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Disproportionality Regulations in IDEA and Why They Are Not Effective for Reducing Bias

It has long been recognized that minority students are over-identified as needing special education and, once identified, over-removed from the regular education classroom.

By **Heather J. Hulit** | September 15, 2020



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"The last thing we need is another Black student in special education."

These are the words of a Black assistant principal, at a mostly Black school, to the parent of a first-grader demonstrating signs of a reading disability.

It has long been recognized that minority students are over-identified ([//www.gao.gov/assets/660/652437.pdf](https://www.gao.gov/assets/660/652437.pdf)) as needing special education and, once identified, over-removed from the regular education classroom. The Individuals with Disabilities Education Act (IDEA) has made attempts to address this by requiring states to monitor their districts for disproportionality, create policies to prevent disproportionality and the inappropriate identification of students for special education, and redirect funds to services for students at-risk for being identified as needing special education. In response to a report ([//www.gao.gov/assets/660/652437.pdf](https://www.gao.gov/assets/660/652437.pdf)) showing that states were masking the true magnitude of racial and ethnic overrepresentation in special education, the Obama administration developed new regulations (<https://www.ed.gov/news/press-releases/fact-sheet-equity-idea>) which, among other things, required states to use a standard methodology to determine disproportionality and

provided *guidance* on how states should define "significant disproportionality."

Despite these changes, over-representation of minority students in special education persists. But is disproportionality the real problem?

The Long Shadow of Systematic Discrimination

Black children in the United States are more likely than their white peers (<https://www.ajmc.com/focus-of-the-week/princeton-study-being-black-doesnt-cause-asthma-the-neighborhood-does>) to be diagnosed with asthma. Is it because pediatricians are exercising bias? Is it because Black children are genetically more prone to the condition? No, it is because of historically racist housing practices that expose Black children to things like mold and pollution from highways and waste at a higher rate than their white peers. It is also because of the fact that Black women are 2.5% more likely (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5893270/#:~:text=Studies%20have%20shown%20that%20the>) than white women to have pre-term birth—a major risk factor for asthma—due to disparate access to medical care and bias in medical treatment. Two researchers, Paul Morgan and George Farkas posit that, just like Black children in the United States have a greater chance of being diagnosed with asthma due to their increased exposure to the risk factors which cause asthma, Black children in the United States have a greater chance of having learning disabilities (<https://journals.sagepub.com/doi/abs/10.1177/0014402916664042>) due to their increased risks for lead exposure, low birth-weight, high blood pressure, among other risk factors related to their greater likelihood of growing up in poverty.

This is not to say that *every* Black student will require more support than their peers. However, we have to acknowledge and address that, as a nation, we expose Black children to a multitude of risk factors related to historic racism and ongoing systemic discrimination that puts them at greater risks for receiving special education. Without parallel federal, state, and local policies to address these inequities, IDEA's requirements will be ineffective in resolving the disproportionality problem.

Bias Runs Both Ways

Arguably, the IDEA requirements respond to the racial misidentification of students. But bias goes both ways, and studies show that the racial make-up of the school has a lot to do with which way the bias will swing.

Even while data shows minority students to be over-represented in special education, the data also tells us that Black children are significantly *less* likely to receive special education compared to their similarly situated white peers—i.e., their white peers who are demonstrating the same red flags. Morgan and Farkus looked at 11 southern states and, while they found that Black students are 44% more likely than white students to receive special education services, when they analyzed children who received the same test scores, white children were *more* likely to receive a disability diagnosis than their Black peers. Another study (<https://www.nber.org/papers/w25829>), comparing the educational treatment of children born with low-birth weight in Florida, found that Black and Hispanic students were identified with a disability at a *lower rate* than their similarly situated white peers. This study further found that in schools of mostly white students, Black students were over-identified as needing special education. Alternatively, in schools with a high number of minority students, Black students were *under*-identified. Keeping this point in mind, consider that, as of 2016, 40% of Black and Hispanic students attended racially isolated (https://nces.ed.gov/programs/digest/d18/tables/dt18_216.50.asp?current=yes) schools where they represent 90% of the student population.

If we want to address bias, rather than comparing the total number of minority students in special education to the number of minority students in the district, we should focus on how students of different races and ethnicities are treated when they present with similar data. This is referred to as the differential treatment standard and it is the standard by which the Office of Civil Rights (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>) evaluates allegations of racial discrimination. Multiple studies also suggest that a universal screening model vs. a teacher referral-only model can be useful to avoid the role that bias plays in referrals to special education.

Addressing Bias

If we want to address bias, then *all* students harmed by bias must have a remedy.

At my practice we often meet students who have been written off by their schools as “bad” rather than evaluated for a disability that might contribute to their behavior. Their records will contain notes such as “student lacks motivation” or “student needs to try harder.” These students will often have disruptive behaviors in the classroom. On the other hand, there are students who fall behind academically for reasons unrelated to a disability—conditions of the school environment, poor instruction, bullying, stressors outside of school, etc. A teacher’s view of whether a student’s classroom behavior and performance is disability-related is highly subject to bias (<https://equality.org/race-poverty-and-disproportionate-representation-of-minorities-in-special-education/>).

When schools fail to identify students who need special education services, students have a remedy under the IDEA—they can file for a “due process” hearing and allege a “child-find” violation, i.e., they need special education services. However, students who *do not* need special education services, and are misidentified as having a disability, may not have a such a remedy under the IDEA. At least in the U.S. Court of Appeals for the Third Circuit. In 2013, the Third Circuit considered a case where several parents of Black students in the Lower Merion School District alleged that their children were misidentified as needing special education, to their detriment—*Blunt v. Lower Merion School District*. ([//casetext.com/case/blunt-v-lower-merion-sch-dist](http://casetext.com/case/blunt-v-lower-merion-sch-dist)) They brought their case under Section 504, which prohibits discrimination against individuals with perceived or actual disabilities, as well as under Title VI, which prohibits racial discrimination by entities that receive federal financial assistance. For the five years at issue, the district’s student body was 81-84% white and 7.7- 8.6% Black. For those same years, Black students made up 12.7-14.5% of the students receiving special education. At the same time, for five years, no Black students were in college preparatory or advanced placements (AP) classes. Despite this, and evidence that a school board member had expressed concern that redistricting could increase the population of minority students in one of its high schools, the majority granted the district’s motion for summary judgement ([//www.berneylaw.com/wp-content/uploads/2017/10/Overrepresentation-of-Minorities-in-Special-Education-The-Legal-Intelligencer.pdf](http://www.berneylaw.com/wp-content/uploads/2017/10/Overrepresentation-of-Minorities-in-Special-Education-The-Legal-Intelligencer.pdf)).

Since bias works to both over-identify minority students and under-identify them, there needs to be an available legal recourse to address both scenarios. Parents are typically not educational experts. When presented with a school evaluation that says their child needs services, reasonable parents often agree with the school. Like one of the plaintiffs in *Blunt*, parents may not discover that the disability finding is wrong until years later. For the students in *Blunt*, being identified as needing special education meant being in classes with instruction below their grade and ability level, not having the opportunity for educational advancement and being segregated from their peers.

One Aspect of a Broader Problem

I contend that the disproportionality we see in special education is not *the* problem so much as it is a symptom of many other problems in and outside of the education system. At minimum, we have to recognize and address the racial inequities that cause some children to be at greater risks than others for needing special education. We cannot close the gap in the need for special education without addressing inequities in housing, health care, pollution exposure, policing, etc., which not only elevate minority students’ risks for learning disabilities but also places them at greater risk for being misidentified for special education and overlooked for needing special education. In brief, we must address systemic racism. On the other side of the problem, if we are really going to target the over-identification of minority students, we need to provide legal remedies for those students who suffer harm as a result of misidentification. Perhaps a legal cause of action for misidentified students would persuade districts to implement better practices across the board, such as implicit bias training, a blind review process of all special education referrals, and universal screening for special needs.

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