advocates understand more deeply how to approach each office in any given context. This is why I include organizational charts for each office as appendices to this essay. Just as law students spend time learning about the structure and hierarchy of the judicial system,<sup>18</sup> it is important to spend time understanding the structure and hierarchy of the administrative institutions relevant to the area in which one practices.<sup>19</sup>

The second reason I organize this discussion by federal office rather than by legal claim is that these agencies, particularly on the Department of Education side, are understudied in the literature on the regulatory state. There is no book on the Department of Education as a regulatory institution, for example, in contrast to some other agencies,<sup>20</sup> and there is little analysis of the Department in the administrative law literature either.<sup>21</sup> While there is

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<sup>16</sup> See, e.g., COLKER & WATERSTONE, *supra* note 12; MARK WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE (3d ed. 2008); PETER D. WRIGHT & PAMELA DARR WRIGHT, SPECIAL EDUCATION LAW (2d ed. 2007).

<sup>17</sup> See, e.g., SAMUEL BAGENSTOS, DISABILITY RIGHTS LAW: CASES AND MATERIALS (2d ed. 2013).

<sup>18</sup> See generally, e.g., DANIEL JOHN MEADOR & GREGORY MITCHELL, AMERICAN COURTS (3d ed. 2009).

<sup>19</sup> See, e.g., John Copeland Nagle, *Saxe's Aphorism*, 79 GEO. WASH. L. REV. 1505 (2011) (discussing rise and importance of law school classes for first-year students to introduce them to Congress and administrative agencies, not simply common law judicial processes); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 817 (2008) (same).

<sup>20</sup> See, e.g., ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 79-152 (1986); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (2012). There are some distinct treatments of the Department's Office for Civil Rights in the 1970s and 1980s, but nothing broader. See, e.g., Jeremy Rabkin, *Office for Civil Rights*, in THE POLITICS OF REGULATION 304 (James Q. Wilson ed., 1980); Rosemary Salomone, *Judicial Oversight of Agency Enforcement: The Adams and WEAL Litigation*, in JUSTICE AND SCHOOL SYSTEMS 111 (Barbara Flicker ed., 1990).

<sup>21</sup> Cf. Paul R. Verkuil, *What the Return of the Administrative Conference of the United States Means for Administrative Law*, 1 MICH. J. ENVTL. & ADMIN. L. 17, 25-28 (2012) (stating that "in many ways, environmental law is administrative law," and describing evolution of administrative law's focus from independent agencies to health- and safety-regulating institutions such as the Environmental Protection Agency and the Occupational Safety and Health Administration).

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an excellent book on the Department of Justice's Civil Rights Division,<sup>22</sup> the book focuses on race discrimination, not disability discrimination, and says little about the Division's interactions with the Department of Education on matters of overlapping interest; that same absence of attention to institutional overlap with the Department of Education is also reflected in the law review literature. This essay is thus part of a broader agenda to conceptualize education law as a regulatory field, in order to expand the conventional understanding of both the field of education law and the workings of the regulatory state more generally.<sup>23</sup>

### II. THE DEPARTMENT OF EDUCATION'S OFFICE OF SPECIAL EDUCATION PROGRAMS AND THE IDEA

The Office of Special Education Programs (OSEP) is a unit located in the Office of Special Education and Rehabilitation Services (OSERS), which is among the program offices under the authority of the Department of Education's Deputy Secretary.<sup>24</sup> OSEP's primary job is to oversee states' implementation of the IDEA.<sup>25</sup>

OSEP's role in the IDEA enforcement system should not be underplayed. Discussion of the IDEA's dispute resolution system often focuses on the role of parents in protecting their children's rights, and there is something to that; after all, the IDEA provides to parents a private right of action for exactly that purpose.<sup>26</sup> Parents and advocates for children with disabilities often approach such actions with a civil rights mindset, treating the IDEA as a civil

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<sup>22</sup> BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* (1997).

<sup>23</sup> See generally Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L. J. (forthcoming 2014) (on file with author) [hereinafter Pasachoff, *Funding Cut-Off*]; Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577 (2013); Pasachoff, *supra* note 4; Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349 (2006).

<sup>24</sup> See *infra* Exhibit 1 (Organizational Chart of ED), Exhibit 2 (Organizational Chart of OSERS).

<sup>25</sup> 20 U.S.C. § 1402(a) (2012).

<sup>26</sup> See, e.g., *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526–32 (2007) (discussing importance of statutory rights granted to parents to enforce their own and their children's rights under the IDEA).

rights statute.<sup>27</sup> Unlike the classic civil rights laws, however, the IDEA consists of a series of grant programs to get the states and local school districts to provide certain services.<sup>28</sup> States and districts therefore typically approach the IDEA simply as another federal grant program,<sup>29</sup> like the service-oriented grants under No Child Left Behind<sup>30</sup> (which has no private right of action).<sup>31</sup> Putting the IDEA in the context of grant programs to states helps reorient the conversation to the role of the federal agency in enforcement. Advocates need not give up their civil rights lens in order to see the benefits of engaging with the agency on the terms under which states, districts, and indeed the agency itself<sup>32</sup> see its role.

The IDEA consists of three formula grants and a series of smaller competitive grants.<sup>33</sup> The IDEA's major grant program, often called "Part B" for its placement in the current version of the IDEA's Public Law,<sup>34</sup> is a formula grant to states that mandates certain substantive entitlements and procedural protections for all children with disabilities between the ages of three and twenty-one in exchange for federal financial assistance.<sup>35</sup> This is often the only program that people think about when they think about the IDEA, but although it is the largest grant program—in 2012, Congress

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<sup>27</sup> See ITKONEN, *supra* note 11, at 7–8; *cf.* 20 U.S.C. § 1400(d)(1)(B) (2012) ("The purposes of this chapter are . . . to ensure that the rights of children with disabilities and parents of such children are protected . . .").

<sup>28</sup> *Compare, e.g.*, 20 U.S.C. § 1411 (2012) (authorizing funds under the IDEA), *with* the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (banning discrimination without providing funds).

<sup>29</sup> See ITKONEN, *supra* note 11, at 7–8; *cf.* 20 U.S.C. § 1400(d)(1)(C) (2012) ("The purposes of this chapter are . . . to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities . . .").

<sup>30</sup> 20 U.S.C. §§ 6301–8962 (2012).

<sup>31</sup> *Horne v. Flores*, 557 U.S. 433, 456 n.6 (2009).

<sup>32</sup> See *Offices: Welcome to OSEP*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/osep/index.html> (last modified Mar. 27, 2014) (describing role as providing "leadership and financial support to support states and local districts").

<sup>33</sup> Formula grants are available to all states that agree to meet the program's conditions, while competitive grants are not available to all applicants but instead awarded only on the merits of particular grant applications. See, e.g., CONGRESSIONAL BUDGET OFFICE (CBO), FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 14–15 (2013); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (GAO), GRANTS TO STATE AND LOCAL GOVERNMENTS 4–6 (2012).

<sup>34</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446 § 101, 118 Stat. 2647.

<sup>35</sup> 20 U.S.C. §§ 1411(d), 1412 (2012).

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funded this grant at \$11.5 billion,<sup>36</sup> second in federal education grants only to Title I<sup>37</sup>—it is only one of the IDEA's grant programs. A second formula grant provides a smaller sum of money (approximately \$372 million in 2012<sup>38</sup>) for states providing preschool programs for children with disabilities.<sup>39</sup> A third formula grant (around \$442 million in 2012<sup>40</sup>) is directed to state services for infants and toddlers with disabilities.<sup>41</sup> Finally, a variety of smaller competitive grants provide particular funding streams either to states or to private non-profit entities to develop state personnel, conduct research in special education, staff parent training and information centers, and engage in other general activities to improve the education of children with disabilities.<sup>42</sup> In 2014, OSEP forecasts awarding funds under twelve such competitive grant programs, ranging in size from \$250,000 per awardee to several million dollars per awardee.<sup>43</sup>

Just over 100 people work in OSEP, all located in the Education Department's headquarters in Washington, D.C.<sup>44</sup> OSEP is itself divided into three main offices, all overseen by a Director who reports to the Assistant Secretary at the helm of OSERS.<sup>45</sup> The Program Services Group largely works on matters internal to OSEP—for example, developing and overseeing the office's budget, coordinating internal data analysis and reporting, and providing administrative management support.<sup>46</sup> The two other offices are outward-facing. One of these offices, the Research to Practice Division,

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<sup>36</sup> *Fiscal Years 2012–2014 State Tables for the U.S. Department of Education*, U.S. DEP'T EDUC. 18, <http://www2.ed.gov/about/overview/budget/statetables/14stbypogram.pdf> (last visited May 21, 2014).

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> 20 U.S.C. § 1419 (2012).

<sup>40</sup> See *Fiscal Years 2012–2014 State Tables*, *supra* note 36, at 20.

<sup>41</sup> 20 U.S.C. §§ 1431–1444 (2012).

<sup>42</sup> 20 U.S.C. §§ 1450–1475 (2012).

<sup>43</sup> See *Forecast of Funding Opportunities under the Department of Education Discretionary Grant Programs for Fiscal Year (FY) 2014*, U.S. DEP'T EDUC. Chart 5A, <http://www2.ed.gov/fund/grant/find/edlite-forecast.html#chart7> (last updated May 15, 2014).

<sup>44</sup> See *OSEP Staff Directory*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/osers/osep/staff.html> (last modified Oct. 26, 2012).

<sup>45</sup> See *US Department of Education Principal Office Functional Statements: D. Office of Special Education Programs*, U.S. DEP'T EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/osers/special.html](http://www2.ed.gov/about/offices/list/om/fs_po/osers/special.html) (last modified June 28, 2004) [hereinafter *OSEP Functional Statement*]; *infra* Exhibit 3 (Organizational Chart of OSEP).

<sup>46</sup> *OSEP Functional Statement*, *supra* note 45.



develops and oversees the competitive grants, dividing its work among three different teams each focused on a different age group of children, as well as a National Initiatives team focused on more widely applicable projects.<sup>47</sup> The other outward-facing office, the Monitoring and State Improvement Planning (MSIP) Division, oversees all matters related to the IDEA's formula grants, including monitoring and providing technical assistance to state grantees.<sup>48</sup>

Because of the central role the formula grants play in special education law, and because advocates need to understand the federal role with respect to the formula grants in order to know how to intervene appropriately, it is worth spelling out in a little more detail what the MSIP Division does. The IDEA tasks OSEP with monitoring state oversight of school districts' provision of special education services and compliance with the IDEA's procedural requirements.<sup>49</sup> OSEP's MSIP Division conducts this monitoring in several ways, including through periodic onsite visits, after which OSEP issues a letter to each state alerting them to any observed problems.<sup>50</sup> In addition, the IDEA requires each state to have in place a State Performance Plan approved by OSEP, against which the state must submit an Annual Performance Report for OSEP's review.<sup>51</sup>

Each year, OSEP reviews all of the information it has about each state, whether gleaned through its monitoring visits, through its review of the Annual Performance Reports, or "any other public information made available,"<sup>52</sup> and puts each state into one of four categories: either it "meets the requirements and purposes" of the IDEA, it "needs assistance," it "needs intervention," or it "needs substantial intervention."<sup>53</sup> Each category comes with a set of statutorily mandated options for OSEP's enforcement, ranging from the relatively lenient provision of technical assistance to more stringent actions such as requiring the state to engage in a corrective action plan or compliance agreement, withholding or seeking to recover a portion of the state's IDEA funds, referring the matter to the Inspector General for further

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<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See* 20 U.S.C. § 1416(a) (2012).

<sup>50</sup> *Awards, Accounts & Reporting: Continuous Improvement Visit Letters, State Monitoring Reports and Fiscal Monitoring Letters*, U.S. DEPT' EDUC., <https://www2.ed.gov/fund/data/report/idea/verificatvisit.html> (last modified Dec. 11, 2013).

<sup>51</sup> *See* 20 U.S.C. § 1416(b) (2012).

<sup>52</sup> *See* 20 U.S.C. § 1416(d) (2012).

<sup>53</sup> *See* 20 U.S.C. § 1416(d)(2) (2012).

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investigation, or referring the matter to the Department of Justice for litigation.<sup>54</sup>

In addition to its monitoring and oversight work, the MSIP Division also participates in the formulation of policy and guidance relevant to IDEA implementation.<sup>55</sup> For example, OSEP has recently considered what kinds of parental consent requirements should be put in place before an agency may access a parent's public benefits (such as Medicaid) to pay for services required under the IDEA.<sup>56</sup> Currently pending is a proposed rule explaining how states should calculate local school districts' financial contributions to satisfy the IDEA's requirement that states and districts maintain their own financial efforts in addition to receiving federal IDEA funds.<sup>57</sup> And over the last few years, OSEP has issued non-regulatory guidance documents providing questions and answers on topics such as using the IDEA's dispute resolution procedures, ensuring the accessibility of instructional material, and conducting evaluations and reevaluations for special education services.<sup>58</sup>

I have previously argued that Congress ought to authorize OSEP, through the MSIP Division, to take a much stronger role in enforcing Part B of the IDEA in order to combat disparities in the provision of special education services between children whose parents have the resources to advocate vigorously and those whose parents do not.<sup>59</sup> In particular, I suggested, Congress ought to provide OSEP with authority to require states to collect more data on the special education and related services offered to children in poverty in comparison to their more financially advantaged peers;<sup>60</sup> to require states to conduct investigations into the quality of special education and related services provided to children in poverty, either in the abstract or in comparison to the quality provided to more financially advantaged children;<sup>61</sup> and either to withhold funds from states permitting its districts to provide worse special education services to poor children than to

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<sup>54</sup> See 20 U.S.C. § 1416(e)(1)–(4) (2012).

<sup>55</sup> *OSEP Functional Statement*, *supra* note 45.

<sup>56</sup> Assistance to States for the Education of Children with Disabilities, 78 Fed. Reg. 10525 (Feb. 14, 2013) (to be codified at 34 C.F.R. 300.154).

<sup>57</sup> Assistance to States for the Education of Children with Disabilities, 78 Fed. Reg. 57324 (proposed Sept. 18, 2013) (to be codified at 34 C.F.R. § 300.203).

<sup>58</sup> For an overview of such policy, see *OSEP Legislation and Policy*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/osers/osep/policy.html> (last modified Aug. 8, 2013).

<sup>59</sup> See generally Pasachoff, *supra* note 4.

<sup>60</sup> *Id.* at 1465–70.

<sup>61</sup> *Id.* at 1473–77.

wealthier children, or to provide additional funds to states taking steps to reduce any disparities in services.<sup>62</sup>

I continue to think these steps are important and hope to see them incorporated into the next reauthorization of the IDEA. But there is no sign of IDEA reauthorization on the horizon. The question, then, is how advocates for children with disabilities can better use OSEP to further their goals now. I have two sets of recommendations in this regard, one on the monitoring side and the other on the policy side.

First, as to monitoring, advocates should get involved in OSEP's evaluation of their state's compliance with the IDEA.<sup>63</sup> Advocates should become familiar with their state's Performance Plan and most recent Annual Performance Reports, which the IDEA requires to be available on the state department of education website.<sup>64</sup> Advocates should also review the state's assessment of each school district's compliance with the IDEA, which the IDEA also requires to be publicly available.<sup>65</sup> Finally, advocates should also review OSEP's most recent evaluations of each state, which are available on the OSEP website.<sup>66</sup>

After reviewing this information, advocates can think about what on-the-ground information would provide helpful insight to OSEP. For example, are there repeated problems in a district that the state is insufficiently attentive to? Is the state failing to resolve complaints satisfactorily?<sup>67</sup> Advocates can

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<sup>62</sup> *Id.* at 1485–87.

<sup>63</sup> *Cf.* Hehir, *supra* note 10, at 232–33 (recommending that advocates for children with disabilities "[s]eek to influence OSEP's monitoring activities within the state").

<sup>64</sup> *See* 20 U.S.C. § 1416(c)(2)(I) (2012). In Ohio, for example, the documents may be found at *Annual Performance Report*, OHIO DEP'T EDUC., <http://education.ohio.gov/Topics/Special-Education/State-Performance-Plan> (last modified May 14, 2014).

<sup>65</sup> *See* 20 U.S.C. § 1416(c)(2)(I) (2012). In Ohio, for example, this information can be found at *District Level Performance Data*, OHIO DEP'T EDUC., <http://education.ohio.gov/Topics/Special-Education/Resources-for-Parents-and-Teachers-of-Students-wit/District-Level-Performance-Data> (last modified Dec. 5, 2013).

<sup>66</sup> *Awards, Accounts & Reporting: State Performance Plan (SPP) and Annual Performance Report (APR) Forms, and Supporting Documents*, U.S. DEP'T EDUC., <https://www2.ed.gov/fund/data/report/idea/sppapr.html> (last modified Dec. 4, 2013); *Awards, Accounts & Reporting: Continuous Improvement Visit Letters, State Monitoring Reports and Fiscal Monitoring Letters*, *supra* note 50.

<sup>67</sup> Filing complaints with the state agency is actually another (albeit indirect) way to get OSEP's attention for monitoring purposes, as one of MSIP's tasks is to "analyze States' resolution of complaints." *See Awards, Accounts and Reporting: OSEP, Monitoring and State Improvement Planning Division*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/osers/osep/msipd.html> (last modified July 8, 2004). For more on the state complaint procedure, see 34 C.F.R. §§ 300.151–153 (2013);

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memorialize their observations in a letter to OSEP, providing documentation of problems; they can telephone OSEP's contacts for their state; they can request to meet with OSEP officials either during onsite visits in their state or in visits to D.C.<sup>68</sup> After all, OSEP can only make its decisions based on the information it has, and if state officials are the only people OSEP talks to, OSEP's understanding of the state's compliance will reflect that limited view. Information from advocates can help OSEP take a stronger, more accurate stand in demanding compliance. Understanding the advocates' views can also help OSEP provide better, more focused guidance to states in how to achieve compliance.

As to policy, advocates should weigh in whenever possible as OSEP develops rules and guidance documents, in order to ensure that OSEP's decisions on these and other policy issues reflect advocates' views and not only the views of state and local officials. One easy way to know when OSEP is considering a new policy and requesting feedback is to sign up for free alerts from [federalregister.gov](http://federalregister.gov) whenever the Department of Education posts a notice in the Federal Register.<sup>69</sup> After reviewing the notice, advocates can submit a comment directly on the website.<sup>70</sup> Even when OSEP does not

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Memorandum from Melody Musgrove, Director, OSEP, on Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act, to Chief State School Officers & State Directors of Special Education, (Part B) 15–33 (July 23, 2003), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>.

<sup>68</sup> Advocates may contact OSEP as follows: Office of Special Education Programs, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Ave., SW, Washington, D.C. 20202-7100; Telephone: (202) 245-7459. A staff directory listing contact names and phone numbers for OSEP staff members responsible for each state may be found at *Offices: OSEP/MSIP State Contacts Part B and Part C*, U.S. DEPT EDUC. (Nov. 18, 2013), <http://www2.ed.gov/policy/speced/guid/idea/monitor/state-contact-list.html>.

<sup>69</sup> A subscription to the Education Department's notices as a whole is available at *Education Department*, FED. REG., <https://www.federalregister.gov/agencies/education-department> (last visited May 21, 2014). To subscribe only to notices relevant to special education, go to [federalregister.gov](http://federalregister.gov); click on "Search" and then "Advanced Article Search"; in the "Find" field, enter "Office of Special Education and Rehabilitative Services" with quotation marks; in the "Agency" field, enter "Education Department" with quotation marks; click "Search"; and then select "Subscribe." (OSEP's documents tend to be filed in the Federal Register under OSERS's mantle. *Id.*)

<sup>70</sup> Advocates seeking an administrative law refresher can learn more about the rulemaking process in *A Guide to the Rulemaking Process*, FED. REG., [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited May 21, 2014). For a more thorough overview, see CORNELIUS M. KERWIN,

seek comment in advance, it frequently solicits comments on guidance documents after publication, and it considers these comments when it undertakes future revision.<sup>71</sup> Providing comments on these documents is yet another valuable task.

OSEP's so-called policy letters provide another avenue for advocates' engagement with policymaking. Anyone may write a letter to OSEP requesting clarification of a policy or an interpretation of whether a state or district action violates a policy. Four times a year, OSEP must publish in the Federal Register and disseminate elsewhere all of its responses to those letters.<sup>72</sup> Advocates should consider whether clarification of policy would be helpful in their efforts to secure compliance at the state and district level, and if so, should ask OSEP for such clarification. Once OSEP responds, advocates can use the response to further their work with states and districts. To the extent the response is not what advocates hoped for, advocates may either challenge it or may use it to build a record of needed policy changes whenever Congress does move toward reauthorization.

### III. THE EDUCATION DEPARTMENT'S OFFICE FOR CIVIL RIGHTS, SECTION 504, AND THE ADA

The second office in the Education Department relevant to advocates for children with disabilities is the Office for Civil Rights (OCR), which is headed by an Assistant Secretary who reports directly to the Secretary of Education.<sup>73</sup> OCR does not oversee the IDEA; that task falls to OSEP. But among the laws that OCR does oversee is Section 504 of the Rehabilitation Act of 1973, which forbids discrimination on the basis of disability status by

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RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (4th ed. 2010).

<sup>71</sup> See, e.g., *Questions and Answers on the National Instructional Materials Accessibility Standard (NIMAS)*, U.S. DEP'T EDUC. (Aug. 2010), <https://www2.ed.gov/policy/speced/guid/idea/nimas-qa.pdf> (seeking comment post-publication and noting that this document supersedes the equivalent document issued in January 2007); *Questions and Answers on Discipline Procedures*, U.S. DEP'T EDUC. (June 2009), <https://www2.ed.gov/policy/speced/guid/idea/discipline-q-a.pdf>.

<sup>72</sup> See 20 U.S.C. § 1406(f) (2012); see also *Offices: OSEP Memos, Dear Colleague Letters, and Policy Letters*, U.S. DEP'T EDUC., <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html> (last modified Mar. 31, 2014).

<sup>73</sup> See U.S. DEP'T OF EDUC., OCR, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION FY 2009–12 (2012) [hereinafter EQUAL ACCESS], available at <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf>; see also *infra* Exhibit 1 (Education Department Organizational Chart), Exhibit 4 (OCR Organizational Chart).

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any entity receiving federal financial assistance, including public schools.<sup>74</sup> Section 504, while tied to federal funding, does not provide any funds of its own.

OCR also has jurisdiction to enforce Title II of the ADA, which protects against discrimination by state and local governments, including educational institutions, on the basis of disability status.<sup>75</sup> The precise legal relationship between Section 504 and the ADA is in flux. OCR has long maintained that the education-related regulations under the ADA "do not provide greater protection than the applicable Section 504 regulations," and so has largely claimed the mantle of Section 504 for its disability-related work.<sup>76</sup> The Department of Justice, which has near-exclusive authority to issue regulations under the ADA,<sup>77</sup> however, has recently taken the position that the ADA and Section 504 have some distinct characteristics.<sup>78</sup> In its most recent statement on the matter, OCR therefore acknowledged that "[t]o the extent that Title II [of the ADA] provides greater protection than Section 504, covered entities must comply with Title II's substantive requirements," but did not provide any more guidance about what such compliance should look like.<sup>79</sup>

Resolving the contours of this legal issue has little bearing on the main point of this essay—to present a compendium of structural ways that advocates can engage with federal agencies on special education and other

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<sup>74</sup> See *Offices: About OCR*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified May 29, 2012). The Education Department's OCR does not have exclusive jurisdiction over Section 504. Other federal agencies enforce Section 504 with respect to federal moneys provided by grant streams under their jurisdiction. See, e.g., 28 C.F.R. § 35.171(a) (2013). Along those lines, other agencies have their own Office for Civil Rights. See, e.g., *Department of Transportation—Departmental Office of Civil Rights*, DEP'T TRANS., <https://www.civilrights.dot.gov/> (last visited May 21, 2014); *Civil Rights*, EPA, <http://www.epa.gov/civilrights/> (last visited May 21, 2014); *Office for Civil Rights*, HHS, <http://www.hhs.gov/ocr/office/> (last visited May 21, 2014).

<sup>75</sup> See *Offices: About OCR*, *supra* note 74.

<sup>76</sup> See *Offices: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/504faq.html> (last modified Dec. 19, 2013).

<sup>77</sup> See 42 U.S.C. §§ 12132, 12134 (2011).

<sup>78</sup> See *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1092, 1099–1100 (9th Cir. 2013); Brief for the United States as Amicus Curiae Supporting Appellant and Urging Remand at 15–29, *Tustin Unified Sch. Dist.*, 725 F.3d 1088 (No. 11-56259).

<sup>79</sup> See Dear Colleague Letter from Seth M. Galanter, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights 2 n. 3 (Jan. 25, 2013), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>.

disability-related matters for schoolchildren—so I need not say more about it here, except to note that it is a substantive development advocates should follow, and may provide a particular topic on which advocates wish to weigh in as OCR and the Department of Justice continue their analysis. I discuss mechanisms for such weighing in on this and other topics below. First, however, I provide an overview of OCR's structure and tasks.

OCR consists of almost 600 staff members, a combination of lawyers, investigators, and administrative personnel,<sup>80</sup> most of whom are located outside D.C., working in one of twelve regional enforcement offices.<sup>81</sup> Staff members in the regional offices are not assigned to handle a particular statute or category of claims but instead generally coordinate enforcement across the civil rights landscape.<sup>82</sup>

The bulk of the regional offices' enforcement work is to review and resolve complaints alleging some kind of discrimination. Between Fiscal Years (FY) 2009 and 2012, OCR received almost 29,000 complaints, just over half of which were disability-related.<sup>83</sup> The kind of disability-related complaint suitable for OCR's review is different from the kind of complaint that might be brought in a due process hearing.<sup>84</sup> As OCR explains:

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.

OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which

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<sup>80</sup> See EQUAL ACCESS, *supra* note 73, at 3.

<sup>81</sup> See *Offices: About OCR*, *supra* note 74. For a list of the regional office addresses, see *Offices: Office Addresses*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/addresses.html> (last modified June 24, 2013).

<sup>82</sup> *US Department of Education Principal Office Functional Statements: A. Immediate Office of the Assistant Secretary (EC)*, U.S. DEP'T EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/osers/special.html](http://www2.ed.gov/about/offices/list/om/fs_po/osers/special.html) (last modified March 28, 2005) [hereinafter *OCR Functional Statement*].

<sup>83</sup> See EQUAL ACCESS, *supra* note 73, at 6.

<sup>84</sup> See generally 20 U.S.C. § 1415(f) (2012).

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is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services.<sup>85</sup>

Between FY 2009 and 2012, OCR resolved over 90% of complaints within 180 days, typically by reaching a resolution agreement with the offending public entity.<sup>86</sup> These agreements usually provide individual remedies for the subject of the complaint as well as systemic remedies and ongoing monitoring.<sup>87</sup> Where OCR cannot reach a resolution agreement, whether because the school district contests the agency's interpretation of the facts or the law or some other reason entirely,<sup>88</sup> OCR may move to withhold federal funds or refer the matter to the Department of Justice for litigation.<sup>89</sup> But such an action is exceedingly rare, as its threat, whether implicit or explicit, is usually enough to secure compliance.<sup>90</sup>

In addition to resolving complaints, OCR's regional offices conduct two different kinds of proactive investigations: compliance reviews, which it defines as "broad-scale, systemwide investigations of issues of strategic significance," and directed investigations, which are "immediate, expedited investigations of urgent and critical civil rights problems" in "fast-moving or exigent circumstances."<sup>91</sup> In the period between FY 2009 and 2012, OCR conducted over 100 compliance reviews, of which thirty-four were disability-

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<sup>85</sup> See *Offices: Frequently Asked Questions*, *supra* note 76. For a list of disability-related complaints by category and subsequent discussion, see EQUAL ACCESS, *supra* note 73, at 50–58. See also generally U.S. DEP'T OF EDUC., OCR, DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS (Oct. 2012) [hereinafter ENFORCEMENT HIGHLIGHTS], available at <https://www2.ed.gov/documents/news/section-504.pdf>.

<sup>86</sup> See EQUAL ACCESS, *supra* note 73, at 21.

<sup>87</sup> See *id.* at 7; see also *Awards, Accounts and Reporting: Recent Resolutions*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html?exp=6#section504res> (last modified March 18, 2014).

<sup>88</sup> See Pasachoff, *Funding Cut-Off*, *supra* note 23 (manuscript at 23–26) (describing reasons grantees such as schools may refuse to comply with federal requirements).

<sup>89</sup> *OCR Case Processing Manual (CPM)*, U.S. DEP'T EDUC. art. IV, [http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#III\\_4](http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#III_4) (last modified Apr. 30, 2014).

<sup>90</sup> At least this is so in the civil rights context. It is a much harder issue in the context of federal grants, where states can remain out of compliance for years. See generally Pasachoff, *Funding Cut-Off*, *supra* note 23.

<sup>91</sup> EQUAL ACCESS, *supra* note 73, at 4.



related; it does not seem to have conducted any directed investigations in the disability context.<sup>92</sup>

OCR's regional offices also provide technical assistance and outreach to schools and community groups to educate them on compliance issues.<sup>93</sup> Between FY 2009 and 2012, OCR held many hundreds of technical assistance events related to disability discrimination—221 in FY 2012 alone.<sup>94</sup>

While the bulk of OCR's work is done in the regional offices, the activities of its headquarters in D.C. are far from irrelevant. Several enforcement directors in D.C. oversee the enforcement work in the regional offices.<sup>95</sup> In addition, the Program Legal Group in headquarters develops policies, guidance, regulations, and related documents, while a resource management team works on budget, human resources, technology, and customer services matters in headquarters.<sup>96</sup>

How can advocates for children with disabilities better use OCR's resources to support the advocates' enforcement goals? As with OSEP, getting involved in OCR's policy decisions provides an important opportunity for advocates. OCR's issuance of formal regulations is much rarer than OSEP's; there are fewer moving pieces in civil rights enforcement than in the grant programs, which change significantly during each reauthorization and which intersect with other grant programs (such as Medicaid), so there are fewer formal opportunities for notice-and-comment rulemaking, comments on grant priorities, and so on in OCR than there are in

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<sup>92</sup> *Id.* at 4, 50–51. Whether 34 disability-related compliance reviews is a lot or a little depends on the baseline. Compared to the 29,000 complaints OCR considered during this four-year time period, see *supra* note 5 and accompanying text, these numbers are quite small. But compared to the numbers of class action cases in the IDEA context on which courts have ruled in the last few years, the number of disability-related OCR investigations seems much larger. See Weber, *supra* note 4, at 9 (discussing four IDEA class action decisions between 2006 and 2009), 14–24 (discussing nine IDEA class action decisions between 2011 and 2013).

<sup>93</sup> EQUAL ACCESS, *supra* note 73, at 9.

<sup>94</sup> *Id.* at 51.

<sup>95</sup> See *OCR Functional Statement*, *supra* note 82.

<sup>96</sup> See *infra* Exhibit 4 (OCR Organizational Chart); see also *OCR Functional Statement*, *supra* note 82. All of OCR's policy documents may be found online in OCR's Reading Room. *Reading Room (eFOIA Index)*, U.S. DEPT' EDUC., <http://www2.ed.gov/about/offices/list/ocr/publications.html> (last modified May 20, 2014).

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OSEP.<sup>97</sup> However, OCR periodically issues important policy documents in the form of Dear Colleague Letters, which set forth the agency's interpretation of schools' compliance obligations as well as best practices.<sup>98</sup> Advocates who see a gap in OCR's policy guidance as new issues emerge should take the opportunity to help OCR develop this guidance. They may write to the Assistant Secretary, copying the Deputy Assistant Secretary for Policy, setting forth their views on the matter in question.<sup>99</sup> They may also seek a meeting with OCR staff to discuss their views, perhaps in a coalition of other interested parties. OCR will benefit both from advocates' views on where guidance is needed and on what the guidance should say.<sup>100</sup>

OCR's complaint procedure provides another avenue for advocates to leverage the agency's resources. The complaint process is relatively straightforward.<sup>101</sup> Advocates may fill out a hard-copy complaint form,<sup>102</sup> fill out an online form,<sup>103</sup> or send an email, letter, or fax with the information requested in the form to the relevant regional office or directly to headquarters (which will forward it to the appropriate regional office).<sup>104</sup> The complaint must be filed within 180 days of the last discriminatory act, with a

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<sup>97</sup> See EQUAL ACCESS, *supra* note 73, at 12 (describing policy documents issued between 2009 and 2012, all in the form of announced guidance, rather than opportunities for public comment).

<sup>98</sup> *Id.* Dear Colleague Letters are all available online at the OCR Reading Room. See *supra* note 96.

<sup>99</sup> OCR's headquarters in D.C. may be contacted as follows: ocr@ed.gov; 400 Maryland Avenue, SW, Washington, D.C. 20202-1100; Customer Service Hotline (800) 421-3481; fax (202) 453-6012; TTY (800) 877-8339. A list of senior staff is available here: <http://www2.ed.gov/about/offices/list/ocr/contactus2.html>.

<sup>100</sup> In light of the emerging law on how the ADA regulations govern services schools must provide to children with disabilities, see *supra* notes 75–79 and accompanying text, advocates could consider this a ripe topic for addressing with OCR. But other topics advocates observe as problematic in their work would be useful as well.

<sup>101</sup> See *OCR Complaint Processing Procedures*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last modified Apr. 30, 2014).

<sup>102</sup> U.S. DEP'T OF EDUC., OCR, OFFICE FOR CIVIL RIGHTS DISCRIMINATION COMPLAINT FORM, CONSENT FORM, AND COMPLAINT PROCESSING PROCEDURES, *available at* <http://www2.ed.gov/about/offices/list/ocr/complaintform.pdf>.

<sup>103</sup> *Office for Civil Rights Complaint Assessment System*, U.S. DEP'T EDUC., <https://ocrcas.ed.gov/> (last visited May 21, 2014).

<sup>104</sup> A list of addresses and other contact information for the regional offices is available at *Office Addresses*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/addresses.html> (last modified June 24, 2013). For headquarters contact information, see *supra* note 99.

rare possibility of a waiver.<sup>105</sup> If a timely complaint alleges matters within OCR's jurisdiction, the matter remains unresolved and not otherwise the subject of a court or other agency proceeding, and the allegations state a viable legal claim, OCR will open the complaint for investigation.<sup>106</sup> Advocates should then be prepared to participate either in the process of Early Complaint Resolution, by which OCR attempts to facilitate settlement between the parties if both parties consent, or in the process of OCR's investigation.<sup>107</sup>

OCR's online repository of successful complaint resolution agreements is new and quite small, so there is not much in the way of easily available precedent for advocates to point to,<sup>108</sup> but advocates should review what is there before filing a complaint. Advocates would also find it helpful to read the most recent report on OCR's disability rights enforcement work for an overview of the kinds of complaints OCR has resolved and the kinds of agreements it has reached.<sup>109</sup> Advocates might also find it helpful to use these documents as leverage to negotiate with the school district even before filing the OCR complaint. Certainly, the mere filing of an OCR complaint may help to shift the balance of power in a discrimination dispute; a federal investigation is big deal, after all, both as a legal matter and as a public relations matter.<sup>110</sup>

Advocates should think expansively about the kinds of issues they might raise in complaints on behalf of children with disabilities. Obviously, direct allegations of disability discrimination fall under Section 504 (and the ADA) and are thus relevant.<sup>111</sup> But many OCR complaints raise issues that

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<sup>105</sup> *OCR Case Processing Manual*, *supra* note 89, §§ 106, 107.

<sup>106</sup> *Id.* §§ 104, 108, 109.

<sup>107</sup> *Id.* at art. II, art. III.

<sup>108</sup> *See Awards, Accounts and Reporting: Recent Resolutions*, *supra* note 87.

<sup>109</sup> ENFORCEMENT HIGHLIGHTS, *supra* note 85.

<sup>110</sup> Of course, before filing a complaint, advocates should consider whether the situation would be better resolved through less adversarial means—whether, for example, the relationship between the child and school would be irreparably harmed by proceeding with legal action, and whether that harm would be better or worse than the status quo. This consideration is no different from any thoughtful review of potential legal avenues for resolving a dispute, however, and has no particular bite with respect to whether to use the agency or some other mechanism. For more on the complexities of this decision in the context of private enforcement of the IDEA, see, for example, Pasachoff, *supra* note 4, at 1444–45.

<sup>111</sup> Complaints in this arena may be another way to affect legal development on the intersection of schools' obligations under Section 504 and the ADA, as described above at notes 75–79 and accompanying text. In a recent complaint resolution agreement under Title IX of the Education Amendments of 1972, codified at 20 U.S.C. § 1681–1688

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implicate multiple civil rights laws or that might affect children with disabilities differently according to their race or gender (discrimination on the basis of which protected category falls under Title VI<sup>112</sup> and Title IX<sup>113</sup> respectively). In seeking to protect all children with disabilities across the spectrum of demographic characteristics, advocates have an opportunity to enlist OCR's broad civil rights efforts.

One other tool made available by OCR bears mention: the Civil Rights Data Collection (CRDC). The federal government has collected data on various civil rights issues in schools since 1968,<sup>114</sup> and has made the data publicly available on a searchable website since 2010.<sup>115</sup> The recently released CRDC of 2011–2012 contains data from every single school district and every single school throughout the country, with responses to its most expansive set of inquiries yet.<sup>116</sup> It is difficult to overstate the incredible richness of this data or the ease of its manipulation online.<sup>117</sup> With a few clicks, advocates can easily learn much about the experience of students with disabilities (and other civil rights categories) in a school or district with respect to enrollment in different types of classes, disciplinary consequences, reported allegations of harassment or bullying, and much, much more. Advocates can then use these findings to push for change at the school, district, or state level,<sup>118</sup> as well as use them as the basis for an OCR

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(2012), for example, OCR recently made clear its interpretation of schools' obligations to protect the rights of transgender students. *See* Resolution Agreement Between the Arcadia Unified Sch. Dist., U.S. Dep't of Educ., and U.S. Dep't of Justice, OCR Case No. 09-12-1020, DOJ Case Number 169-12C-70 (July 24, 2013), *available at* <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>; *see also* The Editorial Board, *The Next Civil Rights Frontier*, N.Y. TIMES, July 31, 2013 (noting the national importance of the resolution agreement and calling it "required reading for school officials at all levels nationally").

<sup>112</sup> Title VI of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000d (2011).

<sup>113</sup> *See supra* note 111.

<sup>114</sup> *See Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEP'T EDUC. (Mar. 21, 2014), <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities>.

<sup>115</sup> *See Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Data*, U.S. DEP'T EDUC. (Mar. 16, 2010), <http://www2.ed.gov/news/pressreleases/2010/03/03162010.html>.

<sup>116</sup> *See Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, *supra* note 114.

<sup>117</sup> *See Civil Rights Data Collection*, U.S. DEP'T EDUC., [ocrdata.ed.gov](http://ocrdata.ed.gov) (last visited May 21, 2014).

<sup>118</sup> EQUAL ACCESS, *supra* note 73, at 17 (citing success stories in using CRDC data to press for policy change in these arenas).

complaint. The CRDC is a valuable public resource offered by OCR and ought to be a fertile source for advocacy efforts.

#### IV. THE DEPARTMENT OF JUSTICE'S CIVIL RIGHTS DIVISION AND THE ADA, SECTION 504, AND THE IDEA

Finally, the Education Department does not have a lock on the federal government's enforcement of laws governing the education of children with disabilities. The Civil Rights Division in the Department of Justice also plays an important, although quite different, role. A program office under the oversight of the Associate Attorney General,<sup>119</sup> the Division's overall mission is to enforce federal statutes prohibiting discrimination across many lines of protected categories and many kinds of entities, including but not limited to public schools.<sup>120</sup> Unlike OCR and OSEP, it does much of its work either in federal court or in the shadow of federal court involvement.<sup>121</sup>

The Civil Rights Division has around 780 staff members, mostly lawyers, working entirely in Washington, D.C.<sup>122</sup> There are no regional offices, although the Division frequently coordinates its work with U.S. attorneys' offices throughout the country.<sup>123</sup> The Division contains ten litigating units (as well as separate units devoted to management, policy, and human resources matters).<sup>124</sup> Three of the litigating units have relevance to the work of school-related disability rights issues: the Disability Rights Section, the Educational Opportunities Section, and the Appellate Section.

The Disability Rights Section and the Educational Opportunities Section have overlapping jurisdiction and interests in matters that affect the education of children with disabilities. Broadly speaking, these Sections engage in three main types of activities relevant to protecting the rights of children with disabilities. First, the Sections process and investigate

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<sup>119</sup> See *infra* Exhibit 5 (Dep't of Justice Organizational Chart).

<sup>120</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ACCOMPLISHMENTS 2009–2012, at 2 [hereinafter ACCOMPLISHMENTS], available at [http://www.justice.gov/crt/publications/accomplishments/crtaccomplishment\\_09\\_12.pdf](http://www.justice.gov/crt/publications/accomplishments/crtaccomplishment_09_12.pdf).

<sup>121</sup> *Id.* at 9–18; see also LANDSBERG, *supra* note 22, at 5 (emphasizing importance of Division's litigating role).

<sup>122</sup> See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FY 2013 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 2, 6 (criminal staff), 8 (civil staff), available at <http://www.justice.gov/jmd/2013justification/pdf/fy13-crt-justification.pdf> [hereinafter BUDGET SUBMISSION].

<sup>123</sup> See, e.g., ACCOMPLISHMENTS, *supra* note 120, at 83–84; see also LANDSBERG, *supra* note 22, at 106–07 (describing varied history of such coordination).

<sup>124</sup> See *infra* Exhibit 6 (Civil Rights Div. Organizational Chart).

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complaints filed by private parties alleging discrimination on the basis of disability under either Title II (applicable to state and local governments) or III (applicable to private entities) of the ADA or under Section 504.<sup>125</sup> In the period around the 2010–2011 school year, for example, the Equal Opportunities Section opened twelve investigations into discrimination against students with disabilities.<sup>126</sup> These investigations are initiated by either Section in contemplation of litigation on behalf of the United States, should the school district, state, or private educational corporation not agree to resolve the matter earlier.<sup>127</sup>

Second, the Sections may participate in ongoing lawsuits brought by private parties under the ADA, Section 504, or the IDEA, whether by filing a statement of interest setting forth the views of the United States on the matter in question<sup>128</sup> or an amicus brief,<sup>129</sup> or by seeking to take part in the case more directly as an intervenor-plaintiff.<sup>130</sup>

Third, the Sections engage in policy work. As noted above, for example, the Disability Rights Section drafts regulations under the ADA.<sup>131</sup> The Sections also issue various guidance documents on matters affecting students

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<sup>125</sup> See 28 C.F.R. §§ 35.170–.171, 36.502 (2013). The sections may also investigate potential violations of the ADA even in the absence of a complaint. See 28 C.F.R. §§ 36.502–.503 (2013).

<sup>126</sup> BUDGET SUBMISSION, *supra* note 122, at 26.

<sup>127</sup> See, e.g., Settlement Agreement, *United States v. Nobel Learning Cmtys, Inc.*, 676 F. Supp. 2d 379 (E.D. Pa. 2011), available at [http://www.ada.gov/nobel\\_learning.htm](http://www.ada.gov/nobel_learning.htm); The United States' Investigation Under Title II of the Americans with Disabilities Act with respect to Public School Children with Diabetes in Alabama, D.J. Nos. 204-1-72, 204-1-73, 204-1-74, & 204-2-59 (Dec. 29, 2013) (Dep't of Justice), available at <http://www.ada.gov/alabama-LOF.htm>.

<sup>128</sup> See, e.g., 28 U.S.C. § 517 (2012) (permitting the United States to appear in court "to attend to the interests of the United States"); Statement of Interest of the United States, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. filed Aug. 8, 2013), available at [http://www.justice.gov/crt/about/spl/documents/contracosta\\_soi\\_2-13-14.pdf](http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf).

<sup>129</sup> See, e.g., BUDGET SUBMISSION, *supra* note 122, at 26.

<sup>130</sup> See, e.g., 28 U.S.C. § 2403 (2012) (permitting direct intervention by the United States in any case in which the constitutionality of a statute is at issue); Brief of the United States, *M.A. ex rel E.S v. Newark Pub. Sch.*, No. 2:01-cv-03389-SRC (D.N.J. Dec. 7, 2009), 2009 WL 4799291, available at <http://www.justice.gov/crt/about/edu/documents/newarkbr.pdf>.

<sup>131</sup> See *supra* note 77 and accompanying text; see generally 28 C.F.R. Parts 35–36; see also Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (proposed Jan. 30, 2014) (to be codified at 28 C.F.R. pts. 35 and 36).

with disabilities, sometimes jointly with the Office for Civil Rights in the Department of Education.<sup>132</sup>

For its part, the Appellate Section is responsible for the entire Civil Rights Division's appellate work.<sup>133</sup> In this regard, it handles two kinds of disability-related education cases. It handles all appeals stemming from trial-level work in the Disability Rights Section and Educational Opportunities Section.<sup>134</sup> But it also files amicus briefs (or otherwise seeks to intervene) in appeals filed by private parties that involve significant statutory or constitutional issues related to civil rights statutes on which the United States seeks to take a position.<sup>135</sup> In Fiscal Year 2011, the Appellate Section filed eighty-one briefs or other substantive papers in court, its highest number of filings in the last six fiscal years, although a much smaller number of these were in disability-related cases.<sup>136</sup>

How can advocates engage with these Sections to further their work on behalf of children with disabilities? They may engage on two levels: in policy development and in individual cases.

As to policy development, similar opportunities to those discussed above for OSEP and OCR exist with respect to commenting on proposed regulations and participating in the formulation of guidance.<sup>137</sup> A subscription to the Civil Rights Division's notices in the Federal Register would again be useful.<sup>138</sup>

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<sup>132</sup> See, e.g., Dear Colleague Letter from Jocelyn Samuels, Principal Deputy Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, et al. (June 12, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-504-title-vi.pdf> (governing the participation of students with hepatitis B in medical, dental, nursing, and other health-related programs under institutions' obligations under the ADA, Section 504, and Title VI).

<sup>133</sup> BUDGET SUBMISSION, *supra* note 122, at 8.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 9.

<sup>136</sup> BUDGET SUBMISSION, *supra* note 122, at 21; see also *Appellate Briefs and Opinions, Individuals with Disabilities Education Act*, U.S. DEP'T JUST., [http://www.justice.gov/crt/about/app/briefs\\_dised.php](http://www.justice.gov/crt/about/app/briefs_dised.php) (last visited May 21, 2014) (Appellate Division briefs on the IDEA); *Appellate Briefs and Opinions, Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, U.S. DEP'T JUST., [http://www.justice.gov/crt/about/app/briefs\\_disright.php](http://www.justice.gov/crt/about/app/briefs_disright.php) (last visited May 21, 2014) (Appellate Division briefs on the ADA and Section 504).

<sup>137</sup> See *supra* notes 69–72, 97–100 and accompanying text.

<sup>138</sup> See *supra* note 69 and accompanying text. A subscription to the Department of Justice's notices as a whole is available at *Justice Department*, FED. REG., <https://www.federalregister.gov/agencies/justice-department> (last visited May 21, 2014). To subscribe only to the Civil Rights Division's notices, go to [federalregister.gov](http://federalregister.gov); click

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As to individual cases, one way to attempt to leverage the resources of the Civil Rights Division in an individual case is to file a complaint alleging discrimination on the basis of disability with the Disability Rights Section,<sup>139</sup> the Educational Opportunities Section,<sup>140</sup> or both. The Sections provide little guidance on when to file a complaint with one or the other, but as they frequently coordinate their school-related disability matters, advocates should not feel that the decision to file a complaint with one Section and not the other will be outcome-determinative.

A harder question is when to file a complaint with the Civil Rights Division and when to file a complaint with the Department of Education's OCR, because the Civil Rights Division and OCR have overlapping jurisdiction on almost all matters. There is one key jurisdictional difference: OCR generally requires complaints to be filed within 180 days of the alleged

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on "Search" and then "Advanced Article Search"; in the "Find" field, enter "Civil Rights Division" with quotation marks; in the "Agency" field, enter "Department of Justice" with quotation marks; click "Search"; and then select "Subscribe."

<sup>139</sup> The Disability Rights Section has a complaint form (at <http://www.ada.gov/t2cmpfrm.htm>) and also accepts complaints that do not use the form, as long as the complaints provide the same information (including the complainant's contact information, contact information for the alleged discriminator, a description of the acts of discrimination, and other information to help support the complaint). U.S. DEP'T OF JUSTICE, TITLE II OF THE AMERICANS WITH DISABILITIES ACT SECTION 504 OF THE REHABILITATION ACT OF 1973 DISCRIMINATION COMPLAINT FORM, *available at* <http://www.ada.gov/t2cmpfrm.htm>. There is no time limit on filing a complaint. *See How to File an ADA Complaint with the U.S. Department of Justice*, U.S. DEP'T JUST., [http://www.ada.gov/fact\\_on\\_complaint.htm](http://www.ada.gov/fact_on_complaint.htm) (last visited May 21, 2014). The Disability Rights Section may be reached as follows: [ADA.complaint@usdoj.gov](mailto:ADA.complaint@usdoj.gov); U.S. Department of Justice Civil Rights Division, 950 Pennsylvania Avenue, NW, Disability Rights Section – 1425 NYAV, Washington, D.C. 20530; main section telephone 202-307-0663 (voice and TTY); ADA Information Line: 800-514-0301 (voice) or 800-514-0383 (TTY); Fax: (202) 307-1197.

<sup>140</sup> The Educational Opportunities Section has no complaint form, and it has no time limit on filing. Advocates may submit a complaint by email, telephone, fax, or letter, including contact information for the complainant, a description of the allegations in as much detail as possible, and any other information that might support the allegations, including any relevant documents. *See Information about filing a complaint with the U.S. Department of Justice, Civil Rights Division and the U.S. Department of Education, Office for Civil Rights*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/edu/documents/filecomp.pdf> (last visited May 21, 2014) [hereinafter *Filing Information*]. The Educational Opportunities Section may be reached as follows: [education@usdoj.gov](mailto:education@usdoj.gov); U.S. Department of Justice Civil Rights Division, 950 Pennsylvania Avenue, NW, Educational Opportunities Section, PHB, Washington, D.C. 20530; telephone (202) 514-4092 or 1-877-292-3804 (toll-free); fax (202) 514-8337.



discrimination, while the Civil Rights Division has no time requirement.<sup>141</sup> There is also one clear-cut substantive distinction: allegations against private elementary and secondary schools or other private educational organizations that do not receive federal funds and thus are not subject to OCR's jurisdiction under Section 504 (but are nonetheless covered by Title III of the ADA) should be presented to the Civil Rights Division, not OCR.<sup>142</sup> Other than that, the decision about where to file largely turns on whether "the complaint raises an issue of general public importance," which is the main criterion for the Civil Rights Division's interest.<sup>143</sup> In contrast, OCR investigates every complaint over which it has jurisdiction.<sup>144</sup>

Because the Civil Rights Division will alert the complainant of its decision not to investigate a complaint and may refer the complaint to OCR<sup>145</sup> (where the complaint will be considered timely if the complaint was originally filed with the Civil Rights Division within OCR's 180-day requirement<sup>146</sup>), initiating a complaint in the Civil Rights Division would not be a consequential mistake in the mine run of cases, although the mine run of cases are more likely to receive a substantive outcome through OCR's process than through that of the Civil Rights Division. Relatedly, particularly groundbreaking complaints originally filed with OCR may end up being shared with the Civil Rights Division,<sup>147</sup> so little may be lost by filing originally with OCR.

Beyond filing complaints, an alternative way advocates may seek involvement of the Disability Rights Section and Educational Opportunities Section is by requesting their participation in an already ongoing case in a trial court. This alternative would permit the private attorney to retain control over the matter (as opposed to the consequences of filing a complaint, after which the Sections would proceed in the name of the United States).<sup>148</sup> The

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<sup>141</sup> See *Filing Information*, *supra* note 140, at 3, 7.

<sup>142</sup> See *id.* at 9.

<sup>143</sup> See *id.* at 4; see also *How to File an ADA Complaint*, *supra* note 139; see also LANDSBERG, *supra* note 22, at 5 (describing the Civil Rights Division's focus on "cases of public importance, leaving to private litigation and administrative enforcement individual complaints that do not raise important legal or policy issues").

<sup>144</sup> See *Filing Information*, *supra* note 140, at 8.

<sup>145</sup> See *id.* at 4; see also *How to File an ADA Complaint*, *supra* note 139.

<sup>146</sup> See *OCR Case Processing Manual*, *supra* note 89, at §§ 106, 107.

<sup>147</sup> See, e.g., Complaint filed by Asaf Orr, Student v. Arcadia Unified Sch. Dist., Oct. 10, 2011, available at [http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia\\_Redacted\\_OCR\\_Complaint\\_07.24.2013.pdf](http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Redacted_OCR_Complaint_07.24.2013.pdf); see *supra* note 111 for discussion of case's importance and joint resolution between OCR and the Civil Rights Division.

<sup>148</sup> See *Filing Information*, *supra* note 140, at 4.

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Sections do not formally indicate their selection criteria for those cases in which they get involved, but again, the criterion of "general public importance" remains applicable.<sup>149</sup> A review of recent cases suggests that cases related to the constitutionality of civil rights laws, cases that address contested issues of statutory interpretation or other matters of doctrinal uncertainty, and cases that might set an important example nationwide are of particular interest.<sup>150</sup>

Advocates may seek the involvement of the Appellate Section once a case has been decided at the trial level in order to request its participation as an amicus. As the Section explains on its website, it "welcomes and encourages" such requests, but not every case is a candidate; "[t]ypically, a serious candidate for *amicus curiae* participation will present one or more important legal questions involving the interpretation or application of a statute that the Civil Rights Division enforces."<sup>151</sup> It is important to give the Appellate Section a long time to make the decision whether to participate as amicus. When making its decision, the Appellate Section must coordinate with other offices (in the context of disability-related education cases, not only with the Disability Rights and Educational Opportunities Sections but also potentially with OSEP and OCR, and the Solicitor General's Office as well), which can take time.<sup>152</sup> Moreover, unless the court grants an extension, an amicus brief is typically due within seven days of the requesting advocate's brief.<sup>153</sup> The Appellate Section therefore asks that requests to participate be made no later than forty-five days from the time the requesting advocate's brief would be due.<sup>154</sup> To request amicus participation even before filing the notice of appeal would not be too soon.<sup>155</sup>

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<sup>149</sup> See *supra* note 143 and accompanying text.

<sup>150</sup> See *Educational Opportunities Cases*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/edu/documents/classlist.php#disab> (last visited May 21, 2014); *ADA Enforcement*, U.S. DEP'T JUST., [http://www.ada.gov/enforce\\_current.htm](http://www.ada.gov/enforce_current.htm) (last visited May 21, 2014); see also LANDSBERG, *supra* note 22, at 121–25 (describing the process of "selecting appropriate cases").

<sup>151</sup> *Amicus Curiae Program*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/app/curiae.php> (last visited May 21, 2014); see also LANDSBERG, *supra* note 22, at 121–25.

<sup>152</sup> See *Amicus Curiae Program*, *supra* note 151.

<sup>153</sup> See FED. R. APP. P. 29(e).

<sup>154</sup> *Amicus Curiae Program*, *supra* note 151.

<sup>155</sup> See FED. R. APP. P. 4.

## V. CONCLUSION

From the systemic to the individual, from policy to administrative investigations to litigation, federal agencies offer a number of avenues that advocates for children with disabilities can usefully pursue. Increased efforts to use these avenues can have a number of related benefits. First, of course, advocates may actually achieve the specific change they desire in the first place—resolving an individual complaint, making a particular policy change, improving the administration of the IDEA in their state. Beyond that obvious point, however, lie two broader potential benefits.

In OSEP, increased involvement of advocates for children with disabilities would help ensure that their voices are heard directly, rather than being filtered through the voices of the school systems and state agencies.<sup>156</sup> School systems and state agencies are full of professionals committed to the success of their students with disabilities, to be sure. But their interests and positions sometimes differ from the interests and positions of advocates for these students, who have no affiliation with the schools and agencies.<sup>157</sup>

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<sup>156</sup> Participation in policy decisions is important in OCR and the Civil Rights Division, too, but those offices have enforcement mindsets, so they are in different position from OSEP's grant implementers, who often see their primary job as working with state and local school systems. See Pasachoff, *Funding Cut-Off*, *supra* note 23 (manuscript at 48–49) (describing potential for different mindsets in grant-making offices than in enforcement offices). Still, research suggests that early participation in policymaking decisions—while the policies are still in the process of initial articulation—can be especially effective. See generally Keith Naughton et al., *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258 (2009). This research underscores the importance of advocates weighing in as these enforcement offices are considering the promulgation of guidance documents.

<sup>157</sup> The comments submitted in response to a recent Notice of Proposed Rulemaking, 78 Fed. Reg. 57324 (Sept. 18, 2013), illustrate this point. My review of the 306 comments submitted to OSEP for consideration suggests that approximately 75% of the comments were from school administrators and their professional organizations and generally opposed the proposed rule, while approximately 20% of the comments were from advocates for children with disabilities and were generally in support of the proposed rule. There was not sufficient identifying information in the remaining comments for me to identify their source. See Comments on *Federal Register Document #2013-28667*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketBrowser; dct=PS; rpp=100; so=DESC; sb=docId; po=0; D=ED-2012-OSERS-0020> (last visited May 21, 2014); see also ITKONEN, *supra* note 11, at 87–119 (describing different ways disability advocates and educator/government associations frame special education issues before Congress).

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Research on the rulemaking process suggests that participation matters<sup>158</sup>—indeed, that the mere volume of participation by industry as compared to public interest groups has an effect on the stringency (or lack thereof) of regulation.<sup>159</sup> While claims of industry capture are frequently overstated,<sup>160</sup> it is generally accepted that an agency that has a vibrant set of competing voices is less likely to consistently err in favor of deference to the industry it is regulating.<sup>161</sup> Ongoing participation by advocates for children with disabilities in OSEP's policy work may thus help shape the instincts of policymaking officials more generally to consider the perspective of children with disabilities as a matter of course.

Beyond that point, increased involvement of advocates for children with disabilities in OCR and the Civil Rights Division may help lay the groundwork for an increased enforcement budget. If more complaints are filed, or more meritorious cases are presented for agency involvement, the agencies may over time be able to make a stronger appropriations case that more staff are needed.<sup>162</sup> Increased staff would make civil rights enforcement (and therefore deterrence) stronger overall.

To be sure, agency officials' receptivity to advocates' efforts to engage with them may vary by administration as presidential priorities shift.<sup>163</sup> Still, the current administration seems quite receptive to efforts to engage federal

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<sup>158</sup> See, e.g., KERWIN, *supra* note 70, at 210–14; Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RES. 336, 344 (2007); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 117 (2005).

<sup>159</sup> See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135–38 (2006).

<sup>160</sup> See, e.g., Daniel Carpenter & David A. Moss, *Introduction to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1*, 1–22 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>161</sup> I discuss this phenomenon and the value of competing interests within OSEP in Pasachoff, *supra* note 4, at 1463 & n. 255.

<sup>162</sup> See generally BUDGET SUBMISSION, *supra* note 122 (justifying budget request by discussing workload); see also LANDSBERG, *supra* note 22, at 102–03 (discussing Civil Rights Division's internal budget allocation as reflecting priorities); Rabkin, *supra* note 20, at 338 (noting that OCR staff tripled between 1970 and 1977 as budget grew by six times); but see MINTZ, *supra* note 20, at 194–95 (discussing perpetual underfunding of EPA's enforcement efforts).

<sup>163</sup> See, e.g., LANDSBERG, *supra* note 22, at 102, 157–58 (describing possibilities for changed priorities in the Civil Rights Division under different presidential administrations); Vladeck, *supra* note 5, at 282–83 (describing Solicitor General's shift in views of pending IDEA case raising federalism concerns as administrations changed).

agencies in action,<sup>164</sup> and the possibility of a future in which agency officials are less receptive than they are now does not mean that efforts to engage the agencies now are without value.<sup>165</sup> Moreover, when considering how to evaluate the potential for federal agencies to complement ongoing efforts in private enforcement of special education law, it is important to remember that private enforcement also has its limitations, both doctrinally<sup>166</sup> and structurally.<sup>167</sup> In any event, special education is an unusual social policy issue that typically garners support both from the left and the right, making it less subject to large variance across administrations.<sup>168</sup>

Congress surely has work to do in reforming various aspects of the special education system and the laws protecting the rights of children with disabilities more generally. But in the meantime, advocates should take an expansive view of the enforcement system and seek to leverage what the federal agencies have to offer.

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<sup>164</sup> See *supra* note 15 and accompanying text.

<sup>165</sup> See, e.g., Pasachoff, *Funding Cut-Off*, *supra* note 23 (manuscript at 52).

<sup>166</sup> See *supra* notes 6–7 and accompanying text.

<sup>167</sup> See, e.g., Pasachoff, *supra* note 4, at 1435–50, 1488 (identifying features of the IDEA's design that lead to enforcement disparities in favor of families with more financial resources); Pasachoff, *Funding Cut-Off*, *supra* note 23 (manuscript at 52) (discussing geographical variation in the distribution of attorneys, lack of information about violations, and reluctance to seek redress against violators as potential limitations of private enforcement more generally).

<sup>168</sup> See, e.g., R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 150 (1994) (disabilities "fall upon rich and poor, black and white, and residents of inner cities, suburbs, and farm districts—even members of Congress and their families," and thus special education is an issue in which "normal political cleavages [are] nearly irrelevant"); Pasachoff, *supra* note 4, at 1482–83 (discussing bipartisan interest in special education funding).

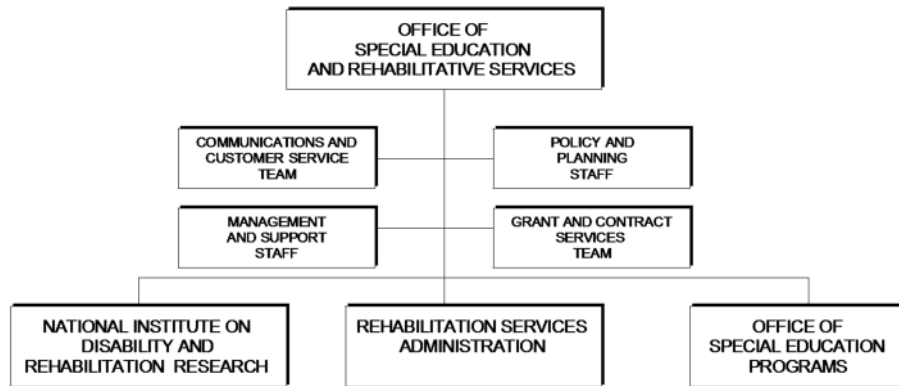
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EXHIBIT 1—ORGANIZATIONAL CHART FOR THE DEPARTMENT OF EDUCATION (ED)



SOURCE: *Offices: Coordinating Structure*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/or/index.html> (last modified Jan. 30, 2014).

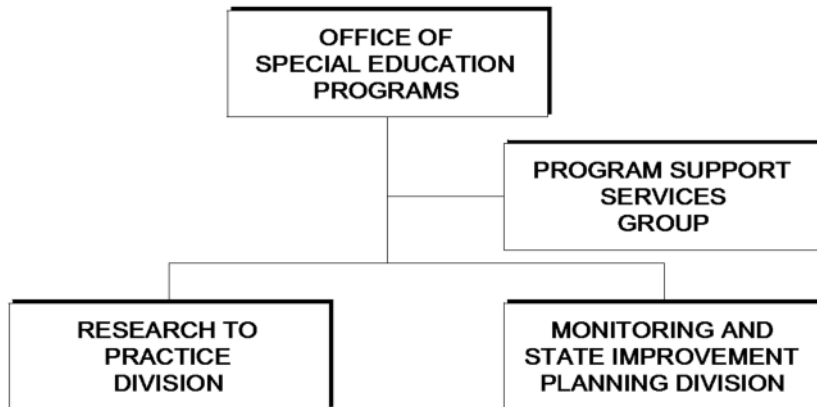
EXHIBIT 2—ORGANIZATIONAL CHART FOR THE OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES (OSERS)



SOURCE: *Offices: U.S. Department of Education Principal Office Functional Statements, Office of Special Education and Rehabilitative Services*, U.S. DEPT EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/osers/home.html](http://www2.ed.gov/about/offices/list/om/fs_po/osers/home.html) (last modified May 22, 2014).

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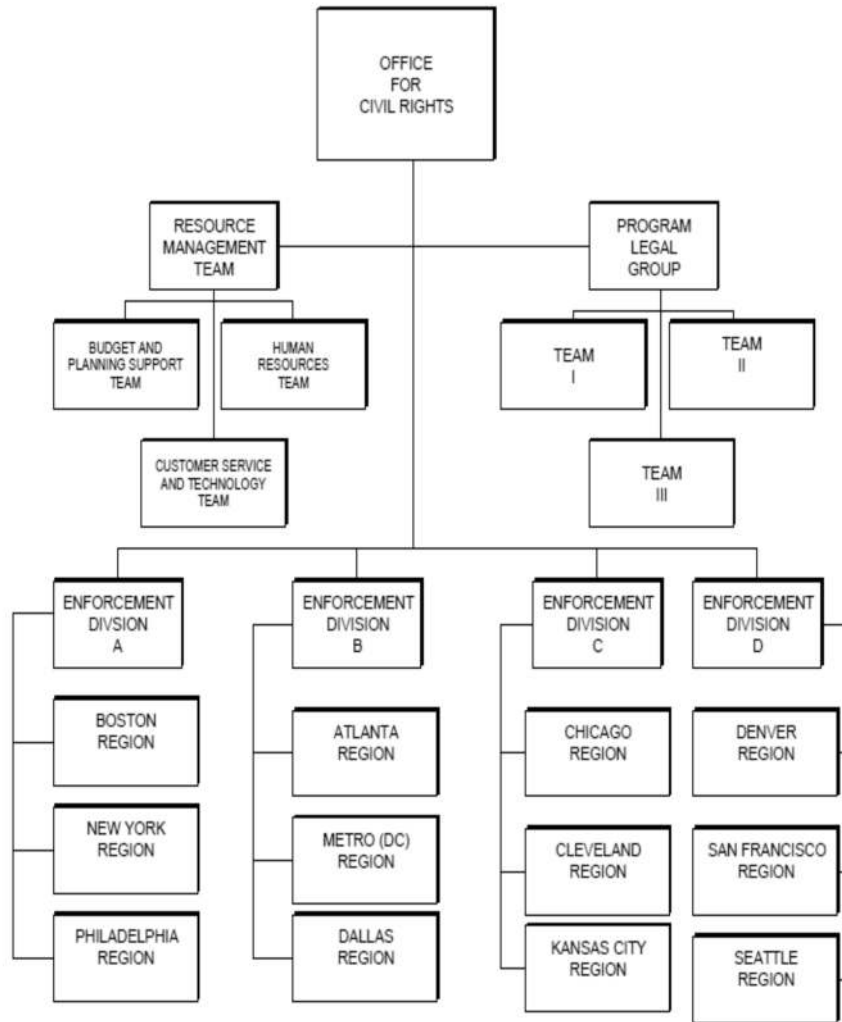
**EXHIBIT 3—ORGANIZATIONAL CHART FOR THE OFFICE OF SPECIAL  
EDUCATION PROGRAMS (OSEP)**



SOURCE: *Offices: U.S. Department of Education Principal Office Functional Statements, Office of Special Education and Rehabilitative Services*, U.S. DEPT EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/osers/home.html](http://www2.ed.gov/about/offices/list/om/fs_po/osers/home.html) (last modified May 22, 2014).



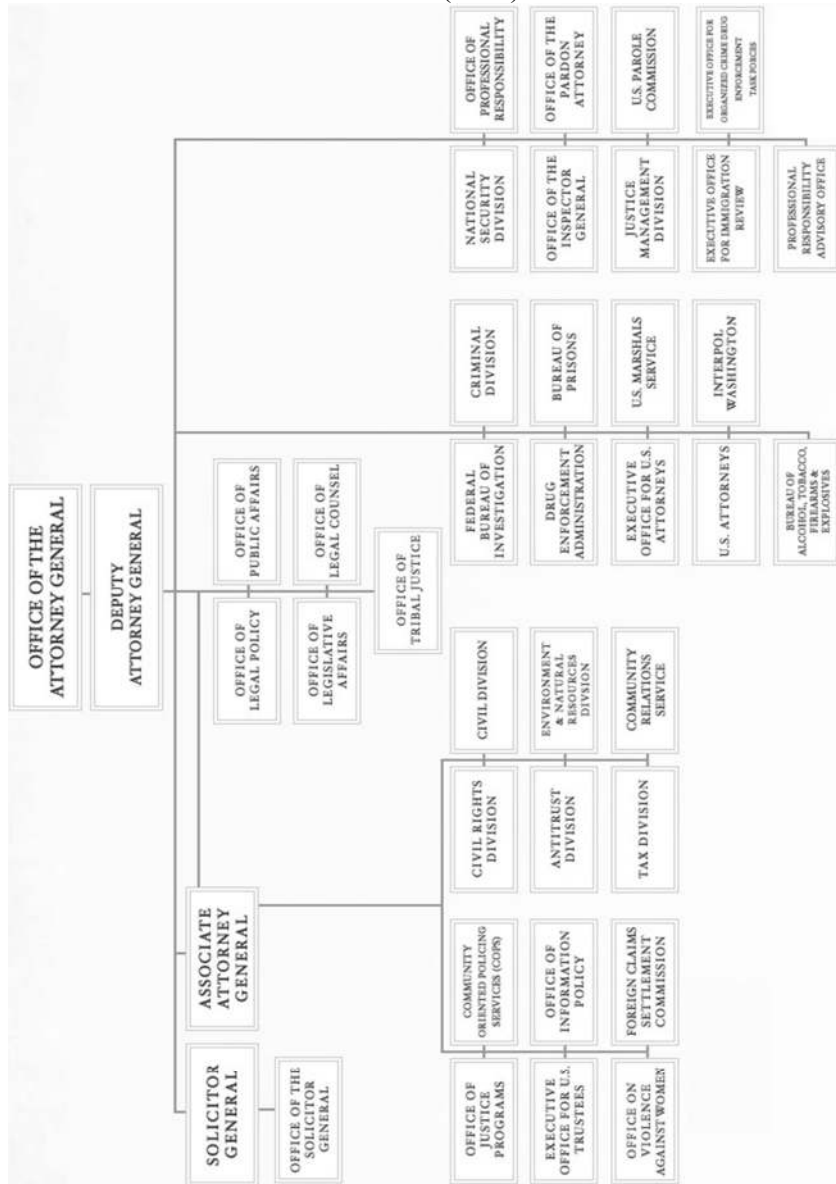
EXHIBIT 4—ORGANIZATIONAL CHART FOR THE OFFICE OF CIVIL RIGHTS (OCR)



SOURCE: *Offices: U.S. Department of Education Principal Office Functional Statements, Office for Civil Rights*, U.S. DEPT EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/ocr/orgchart.html](http://www2.ed.gov/about/offices/list/om/fs_po/ocr/orgchart.html) (last modified Aug. 22, 2005).

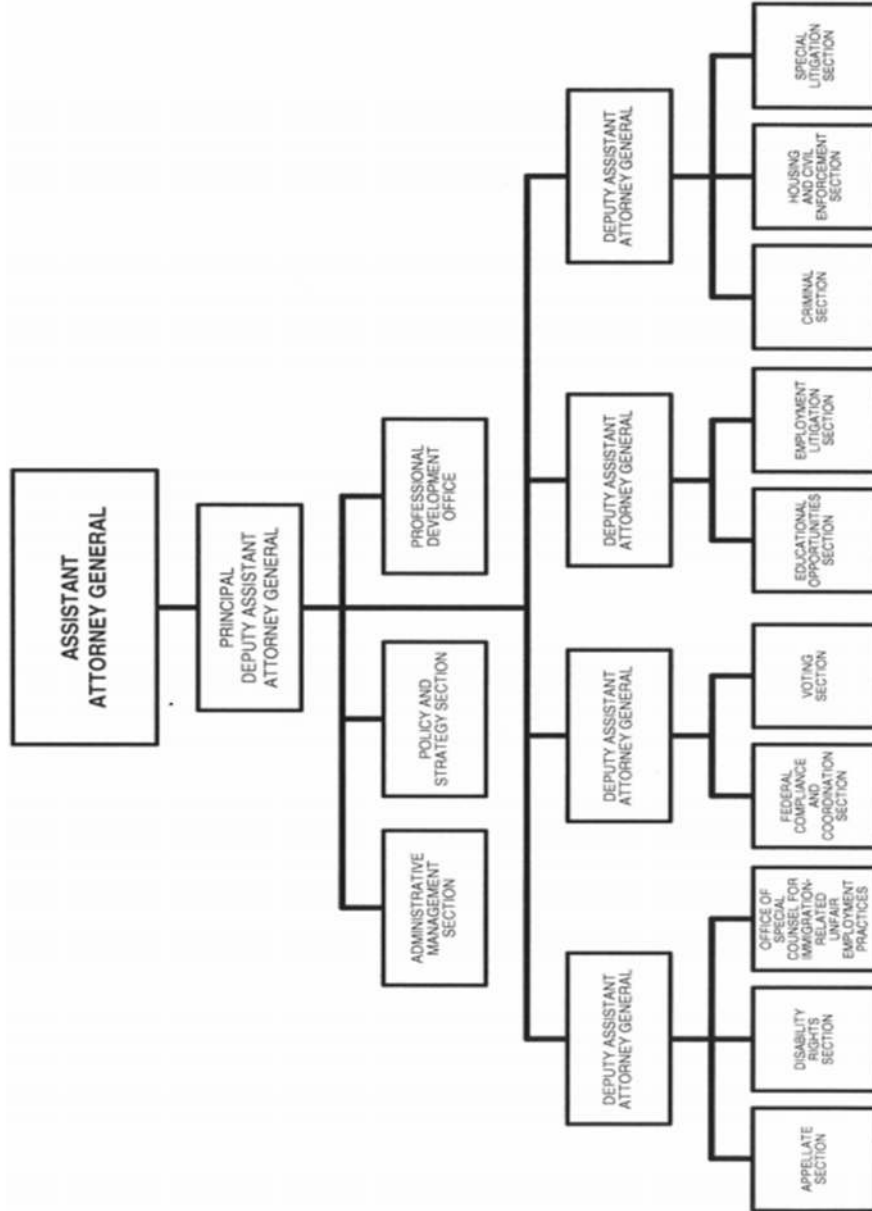
ADVOCATES, FEDERAL AGENCIES, AND THE EDUCATION

EXHIBIT 5—ORGANIZATIONAL CHART FOR THE DEPARTMENT OF JUSTICE (DOJ)



SOURCE: *Department of Justice Agencies*, U.S. DEP'T JUST., <http://www.justice.gov/agencies/index-org.html> (last modified Nov. 26, 2012).

EXHIBIT 6—ORGANIZATIONAL CHART FOR THE CIVIL RIGHTS DIVISION



SOURCE: BUDGET SUBMISSION, *supra* note 122, Ex. A.