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The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims

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THE FUTURE OF IDEA:
MONITORING DISPROPORTIONATE
REPRESENTATION OF MINORITY
STUDENTS IN SPECIAL EDUCATION
AND INTENTIONAL DISCRIMINATION
CLAIMS

Natasha M. Strassfeld[†]

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INTRODUCTION

Following the progress made by the civil rights movement to secure educational opportunities for racial and ethnic minority students in landmark decisions such as *Brown v. Board of Education*,¹ civil rights advocates and policymakers were able to use prior successful legal strategies and challenges to secure educational rights for students with disabilities.² Several of the earliest legal challenges to school segregation

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1. 347 U.S. 483 (1954).

2. *Id.* Many school systems that were already under a court’s desegregation order were more likely to be found to have discriminatory placement patterns in their special education programs. For instance, in *Lee v. Macon County Board of Education*—a lawsuit filed by civil rights attorney Fred Gray

involved separate classrooms and instruction for students with a disability or the disproportionate representation of racial and ethnic minority students with disabilities within the most restrictive special education settings in public schools.³ In the decades following the

against one school board—parents (on behalf of their children) sought an injunction to prevent the Macon County School Board from continuing to run schools segregated by race. *See Lee v. Macon Cty. Bd. of Educ.*, 221 F. Supp. 297, 297–98 (M.D. Ala. 1963) (issuing an injunction against maintaining a segregated school system and the race-based assignment of teachers and school employees). Eventually, the case expanded to include the Alabama State Board of Education and over one hundred local school systems. *See Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 745 (M.D. Ala. 1964) (expanding the case to the Alabama State Board of Education); *Lee v. Lee Cty. Bd. of Educ.*, 476 F. Supp. 2d 1356, 1359 (M.D. Ala. 2007) (granting state sought declaration that its schools had achieved unitary status and compliance with the court’s earlier orders regarding elimination of the vestiges of de jure segregation as it related to special education in its schools). In 1997, Judge Myron Thompson, in the Middle District of Alabama, called on the parties in twelve of these cases to negotiate a settlement of the suits that would bring the districts to unitary status, a process whereby the district eliminates the effects of any past segregation to the most practical extent possible. *Lee*, 476 F. Supp. 2d at 1358–59. Within the course of the discovery, plaintiff parties found that, in addition to segregation by race, there was also evidence of overrepresentation of African American students in the “mentally retarded” disability category and underrepresentation of African American students in the “learning disabled” and “gifted” disability categories. *Lee v. Butler Cty. Bd. of Educ.*, No. CIV.A.70-T-3099-N, 2000 WL 33680483, at *2 (M.D. Ala. Aug. 30, 2000).

During 1997 and 1998, all parties initially met and engaged in discovery and negotiated consent decrees to address, among other things, issues regarding disproportionate representation. *Id.* at *1–2. Four major components of the decree were agreed upon. First, changes to policies and procedures within the special education placement and related services process (e.g., pre-referral, referral, evaluation, and identification stages) and changes to the eligibility criteria must be addressed by each Local Educational Agency (LEA). *Id.* at *2–4. Second, there must be extensive teacher training regarding etiology and characteristics by specific disability type. *Id.* at *3. Third, funding for general education curriculum must address literacy issues and services for at-risk students. *Id.* at *5. Finally, there must be extensive state monitoring of placement and identification practices set forth by each LEA. *Id.* at *4. In 2000, the parties resolved to enter into a consent decree to resolve racial disproportionality in special education placements, and a continuing review of progress continued until 2006. *See Lee v. Lee Cty. Bd. of Educ.*, No. 3:70cv845-MHT, 2006 WL 1041994, at *1 (M.D. Ala. Apr. 20, 2006) (approving the consent decree). Current federal statutory special education disproportionality provisions closely resemble this decree.

3. The Individuals with Disabilities Education Act (IDEA) outlines a range of special education settings and placements for students with disabilities that exist on a continuum. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2005) (codified as 20 U.S.C. 1400 et seq.). Under IDEA 2004, eligible students with disabilities in public schools must be educated, to the maximum extent appropriate, with children who do

Brown decision, racial and ethnic minority students gained access to integrated classrooms. Over time, however, student placement by factors such as ability-level grouping, disability category, and academic achievement produced patterns of internal resegregation for racial and ethnic minority students in desegregated schools.⁴ Even though students with disabilities and students without disabilities share a vibrant civil rights legacy in regards to securing educational rights and opportunities, the achievement gap between students with and without disabilities persists.⁵ Moreover, decades of research affirms that racial and ethnic minority students have often been reported to be both under- and over-identified for special education and related services.⁶

Disproportionality is a complex phenomenon, but it can best be defined as the overrepresentation or underrepresentation of a racial or ethnic minority group in special education relative to the presence of this group within the overall student population.⁷ According to a 2016 report issued by the National Center for Education Statistics, approximately 13.5% (6.5 million) of all students in K-12 public schools receive special education and related services.⁸ The percentage of students

not have disabilities. 20 U.S.C. § 1412(a)(5)(A) (Supp. IV 2005). Students with disabilities can only be educated in a more restrictive setting when the severity of the student's disability sufficiently impairs the student's ability to be in a general education classroom. *Id.*

4. ERICA FRANKENBERG, CHUNGMEI LEE, & GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003).
5. Janette Kettmann Klingner et al., *Outcomes for Students with and without Learning Disabilities in Inclusive Classrooms*, 13 LEARNING DISABILITIES RES. & PRAC. 153 (1998).
6. Paul L. Morgan et al., *Are Black Children Disproportionately Overrepresented in Special Education? A Best-Evidence Synthesis*, 83 EXCEPTIONAL CHILD. 181 (2017); 34 C.F.R. § 300-99 (2016); Dalun Zhang et al., *Minority Representation in Special Education: 5-Year Trends*, 23 J. OF CHILD AND FAM. STUD. 118, 123 (2014).
7. See JULIE M. BOLLMER ET AL., IDEA DATA CTR., METHODS FOR ASSESSING RACIAL/ETHNIC DISPROPORTIONALITY IN SPECIAL EDUCATION: A TECHNICAL ASSISTANCE GUIDE (REVISED) (2014) (providing technical assistance and interpretation of disproportionality methodology). For purposes of this discussion, the terms “disproportionality” or “disproportionate representation” are synonymous. The terms “under-representation” and “over-representation” are specifically used within this discussion to designate a placement at either end of the spectrum. The term “significant disproportionality” is used solely in relation to regulatory provisions within the Individuals with Disability Education Act.
8. NAT'L CTR. FOR EDUC. STATS., CHILDREN AND YOUTH WITH DISABILITIES 1 (2016), https://nces.ed.gov/programs/coe/pdf/coe_cggs.pdf [<https://perma.cc/K8SH-SJ2E>].

served under the Individuals with Disabilities Education Act (IDEA)⁹ is highest for American Indian/Alaska Native students (seventeen percent), followed by African American/Black students (fifteen percent), White/Caucasian students (thirteen percent), students of two or more races (twelve percent), Hispanic students (twelve percent), Pacific Islander students (eleven percent), and Asian students (six percent).¹⁰

Studies that have examined disproportionate representation in special education have identified various factors to explain the presence of disproportionate representation including teachers' race and ethnicity bias, school-level characteristics such as student population size, rural/urban school district classification, or student- and parent-level characteristics such as family-level income, parental education attainment, or disability category of the student.¹¹ However, studies have had inconclusive or contradictory findings as to which of these factors predominately account for disproportionality within a district.¹² A criticism of studies in this area is that some studies are only correlational in nature or have not adequately addressed causal factors such as discriminatory practices, procedures, or racial, ethnic, and gender bias in the referral and evaluation process.¹³ Because of the uncertainty regarding the underlying causal factors for disproportionate representation within special education, federal law has required that local educational agencies (LEAs) monitor, report, and identify ways to address disproportionate representation of racial and ethnic minority students in special education.¹⁴

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9. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2012).
 10. NAT'L CTR. FOR EDUC. STATS., *supra* note 8, at 2.
 11. *See generally* John L. Hosp & Daniel J. Reschly, *Disproportionate Representation of Minority Students in Special Education: Academic, Demographic, and Economic Predictors*, 70 *EXCEPTIONAL CHILD*. 185, 190 (2004) (examining representation rates of racial and ethnic minority students in special education using district-level academic, demographic, and economic predictor variables); Russell J. Skiba et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 *EXCEPTIONAL CHILD*. 264 (2008) (offering a history of disproportionate representation in special education and providing recommendations based on racial and ethnic disparities found within special education practices).
 12. *See, e.g.*, Skiba et al., *supra* note 11, at 264 (stating that “a number of factors may contribute to disproportionality”); Amanda L. Sullivan & Aydin Bal, *Disproportionality in Special Education: Effects of Individuals and School Variables on Disability Risk*, 79 *EXCEPTIONAL CHILD*. 475 (2013) (finding that a student's gender, race, socioeconomic status, and number of suspensions are the most reliable predictors of disability identification).
 13. Morgan et al., *supra* note 6.
 14. 20 U.S.C. § 1418(d)(1) (Supp. IV 2005).

Even with monitoring and enforcement provisions in place, there are concerns that states fail to adequately monitor and identify the disproportionate representation of racial and ethnic minority students in special education. In 2013, the U.S. Government Accountability Office issued a report on racial and ethnic overrepresentation in special education in U.S. public schools.¹⁵ The report examined the characteristics and extent to which LEAs provide coordinated early intervening services (CEIs) when overrepresentation is found, how states determine which LEAs are required to provide CEIs, the types of CEIs provided, and what constituted oversight by the State Department of Education.¹⁶ The report found that, even though overrepresentation is consistently cited as an education practice concern by education researchers, most states actually do not identify problems in their districts regarding over-identification of minority students in special education.¹⁷ The report concluded that some of the examined states did have some instances of district-level and state-level overrepresentation within the oversight process.¹⁸ However, a lack of uniformity across states' disproportionality monitoring and measures made it more difficult to make state comparisons or interpret findings of disproportionate representation.¹⁹

In 2014, the Department of Education submitted a Request for Information to address significant disproportionality²⁰ under section 618(d) of IDEA, which included a specific request to the public to submit comments for recommendations for how to best address significant disproportionality based on race and ethnicity in the identification of children for special education, placements, and disciplinary actions.²¹ After an impassioned public comment period, the final Department of

15. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION (2013).

16. *Id.* at 1–3.

17. *Id.* at 7.

18. *Id.* at 21.

19. *Id.* at 18. The GAO report found that, of the approximately 15,000 school districts nationwide that received IDEA funding in SY 2010–2011, states only required 356 (2.4%) to allocate funds towards early intervening services due to significant disproportionality. *Id.* at 7.

20. Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals With Disabilities Act (IDEA), 79 Fed. Reg. 35154 (June 19, 2014).

21. *Id.*

Education regulations to guide states and LEAs regarding special education practices were released in December 2016.²²

These new and revised regulations address the effects of disproportionate identification, both over- and under-identification, of racial or ethnic minority students who receive special education and related services and are intended to promote equity within IDEA enforcement.²³ The regulations are further intended to increase state accountability for the effects, if any, of being placed in more restrictive environments or in settings that lack academic rigor.²⁴ Specifically, the new regulations under IDEA require that states and LEAs take steps to determine the presence of significant disproportionality, and to address and to remedy disproportionate placement, if found.²⁵ The regulations also establish a standard methodology that states must use to determine whether significant disproportionality occurred within the state and in LEAs. In addition, each state must now address significant disproportionality by incidence, duration, and type of disciplinary action (including suspensions and expulsions).²⁶ Finally, states must clarify their existing requirements for the review and revision of relevant policies, practices, and procedures when significant disproportionality is found. LEAs must then identify and correct the factors that contributed to significant disproportionality via comprehensive CEIs.²⁷

While the revised regulations aim to provide greater uniformity for states on the reporting of both over- and under-identification of students with disabilities by race and ethnicity, the systemic identification of students with disabilities into special education and related services by race and ethnicity must be examined not only as a policy-based issue, but also as a legal concern for parents, school districts, and states. That is, even though states are, increasingly, under greater pressure to identify and address significant disproportionality in the placement of

22. 34 C.F.R. §§ 300–99 (2016).

23. Assistance to States for the Education of Children with Disabilities; Pre-school Grants for Children with Disabilities, 81 Fed. Reg. 92,376 (Dec. 19, 2016) (to be codified at 34 C.F.R. pt. 300).

24. *Id.*

25. The final regulations became effective on January 18, 2017. *Id.*

26. The regulations highlight disparity in the discipline of students with disabilities by race and ethnicity as a focal concern. Specifically, each state must now examine significant disproportionality by incidence, duration, and type of disciplinary actions—including suspensions and expulsions—with the same statutory remedies required to address significant disproportionate representation within the identification and placement processes for students with disabilities. *Id.*

27. These services for children must be provided to children from age three through grade twelve, both with and without disabilities. 34 C.F.R. § 300.226 (2016).

minority children into special education, current reports indicate that states under-report, fail to report, or face a lack of severe penalties or sanctions when found to have significant disproportionality within the state.²⁸ For racial or ethnic minority parents who have a child with a disability enrolled in an LEA that has been found to have significant disproportionality under IDEA, there is a growing interest in pursuing legal action with the limited number of legal remedies for plaintiff parents and children that are available.

The pursuit of equity regarding proportional placement for minority students with disabilities must also be placed within the broader provision of civil rights for racial and ethnic minority students. The continuing difficulties faced by parents of racial and ethnic minority students who reside in districts that have run afoul of IDEA regulations must be viewed as a continuing civil rights concern where civil rights continue to be at stake. This Article proceeds in three parts. Part I focuses on the history of the Individuals with Disabilities Education Act, specifically analyzing how the Act has been reauthorized over time to include provisions that address the disproportionate representation of minority students in special education. Part II examines how states currently use different measures to frame and, ultimately, address the problem of disproportionate representation and the Department of Education's role in preventing over-identification. It also explores how education federalism, the practice of favoring significant autonomy for states and local school boards, even in instances where constitutional or federal statutory rights are involved, causes inconsistent definitions of disproportionality and under-enforcement of IDEA's protection against disproportionate placement. Part III examines *Blunt v. Lower Merion School District*²⁹ and the high bar that courts set for plaintiffs who assert that their school district discriminated against racial and ethnic minority students with disabilities and allege intentional discrimination claims against school districts. Finally, this Article concludes by examining the potential impact of new regulatory changes and offering recommendations for future best practices.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND DISPROPORTIONALITY

In the landmark *Brown v. Board of Education* ruling, the Supreme Court mandated the end of segregation within the U.S. public school

28. See Assistance to States for the Education of Children with Disabilities, 81 Fed. Reg. at 92,376 (summarizing the limitations of state reporting).

29. 826 F. Supp. 2d 749 (E.D. Pa. 2011), *aff'd*, 767 F.3d 247 (3d Cir. 2014).

system.³⁰ The *Brown* ruling also provided the legal foundation for potential plaintiffs who were parents of students with disabilities. In 1972, plaintiffs brought two cases to challenge the exclusion of students with disabilities from the public education system: *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*³¹ and *Mills v. Board of Education*.³² The plaintiffs in *PARC* argued that a state law that specifically allowed public schools to deny services to children “who have not attained a mental age of five years”³³ at the time they would typically enroll in first grade violated both the Due Process and Equal Protection clauses of the 14th Amendment.³⁴ The district court agreed to enforce a negotiated consent decree that required the state to provide each child with a disability a free, appropriate public education that was individualized and based on that child’s capacity and that acknowledged a due process right to a hearing prior to any change in a student’s educational status or assignment.³⁵ As a consequence, the state began to provide free education to children with disabilities up to age 21.³⁶ In articulating the idea of a free, appropriate public education, the *PARC* court established the “appropriateness standard” that Congress would later adopt within federal special education legislation.³⁷

In addition, the *Brown* ruling provided the foundation for subsequent legislation requiring access to public education for students with disabilities.³⁸ Parents of children with disabilities spent years advocating for the passage of civil rights legislation for students with disabilities,³⁹ and the Education for All Handicapped Children Act of 1975 (EAHCA) has been hailed as a fruit of those labors.⁴⁰ Under the

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30. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).
 31. 343 F. Supp. 279 (E.D. Pa. 1972).
 32. 348 F. Supp. 866 (D.D.C. 1972).
 33. *PARC*, 343 F. Supp. at 282.
 34. *Id.* at 283.
 35. *Id.* at 302–03.
 36. See, e.g., Gabriela Brizuela, Note, *Making an “Idea” a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 598–603 (2011) (describing *PARC* and early government responses to the case to remedy a history of discrimination against children with disabilities).
 37. See Education for All Handicapped Children Act of 1975, Pub. L. 94-142, § 4, 89 Stat. 775, 775–76 (1975) (incorporating “free appropriate public education” as an educational right).
 38. See, e.g., *id.* (providing educational assistance to all students with disabilities).
 39. ROBERTA WEINER & MAGGIE HUME, AND EDUCATION FOR ALL: PUBLIC POLICY AND HANDICAPPED CHILDREN (1987).
 40. See Note, *Enforcing The Right to an “Appropriate” Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1105

EAHCA, a child with a disability was guaranteed the right to a free, appropriate public education.⁴¹ In addition, the EAHCA secured procedural rights and safeguards for parents.⁴² In 1990, Congress renamed the Act the Individuals with Disabilities Education Act⁴³ and updated provisions to ensure that students, ages three to twenty-one with a disability that serves as an educational impairment, have access to a “free appropriate public education”⁴⁴ that provides individualized special education and related services to prepare them for “further education, employment, and independent living.”⁴⁵ Thus, an LEA must provide special education and related services to any student who meets the criteria for one (or more) of the thirteen IDEA-eligible disability categories and who has demonstrated that he or she has a disability that serves as an education impairment.⁴⁶ After a student has been evaluated and classified as a student with a disability under IDEA, an Individualized Education Program (IEP), a written and mutually agreed upon document, is drafted and finalized by the IEP team. This team can include parents, special education and general education teachers, specialists, or school counselors. The mutually agreed upon IEP is then reviewed periodically and revised to ensure that the student’s needs and progress toward measurable goals are met.⁴⁷

Services for IDEA-eligible students are meant to be individualized for each student and based on non-discriminatory identification and evaluation methods, but concerns about discriminatory practices and disproportionate representation of racial and ethnic minority students

(1979) (explaining how the EAHCA resulted from state recognition that federal funding and procedural safeguards were necessary in order to provide free and appropriate public education to students with disabilities).

41. See EAHCA, Pub. L. 94-142, at § 3. Under the IDEA, a free and appropriate public education (FAPE) includes special education and related services that “have been provided at public expense under public supervision and direction, and without charge, meet the standards of the State educational agency; include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the Individualized Education Program required.” 20 U.S.C. § 1401(9)(A)–(D) (2012).
42. EAHCA, Pub. L. 94-142, at § 5.
43. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2012).
44. *Id.* § 1401(d)(1)(A).
45. *Id.* The thirteen disability categories covered under IDEA are: Autism, Deaf-Blindness, Deafness, Emotional Disturbance, Hearing Impairment, Intellectual Disability, Multiple Disabilities, Orthopedic Impairment, Other Health Impairments, Specific Learning Disability, Speech or Language Impairment, Traumatic Brain Injury, and Visual Impairment. 34 C.F.R. § 300.8 (2016).
46. 34 C.F.R. § 300.101(c) (2016).
47. 34 C.F.R. § 300.324(b)(1)(i–ii) (2016).

ultimately placed in special education have been persistent and continuing concerns for advocates, educators, and policymakers. In fact, disproportionate representation has been identified as an education dilemma since the 1960s when educational researcher Lloyd Dunn found that between sixty to eighty percent of students identified as the “educable mentally retarded”⁴⁸ were children who came from low-socio-economic backgrounds or were classified as African American/Black.⁴⁹ Subsequently, National Research Council reports, policy briefs, position statements, and federal civil rights investigations have examined and addressed disproportionate representation as a persistent problematic practice in special education that requires careful monitoring.⁵⁰

Congress amended IDEA in 1997⁵¹ and reauthorized it in 2004.⁵² The amendment most notably addressed the issue of disproportionate representation of racial and ethnic minority students in special education. The 1997 amendments required states to start monitoring and identifying LEAs and, if the state found significant disproportionality⁵³ within the LEA, the LEA was required to “provide for the review and, if appropriate, revision of policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirement of this [Act].”⁵⁴ In 2004, Congress reauthorized IDEA and “prioritized the problem of racial disproportionality, [in part] because neither the 1997 amendments

48. Lloyd M. Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 5 (1968).

49. *Id.* at 6.

50. See generally COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., MINORITY STUDENTS IN SPECIAL EDUCATION AND GIFTED EDUCATION (M. Suzanne Donovan & Christopher T. Cross eds., 2002) (studying the issue of racial and ethnic minority student disproportionate representation in special education); Council for Children with Behavioral Disorders, *CCBD’s Position Summary on Federal Policy on Disproportionality in Special Education*, 38 BEHAV. DISORDERS 108 (2013); U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., 37TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2015 (2015) (providing a comprehensive analysis of state compliance with IDEA and outcomes regarding the education of students with disabilities).

51. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (prior to 2004 reauthorization).

52. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400 to 1491).

53. 20 U.S.C. § 1418(d)(1) (2012) (effective Dec. 3, 2004).

54. *Id.* § 1418(d)(2)(A).

nor [the Office of Civil Rights] appeared to have had much impact on the problem.”⁵⁵

Within the 2004 IDEA reauthorization, Congress highlighted racial and ethnic minority student disproportionate representation as one of three priority areas for monitoring and enforcement by the states.⁵⁶ To ensure compliance with previous policy that mandated that states address current practices, policies, and procedures when significant racial and ethnic disproportionality occurred, the reauthorization included amended language that required states to have policies in effect that are “designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities.”⁵⁷ Within the 2004 provisions, states were also required to monitor districts for “significant discrepancies” in disciplinary practices, which can include suspensions and expulsions.⁵⁸

Prior to the revised 2016 regulations, each state had been required to develop its own disproportionality monitoring system to collect and examine data to determine if, within the special education and related services processes, significant disproportionality based on race and ethnicity occurred in the state and the LEA.⁵⁹ The older regulatory provisions did not specifically define what significant disproportionality meant under the IDEA and allowed each state to make its own determination as to what constitutes significant disproportionality. However, each IDEA-funded state was required to collect and examine data pertaining to: “(1) the identification of children as children with disabilities including the identification of children with IDEA-disability categories; (2) the placement of children with disabilities across settings; and (3) the incidence, duration, and types of disciplinary actions (including suspensions and expulsions).”⁶⁰ If a state made a determination of significant disproportionality with respect to the identification or placement of a child with a disability, then the state was required to provide for the review and revision of the policies, procedures, and practices to ensure compliance. In addition, the LEA with significant disproportionality had to reserve the maximum amount of funds under Section 613(f) of the IDEA to provide “comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not ex-

55. Susan Fread Albrecht et al., *Federal Policy on Disproportionality in Special Education: Is It Moving Us Forward?*, 23 J. OF DISABILITY POL’Y STUD., no. 1, 2012, at 14, 15.

56. 20 U.S.C. § 1416(a)(3)(C) (2012) (effective Dec. 3, 2004).

57. *Id.* § 1412(a)(24).

58. *Id.* § 1412(a)(22)(A).

59. 34 C.F.R. § 300.646(a) (2016).

60. *Id.* § 300.646(a)(1)–(3).

clusively, children in those groups that were significantly overidentified.”⁶¹ Finally, each LEA had to publicly report on revisions made to its policies, procedures, and practices after a finding of significant disproportionality under the IDEA.⁶²

Within the 2004 reauthorization to IDEA, and to add further heft to the monitoring requirements for states, Congress also heralded policy priority with the allocation of two (out of twenty) IDEA policy indicators for state IDEA compliance to disproportionality monitoring.⁶³ Each of the twenty indicators are related to monitoring performance related to implementation of Part B of IDEA for students ages three to twenty-one, and states must then submit the data annually to the U.S. Department of Education, Office of Special Education Programs (OSEP).⁶⁴ Indicator nine requires states to identify the proportion of districts exhibiting “disproportionate representation of racial and ethnic

61. *Id.* § 300.646(b)(2).

62. *Id.* § 300.646(b)(3).

63. Across the state’s monitoring of the areas covered under the indicators, the primary focus of the State’s monitoring activities must improve educational results and functional outcomes for all children with disabilities and ensure that public agencies meet the program requirements under Part B of the IDEA, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities. *Id.* § 300.600(a–e). The twenty IDEA indicators include: Graduation Rates; Drop-Out Rates; Participation and Performance on Statewide Assessments; Suspensions and Expulsions; Participation/Time in General Education Settings; Preschool Children in General Education Settings; Preschool Children with Improved Outcomes; Parental Involvement; Disproportionate Representation in Special Education that is the Result of Inappropriate Identification; Disproportionate Representation in Specific Disability Categories; Timeframe Between Evaluation and Identification (Child Find); Transition between Part C and Part B; Post School Transition Goals in IEP; Participation in Postsecondary Settings One Year After Graduation; Timely Correction of Noncompliance; Resolution of Written Complaints; Due Process Timelines; Hearing Requests Resolved by Resolution Sessions; Mediations Resulting in Mediation Agreements; and Timeliness and Accuracy of State Reported Data. See *Part B Indicators*, NAT’L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, http://www.drcvi.org/_literature_183445/Part_B_Indicators [<https://perma.cc/K25L-6QE4>] (last updated Apr. 2013) (listing the monitoring indicators identified by the Office of Special Education Programs (OSEP) and the related requirements found in IDEA for state administrators responsible for completing state performance plans (SPPs) and annual performance reports (APRs)).

64. Each state’s plan for addressing each of the twenty indicators is outlined within the State Performance Plan, which is then included with each state’s Annual Performance Report. Batya Elbaum, *Challenges in Interpreting Accountability Results for Schools’ Facilitation of Parent Involvement Under IDEA*, 24 J. DISABILITY POL’Y STUD., no. 4, 2014, at 206.

groups in special education and related services, to the extent the representation is the result of inappropriate identification.”⁶⁵ Indicator ten requires states to identify the percent of districts in the state with “disproportionate representation of racial and ethnic groups in specific disability categories that is the result of inappropriate identification.”⁶⁶ Finally, each state had to monitor all LEAs within the state using quantifiable and qualitative indicators to measure disproportionate representation in special education and related services to the “extent the representation is the result of inappropriate identification.”⁶⁷

While IDEA is a progression of civil rights obtained in civil rights litigation, it has taken multiple amendments to the Act to delineate the process for determining significant disproportionality. Over time, states have received increasing levels of monitoring and enforcement powers over practices at both the state- and district-level.

II. DISPROPORTIONALITY POLICY MONITORING AND ENFORCEMENT UNDER IDEA

As the previous Part describes, the IDEA amendments and the 2004 reauthorization reserved considerable discretion to the states pertaining to the implementation of its requirements regarding disproportionality. This is consistent with a strong tradition of regarding education as largely a state and local matter. Because statutes like IDEA, along with the Equal Protection Clause of the Fourteenth Amendment, are sources of federal rights, education creates a terrain for shifting balances between federal and state control. Some commentators have described this tug of war between the federal government and the states in terms of education federalism.⁶⁸ Professor Kimberly Robinson has defined education federalism as “a balance of power between the federal, state, and

65. 20 U.S.C. § 1416(a)(3)(C) (2012).

66. *Id.*

67. 34 C.F.R. § 300.600(d)(3) (2016); 20 U.S.C. § 1416 (a)(3)(C) (2012).

68. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006) (examining the education federalism issues arising from the No Child Left Behind Act); Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CAL. L. REV. 565 (2015); Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER, RACE, AND JUST. 163 (1999) (exploring the impact of federal retreat from support of bilingual education in deference to the states on bilingual instruction); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013) (examining the deleterious impact of education federalism on school desegregation efforts, on attempts to rectify inequality resulting from current school finance regimes through litigation, and on reforms intended under the NCLB).

local governments that emphasizes substantial state autonomy over education.”⁶⁹

The strong preference for state and local control of education is not surprising. To begin, education has historically been a matter that fell within the ambit of what states and local governments did. There are good reasons for a predisposition for local autonomy, ranging from a belief that local authorities are more likely to understand the idiosyncratic needs of their residents, to a belief that local control is likely to be more democratic control. History regarding such matters as school desegregation has demonstrated, however, that complete abdication to local control can undermine important federal rights. Desegregation has, indeed, been an area where federal rights have been aggressively imposed upon resistant states.⁷⁰ *Brown v. Board of Education* represented a rebalancing of the federalism equilibrium in asserting that neither the law nor mores of states with compulsory school segregation could stand in the face of the Fourteenth Amendment’s Equal Protection Clause.⁷¹

Indeed, the history of school desegregation after *Brown* is something of a cautionary tale about the perils of education federalism. A year after *Brown* in its implementation decision, *Brown II*,⁷² the Court tilted strongly toward local autonomy. Writing for the Court, Chief Justice Warren hailed what he saw as significant progress that some school districts had already made since *Brown*.⁷³ He added that schools might face particular local issues in moving toward desegregation. Consequently, he added, “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems . . .”⁷⁴ In turn, local federal district courts, which often were sympathetic to school

69. Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 962 (2015).

70. Other earlier cases also recognized a federal role in education. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding Oregon’s compulsory public education statute, which, among other things, prohibited attendance at private parochial schools, violated the Due Process Clause of the 14th Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding the state’s prohibition of teaching foreign languages to students before 9th grade violated the Due Process Clause of the 14th Amendment).

71. Other cases dealing with segregation in higher education, such as *Sweatt v. Painter*, also represented this kind of rebalancing. 339 U.S. 629 (1950) (finding that the legal education offered to petitioner was not substantially equal to the University of Texas Law School and that the Fourteenth Amendment’s Equal Protection Clause required that he be admitted to the University of Texas Law School).

72. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

73. *Id.* at 299.

74. *Id.*

district efforts to slow down or impede desegregation, would retain jurisdiction over the cases. This was to be accomplished with “all deliberate speed.”⁷⁵ Yet, ten years after *Brown*, a mere 2.3% of African American children attended integrated southern schools.⁷⁶ Only when the full force of the federal government intervened to rebalance federal and local authority by coupling the 1964 Civil Rights Act and the Elementary and Secondary Education Act (ESEA) in 1965⁷⁷ did progress begin to happen regarding desegregation of southern schools. Title VI of the Civil Rights Act prohibited discrimination by government agencies that received federal money.⁷⁸ The threat of losing federal funding became much more potent in 1965 with the enactment of ESEA which provided for a major flow of federal funding to schools.⁷⁹ The judiciary’s patience with the delaying tactics of school districts also ran out. That growing impatience, and willingness to displace local autonomy with federal command, culminated in *Green v. County School Board of New Kent County, Virginia*.⁸⁰ There the Court rejected the county’s “freedom of choice” plan, which nominally permitted African American children to choose to attend any school in the district, but practically continued segregation.⁸¹ Instead, it ordered the county to speedily adopt plans that would create a unitary school system.⁸² This confluence of agreement among the three branches of federal government that local school autonomy must give way to an aggressive assertion of federal rights regarding education had a powerful impact on southern schools, but the retreat to state autonomy began not long after the *Green* decision.

The impulse to defer to state and local authority in education, even when constitutional or other federally created rights are at stake, continues to play out. The No Child Left Behind Act of 2001⁸³ (NCLB)

75. *Id.* at 301.

76. JOHN MORTON BLUM, *YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY 1961–1974*, at 196 (1991).

77. *Id.* at 178.

78. 42 U.S.C. § 2000(d)(1) (2012).

79. *See generally* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (authorizing Congress to appropriate federal funds to states and LEAs for the education of K-12 students).

80. 391 U.S. 430 (1968).

81. *Id.* at 441.

82. *Id.* at 437–38.

83. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in various sections of Title 20 of the U.S. Code).

represented a major federal effort to reform education nationwide.⁸⁴ The Act was intended to promote educational excellence and equity by providing for high standards of performance and creating incentives to achieve those standards.⁸⁵ While NCLB called for setting rigorous standards in core subjects and testing to monitor those standards with reporting requirements for schools and consequences for poorly performing schools, it also, in deference to education federalism, let each state set its own academic standards. The results have been largely regarded as disappointing.⁸⁶ The impact of education federalism can also be seen in IDEA's treatment of disproportionality monitoring, perhaps with similarly disappointing consequences.

Since the 1997 amendments to the IDEA, Congress has made a concerted effort to maintain a balance of federal and state oversight of special education programs by including specific provisions for the U.S. Department of Education and the Office of Special Education Programs to monitor and enforce equitable practices for placing students, particularly racial and ethnic minority students, into special education.⁸⁷ Research conducted since the most recent reauthorization, however, strongly suggests that states vary widely in how they interpret and enforce the federal provisions.⁸⁸ This is mostly due to changes in the methods used to measure disproportionate representation at the district level and state variation regarding what constitutes significant disproportionality.

The IDEA amendment and reauthorization ushered in systemic state monitoring and enforcement practices with a significant focus on numerical criteria, and this moved policymakers and school- and state-level district leaders away from using qualitative indicators of disproportionate representation to making primary use of quantitative indicators. While these quantitative indicators shape problem identification and state response across states, they have also served to signal which components of the disproportionate representation monitoring and enforcement process under the IDEA are most relevant to any policy sanctions. In 2004, the OSEP/Westat Disproportionality task force issued

84. *See id.* (enacting legislative reform with a focus on annual state-level testing of all K-12 students (including students with disabilities), adequate yearly progress at the school-level, and teacher accountability standards).

85. *Id.*

86. For a discussion of education federalism and NCLB, see Robinson, *supra* note 68, at 322–30 (explaining how education federalism undermines reform efforts such as NCLB).

87. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (prior to 2004 reauthorization).

88. Albrecht et al., *supra* note 55, at 1.

guidelines concurrent with the 2004 IDEA reauthorization that “recommended that states use a risk ratio as a means for comparing the probability for special education placement.”⁸⁹ Broadly, a state uses risk ratios to measure risk for disproportionate representation by examining the probability that a racial or ethnic minority student with a disability will receive special education and related services, in relation to the size of the overall risk for special education placement within the state or district. A risk ratio “compares the relative size of two risks by dividing the risk for a specific racial/ethnic group by the risk for a comparison group.”⁹⁰ For example, if a district reports that the risk for African American/Black children of receiving special education and related services for autism was 3.25 times the risk for all other children, then the District is essentially reporting that African American/Black children were 3.25 times as likely to receive services for autism than all other children.

However, risk ratios can be difficult to interpret when there are small numbers of students at the district level in either the racial and ethnic group or the comparison group.⁹¹ In school districts where there were fewer than ten students in a given racial or ethnic group, the task force recommended an alternative weighted risk ratio out of concern that the risk ratio methodology might misidentify certain districts as having a disproportionality problem where none existed.⁹² Thereafter, many states shifted to measuring the risk of disproportionate representation via weighted risk ratios or alternative risk ratios.⁹³ The weighted risk ratio combines district-level risk data with state-level demographics to yield standardized risk ratios for across-district comparisons,⁹⁴ thus helping states to determine a specific racial or ethnic group’s risk of receiving special education and related services for a disability compared to the risk for all other children when the risk is standardized

89. Wendy Cavendish, Alfredo J. Artiles & Beth Harry, *Tracking Inequality 60 Years After Brown: Does Policy Legitimize the Racialization of Disability?*, 14 MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS, no. 2, 2014, at 30, 33. Westat is a statistical survey research corporation that provides research services to various agencies within the U.S. Government. See *Our Clients*, WESTAT, <https://www.westat.com/about-us/our-clients> [<https://perma.cc/47K8-ZUPE>] (last visited Mar. 23, 2017).

90. BOLLMER ET AL., *supra* note 7, at 22.

91. See *id.* (“A risk ratio of 1.00 indicates no difference between the risks. A risk ratio greater than 1.00 indicates the risk for the comparison group, while a risk ratio less than 1.00 indicates the risk for the racial/ethnic group is less than the risk for the comparison group. Risk ratios can never be less than 0.00.”).

92. *Id.* at 23, 73.

93. Albrecht et al., *supra* note 55, at 21.

94. *Id.* at 32.

based on state-level racial or ethnic demographic information. By using a weighted risk ratio based on standardized state data, however, states can have similar weighted ratios for both large and small districts.⁹⁵ For small districts, this means that small enrollment changes can impact the direction of overrepresentation or underrepresentation. This can lead to small districts being misidentified as having under-representation or overrepresentation, depending upon the state-level data.

Finally, another popular measurement tool for states is the use of the alternative risk ratio where the district risk is compared against the statewide comparison group, thus aiding states in gaining a better understanding of whether a child from a racial or ethnic group is more or less likely to receive special education and related services for a disability in a district versus the risk for all other children within the state.⁹⁶ Unlike the weighted risk ratio or the risk ratio, the alternative risk ratio is also a more reliable measure when districts have only a few children in one or more racial or ethnic groups, which enables states to evaluate both district disproportionality and to compare children from a racial or ethnic group in a district to children from other racial or ethnic groups within the state.⁹⁷

In an analysis of data from state Annual Performance Reports to examine progress made in identifying disproportionality, Albrecht and colleagues (2012) found that a number of states subsequently shifted from using a standard risk ratio approach to using a weighted or alternative risk ratio with criteria for disproportionate representation that often included “progressively larger cut-offs”⁹⁸ for what constitutes disproportionate representation. By providing states a set of alternatives to using traditional risk ratios to compare the probability of special education placement, federal policy and recommended practices have also allowed states and LEAs to mask patterns of disproportionate placement and limit the “structural and historical underpinnings of the problem.”⁹⁹ Moreover, this has led to a troubling trend across states where states are both able to meet the IDEA mandate and also not report indices of disproportionate representation by increasing the student size minimum required for the risk ratio cutoff scores that must be reported to the state. With these practices, states enable themselves to only address disproportionality when it impacts a significant number

95. BOLLMER ET AL., *supra* note 7, at 32, 47.

96. *Id.* at 23, 31.

97. *Id.*

98. Albrecht et al., *supra* note 55, at 21.

99. Cavendish et al., *supra* note 89, at 33.

of students with higher levels of risk for special education and related services.¹⁰⁰

A second difficulty associated with disproportionality monitoring and policy enforcement is related to the lack of policy specificity regarding what constitutes significant disproportionality¹⁰¹ in special education placements and settings. Until full implementation of the 2016 disproportionality regulations occurs, each state is responsible for drafting and adopting its own definition as to what constitutes significant disproportionality of minority students in special education, and this determination is not based on recommended determinations or best evidence within the field.¹⁰² The 2003 Government Accountability Office report examined a sample of sixteen states and reviewed each states' definition of significant disproportionality based on the 2010–11 School Year and found wide variation in definitions of the term significant disproportionality among the sample.¹⁰³ In addition, the report noted that “some states’ definitions may be preventing them from identifying disproportionality.”¹⁰⁴

Under IDEA, each state must also monitor and collect data regarding disproportionate representation that is the result of inappropriate identification. However, “inappropriate identification”¹⁰⁵ is not defined within IDEA, and each state or LEA has discretion to determine which aspects of the identification process are practices that can be held as “inappropriate.”¹⁰⁶ Some research has found that, since the 2004 reauthorization, the number of districts that have reported disproportionate representation due to “inappropriate identification” has drastically decreased.¹⁰⁷ Most states currently report that there are no districts within each state that have been flagged as a district with disproportionality due to “inappropriate identification” by the district. One possible reason for the decline in “inappropriate identification” flags may be due to additional scrutiny that comes with the flag. That is, the “inappropriate identification” flag serves as an automatic trigger which requires a state to achieve compliance within one year and to set aside funds for CEIs,

100. *Id.*

101. *Id.* at 32–33.

102. 20 U.S.C. § 1418(d) (2012).

103. U.S. GOV'T ACCOUNTABILITY OFFICE, Pub. No. 13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION 22 (2013).

104. *Id.* at 18.

105. Cavendish et al., *supra* note 89, at 33.

106. *Id.*

107. *Id.*

and this may discourage states from using the “inappropriate identification” flag as a check against any LEAs within the state that might be engaging in “inappropriate identification.”¹⁰⁸

While IDEA includes monitoring and enforcement provisions, there are ways for states to skirt federal policy and under-report or fail to report disproportionate representation. This is a troubling consequence of gaps within IDEA. Current policy fails to adequately address disproportionality as a civil rights issue with accompanying remedies for traditionally under-represented racial and ethnic minority groups who are at-risk for discrimination within special education placements. This is true despite repeated calls for federal policy and guidelines for administrative practices to “align, resulting in consistent and effective actions by the states to eliminate the long-standing and still prevalent problem of racial and ethnic disproportionality.”¹⁰⁹ Moreover, it also signals to parents of students with disabilities that IDEA’s monitoring and enforcement provisions for disproportionate representation lack substantive sanctions at the state- and district-level when LEAs fail to comply.

III. “SIGNIFICANT DISPROPORTIONALITY” AND INTENTIONAL DISCRIMINATION CLAIMS

As state policy monitoring has been found to either inadequately define or find evidence of significant disproportionality across states, potential claimants have relied on litigation to show intentional discrimination. Plaintiffs, however, face an uphill battle in using school- and district-level placement data to prove intentional discrimination, even when policy monitoring under IDEA has led to a finding that significant disproportionality by race or ethnicity in special education and related services has occurred within the plaintiff’s district.

In *Blunt v. Lower Merion School District*, a group of plaintiffs alleged that the Lower Merion School District (LMSD) improperly placed African American children in special education.¹¹⁰ Originally, plaintiffs brought the action in the U.S. District Court for the Eastern District of Pennsylvania as a class action lawsuit, but the court declined to certify the class action.¹¹¹ This limited the case and its eventual ruling

108. Albrecht et al., *supra* note 55, at 22.

109. *Id.* at 23.

110. *Blunt v. Lower Merion School Dist.*, 826 F. Supp. 2d 749 (E.D. Pa. 2011), *aff’d*, 767 F.3d 247 (3d Cir. 2014).

111. The complicated procedural history of the case is beyond the scope of the article. Suffice it to say that a group of plaintiffs, including Amber Blunt and her parents, Crystal and Michael Blunt, filed a complaint in July 2007 against the Lower Merion School District (LMSD) and certain school officials alleging violations of IDEA, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, along with violations of Title VI of the Civil Rights

to the named plaintiffs only. The plaintiffs alleged that LMSD racially discriminated against a class of African American students, “in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Civil Rights Act of 1871, 42 U.S.C. § 1983.”¹¹² The plaintiffs in the case were current or former African American students who were identified as having a disability by LMSD.¹¹³ Each student had received some special education services while also being enrolled in some general education classes. The plaintiffs asserted that they were not “disabled”¹¹⁴ or “students with disabilities”¹¹⁵ as defined under IDEA, and were thus only labeled as “students with a disability”¹¹⁶ due to racial discrimination.¹¹⁷ The plaintiffs further alleged that placement into special education classes occurred on the basis of incorrect disability diagnoses, incomplete evaluations for special education eligibility, and subjective determinations of disability.¹¹⁸ In addition, the plaintiffs argued that there were not only a disproportionate number of African American children who received special education services from LMSD, but that plaintiffs were denied access and enrollment to advanced and college preparatory classes such as higher-level science courses, advanced history, and foreign language classes.¹¹⁹ The plaintiffs also alleged that

Act of 1964, and Section 1982. Additionally, they alleged a violation of Pennsylvania’s public education law as a pendent state law claim. *Id.* at 751. After the plaintiffs amended their complaint to add additional plaintiffs and defendants, the defendants filed motions to dismiss under Federal Rule 12(b)(6). The district court granted much of the motion and dismissed most of the claims. *Id.* at 751–52.

After a second and then third amended complaint, what remained of the plaintiffs’ case were claims of violations of Title VI and Section 1983 arising out of racial discrimination by LMSD. *Id.* at 752.

112. *Id.* at 751–52.

113. *Id.* at 752. Throughout the discovery stage of the case before the U.S. District Court for the Eastern District of Pennsylvania, there were disputed facts regarding the disability status of several named plaintiffs. Named plaintiff students contended that they did not have disabilities, but these students stated in their Third Amended Complaint that they were students with IDEA-eligible disabilities. The court assumed for purposes of the case that, with the exception of plaintiffs Chantae Hall and Lydia Johnson, the plaintiffs were not students with disabilities. *Id.* at 753.

114. *Id.*

115. *Id.* at 760.

116. *Id.* at 753.

117. *Id.*

118. *Id.* at 760.

119. *Id.* at 753. “In 2005, the Pennsylvania Department of Education (PDE) found that there was a disproportionate number of African American students in special education programs in [LMSD].” *Id.* at 757. By 2006, however, the

complaints to teachers and administrators made prior to the start of litigation regarding inadequate determinations of special education eligibility and inadequate course selection options went unanswered.¹²⁰

A. *Blunt v. Lower Merion School District—U.S. District Court for the Eastern District of Pennsylvania*

After the plaintiffs submitted their final series of amended complaints, the United States District Court for the Eastern District of Pennsylvania considered the remaining claims in 2011.¹²¹ Plaintiffs' first claim was that LMSD racially discriminated against African American students by assigning them disproportionately to special education placements in violation of Title VI of the Civil Rights Act of 1964.¹²² Plaintiffs sought injunctive relief to "ensure that the [LMSD] properly educate[s] all African American students with disabilities."¹²³ The court concluded that even though the plaintiffs had provided systematic statistical evidence of racial disproportionality within the special education program and associated special education placements within LMSD in 2007, 2008, and 2009, this was not sufficient to create a prima facie case under Title VI.¹²⁴

PDE closed its investigation of LMSD. In its report, the PDE claimed that the district now had a percentage of children with disabilities that was comparable to data across the state. In addition, the PDE found that LMSD met special education disproportionate representation targets by race/ethnicity in 2007, 2008, and 2009. *Id.*

120. Opening Brief of Appellants at 11–13, *Blunt v. Lower Merion School Dist.*, 826 F. Supp. 2d 749 (E.D. Pa. 2011), *aff'd*, 767 F.3d 247 (3d Cir. 2014) (No. 11-4200).

121. *Id.* at 752.

122. *Id.* at 758. Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2012).

123. *Blunt*, 826 F. Supp. 2d at 753.

124. *Id.* at 759, 763. The Plaintiffs' claims were made based on identification practices during the 2006–2007 SY and 2007–2008 SY. In the 2006–2007 SY, there were 6,981 students in the district. Of that, approximately 7.9% were African American and approximately 83.2% were Caucasian. There were 1,187 students (17%) within the total student body who received special education services and approximately 14.5% of those students were African American students enrolled in LMSD and had IEPs. *Id.* at 757.

In the 2007–2008 SY, LMSD had 6,914 students, with 8.1% of the student population identified as African American and 83.1% percent identified as Caucasian. 1,158 students (16.7%) received some type of special education or related services. 14% of the students receiving those services were African American and 80.8% were Caucasian. *Id.*

The district court relied on a series of Supreme Court decisions holding that Title VI entitled plaintiffs to claims of intentional discrimination only.¹²⁵ To make out a prima facie case under Title VI, the court held that:

[P]laintiffs must show that: (1) they are members of a protected class; (2) they were qualified to continue in pursuit of their education; (3) they suffered an adverse action; and (4) such action occurred under circumstances giving rise to an inference of discrimination.¹²⁶

The court ruled that, although a lack of “comparative evidence”¹²⁷ regarding the treatment of similarly-situated students outside the protected class was not “fatal to a plaintiff’s prima facie case,”¹²⁸ Title VI only reaches to instances of intentional discrimination.¹²⁹ Turning to proof of intentional discrimination, the court noted that while statistical evidence of disparate impact may be an initial step towards determining the existence of intentional discrimination, it is not without other evidence sufficient.¹³⁰ Further, the ruling noted that plaintiffs’ evidence to support allegations that LMSD committed “various improprieties” were insufficient to prove a prima facie case. These allegations included:

(1) destroying testing protocols; (2) failing to obtain parental permission before conducting evaluations; (3) neglecting to notify parents regarding procedural safeguards available to them under the IDEA; (4) failing to provide drafts of individual education plans (“IEPs”) to parents; (5) omitting information from evaluation reports and IEPs; (6) failing to conduct proper and timely reevaluations; (7) obtaining parental consent without providing all relevant documents; and (8) evaluating students to determine their eligibility for services under the IDEA without conducting evaluations.¹³¹

In the subsequent 2008–2009 and 2009–2010 SY, the number of students within the district did not significantly increase or decrease (6,788 and 7,072 students, respectively), and the percentage of African American students who received special education services also did not significantly increase or decrease (13.7%, 14.3%, respectively). *Id.*

125. *Id.* at 758–59.

126. *Id.* at 758.

127. *Id.*

128. *Id.*

129. *Id.* at 759 (citing *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)).

130. *Id.*

131. *Id.* at 760.

In other words, the plaintiffs offered evidence that LMSD systematically violated or ignored their procedural rights under IDEA, and the court held that these allegations might prove to serve as the foundation for a claim under IDEA but were insufficient to prove a prima facie case or withstand a motion for summary judgment.¹³² Therefore, the court reasoned that plaintiffs' evidence of "disproportionality alone" was not sufficient evidence necessary to meet the components of a Title VI prima facie case, particularly the requirement that plaintiffs must prove intentional discrimination on the part of LMSD, even when coupled with evidence of widespread procedural violations.¹³³ Thus, the motion of LMSD for summary judgment as to plaintiffs' Title VI claims was granted.¹³⁴

The plaintiffs also brought claims under 42 U.S.C. § 1983 and alleged a violation of the Equal Protection Clause.¹³⁵ The court granted the defendants' motion for summary judgment on the section 1983 claim, on the ground that section 1983 similarly requires proof of purposeful discrimination.¹³⁶ The court held that the evidence that actions of the LMSD had disproportionate impact on African Americans was not sufficient, finding that "[p]laintiffs have not put forth more than a scintilla"¹³⁷ of evidence that LMSD acted with a racially discriminatory purpose when it identified plaintiff students as disabled and offered special education and related services.¹³⁸ This, the court held, was the correct ruling even if identification for special education and related services was somehow incorrect.¹³⁹ In sum, no evidence of discrimination

132. *Id.* at 760, 763.

133. *Id.* at 763.

134. *Id.*

135. *Id.* Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983 (2006).

To bring a successful § 1983 claim, a plaintiff must demonstrate: "(1) a violation of a right protected by the Constitution; and (2) that the violation 'was committed by a person acting under the color of state law.'" *Blunt*, 826 F. Supp. 2d at 763 (quoting *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000)).

136. *Blunt*, 826 F. Supp. 2d at 764–65.

137. *Id.*

138. *Id.* (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989)).

139. *Id.* (citing *Williams*, 891 F.2d at 460–61 (3d Cir. 1989)).

short of direct evidence of discriminatory intent, such as biased statements by district officials, would satisfy the court, even at the summary judgment stage of the litigation.

B. Blunt v. Lower Merion School District—U.S. Court of Appeals for the Third Circuit

On December 1, 2011, the Blunt plaintiffs filed a cross-appeal from portions of the District Court's Memorandum and Judgment Order that granted a final summary judgment to the defendant (LMSD).¹⁴⁰ On appeal, the court considered a number of questions including whether the district court abused its discretion in its consideration of the weight it gave to the plaintiffs' evidence for the purpose of ruling on the motion for summary judgment.¹⁴¹ Relatedly, it considered whether the district court erred in ruling that plaintiffs had failed to establish a prima facie case of discrimination in violation of Title VI and section 1983 in granting of the district's motion for summary judgment.¹⁴² In a lengthy ruling, the divided three-judge panel affirmed the district court's grant of summary judgment and most notably held that there was no genuine issue of material fact concerning LMSD's intent to discriminate nor evidence showing that LMSD or its employees intentionally discriminated against African American students.¹⁴³

The United States Court of Appeals for the Third Circuit affirmed the entry of summary judgment against the plaintiffs' Title VI and section 1983 claims and held that the plaintiffs did not establish a prima facie case of discrimination for either claim.¹⁴⁴ The court further held that the evidence found to be inadmissible by the district court did not have to be considered in a light most favorable to the non-movant plaintiffs because it could not be introduced at trial.¹⁴⁵ The court also asserted that, regardless of the summary judgment motion, the plaintiffs' evidence would not have been admissible during the district court hearing.¹⁴⁶

In addition, the court reiterated the district court's assertion that statistical evidence alone is not sufficient to prove a claim of intentional

140. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247 (3rd Cir. 2013), *cert. denied*, 135 S. Ct. 1738 (2015). On appeal to the U.S. Court of Appeals for the Third Circuit, the appellants again brought forth claims to seek relief pursuant to Title VI and the Equal Protection Clause of the 14th Amendment through 42 U.S.C. § 1983. *Id.* at 267.

141. *Id.*

142. *Id.*

143. *Id.* at 301.

144. *Id.* at 302.

145. *Id.*

146. *Id.*

discrimination because the statistical evidence did not sufficiently show that LMSD's policy and practices were the actual cause of discrimination.¹⁴⁷ The court held that, on taking the appellants' evidence as a whole, there was no evidence showing intentional discrimination on the part of LMSD, nor was there evidence that district employees intentionally discriminated against African American plaintiffs.¹⁴⁸ Moreover, the court held that even though the appellants provided five years of statistical evidence supporting their claim that racial or ethnic minority students were disproportionately represented within LMSD, there were also evaluation procedures in place used for all students, regardless of race, who received special education and related services.¹⁴⁹ Thus, due to the uniform evaluation procedures in place and regardless of statistical evidence showing significant disproportionality, the court held that "there simply is no discrimination."¹⁵⁰

Chief Judge Theodore A. McKee concurred in part but disagreed with the affirmation of the lower court summary judgment in favor of the district.¹⁵¹ McKee took issue with the way the majority applied the "deliberate indifference"¹⁵² standard under Title VI, finding it inconsistent with precedent, difficult to prove, and more than what the summary judgment standard requires.¹⁵³ He concluded that the parent and student plaintiffs had offered evidence that served as a sufficient basis for the case to move beyond the summary judgment stage by citing the report of Dr. James Conroy, Ph.D., an expert on disability policy, special education, and statistical analysis.¹⁵⁴ Conroy found, within LMSD, statistically significant evidence showing that both overrepresentation of African American students in special education classes and underrepresentation of African American students in advanced placement classes had occurred.¹⁵⁵ Judge McKee criticized the majority justices for failing to consider the expert report as part of the basis for summary judgment evidence because it highlighted "procedural irregularities in the erroneous and improper placement of African American students

147. *Id.* at 302–03.

148. *Id.* at 300–01.

149. *Id.* at 300.

150. *Id.*

151. *Id.* at 305 (McKee, C.J., concurring in part and dissenting in part).

152. *Id.* at 314 (McKee, C.J., concurring in part and dissenting in part).

153. *Id.* at 314–20 (McKee, C.J., concurring in part and dissenting in part).

154. *Id.* at 323–27 (McKee, C.J., concurring in part and dissenting in part).

155. *Id.* at 323–24 (McKee, C.J., concurring in part and dissenting in part).

[within the LMSD] in special education classes [that were] the result of bias (i.e. deliberate indifference), ineptitude, or coincidence.”¹⁵⁶

In 2015, the U.S. Supreme Court denied the plaintiffs’ petition for certiorari, thus leaving in place the case’s dismissal and concluding a long, procedural fight to secure an additional pathway for the enforcement of rights secured under the IDEA.¹⁵⁷ The Third Circuit decision erects a significant barrier for future intentional discrimination claims, even if those claims are linked to both widespread violations of IDEA’s procedural protections coupled with statistical evidence of disproportionate representation within the LEA or district.¹⁵⁸ In a public statement after the denial of certiorari by the U.S. Supreme Court, the Public Interest Law Center of Philadelphia, which had been part of the legal team representing the plaintiffs throughout the litigation, released a statement and noted that *Blunt* effectively closed the door to future similar litigation: “The case is over. What this means is that the fight to reduce disproportionate and inappropriate referral to special education will be fought on different territory. This is a national issue, and we are considering what strategies are most effective for the next step.”¹⁵⁹

CONCLUSION: THE FUTURE OF DISPROPORTIONALITY MONITORING AND RECOMMENDATIONS

The new IDEA regulations went into effect on January 18, 2017.¹⁶⁰ States, LEAs, policymakers, parents and advocates must now work to address the revised policy provisions that require states and LEAs to, among other things, use a standard methodology to determine whether significant disproportionality based on race and ethnicity is occurring within the state and LEAs.¹⁶¹ Moreover, states must continue to address significant disproportionality by incidence, duration, and type of disciplinary action (including suspensions and expulsions) as well as revise

156. *Id.* at 322 (McKee, C.J., concurring in part and dissenting in part).

157. *Allston v. Lower Merion Sch. Dist.*, 135 S. Ct. 1738 (2015).

158. *See Blunt*, 767 F.3d at 335 (McKee, C.J., concurring in part and dissenting in part) (concluding that the court erroneously ruled that there was no genuine dispute of material fact to be determined in the case).

159. *Blunt v. LMSD*, THE PUBLIC INTEREST LAW CTR., www.pilcop.org/blunt-vs-lmsd/ [<https://perma.cc/QQD7-4ZEP>] (last visited Mar. 22 2017).

160. Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 92,376 (Dec. 19, 2016) (to be codified at 34 C.F.R. pt. 300). States and LEAs are not required to comply with these regulations until July 1, 2018. Moreover, states and LEAs are not required to include children ages three through five in the review of significant disproportionality by disability classification. *Id.*

161. *Id.*

policies and find comprehensive coordinated early intervening services when significant disproportionality is found.¹⁶² Several of the new regulatory provisions have been requested by special education advocates since the 2004 reauthorization as a way to provide greater equity and accountability, particularly as a way to limit systemic patterns of overrepresentation such as that found within the Lower Merion School District.¹⁶³ Yet, there are lingering concerns about the potential reach of the new provisions, particularly relating to students with disabilities who are at high risk of being disproportionately placed and identified.¹⁶⁴

While states and LEAs will now have greater responsibility and a more uniform methodological approach to disproportionate representation identification, the framework remains largely unchanged from the old approach based upon principles of education federalism.¹⁶⁵ Overall, the new provisions continue to require states to use a standard methodology to determine whether there is significant disproportionality based on race or ethnicity.¹⁶⁶ Each state must set “reasonable risk ratio threshold[s],” and “reasonable” minimum number of students within a reported subgroup.¹⁶⁷ However, states are still given great flexibility as to how to determine when significant disproportionality exists.¹⁶⁸ In fact, states can choose not to identify an LEA that has previously exceeded risk ratio thresholds as an LEA with significant disproportionality as long as the LEA is making “reasonable” progress in lowering its risk ratio.¹⁶⁹ As with the previous regulations, the state sets its own determination for what constitutes “reasonable” progress.¹⁷⁰ Thus, the concern remains that the new approach to examining, identifying, and rectifying disproportionate representation of racial or ethnic minority students with disabilities will not adequately address the underlying civil rights issues that remain.¹⁷¹ Moreover, coupled with case precedent firmly establishing that plaintiff parents and students need more than a showing of an IDEA finding of significant disproportionality or patterns of inappropriate district-wide identification and

162. *Id.*

163. See The Council for Children with Behavioral Disorders, *CCBD’s Position Summary on Federal Policy on Disproportionality in Special Education*, 38 BEHAV. DISORDERS 108, 115–17 (2013).

164. *Id.* at 114–15.

165. 34 CFR § 300.647(b)(1)(D) (2016).

166. *Id.*

167. 34 CFR § 300.647(b)(1)(i)(A)–(D) (2016).

168. 34 CFR § 300.647(d)(1)–(2) (2016).

169. 34 CFR § 300.647(d)(2) (2016).

170. 34 CFR § 300.647(b)(1)(D) (2016).

171. Cavendish et al., *supra* note 89, at 38.

assessment procedures for special education placements to prove intentional discrimination, how do potential plaintiff parents and students best ensure that states and LEAs are engaged in equitable practices and enforcement with the special education identification and assessment processes? This Conclusion outlines several considerations for future practice.

Moving forward, it cannot be ignored that enforcement and monitoring are the obligations of states and LEAs across the U.S., and that ensuring fidelity within this process is the primary, and in many ways the only, avenue for parents of racial and ethnic minority students with disabilities to seek equity within the special education identification and referral processes. Therefore, states must redouble efforts to not only comply with the updated IDEA regulations, but to also meaningfully address the underlying factors that have plagued special education for decades—namely implicit racial bias within the identification, referral, and assessment processes. In a synthesis study of disproportionate representation, Morgan and colleagues evaluated whether African American/Black children are disproportionately overrepresented in special education.¹⁷² Within the study synthesis, Morgan et al. found that evidence of overrepresentation significantly declines as additional “best-evidence” and individual-level student controls were added to study analyses.¹⁷³ That is, certain studies reviewed within the Morgan et al. review controlled or accounted for the effect of confounding variables that limit the ability to clearly determine the existence of disproportionate representation in studies conducted across the U.S. The synthesis found that, in studies with additional controls, African American students were “significantly less likely than otherwise similar White children to receive special education services.”¹⁷⁴ This finding has its own important implications for the civil rights of racial and ethnic minority school-aged children. Along with the problem of overrepresentation, it suggests that there are patterns of under-representation whereby minority children are denied necessary educational services that they are entitled to under IDEA.

Moreover, the study called for states to “intensify the use of culturally sensitive disability screening and evaluation practices.”¹⁷⁵ Those practices, such as including differential screening tools and shifting disability eligibility procedures, which influence the direction of disproportionate representation, whether towards over- or under-identification, not only limit the reach of IDEA policy designed to promote equity

172. Morgan et al., *supra* note 6.

173. *Id.* at 181–98.

174. *Id.* at 181.

175. *Id.* at 193.

for students with disabilities, but may contribute to education inequalities disfavoring the very students whose civil rights IDEA was designed to protect.¹⁷⁶

Second, states and LEAs must adhere to the new regulations requirement to establish a standard methodology to use in their annual determination of whether significant disproportionality based on race and ethnicity is occurring within the state. Although flexibility enables states to ensure that disproportionate representation is accurately identified at the LEA level, it also allows states to potentially mask the activity of a district engaging in significant disproportionality regarding placement of a particular group of racial and ethnic minority students with disabilities. Further, by providing states with flexible exclusionary criteria as to when LEAs must lower risk ratios, the equity mandate under IDEA remains unmet and the discourse moves from an equity focus to “debates over appropriate formulas for calculating overrepresentation.”¹⁷⁷

In addition, it is incumbent upon states to view disproportionality enforcement and monitoring within the broader civil rights and education context. That is, the rights secured under IDEA were to attain equity in education for all students with disabilities, and the continuing reconfiguration of IDEA compliance monitoring provisions signals that efforts to reduce disparities between students with and without disabilities have not been entirely successful. Though several of the earliest successful legal challenges to school segregation involved students with disabilities, unresolved issues and continuing inequities for racial and ethnic minority students with disabilities persist. Therefore, states and the Office of Special Education Programs must take meaningful action to develop intervention programs that identify trends and practices in special education identification and referrals, so that policymakers have a greater understanding of which racial and ethnic minority groups are at-risk for over- or under-identification within special education placements. Moreover, states must continue to support administrators and teachers by providing them with evidence-based and culturally responsive approaches to identification, referral, and assessment procedures within special education.

Finally, civil rights legislation in special education is inextricably linked to the civil rights struggle to secure education rights for racial and ethnic minority students across the U.S. While racial and ethnic minority students with disabilities face challenges that are different than those without disabilities, policymakers and administrators at the state and district-level must still be held responsible to all students and eliminate racial or ethnic segregation in special education, general education, or advanced placement classes. Since future potential plaintiffs

176. *Id.* at 194.

177. Cavendish et al., *supra* note 89, at 37.

seem unlikely to have success by pursuing intentional discrimination claims, it is necessary to hold states accountable for non-discrimination in special education and related services using the limited means that are available for civil rights advocates. What remains uncertain, at this point, is whether the new regulations will be used to effectively monitor and address disproportionate representation at the state and district levels or whether it will result in continued intransigence over state- and district-level accountability towards racial and ethnic minority families and students with disabilities.