

# Racial/Ethnic Disproportionality and Special Education Assessment: Policy Analysis and Recommendations for Practice

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**Abstract** The overrepresentation of racially/ethnically diverse students in special education is a well-established malady of public education in the United States with dire consequences for both students and school districts. This manuscript provides a review of federal statutes and pertinent case law, as well as guidance offered by the Office of Special Education Programs that elucidates the need of school districts to check for the overrepresentation of racially/ethnically diverse students in their special education programming. Further, the review indicates that school districts must ensure that students receive a nondiscriminatory special education evaluation. A discussion is presented that offers districts with recommendations for tracking the presence of overrepresentation through the calculation of risk ratios. Strategies for ensuring the delivery of nondiscriminatory special education evaluations are provided including ensuring the fidelity of test administration, norm over-sampling, use of local norms, examination of test invariance, and multi-method/multi-informant assessment process.

**Keywords** Disproportionality, Test Bias, Nondiscriminatory Assessment

impacting racially/ethnically diverse students in the United States dates to at least the 1950s. The decision in *Brown vs. the Board of Education* brought with it the judicial mandate to end systematic racial segregation in United States' schools. Despite this order, racial segregation within the United States has been recapitulated in other ways. Evidence of this segregation is observed in lower graduation rates for African-American students as compared to white students [1], significant achievement gaps between white and African-American students [2], and the possible over-identification of African-American students as students with an educational disability [3].

Overrepresentation of racially/ethnically diverse students in special education has been observed for over 50 years [3]. It has been posited that African-American students are disproportionately labeled as requiring special education generally, and having an emotional or intellectual disability given their total school population specifically [4]. Disproportionate representation in special education can have dire consequences. Students identified as qualifying for special education services have been shown to be at risk for depression, display poor longitudinal educational achievement, show increased levels of incarceration as adults, and have higher incidences of substance abuse as adults [5].

In conjunction with the ramifications disproportionality can impart on students' quality of life, there are also legal implications for school districts. While the issue of disproportionality touches on many facets of special

## 1. Introduction

Efforts to remediate inequitable educational practices

education such as program development and the requirements that students with a disability must receive a free and appropriate public education (FAPE) in the least restrictive environment (LRE). This legal analysis focuses solely on disproportionality in the context of school based special education evaluations. The following discussion reviews the relevant legal principles derived from federal policy, a sample of pertinent case law related to special education evaluations in the context of school districts' roles in addressing disproportionality, and guidance provided in dear colleague letters from the Office of Special Education Programs. The discussion concludes with guidance on how to calculate risk ratios to identify the presence of disproportionality, recommendations for selecting and implementing tests and testing procedures to mitigate bias, and diagnostician behaviors to promote cultural consonance.

## 2. Legal Analysis

In order to remediate the overidentification and disproportionate placement of African-American students in special education, guidance was issued from the federal government within the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004 (P.L.108-446). The two primary considerations of this discussion for school districts presented in the IDEIA 2004 are disproportionality and nondiscriminatory evaluations.

Section 618(d)(1)(A-C) and Section 618(d)(2)(A-C) of Part B of IDEIA 2004 mandates that states collect data examining the rates of special education entitlement,

particular eligibility category identification, and educational placement of racial/ethnic minorities. The number and characteristics of disciplinary actions must also be collected. Following the identification of disproportionality, the local educational agency must review and revise its policies, procedures, and practices used in the process of special education identification and educational placement of students. Table 1 provides specific citations and legislative language related to disproportionality within P.L.108-446.

Key to reducing the overidentification and disproportional representation of racially/ethnically diverse students in special education is to ensure the implementation of nondiscriminatory evaluation procedures. Sec 614(b)(2)(A-C) and Sec 614(b)(3)(A)(i-v) of Part B of IDEIA 2004 provides direction regarding the required conduct and requirements of special education evaluations (Table 2). In order to be congruent to the regulations, school districts must ensure that its special education evaluations consist of a multi-method, multi-informant process that measures students' performance in various domains of life such as functional skills, academic achievement, and social-emotional functioning. The tests and tools used to gather this information must be psychometrically sound in that their use derives reliable and valid data for the purpose of determining eligibility for special education services. Furthermore, these tests must be unbiased, administered in a child's native language, and implemented by trained personnel in accordance with the test publishers standardized administration procedures.

**Table 1.** Statutory Citations and Language Involving Disproportionality in IDEIA 2004

Section	Statement
	(d) Disproportionality.—
20 USC § 1418 Part B. Sec 618(d) (1) (A-C)	(1) In general.--Each State that receives assistance under this part, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the local educational agencies of the State with respect to— (A) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3); (B) the placement in particular educational settings of such children; and (C) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions
20 USC § 1418 Part B. Sec 618(d) (2) (A-C)	(2) Review and revision of policies, practices, and procedures.--In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of such children, in accordance with paragraph (1), the State or the Secretary of the Interior, as the case may be, shall— (A) provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this title; (B) require any local educational agency identified under paragraph (1) to reserve the maximum amount of funds under section 613(f) to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly children in those groups that were significantly overidentified under paragraph (1); and (C) require the local educational agency to publicly report on the revision of policies, practices, and procedures described under subparagraph (A).

**Table 2.** Statutory Citations and Language involving Nondiscriminatory Evaluation in IDEIA 2004

Section	Statement
20 USC § 1414 Part B. Sec 614 (b) (2) (A-C)	(1) CONDUCT OF EVALUATION.—In conducting the evaluation, the local educational agency shall—
	(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—
	(i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
	(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
	(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
20 USC § 1414 Part B. Sec614 (b) (3) (A) (i-v)	(2) ADDITIONAL REQUIREMENTS.—Each local educational agency shall ensure that—
	(A) assessments and other evaluation materials used to assess a child under this section—
	(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
	(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;
	(iii) are used for purposes for which the assessments or measures are valid and reliable;
	(iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments;

**Case Law Sample**

Guidance regarding the implementation and review of policies and procedures related to nondiscriminatory evaluation can be gleaned from a perusal of pertinent case law. The following section will present a seminal case that laid the foundation for nondiscriminatory evaluations, as well as two more pertinent cases.

**Larry P. v. Riles.** The seminal court case regarding disproportionality and nondiscriminatory evaluation is Larry P. v. Riles, which occurred in 1979. The implications of the Larry P. case were profound and widespread. The court ruled that special education evaluations must be conducted with technically sound assessment instruments that are free of racial/ethnic bias. Failure to use these tools is likely to result in disproportionate enrollment in special education due to membership in a suspect class. The court held this is a clear violation of the 14th Amendment and schools must actively protect against the overidentification of racial/ethnic minorities as eligible for special education. This case is directly linked to the provisions in IDEIA 2004 requiring that districts collect disaggregated data related to the racial/ethnic composition of its students with IEPs. Further, its influence is also seen in the mandate requiring the implementation of nondiscriminatory special education evaluations.

**D.K. v. Abington School District.** The D.K. v. Abington School District case, which was heard in 2012, also holds relevance to the topic of racial/ethnic disproportionality and nondiscriminatory evaluation. Within this case, the parents of a student sought compensatory education services due to their child being

denied FAPE as the result of a poor initial evaluation testing battery. The court denied the parents’ claim because, while the assessment battery was poorly constructed and did not satisfy the requirement of child find, the student was not denied a FAPE because the school was providing him with adequate intervention services in place of special education services.

This case implies that special education evaluations must be adequately constructed, of sufficient breadth, and tailored to each individual’s needs and inherent characteristics. Thus, when designing an evaluation for a student from a racial/ethnic minority group all assessors must ensure that the evaluation tools are not only technically sound but also capture the unique variability attributable to a student’s racial/ethnic background. Particular items and administration procedures must be in line with the student’s background.

**Vaughns v. Board of Education of Prince George’s County.** Finally, Vaughns v. Board of Education of Prince George’s County was heard in 1985 and provides possible guidance for school districts. The district within this case had been placed under a desegregation order due to the disproportionate representation of African-Americans in its special education programming. The district was able to successfully petition for a repeal of this order by providing evidence of an extensive and detailed process for special education evaluation. The district was also able to show that its special education evaluations implemented all necessary safeguards during the testing sessions. This requirement was substantiated by the district providing evidence of the application of pre-referral intervention services, the acquisition of parental consent, the utilization

of a multi-method/multi-informant assessment approach, and adherence to criteria when determining special education eligibility. The court held that this evidence outweighed the incrimination of discriminatory assessment practices indicated by statistical figures pointing to disproportionate placement in special education of racial/ethnic minorities.

### **Office of Special Education Programs' Policy Documents**

Despite being the nexus of FAPE, there is little guidance regarding nondiscriminatory evaluation within the context of race. There is a dearth of current case law. This is also the case regarding policies issued by the Office of Special Education Programs (OSEP) save for a pair of Dear Colleague Letters (DCL). The first under consideration was issued to Ben Nighthorse Campbell in September of 2003 [6]. Within this letter, Eleanor Baker, writing on behalf of OSEP, indicated that the selection of specific test instruments and methodologies for special education evaluations is left to the state and local educational agencies. Further, the author stated that there is no language within the IDEA statutes or regulations that mandates the use of a particular set of tests or consideration of a student's intelligence. This DCL indicates that school districts are offered latitude in determining what test instruments its assessors may select so long as they comply with the evaluation safeguards within IDEIA 2004.

The second DCL is more recent, being issued in 2016 [7]. This letter states that explicit or implicit bias may, at some point, be present within one or all the decisions made by school personnel within the special education process. This bias may unduly influence students' enrollment in special education services. The DCL indicates that states and school districts must adopt lawful methods of reducing the impact of racial/ethnic bias on special education eligibility. This letter directs school districts to review and evaluate their special education assessment procedures to ensure that racial bias is inconsequential to the process of determining special education eligibility. Further, the DCL dictates that school districts could attempt to remediate the presence of racial/ethnic overidentification through varied means such as training in culturally responsive techniques or the analysis of test item bias.

## **3. Practice Recommendations**

Review of the previously discussed information provides guidance as to how school districts may reduce or protect themselves against claims of racial/ethnic disproportionality. An examination of IDEIA 2004 and associated case law offers guidance on how school districts can address the occurrence of disproportionality in special education through its testing process. First, Section 618(d)(1)(A-C) and Section 618(d)(2)(A-C) of Part B of

IDEIA 2004 and the Larry P. v. Riles decision indicates that districts should be collecting and analyzing data on a continual basis so as to detect the presence of disproportionality in special education eligibility. Second, Sec 614(b)(2)(A-C) and Sec 614(b)(3)(A)(i-v) of Part B of IDEIA 2004 dictates what constitutes the necessary tools and processes of a nondiscriminatory evaluation, which, in turn, compels school districts to examine its testing materials, reaffirmed by the Vaughns v. Board of Educ. of Prince George's County decision, and ensure an appropriate testing process, confirmed by the D.K. v. Abington School District case.

### **Tracking Rates of Disproportionality**

The first recommendation concerns the tracking and determination of disproportionality. School districts may benefit from periodic racial/ethnic disproportionality checks within their special education eligibility categories during a school year. Disproportionality can be quantified using risk ratios [8]. Risk ratios are a relatively simple method of analyzing disaggregated special education eligibility rates by race/ethnicity.

To calculate a risk ratio, school personnel must first determine a specific demographic group's risk index. A risk index is calculated by dividing the number of students in a particular racial/ethnic group who are eligible for special education by the total number of enrolled students in that demographic group [8, 9]. For example, a risk index is equal to the number of African-American students eligible for special education divided by the number of total enrolled African-Americans.

Risk indices in isolation are interpretively limited. The use of risk ratios moves beyond descriptive analyses of special education eligibility composition and provides a comparison group for the disproportionality analysis [8]. A risk ratio is figured by dividing the risk index of one group by the risk index of a comparison group. Proportionate representation would be indicated by a risk ratio equal to 1.0, but overrepresentation would be indicated by risk ratios greater than 1.0 [8]. The following is indicative of the formula used to calculate a risk ratio. A hypothetical risk ratio equals the risk index of African-American students eligible for special education divided by the risk index of white students eligible for special education

The use of risk ratios can also be applied to distal outcomes of schooling such as graduation rates, post-high school employment rates, and post-high school incarceration rates. Tracking of employment rates would likely prove difficult and require longitudinal tracking by school districts. Arrest rates for crimes would also likely be difficult to fully capture accurately, but individuals arrest records are generally publicly available through a state or county clerk's office. Analysis of this data in comparison to within race and between race special education eligible and non-special education eligible students may help to provide a piece of evidence for or against the consequential

validity of special education enrollment of racial/ethnic minorities. Technical assistance for these analyses may be found at <https://ideadata.org/technical-assistance/>

### Testing Considerations

The second set of recommendations centers on the tests utilized within school districts' special education evaluations. Districts should emphasize the application of tests that use standardized administration and scoring procedures. Tests should be evaluated and selected for use based on the merits of their psychometric qualities provided in their technical manuals, as well as within independent test evaluations. Furthermore, assessors should be trained to mastery on how to administer these tests. A mastery criterion can be reached by attending district, state, and national professional development trainings targeted at the administration of specific standardized assessments.

Individual assessors may also benefit from developing a procedural fidelity checklist [10] that discretely elucidates the core activities that must be executed for a test to be administered in accordance with how it was administered during the publisher's standardization process. The test assessor would, after consent has been granted, video-record her or his self administering a test to a test taker. The assessor then evaluates the video recorded administration by checking each component on the procedural fidelity checklist that was accurately fulfilled during the test administration. This process would continue until the assessor reaches a mastery criterion (100% accuracy). A peer-review process by a qualified colleague may also be initiated using the video recordings and procedural fidelity checklist. Mastery of the administration and scoring of standardized assessments will help to mitigate the impact of assessor bias as a source of variance in students' scores [11]. This in turn, may help to obtain a more fully objective depiction of the assessed students' functioning.

The norm-referenced measures utilized within special education evaluations should possess current and proportionally representative norms that were obtained through a rigorous sampling methodology. Typically, it is recommended that the racial/ethnic percentages represented in a test's norms be equal to their percentages in the general population and that these percentages are obtained nationally through a random stratified sampling method. There are two other considerations, over-sampling and local norms, that assessors must consider in terms of norms.

One, it may be beneficial to use tests that over-sample racial/ethnic minorities. This is especially true in schools that are predominately composed of one racial/ethnic category or when assessing students from statistically small demographic categories such as the Native American racial designation. For example, if a school's population is 98% African-American, it may be beneficial to use a test

with norms in which African-Americans are overrepresented. To illustrate, assume a test uses data for its norms derived from a sample of 1,000 children. Also assume that the test publisher went to great pains in deriving a numerically representative sample and the percentage of individuals in each racial/ethnic group within the norms is perfectly aligned with the percentage of each racial/ethnic group in the total population. It could be said that the publisher did an adequate job in ensuring racial/ethnic representation within its norm sample, but this may not be the case for African-Americans who represent 13% of the total population [12]. Once again using the norm sample of 1,000 children, this means that the performance of only 130 individuals who self-identify as African-American could potentially be the criterion against which all other African-American students in the country would be compared. In this light, the norm sample is not quite as fair as the matching percentages would lead one to believe.

To remediate the aforementioned issue, assessors may elect to utilize local norms. Local norms may be highly desirable for use in making special education eligibility determinations. Local norms not only take into consideration the racial/ethnic composition of a particular school, but also the acculturation of the students in that particular school. Furthermore, the use of local norms as a comparison group may help to control for teacher instructional efficacy, time in instruction, and curriculum quality when making determinations for special education [13].

The last point concerning tests is that assessors should examine the psychometric characteristics of tests as related to test bias. The test's technical manual should describe procedures that were used to avoid racial/ethnic bias in the construction of the test. The test publisher should provide clear detail as to how racial/ethnic bias was mitigated during the construction of the test, minimally, at both the item and aggregate level.

At the item level, item content should not consist of or require knowledge that is specific to a single racial/ethnic group. Assurance of this sort typically involves the use of statistical procedures such as differential item functioning (DIF). DIF analyses should indicate no systematic item level performance variation as a result of membership in a racial/ethnic category [14]. Further, the test's manual should provide global performance data that is disaggregated by racial/ethnic category. There should be disaggregated mean subtest, index, and composite performance data presented for each racial/ethnic category. There should be no statistically significant mean differences between racial/ethnic groups.

### Diagnosticians' Considerations

Finally, the last set of recommendations centers on diagnosticians. A lack of cultural congruence between teachers and students from racially/ethnically diverse

backgrounds has been posited as an explanatory factor for overrepresentation of racially/ethnically diverse students in special education [15]. The preponderance of diagnostic support personnel who conduct evaluations to determine student eligibility for special education services are white college educated females [16]. The support personnel practicing in the United States differ from a large portion of the student population by class, race, and sex. These cultural incongruences can manifest as lowered expectations concerning the academic ability of culturally diverse students [17] and increased achievement disparity between students from dominant and non-dominant cultural backgrounds [18].

In order to realign any cultural incongruence that exists between students and assessors, it may be beneficial for diagnosticians to embed themselves within their assigned schools by attending each location's family/school engagement events. This helps to attenuate the impact of implicit personal bias by exposing diagnosticians to the cultures of the families within their assigned schools. These positive interracial interactions can mollify the presence of implicit bias on the part of the diagnosticians. Positive cross-cultural interpersonal interactions have the potential to significantly improve the cultural responsiveness of diagnosticians to the students with whom they work [19].

To further meet the nondiscriminatory evaluation mandates within IDEIA 2004, it is vital that diagnosticians utilize a multi-method/multi-informant evaluation approach that falls in line with the procedural safeguards laid out in the statute. Assessors should incorporate multiple assessments, both criterion and norm referenced, into their assessment batteries. These tests should gather information through multiple means (oral response, observation, paper and pencil, etc...) and be conducted within multiple environments [20]. Furthermore, multiple assessors should collect data from multiple informants (student, teacher, parent, permanent products, etc...). The particular tests/assessment batteries, evaluation environments, and evaluation informants should be tailored to each student's presenting needs [21]. This approach to special education evaluation provides a legally defensible fulfillment of the requirements within IDEIA 2004.

#### 4. Conclusions

The overrepresentation of racially/ethnically diverse students in special education is a well-established malady of public education in the United States with dire consequences for both students and school districts. In order to remedy this situation, the federal government has mandated school districts in the United States to adhere to several key principals elucidated by national educational policy. School districts may meet these mandates by regularly checking for the presence of racial/ethnic

disproportionality in their special education programming and bearing in mind several testing and diagnostician considerations related to special education evaluations. By following the recommendations previously described, school districts may be able to avoid the disproportionate representation of racial/ethnic minorities in special education. These steps may improve the future of the country's most vulnerable students. Furthermore, they may help to deflect future legal complaints leveled at school districts regarding racially based overrepresentation in special education.

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