A Better IDEA: Implementing a Nationwide Definition for Significant Disproportionality to Combat Overrepresentation of Minority Students in Special Education

LINDSEY HERZIK*

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I. INTRODUCTION

Judge Robert J. Carter, one of the main architects of the *Brown v. Board of Education* case, expressed fears that the success of the case could be

detrimental to African American principals and teachers.[1] He thought they might lose their jobs, which did end up happening.[2] Although Judge Carter's fear extended only to African American principals and teachers, African American students faced new struggles in their desegregated schools, specifically, being placed in less academically challenging classes.[3]

One form of resegregation involves the tendency for teachers and administrators to place African American students into special education classes without addressing what may be other, underlying problems of learning development.[4] After *Brown*, this technique, although perhaps intended to help rather than hinder students, had the effect of resegregating African American students.[5] In fact, in 1968, "blacks were overrepresented in [educable mentally retarded] classes by a factor of 330 percent" and "overrepresentation increased to 540 percent by 1974."[6]

While this resegregation problem was exceptionally prevalent during desegregation in the 1960's and 1970's, the problem has not gone away. For instance, in 2010, Saleema Hall, an African American student, was identified as having a specific learning disability in elementary school.[7] Her elementary school placed her in special education classes, and she received additional support in reading.[8] However, this placement was suspect because the School District psychologist did not conduct a legally required classroom observation before placing her in special education classes.[9] Additionally, the psychologist told Saleema's "family that her

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1. ROBERT J. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 156 (2005). Judge Carter was a NAACP civil rights attorney and was a "major architect" of the *Brown v. Board of Education* case. Dennis McLellan, *Robert L. Carter Dies at 94; NAACP Attorney Fought Segregation*, L.A. TIMES (Jan. 6, 2012), http://articles.latimes.com/2012/jan/06/local/la-me-robert-carter-20120106 [http://perma.cc/SFV6-63M6]. Judge Carter "argued 22 cases before the U.S. Supreme Court and won 21 of them before resigning from the NAACP in 1968." *Id.* After retiring from the NAACP, Judge Carter was appointed a U.S. District Court Judge for the Southern District of New York. He retired in 2009 and died in 2012 at the age of 94. *Id.*

2. Kevin D. Brown, *Review: Robert L. Carter, A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*, 31 VT. L. REV. 925, 939 (2007).

3. *Id.* at 940–41.

4. ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 76 (1990).

5. *Id.* at 76–77

6. *Id.* at 77.

7. Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749, 753 (E.D. Pa. 2011), *aff'd*, 767 F.3d 247 (3d Cir. 2014). The *Blunt* case examines six other plaintiffs' experiences of being placed into special education classes. *Id*. at 754–55. One plaintiff, Chantae Hall, "noted that one of her special education support classes . . . was 100% African American." *Id.* at 754. Another plaintiff, Quiana Griffin was placed in the PASS class for students at risk of failing Pennsylvania standardized tests and stated that the "PASS class was 'predominately African American.'" *Id.*

8. *Id*. at 753.

9. *Id.*

initial testing protocols were destroyed, which Saleema later discovered was a lie."[10] An independent certified school psychologist reevaluated Saleema, who concluded that her test scores were within average range at the time of her initial testing and at the time of the psychologist's reevaluation.[11] After Saleema's reevaluation, she was removed from special education classes.[12]

As evidenced by Saleema's experience, the resegregation that occurred in the 1960s and 1970s is still prevalent today. Minority students across the country are consistently placed in special education courses at a disproportionate rate to non-minority students.[13] It is estimated that around 13% of the current student population in the United States experiences some type of disability.[14] Therefore, one would expect that the incidence of students who have disabilities would be equally distributed among the different student populations—however, this is not the case. Minority students make up a disproportionate statistical representation in special education programs.[15] Federal data from 2007 shows that African American students made up 16% of the U.S. school enrollment but account for more than 30% of the students classified with specific learning disabilities.[16] Hispanic students received comparable rates of classification.[17]

Currently, each state is responsible for adopting their own definition of determining whether minority students make up a disproportionate number of students in special education classes, commonly referred to as significant disproportionality.[18] However, the Department of Education asked for

10. *Id.* Saleema was not the only plaintiff whose testing protocols were destroyed; an "expert stated that data [was] missing from [plaintiff] Lydia's files and that the absence of th[at] data 'likely caused continued inappropriate placement, which caused [Lydia's] overall academic performance and outcome to suffer significantly.'" *Id.* at 755.

11. *Id.* at 753.

12. *Id.* at 753–54.

13. Memorandum from the U.S. Dep't of Educ., Office of Special Educ. & Rehab. Serv. to State Directors of Special Education (Apr. 24, 2007), https://www2ed.gov/policy/speced/guid/idea/memosdcltrs/osep07-09disproportionalityofracialandethnicgroupsinspecialeducation.pdf [http://perma.cc/YB6Q-VKBB].

14. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2015, at 88 (2015), http://nces.ed.gov/pubs2015/2015144.pdf [http://perma.cc/HWZ2-RLQJ].

15. 20 U.S.C. § 1400(8) (2012).

16. Kris Zorigian & Jennifer Job, *Minority Representation in Special Education Classrooms*, LEARN NC, http://www.learnnc.org/lp/pages/6799 [http://perma.cc/W8QN-JT8H] (last visited Oct. 1, 2015).

17. *Id.*

18. 20 U.S.C. § 1418(c) (2012).

comments on a proposal to create a nationwide definition of significant disproportionality under § 618(d) of the Individuals with Disabilities Education Act (IDEA).[19]

In 2013, the U.S. Government Accountability Office (GAO) reported that most states were not identifying any problems in their districts concerning overidentification of minority students in special education classes.[20] The Department of Education noted that the GAO report was one of the reasons it was accepting comments on a potential nationwide standard definition of significant disproportionality.[21] This Comment argues that the Department of Education should implement a nationwide standard definition of significant disproportionality to ensure that states are actively trying to reduce overrepresentation of minority students in special education classes.

This Comment proceeds in three parts. Part II focuses on the history of desegregation in schools, specifically analyzing *Brown v. Board of Education* and how states have continued to keep schools segregated through overidentification of minorities in special education classes. It also examines IDEA and how IDEA allows bias to creep into identification of children with emotional or intellectual disabilities. Part III discusses how states currently address the problem of overidentification and the Department of Education's role in preventing overidentification. Part III also discusses the high bar the court sets for finding significant disproportionality of minorities in special education classes, as evidenced in *Blunt v. Lower Merion School District*. Lastly, Part IV proposes a nationwide standard for defining significant disproportionality, addresses states' concerns, and concludes.

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19. Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (IDEA), 79 Fed. Reg. 35,154 (June 19, 2014). The Department of Education received ninety-five comments on their proposed change. *Request for Information on Addressing Significant Disproportionality Under Section 618(d) of* IDEA, REGULATIONS.GOV, http://www.regulations. gov/#!docketBrowser; rpp=25;po=0; dct=PS;D=ED-2014-OSERS-0058 [http://perma.cc/67YC- WQVR] (last visited Oct. 1, 2015).

20. 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 10–11 (2013), http://www.gao.gov/assets/660/652437.pdf [http://perma.cc/P2DW-GFAA].

21. Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (IDEA), 79 Fed. Reg. at 35,155.

II. THE BASIS FOR IDEA: *BROWN V. BOARD OF EDUCATION*, *PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN V. PENNSYLVANIA (PARC)*, & *MILLS V. BOARD OF EDUCATION*

The legal foundation for the development of a federal act "guaranteeing the right to an education for handicapped children lies in the United States Supreme Court decision of *Brown v. Board of Education.*"[22] The Court in *Brown* stated:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.[23]

Although *Brown* challenged the practice of school segregation based on race, the principle of equal educational opportunity in *Brown* laid the foundation for two subsequent cases, *PARC* and *Mills*.[24]

In *PARC*, a court first examined whether disabled children possessed a right to education and was the first case to hold that every child has a right to suitable public education.[25] In *PARC*, students with mental retardation and their parents brought a civil rights class action lawsuit against Pennsylvania, arguing that various state statutes exempting the state from educating students with disabilities were unconstitutional.[26] After a hearing and appeal, the parties reached a consent agreement, approved by the court, "that no child who is mentally retarded or thought to be mentally retarded can be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without prior recorded hearing before a special hearing officer."[27] *PARC's* court-approved agreement was monumental in recognizing that students with disabilities deserve a public education on par with their non-disabled peers.[28] *Mills v. Board of Education* furthered *PARC*'s holding. In *Mills*, the court ordered

22. Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 73 (1978).
23. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
24. Stafford, *supra* note 22, at 73.
25. *Id.*
26. Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279, 281–84 (E.D. Pa. 1972).
27. *Id*. at 284–85.
28. Stafford, *supra* note 22, at 74.

the District of Columbia to "provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."[29] The plaintiffs included children who had brain damage, epilepsy, and mental disabilities.[30] The broad language in the decision essentially "extend[ed] its protection to all handicapped children."[31]

Congressional Senators who drafted the Education for All Handicapped Children Act (EAHCA), the predecessor to IDEA, were influenced and instructed by the *PARC, Mills,* and *Brown* decisions.[32] Vermont Senator Robert Stafford viewed handicapped individuals as having a similar struggle to receive adequate education as African American students noting, "handicapped individual[s] represented a class of citizens similar to other aggrieved classes for whom civil rights laws have been expressly enacted."[33] These cases laid the foundation for EAHCA, which helped handicapped children receive a free and appropriate education; however, both EAHCA and its successor, IDEA, fall short in making sure that minority students receive an *appropriate* education.[34]

Minority students are being resegregated within public schools through their over-placement in special education classes.[35] Under IDEA's current allowance of independent state definitions of significant disproportionality, some states are able to avoid addressing this problem by creating extremely lax definitions.[36] A nationwide standard defining significant disproportionality would enable the Department of Education to maintain greater oversight

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29. Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972). Two recurring issues under IDEA concern the definition of "free appropriate public education," *see, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and "related services," *see, e.g.*, Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 68 n.1 (1999).

30. *Mills*, 348 F. Supp. at 869–70.

31. Stafford, *supra* note 22, at 74.

32. *Id.*

33. *Id.*

34. This is a challenge for all students, *see supra* note 29, but especially for minority students. In addition, changing classifications of disability make it difficult to achieve the stated goals of the Act. *See* Stafford, *supra* note 22, at 74–75.

35. Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms To Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072 (2005).

36. U.S. GOV'T ACCOUNTABILITY OFFICE , *supra* note 20, at 10–15. For example, Pennsylvania requires racial and ethnic groups in a district to be identified for special education at a rate more than four times higher than other groups for three consecutive years to be identified as having significant disproportionality. *Id.* at 11. Connecticut also requires racial and ethical groups in a district to be identified for special education services at four times or higher than other groups but for only two consecutive years. *Id.* California similarly requires a rate of four times or higher than other groups for the current year and two out of three previous years. *Id.* For more state definitions of significant disproportionality, see *id.* at 10–15.

over states' special education programs and help reduce resegregation of minority students.

A. Individuals with Disabilities Education Act

In 2004, Congress reauthorized IDEA with the intent to reduce the significant disproportionality of minority students in special education.[37] IDEA requires all school districts to follow certain procedures when identifying a student with a specific disability and then create an individual education plan for that student.[38] However, educators often do not follow these procedures correctly.[39]

The initial step under IDEA, to identify and accommodate a student with a specific disability, requires a teacher, parent, or school administrator to refer the child in question for a special education evaluation.[40] Generally, the parent makes the initial referral, but if not, the child's teacher usually makes the referral.[41] The school then notifies the child's parent or guardian and must receive consent for the evaluation.[42] After the school receives consent, the Individualized Education Plan (IEP) multi-disciplinary team[43] conducts the evaluation, using standardized assessments, information provided by the parent, and other techniques "tailored to address specific areas of educational need."[44]

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37. *IDEA – Reauthorized Statute: Disproportionality and Overidentification*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/speced/guid/idea/tb-overident.pdf [http://perma.cc/9RL9-RK2U] (last visited Oct. 1, 2015).

38. 20 U.S.C. § 1414 (2012).

39. Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749, 753–55 (E.D. Pa. 2011) (discussing several students' experiences with specific disability evaluations that did not conform to IDEA standards).

40. 20 U.S.C. § 1414(a).

41. Suzanne J. Shaw, Comment, *What's "Appropriate"?: Finding a Voice for Deaf Children and Their Parents in the Education for All Handicapped Children Act*, 14 U. PUGET SOUND L. REV. 351, 357 (1991) ("In order to identify children who are in need of special education and related services, schools often rely in the first instance on referrals from parents and teachers.").

42. 20 U.S.C. § 1414(a).

43. An IEP team must include a general education teacher, a special education teacher, and a representative of the local education agency, and may also include the child's parent or guardian and the child. 20 U.S.C. § 1414(d)(1)(B) (2012).

44. 20 U.S.C. §1414(b)(2) (2012); 34 C.F.R. § 300.304 (2014). IDEA regulations also recommend that assessments "[a]re selected and administered so as not to be discriminatory on a racial or cultural basis." 34 C.F.R. § 300.304.

If the IEP team determines that a child has a specific disability then the team creates a unique IEP for the student.[45] The IEP "will guide the child's education as long as he is diagnosed with a disability and qualifies for special education services."[46] IDEA also mandates various IEP requirements. One main requirement is the least restrictive environment (LRE) mandate, also known as the mainstream or inclusion preference.[47] The LRE requires schools to integrate students with disabilities with their non-disabled peers whenever possible.[48]

B. IDEA's Shortcomings

The problem with IDEA is that "[t]eachers, social workers, and psychologists often have to make subjective decisions on whether a child should receive special education services."[49] This problem is where bias creeps in. Teachers often misinterpret cultural cues as evidence of an emotional or intellectual disability.[50] Congress recognized a cultural gap exists between African American students and their predominately-white teachers.[51] Additionally, Congress acknowledged that white teachers have "placed disproportionately high numbers of their minority students into special education."[52] Various psychologists and policy makers found that one reason for this disproportionate placement is that even the tests designed to determine a child's intelligence are culturally biased.[53] This bias shows

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45. 20 U.S.C. § 1414(d)(3) (2012). "The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't. of Educ., 471 U.S. 359, 368 (1985).

46. Nicole M. Oelrich, *A New "IDEA": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 14 (2012).

47. 34 C.F.R. § 300.114 (2014). A free appropriate public education (FAPE) is IDEA's other essential mandate. For more information on the FAPE mandate, *see supra* note 29.

48. 34 C.F.R. § 300.114. The regulation states, in pertinent part:

> Each public agency must ensure that—(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2).

49. Avi Salzman, *Special Education and Minorities*, N.Y. TIMES (Nov. 20, 2005), http://www.nytimes.com/2005/11/20/nyregion/nyregionspecial2/20ctspecial.html?pagewanted=all&_r=0 [http://perma.cc/VPE2-XXHX].

50. *See* Oelrich, *supra* note 46, at 10.

51. 20 U.S.C. § 1400(c)(12)(E) (2012).

52. *Id.*

53. *See* Oelrich, *supra* note 46, at 28.

in the startling statistics of overrepresentation of minority students in special education classes.

While school enrollments consist of only 16% African American students, these students comprise twice that number of special education programs.[54] The Department of Education found that this overrepresentation is occurring in schools across the country.[55] Yet, "[n]o evidence exists to show that minority students have innately more exceptionalities than white students . . . [.]"[56] Additionally, minority overidentification is seen with disability categories that lack clear definitions.[57] Minority students are more likely to be clustered in disability categories such as emotional and behavioral disturbance or intellectual disability.[58] However, what is most telling is that "[o]veridentification is not seen in disability categories with clearer definitions, such as hearing impairment or visual impairment."[59]

"Disproportionality is not just a problem of numbers. It is rather more about the fact that students are being misdiagnosed as disabled and being placed in special education programs they do not need."[60] This causes widespread problems that follow misdiagnosed students throughout their education; a disabled label and reduced academic achievement set students up for failure. Those students labeled with an emotional or intellectual disability "fail more courses, earn lower grade point averages, miss more

54. *See* Zorigian & Job, *supra* note 16.

55. Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (IDEA), 79 Fed. Reg. 35,154, 35,155 (June 19, 2014).

56. *See* Zorigian & Job, *supra* note 16.

57. *See* Oelrich, *supra* note 46, at 24. "Some commentators have proposed that, due to socio-economic factors, certain racial groups are simply more prone to over-identification . . . [w]hen studies control for socio-economic factors, race and ethnicity remain the most significant factors in placing students into special education." *Id.* at 24–25.

58. *Id.*

59. Christina A. Samuels, *Steps Weighed on Method for Flagging Bias in Spec. Ed.*, EDUC. WK. (Sept. 30, 2014), http://www.edweek.org/ew/articles/2014/10/01/06bias. h34.html [http://perma.cc/H4FX-H5ZR].

60. NAT'L INST. FOR URBAN SCH. IMPROVEMENT, ON POINT . . . : ON THE NEXUS OF RACE, DISABILITY AND OVERREPRESENTATION: WHAT DO WE KNOW? WHERE DO WE GO? 9 (2001) (emphasis omitted), http://www.niusileadscape.org/docs/FINAL_PRODUCTS/LearningCarousel/On_the_Nexus_of_Race_Disability_and_Overrepresentation.pdf [http://perma.cc/K5LV-4RZF].

days of school, and are retained more often than other students with disabilities."[61]

Because of this well-documented problem, Congress, in 2004, reauthorized IDEA with an emphasis on reducing the overrepresentation of minority students in special education courses.[62] However, the statistics have not shown a great change in this disproportionality.[63] IDEA needs to change: a nationwide standard definition of significant disproportionality would identify the problem within each district and bring states one-step closer to reducing overrepresentation.

III. STATE RESPONSE

In the 2004 reauthorization of IDEA, Congress not only made reducing overrepresentation of minority students in special education a priority, they also included provisions to help states reduce the disproportionality. One provision *allows* school districts to use up to 15% of their IDEA funds—previously expended only for students with disabilities—to provide early intervening services to students not currently receiving special education services, but in need of academic or behavioral support.[64] This provision also *requires* a school district determined by its state as having "significant disproportionality"—a term not defined in IDEA—to reserve 15% of its IDEA funds to provide early intervening services for students who are not currently in special education.[65]

The reauthorization of IDEA also gives states the flexibility and responsibility under regulation § 618(d) to define "significant disproportionality" based on race or ethnicity at the state and local education agency levels.[66] States must make this determination annually based on an analysis of numerical information.[67] Some factors that states consider when making significant disproportionality determinations include population size, the

61. Jim Comstock-Galagan & Rhonda Brownstein, *Stopping the Schoolhouse to Jailhouse Pipeline by Enforcing Federal Special Education Law*, NAT'L JUV. JUST. NETWORK, http://www.njjn.org/uploads/digital-library/resource_422.pdf [http://perma.cc/XFM8-VZMC] (last visited on Oct. 15, 2015).

62. Christina A. Samuels, *Renewed IDEA Targets Minority Overrepresentation*, EDUC. WK. (Dec. 7, 2004), http://www.edweek.org/ew/articles/2004/12/08/15idea.h24.html [http://perma.cc/5PN4-EUPE].

63. Zorigian & Job, *supra* note 16.

64. 20 U.S.C. § 1413(f) (2012).

65. 20 U.S.C. § 1418(d)(2) (2012).

66. Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (IDEA), 79 Fed. Reg. 35,154, 35,155 (June 19, 2014).

67. 20 U.S.C. § 1418 (a)(1) (2012).

size of the individual local education agency, and the composition of the state population.[68]

Although Congress created the provision allowing states to individually define significant disproportionality to help reduce the disproportionality, it has actually done the opposite. A 2013 study conducted by the GAO looked at sixteen different states and reviewed each states' definition of significant disproportionality.[69] The GAO found wide variation in definitions among the sixteen states selected.[70] Moreover, the report found, and the Department of Education acknowledged, "some states' definitions may be preventing them from identifying disproportionality."[71] For example, Nebraska and Louisiana's differing definitions resulted in completely different findings of disproportionality.[72] In Nebraska, racial and ethnic groups must be identified for special education at a rate three times higher than for other groups for two consecutive years.[73] Conversely, Louisiana requires racial and ethnic groups must be identified for special education at a rate two times higher than for other groups in any year.[74] Because of these varying definitions, Nebraska did not require any districts to provide early intervening services in the 2010–2011 year; however, Louisiana required 73 districts to provide early intervening services.[75]

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68. 20 U.S.C. § 1418 (a)(1)(a)–(d).

> The term "significant disproportionality" was used in the 1997 reauthorization of IDEA. At that time, Congress required states to collect and examine data to determine if significant disproportionality based on race is occurring with respect to the identification, particular disability category, and placement of students in special education. It was not until the 2004 reauthorization that Congress required districts identified as having significant disproportionality to use IDEA, Part B funds for early intervening services.

U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 5 n.6.

69. *Id.* at 2.

70. *Id.* at 10.

71. *Id*. at 18. "[W]hile [the Department of] Education requires states to change their definition of significant disproportionality when it appears to treat one racial or ethnic group differently, it has not similarly required states to change their definitions when they make it unlikely that disproportionality will be identified." *Id.*

72. *Id.* at 14.

73. *Id.* at 11.

74. *Id.*

75. *Id.* Nebraska has about 300,000 school-age children with 15% receiving special education services, however, because of Nebraska's definition of significant disproportionality, none of its 253 districts were identified as having significant disproportionality in the 2009–2010 or 2010–2011 school years. *Id*. at 12. Louisiana has about 700,000 school-aged children and in the year 2009–2010 the state required 86 of is 111 districts to provide

Overall, in 2010, states required about 2% of all districts to use IDEA funds for early intervening services to address the overrepresentation of minorities in special education.[76] In the 2010–2011 school year, only 356 out of almost 15,000 districts were required to provide services.[77] Half of those districts were clustered in five states and seventy-three were in Louisiana alone.[78]

Because states get to define their own definitions of significant disproportionality, only a few states actually create definitions to fix the problem. One reason states are wary to catch overrepresentation is that a portion of their already tight special education budget will have to go to early intervention services.[79] However, the costs of improperly placing students into special education are too high. As noted above, students labeled "learning disabled" are at a clear disadvantage even if they are not, in fact, learning disabled.[80] Minority students should not be at the mercy of states, which want to maintain an unencumbered IDEA budget. The Department of Education must implement a nationwide standard to fix state definitions that do not adequately flag disproportionality. A nationwide standard will give states guidance and regulation to make sure that minority students are not being improperly placed in special education classes.

A. Legal Options Are Inadequate: Blunt v. Lower Merion School District

When states fail to adequately address overidentification issues, minority students have occasionally relied on legal challenges to show discrimination. One such case was *Blunt v. Lower Merion School District*.[81] In *Blunt*, plaintiffs, a group of African American parents in Pennsylvania, claimed the school district was improperly placing their children in special education.[82]

The plaintiffs primarily relied on statistical and anecdotal evidence. They noted that around 8% of the district's enrollment was African American, but African American students comprised nearly 16% of the special education

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services, and in the 2010–2011 school year the state required 73 districts to provide services. *Id.* at 13.

76. *Id.* at 7.

77. *Id.*

78. *Id.* "Twenty-one states did not require any of their districts to provide services." *Id.*

79. Minnesota Department of Education, Comment Letter on U.S. Department of Education Request for Information Regarding Significant Racial Disproportionality in Special Education Identification Rates, Placement and Discipline (July 25, 2014) [hereinafter Comment Letter], http://www.regulations.gov/#!documentDetail;D=ED-2014-OSERS-0058-0044 [http://perma.cc/8GZM-5SZG].

80. *See* Brownstein & Comstock-Galagan, *supra* note 61.

81. 826 F. Supp. 2d 749 (E.D. Pa. 2011) *aff'd,* 767 F.3d 247 (3d Cir. 2014).

82. *Id.* at 751.

students.[83] Even with statistics showing special education courses were disproportionately African American, the district court granted summary judgment to the school district, reasoning that statistics alone do not show intentional discrimination.[84] The plaintiffs needed to show intentional discrimination by the school district.[85]

The plaintiffs appealed, but a three-judge panel for the Third Circuit dismissed the parents' case in a 2-1 split.[86] The judges noted, "[l]ooking at the whole record, which includes statistical evidence showing that minorities are overrepresented in low achievement classes, we conclude . . . [t]here is no evidence showing that the District intended to discriminate against plaintiffs."[87] The high bar of showing intentional discrimination illustrates the difficulty that parents have in proving that a school district intentionally engages in discriminatory practices, even though the statistics may show otherwise. This difficulty in getting a legal remedy clearly highlights the need for a nation-wide standard of significant disproportionality. Minority students should not have to roll the dice with litigation and should instead be able to rely on the IDEA act itself.

IV. PROPOSAL

The Department of Education should implement a nationwide definition of significant disproportionality into § 618(d) of IDEA. A nationwide definition of disproportionality will promote consistency in how states determine the districts required to provide early intervening services as well as understand, identify, and reduce the extent of racial and ethnic overrepresentation in special education. When adopting a definition of significant disproportionality states have developed their own definitions taking into account similar factors:

> To determine whether any of their districts have significant disproportionality, states have used the flexibility Education provided them to develop their own definitions. These definitions include method(s) of calculation and associated criteria that set the conditions under which a determination of significant disproportionality is made. Specifically, after states calculate how many students of each race and ethnicity receive special education services, states compare these results to criteria established in their definition, which include (1)

83. *Id.* at 757.
84. *Id.* at 759.
85. *Id.* at 760.
86. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 255, 303–04 (3d Cir. 2014).
87. *Id.* at 257.

> the value that must be exceeded, and (2) the number of years that value or condition must persist for a determination of significant disproportionality. States can also establish a minimum number of students needed in a group for calculation, and all of these factors can influence a determination of significant disproportionality. In general, the higher the values that must be exceeded, the more years the value or condition must persist, and the greater the minimum number of students required for calculation, the less likely a state will identify districts as having significant disproportionality.[88]

Taking into account how each factor can influence a determination of significant disproportionality, the Department of Education should adopt Louisiana's definition of significant disproportionality because of its effectiveness of flagging overrepresentation of minorities in special education.

In Louisiana, racial and ethnic groups in a district must be identified for special education at a rate more than two times higher than other groups in a single year to be identified as having significant disproportionality.[89] The Department of Education should use this definition of significant disproportionality because it has a lower identification rate—two times as high as other groups, rather than the more common four times as high as other groups rate most states use[90]—and only requires the rate to occur in a single year. This 2.0 identification rate is generous, given that "the United States Department of Education has reported that a disproportionality risk ratio of 1.5 indicates over-representation of that race."[91] Therefore, the 2.0 rate in the proposed nationwide definition gives states an extra half a percent to reduce stringency. The single-year allowance provides for the quick identification of overrepresentation within a state and helps the state channel funds into helping reduce overrepresentation instead of letting the problem continue for years before the state even identifies the issue.

Many states argue that a nationwide standard would not take into account their unique population composition and size. Some states exclude districts that have less than 30 to 40 students in each racial and ethnic group.[92] They argue this exclusion takes into account different size districts, such as small districts and districts with small numbers of certain racial and ethnic groups.[93] However, this argument may be unfounded. For example,

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88. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 10–11.

89. *Id.* at 11.

90. *Id.* States that use a 4.0 rate include California, Connecticut, Mississippi, Pennsylvania, Wisconsin, and South Carolina to name a few. *Id.* at 11–12.

91. Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749, 756 (E.D. Pa. 2011)..

92. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 12. Pennsylvania excludes districts with less than 40 students in each racial and ethnic group from their disproportionality calculation. *Id.* Nebraska excludes districts with less than 30 students in each racial and ethnic group from their calculation. *Id.*

93. *See* Comment Letter, *supra* note 79.

a district with 20 white students and 20 African American students would be excluded from the states' significant disproportionality calculations. However, if 19 of the African American students were placed in special education classes and only 3 white students, then there would be a serious problem of racial disproportionality. Thus, in order to combat significant disproportionality, there should be no exclusions based on the size of the school district.

A. States Wary of Standard Definition

Generally, advocates of states maintaining their individual definitions of significant disproportionality argue against a standard definition for two reasons. First, states argue that the Department of Education should not stretch their already tight special education budget with a requirement that 15% of IDEA funding going towards early-intervening services.[94] Although states' budgets are thin for special education, early-intervening services could actually save states money in the long term. Some estimates put the average cost of educating a special education student at around $16,921 a year.[95] If a student improperly placed in special education is given early intervening services to increase their reading comprehension or math skills, the student, who might have ended up in special education courses, will instead maintain their place in the general education classroom, and cost the school no additional money after utilizing the early-intervention services. By providing special education services to students who need it, states can reduce their overall special education costs. Therefore, a nationwide standard for determining significant disproportionality would recognize a problem and fix it, all while saving states money in the end for special education.

Second, states argue that a standardized approach would be a disincentive to identify students with specific learning disabilities. The Minnesota Department of Education (MDE), in a comment on the proposed regulation, stated that the potential of the Department of Education requiring 15% of their IDEA funding go towards early intervening services if the state is

94. *Id*.

95. *Background of Special Education and the Individuals with Disabilities Education Act (IDEA)*, NAT'L EDUC. ASS'N, http://www.nea.org/home/19029.htm [http://perma.cc/SQV2-YXND] (last visited Oct. 15, 2015). "The current average per student cost is $7,552 and the average cost per special education student is an additional $9,369 per student, or $16,921." *Id.*

found to have significant disproportionality is a disincentive to properly identify students who need services.[96] The MDE further stated, "[t]his may lead to situations where students who might otherwise need specialized instruction do not receive the services and supports they need."[97] However, parents provide a safeguard in this instance. As stated previously, parents are often the ones that request and initial referral for a special education assessment.[98] Because parents are able to implement testing procedures, schools and school districts do not hold all the power in identifying students who might need special education. Thus, even if some schools do not identify students who need services, parents can be a check on the school's lack of identification.

V. CONCLUSION

Overrepresentation of minority students in special education courses has been a problem for years. It is time for the Department of Education to step in and give guidance to the states. A nationwide standard for defining significant disproportionality will achieve consistency, understanding, and results among the states at reducing overrepresentation of minority students in special education.

96. *See* Comment Letter, *supra* note 79.

97. *Id.*

98. *See* Shaw, *supra* note 41, at 357. IDEA allows a parent to request an initial evaluation to determine whether their child qualifies as a child with a disability. 20 U.S.C. § 1414(a)(1)(B) (2012). In addition to the initial referral, informed parental consent is required for a state agency to conduct an initial evaluation, however parental consent for the evaluation cannot be construed as consent for the placement in special education courses. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2012). Parents also have an opportunity "to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . ." 20 U.S.C. § 1415(b)(1) (2012). For more information on what rights parents have under IDEA, see *Right to an Evaluation of a Child for Special Education Services*, LEARNING DISABILITIES ASS'N OF AM. (Feb. 16, 2013), http://ldaamerica.org/advocacy/ lda-position-papers/right-to-an-evaluation-of-a-child-for-special-education-services/ [http://perma.cc/4DXV-YR4C].