PREVENTING DISCRIMINATORY, EVALUATION, DISCIPLINE, AND PLACEMENT PRACTICES IN SPECIAL EDUCATION

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Under Federal law, school districts are required to provide all children with equal access to public education at the elementary and secondary levels. Schools cannot discriminate against students on the basis of race, gender, religion, sexual orientation, national origin, or immigration status. Discrimination in education was a main focus of the Civil Rights Movement in the 1960s; however, significant disparities still exist today.

A school district’s policies and practices in the evaluation, discipline, and placement of special education students can have an unintentional disparate impact on minority students and students with disabilities. The Office for Civil Rights just released data in June of 2016 highlighting this pervasive problem in public schools across the United States. The results show students of color are more likely to be identified as having a disability and issued harsher discipline than their White classmates.¹ Almost 800 school districts in the U.S. have identified Black students with an emotional disability (“ED”) at least 3x as often as White students.² Over 500 school districts identified American Indian students with disabilities at least 67% more often than White students.³ Black students historically are more likely to be placed in more restrictive environments.⁴

The data released in 2014 showed similar results. African American students are over-identified as having ED and specific learning disabilities (“SLD”) and under-identified as autistic.⁵ American Indian/Alaska Native students over-identified as SLD,

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³ Id.  
and Latino students are more likely to receive services for hearing impairment.\textsuperscript{6} Not surprisingly, assessments with the greatest subjectivity have the greatest likelihood for disproportionate representation results. Accordingly, assessments for ED, intellectual disability ("ID"), and SLD often show greater disproportionate representations than hearing impairment, visual impairment, and orthopedic impairments.\textsuperscript{7}

For example, students with disabilities served by IDEA in grades K-12 (11\%) were twice as likely to receive one or more out-of-school suspensions as students without disabilities (5\%).\textsuperscript{8} Almost 100 school districts suspended Black students with disabilities twice as often as their nonblack peers for three consecutive years.\textsuperscript{9} More than one out of five American Indian or Alaska Native (22\%), Native Hawaiian or other Pacific Islander (23\%), Black (23\%), and multiracial (25\%) boys with disabilities served by IDEA received one or more out-of-school suspensions, compared to one out of ten White (10\%) boys with disabilities.\textsuperscript{10} One in five multiracial girls with disabilities served by IDEA (20\%) received one or more out-of-school suspensions, compared to one in twenty White girls with disabilities served by IDEA (5\%). Students with disabilities served by IDEA represent 12\% of all students, but comprised 67\% of students subject to restraint or seclusion.\textsuperscript{11} According to OCR, Illinois has one of the widest disparities in the nation between suspended Black students and their White classmates.\textsuperscript{12}

\textsuperscript{7} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Christine Wilkie, Illinois Governor Signs Sweeping School Discipline Reform, \textit{HUFFINGTON POST}, Aug. 25, 2015, available at \url{http://www.huffingtonpost.com/entry/illinois-school-discipline-reform_us_55dcc9c0e4b0a40aa3ac8907}
To address these inequities, in February 2016, the Department proposed a new rule to improve equity in IDEA.\textsuperscript{13} The proposed rule would require states to implement a standard methodology to compare racial and ethnic groups.\textsuperscript{14} In this session, we will look at disproportionate representation, when it becomes an indicator of discrimination, the causes for disproportionate representations, best practices for prevention, and how the Department of Education and the Office of Special Education and Rehabilitative Services are proposing that disproportionality be defined and measured.

A. Racial Disproportionality in Special Education Programs

1. Racial disproportionality, or the overrepresentation of certain races or ethnicities, can be an indicator of racial discrimination.


      i. Racial disproportionality in special education and discipline can violate Section 504,\textsuperscript{15} Title II,\textsuperscript{16} Title IV,\textsuperscript{17} and Title VI.\textsuperscript{18}

      ii. Federal nondiscrimination regulations also provide that a recipient of federal funds may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination.”\textsuperscript{19}

   b. Illinois Law. Racial disproportionality in special education and/or discipline also violates the Illinois Human Rights Act.\textsuperscript{20}

2. To establish discrimination, plaintiff must show either discriminatory intent or disparate impact.

\textsuperscript{14} Id.
\textsuperscript{15} 29 U.S.C. § 701 et seq.
\textsuperscript{16} 42 U.S.C. §§ 12131-12165.
\textsuperscript{17} 42 U.S.C. §2000c-8.
\textsuperscript{18} 42 U.S.C. § 2000d.
\textsuperscript{19} Elston v. Talladega, 997 F.2d 1394, 1412 (11th Cir. 1993).
\textsuperscript{20} 775 ILCS 5/ et seq.
a. **Intentional Discrimination** occurs when educational institutions intentionally discriminate against protected individuals or fail to apply their policies and practices consistently to similarly situated individuals or groups, without regard to their race or national origin.

b. **Disparate Impact.** To establish disparate impact, a plaintiff must demonstrate that a facially neutral practice has a disproportionate adverse effect on a protected group.

   i. This is typically shown through statistical data that demonstrates a substantial enough disparity to raise an inference of adverse impact.

   ii. Further, the disparate impact must be caused by the challenged practice.

   iii. In other words, if the same disparate impact would have existed even if the defendant had not engaged in the challenged practice, then no liability attaches. ²¹

3. **Indicators of Discrimination.**

   a. Disproportionate representation of racial and ethnic groups in special education services as a whole; and

   b. Disproportionate representation of racial and ethnic groups in categories of specific disabilities, i.e., speech/language, specific learning disability, emotional disability, intellectual disability, autism, and other health impairment.²²

   c. Disproportionate representation of racial and ethnic groups in incidents of discipline.

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²¹ *Elston v. Talladega*, 997 F.2d 1394, 1407 (11th Cir. 1993).
²² 34 CFR 300.646.
4. **Causes of disproportionate representation** of different races/ethnicities in special education are created by a complex combination of forces within our educational system and beyond and include:

- Lack of evidence based instruction or inadequate instruction;23
- Novice/inexperienced teachers with fewer classroom management skills tend to refer more minority students for special education evaluation;24
- Referrals or evaluations from teachers with little or no training in multi-cultural education or experience teaching diverse students;25
- Systemic institutional racism suggested by higher number of Black students with disabilities who are suspended;26
- Testing bias due to use of a test that was not developed for a demographically or culturally diverse student body and as a result systematically disadvantages students of color, students from lower-income backgrounds, students who are not proficient in the English language, or students who are not fluent in certain cultural customs and traditions;27
- Poverty;28
- Flawed assessments, practices, or special education processes;29
- Culturally inappropriate and unresponsive curricula and pedagogy;30
- Unconscious bias in teacher perceptions which mistake cultural differences for cognitive or behavioral disabilities;31

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26 Codrington, Fairchild, Special Education and the Mis-education of African American Children: A Call to Action, Feb. 2012, p. 6
28 Id.
29 Id.
• Inequity in general education;\textsuperscript{32} and
• Lack of quality of behavioral supports and services.\textsuperscript{33}

5. \textbf{Justification for disparate representation}. Discrimination occurs if a disparate impact is established, that would not have occurred without the challenged practice, and for which the school has no educational justification.\textsuperscript{34} Thus, after the existence of disparate impact is established, the burden then shifts to the school district to show that the challenged practice is educationally justified.\textsuperscript{35}

   a. Educational justification or necessity is evaluated by looking at the legitimacy of the educational goal and the use of the policy, practice, or test to advance that goal.

   b. Courts typically give deference to schools in the creation of their goals and instead focus their analysis on whether the challenged policy, practice, or test actually supports those goals.\textsuperscript{36}

6. \textbf{Alternative practice}. However, even if a school district can show educational justification, the party challenging the practice can show that an alternative practice with less disparate impact is equally effective in meeting the educational goals.\textsuperscript{37} Factors that the court considers in evaluating the feasibility of the proposed alternative practice include costs and administrative burdens.\textsuperscript{38}

7. \textbf{Proactive measures to prevent disproportionate representations.}

   To prevent over-representations of students of color in special education:

\begin{itemize}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{34} \textit{People Who Care v. Rockford Bd. of Educ.}, 851 F. Supp. 905, 958-1001 (N.D. Ill. 1994), remedial order rev’d, in part, 111 F.3d 528 (7th Cir. 1997).
\item \textsuperscript{35} Elston v. Talladega, 997 F.2d 1394, 1407 (11th Cir. 1993).
\item \textsuperscript{37} Elston v. Talladega, 997 F.2d 1394, 1407 (11th Cir. 1993).
\end{itemize}
• Use data to establish a baseline of student populations and monitor progress;39

• Train teachers to respect and value cultural differences, irrespective of socioeconomic status.40

• Use interventions early and often and involve parents in intervention process;

• Document all interventions and outcomes; and

• Create a policy delineating a standardized process and criteria for special education eligibility determinations and assessments;

• Apply policy consistently to all students;

• Document criteria used and met for individual eligibility determinations;

• Conduct thorough and individualized assessments using multiple and varied types of assessments including tests, observational data, and rating scales with adequate technical qualities that are appropriate to student’s cultural background and language;41

• Evaluate student’s performance on assessments and in previous learning opportunities by using local and subgroup norms that are similar to the student being evaluated rather than by using district-wide norms or national standards;42

• Document assessments and conclusions; and

• Use a collaborative team-based instructional consultation model that focuses on both remediating student deficits and addressing potential challenges with instructional approaches and often expands the role of the school psychologist.43

To prevent over-representations of students of color in discipline:

• Use expulsions/suspensions only for legitimate educational purposes.

• Consider forms of non-exclusionary discipline first.44

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41 Id. at 10.

42 Id. at 22.


44 105 ILCS 5/10 22.6(b)(5).
• Create a policy to re-engage students who are suspended, expelled or returning from an alternative setting.\textsuperscript{45}

• Use zero tolerance policies only as required by law.\textsuperscript{46}

• For any expulsion/suspension over ten (10) days, determine if the behavior was a manifestation of disability;

• If expulsion is warranted detail specific reasons why removing student from the learning environment is in the best interest of the school and define the rationale for the specific duration imposed.\textsuperscript{47}

B. Legislative Response to Disproportionality

1. Illinois Law. Senate Bill 100 requires alternative disciplinary measures instead of expulsion and suspension. Further, it finds that school officials shall not encourage or advise a student to drop out voluntarily based on behavioral or academic difficulties.\textsuperscript{48}

2. Federal Law. Proposed Amendments to 34 CFR Part 300. On March 2, 2016 OSERS proposed a new rule to expand and standardize identification of racial and ethnic patterns in the way children with IEPs are identified, placed, or disciplined and to allow the use of federal money for early intervention.\textsuperscript{49}

   a. Establishes a standard methodology (risk ratio method or alternative risk ration method) to determine whether significant disproportionality based on race and ethnicity is occurring.

   b. Clarify that states must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and

\textsuperscript{45} 105 ILCS 5/10-22.6(b-25).
\textsuperscript{46} 105 ILCS 5/10-22.6(b)(10).
\textsuperscript{47} 105 ILCS 5/10-22.6(a).
\textsuperscript{48} 105 ILCS 5/10-22.6(h).
expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities;

c. **Clarify requirements for the review and revision of policies, practices, and procedures** for every year in which significant disproportionality is found; and

d. **Expand the use of IDEA funds for early intervening services** and require states to permit LEAs identified with significant disproportionality to provide comprehensive Coordinated Early Intervening Services to preschool children ages three through five, with or without disabilities, and children with disabilities in kindergarten through grade 12. LEAs would also be required as part of the implementation to address the factors contributing to the disproportionality.\(^{50}\)

The comment period of 75 days ended on May 16, 2016. OSERS will review comments, data, facts, and expert opinions before deciding whether to issue the final rule.

**C. Calculation Methods**

1. **Methodology currently used in Illinois**

   a. **Method.** Illinois currently uses a weighted risk ratio method if there are at least 10 students in the racial/ethnic group in question for special education overall or within a particular disability category and at least 10 students in the comparison group (all other races/ethnicities in the total school enrollment, including students with or without IEPs).\(^{51}\) An alternative risk ratio method is used if the district has at least 10 students in the racial/ethnic group in question eligible for special education overall or within a particular disability category but fewer than 10 students in the

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comparison group (all other races/ethnicities in the total school enrollment, including students with and without IEPs). The weighted risk ratio takes into account the racial/ethnic composition of all students in the State. In other words, each district risk is affected by the statewide demographics. If the proposed federal rule becomes effective, Illinois would have to change from the weighted risk ratio method to the risk ratio method.

b. **Data.** Uses preceding three years’ Fall Enrollment data and December Special Education Child Count.

c. **Threshold.** Illinois currently uses 3.0 or greater. At a risk ratio of 3.0 the particular racial or ethnic group is 3x as likely as a member of the rest of the student population to be enrolled in special education.

2. **Proposed Rule Methodology**

   a. **Method.** The proposed rule requires use of the risk ratio method. The risk ratio method only uses district information and would not be affected by statewide demographics. Risk ratio is more straightforward and transparent than the weighted risk method used by Illinois; however, the risk ratio method still has a number of drawbacks which were vetted in some of the comments.

   b. **Data.** Under the proposed rules, states will still be allowed to use three years of data.

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52 Id.
c. **Threshold.** Under the proposed rule, states would still have control over setting a risk ratio threshold. The only requirement is for it to be reasonable.\(^{58}\) The Leadership Conference on Civil and Human Rights and a number of non-profit groups including NAACP Legal Defense and Education Fund submitted comments strongly opposing a weighted risk ratio and seeking a risk ratio threshold of 1.5-3.0.\(^{59}\)

### D. Impact of Proposed Rule

1. **Expanded Identification.** OSERS’ goal is for the new rule to provide a better representation of the true scope of disparities in special education as seen in the data release.\(^{60}\) In the 2012-2013 school year, only 3% of the nation’s school districts were flagged for overrepresentation, from only 7 states. 22 states identified 0 districts as having significant disproportionality.\(^{61}\) The Education Department has estimated close to half of the nation’s districts will show significant disproportionality in at least one monitored area when analyzed by the Department’s criteria.\(^{62}\) For Illinois, only 483 of 878 districts (55%) would not have a risk ratio that exceeds two median absolute deviations above the national median (Department’s criteria) for at least one race/ethnicity in at least one disability, educational environment, or discipline category.\(^{63}\)

2. **Expanded use of IDEA funds.**
   
   a. **Currently,** districts with significant disproportionality may not use their 15% set aside (IDEA Part B Funds) to serve children with disabilities, even if they

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\(^{58}\) *Id.*


\(^{61}\) *Id.*


\(^{63}\) *Id.*
have racial disparities in the discipline and placement of children with disabilities. Districts cannot use 15% set aside to serve preschool children.

b. **Proposed rule** expands use of IDEA funds. Districts identified with significant disproportionality would be able to use IDEA Part B Funds for:

- Students with disabilities in grades K-12
- To provide early intervention services to preschool children ages three-five

**CASE LAW ADDRESSING DISCRIMINATORY EDUCATION PRACTICES**

**Disproportionality in Special Education**

- **Sun Prairie (WI), 62 IDELR 125 (2013).**
  A Wisconsin school district had a student body with 10% Black students; however Black students made up 30.2% of its special education population. Further, those students made up 48.9% of students receiving services for an intellectual disability, 39.2% of students eligible for an emotional disturbance, and 38.95% of students deemed to have an SLD. OCR therefore determined that a review of the referral and evaluation processes was in order. In reviewing the disproportionality, OCR observed that the district did not have a standardized screening procedure. Moreover, the district did not consistently document interventions attempted or the success of the interventions. Further, in reviewing the eligibility determination, OCR found an absence of documentation that applicable criteria were met. Because the district asked to resolve the matter voluntarily, OCR did not decide whether it violated 504 or Title II. OCR concluded that the district could resolve the matter by hiring an expert consultant to review its procedures and ensure students of all races received equitable treatment in the IDEA referral process.

- **Blunt v. Lower Merion Sch. Dist., 64 IDELR 32 (3d Cir. 2014).**
  African American students who were disproportionately placed in remedial classes sued for discrimination under IDEA, ADA, Section 504, Title IV, and Section 1983. Statistical data showed that African Americans were slightly over-represented in special education classes; however the record demonstrated that each individual student’s educational needs were assessed and satisfied with a thorough and individualized process. The students could not show that their placements were unrelated to their IDEA evaluations. Accordingly, the court found there was no evidence of intentional discrimination or deliberate indifference to intentional discrimination by a third party.

**Discipline Practices that Target Minorities, Special Education Students, etc.**

- **Minneapolis Public Schools, OCR Compliance Review (05-12-5001) (OCR).**
  In 2010 and 2011-12, OCR found that Black students made up about 40% of the student enrollment in the Minneapolis public school system, yet were the subject
of 74% of the district’s recorded disciplinary incidents, received over 60% of in-school suspensions, over 78% of the out-of-school suspensions, and over 69% of the referrals to law enforcement. Further, when interviewed, staff could not provide nondiscriminatory reasons for the differences in the discipline received by similarly situated students of different races. For example, school officials assigned a White student to an alternate instruction room for bullying, but imposed a two-day out-of-school suspension on a Black student who also engaged in bullying. To resolve the matter, the district entered into an agreement to take specific actions to ensure fair and equitable discipline policies and practices, including to: consult with and retain an expert to make recommendations on non-discriminatory practices, establish a discipline team to review disciplinary actions taken at each school to ensure the actions are non-discriminatory and consistent with district policy, and ensure that school staff employ a range of corrective measures before referring a student to disciplinary authorities.

- **East Aurora (IL) School District #131, 63 IDELR 174 (OCR 2013).**
  OCR found that a district did not discriminate against a student based on her race or disability when it imposed two days of out-of-school suspension on the student after she was involved in two different incidents of misconduct. The eighth-grade Filipino student, who had depression and ADHD, had an IEP that did not provide for individualized disciplinary interventions or techniques and did not exclude her from consequences under the school disciplinary code. OCR found no evidence that the district was required under the student’s IEP to provide her with different disciplinary treatment because of her disabilities or that it actually treated her differently than her schoolmates without disabilities. Finding no evidence that the student was given a harsher punishment due to her race or disability, OCR dismissed her mother’s complaint.

- **Indian River (DE) School District, 61 IDELR 235 (OCR 2013).**
  A fifth-grader with an undisclosed disability who allegedly threatened to kill a non-disabled classmate with a pen on a bus may have been punished more severely than the target of her threat, but there was good reason for it, OCR concluded. The fifth-grader took a pen out of her bag on the bus, held it, and said that she was going to kill the student. The threatened student allegedly responded, “You should do it to yourself.” For that statement, the student without a disability received a verbal reprimand. In contrast, the district suspended the student with a disability for five days for bullying. OCR noted that the district's disciplinary data established that the two students were not similarly situated with respect to the incident. First, the student with a disability engaged in more serious misconduct by threatening to kill the student. In addition, the incident was the fifth-grader's fourth referral for bullying, while the other student had no disciplinary record. Finally, OCR observed that the punishment was consistent with the district's progressive discipline policy.

- **Marshall County (KY) Sch. Dist., 20 IDELR 556 (OCR 1993).**
  The parent of a 14-year-old student with a learning disability and speech impairment alleged that the district engaged in discrimination by denying her son beverage breaks, taping his mouth shut as a means of discipline, and by subjecting students with disabilities, including her son, to harassment by a resource room teacher. OCR found that the student had been treated differently
from nondisabled students when his teacher disciplined him for disrupting class by suggesting that he tape his mouth shut; however, the district took immediate action, including a verbal reprimand of the teacher, upon being informed about the incident. Further, no discrimination occurred as to suspension of the student's break privileges, following a snow ball throwing incident, in accordance with the district's disciplinary code, as students with and without disabilities had been subjected to the same disciplinary treatment as a result of this incident. Finally, OCR found that the resource room teacher's practice of telling students that they were acting like small children when they misbehaved in class was a proper disciplinary measure and was not based on any of the students' particular disabling conditions. OCR concluded that the district was not in violation of the Section 504 or ADA regulations.