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The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA

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ABOUT THE AUTHOR: Professor of Law and Director of the Wilf Impact Center for Public Interest Law, New York Law School. The author is grateful for the assistance of many colleagues and students and offers thanks as follows. Thanks to Deborah Archer and Edward A. Purcell, Jr., for co-founding the Race, Bias, and Advocacy course at NYLS and for inviting the author to teach a class session on race and special education. The author has learned much from his colleagues who co-teach the course and from his students. Thanks also to Edward Purcell for the idea for this group writing project, his patience in shepherding it through, and his insightful comments on earlier drafts of this article, and to colleagues for their comments on earlier drafts, especially Lenni Benson and Ann Thomas, the members of the author's writing pod, and Jean Marie Brescia, Carol Buckler, Samantha Pownall, Blakely Simoneau, and Amy Wallace, for their comments on several drafts. The author gives special thanks to his research assistants—Sydney Hershenhorn, Katerina Pluhacek, and Francesca Rogo—without whose keen legal research, writing, and analytical skills this article would not have been possible. This article benefitted from comments from participants in the NYLS Faculty Workshop, the Association of American Law Schools Clinical Section Writers' Workshop, and the *Clinical Law Review* Writers' Workshop, all of whom the author wishes to thank. Finally, the author thanks NYLS for its generous support of this project.

I. INTRODUCTION

Congress passed the Individuals with Disabilities Education Act (IDEA)[1] in 1975 to counteract public schools' widespread discrimination against children with disabilities by warehousing them in separate classrooms where they did not receive a meaningful education or excluding them from school altogether.[2] At the time of its passage, approximately four million children with disabilities attended public school but received an inappropriate education and one million were excluded from school entirely.[3] There was very little that their parents could do to challenge this treatment because the courts gave school officials significant discretion to exclude children with disabilities from school.[4]

Fueled in large part by *Brown v. Board of Education*, the 1954 Supreme Court decision that banned race-based school segregation,[5] a movement emerged to require school districts to provide an appropriate education to children with disabilities.[6] This movement was largely successful. By 2018, of the roughly fifty million children who attended public school in the United States, more than seven million (14.1 percent) were receiving services under the IDEA.[7] In 2019, the high school graduation rate for students with disabilities was 72 percent.[8]

The IDEA provides federal funds to states to help them educate children with disabilities in exchange for a commitment from the state to abide by the IDEA's requirements.[9] Race has no bearing on determining whether a child has a disability, the scope of the educational services they should receive, the classroom setting in which they should receive them, or the right of their parents to advocate on their behalf. However, structural inequities in the IDEA, including time-consuming and expensive procedural provisions and ill-defined standards for meeting the educational needs of children with disabilities, allow race and wealth to intersect with the provision of special education services.

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1. 20 U.S.C. §§ 1400–82.

2. *See* Pa. Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

3. Honig v. Doe, 484 U.S. 305, 309 (1988). These data are based on congressional studies conducted prior to the passage of the IDEA in 1975. *Id.* (first citing 20 U.S.C. § 1400(b)(3); and then citing *id.* § (b)(4)).

4. *See* Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265, 270 (Ill. 1958); State *ex rel.* Beattie v. Bd. of Educ. of Antigo, 172 N.W. 153, 155 (Wis. 1919); Watson v. City of Cambridge, 32 N.E. 864, 864–65 (Mass. 1893).

5. 347 U.S. 483, 495 (1954).

6. Deborah N. Archer & Richard D. Marsico, Special Education Law and Practice 3 (2016).

7. Nat'l Ctr. for Educ. Stats., Digest of Education Statistics: 2019 Tables and Figures tbl.203.50 (2021) [hereinafter NCES Statistics I]; *id.* tbl.204.50 [hereinafter NCES Statistics II].

8. Nat'l Ctr. for Educ. Stats., Students with Disabilities 5 fig.4 (2021). This graduation rate translates to 304,560 students with disabilities who graduated from high school in 2019. *See id.* at 4, 5 fig.4.

9. 20 U.S.C. § 1412(a).

The structural inequities in the IDEA manifest themselves in at least nine inflection points where race and special education meet. These inflection points, presented in three different categories that reflect the IDEA's process for developing and delivering a child's special education program, its substantive education rights, and its enforcement mechanisms, are as follows:

Category 1 The IDEA's Procedures for Developing and Providing Special Education

Inflection Point One: Identifying a Child Suspected of Having a Disability

Inflection Point Two: Evaluating a Child for a Disability

Inflection Point Three: Determining Eligibility for Special Education

Inflection Point Four: Preparing a Child's Individualized Education Program (IEP)

Category 2 The IDEA's Substantive Educational Requirements

Inflection Point Five: Determining the Elements of a Free Appropriate Public Education (FAPE)

Inflection Point Six: Identifying the Least Restrictive Environment (LRE)

Category 3 The IDEA's Enforcement Mechanisms

Inflection Point Seven: Advocacy Rights and Opportunities

Inflection Point Eight: Remedies

Inflection Point Nine: The Administrative Exhaustion Requirement

At many of these points, educators exercise significant discretion over educational decisions, which can mask discriminatory intent or unconscious bias.[10] At other points, parents with limited economic resources will have difficulty securing the advisors, attorneys, or experts they need to help them navigate the IDEA's procedures and advocacy opportunities and to secure positive outcomes for their children. Because Black families have lower median income and wealth than other groups,[11]

10. *See* Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 Ala. L. Rev. 1071, 1088 (2005) ("The most evident factor is that bias, whether intentional or unconscious, enters the highly subjective eligibility determinations.").

11. Median family income by race and ethnicity in 2017 was as follows: Asian, $81,331; White, $68,145; Hispanic, $50,486; and Black, $40,258. U.S. Census Bureau, Real Median Household Income by Race and Hispanic Origin: 1967 to 2017 fig.1 (2018). The overall median income was roughly $61,372. *Id.* Median family wealth by race and ethnicity in 2019 was, approximately, as follows: White, $188,200; Other (comprising persons identifying as Asian, American Indian, Alaska Native, Native Hawaiian, Pacific Islander, "other race," and more than one racial identification), $75,000; Hispanic, $36,100; and Black, $24,100. Neil Bhutta et al., Bd. of Governors of the Fed. Rsrv. Sys., FEDS Notes: Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances (2020).

Underlying the IDEA is a superstructure of inequitable funding of school districts comprised primarily of families with low income and children of color, further exacerbating the potential for race-based special education outcomes. *See* Emma García, Econ. Pol'y Inst., Schools Are Still Segregated, and Black Children Are Paying a Price 1, 2 fig.B (2020) ("Black children are more than twice as likely as white children to attend high-poverty schools."). The wealth gap in the provision of

the negative impact that limited financial resources can have on IDEA outcomes is likely to have a disparate impact on Black students.

Part II of this article describes the legislative history of the IDEA relating to Congress's awareness of race discrimination in special education when it passed and amended the IDEA and the limited steps it took to address it. Part III examines each of the IDEA's inflection points, describing the legal standards that apply at each point and how these standards give educators discretion over decisions regarding special education and place economic burdens on parents seeking to secure positive outcomes for their children. Part IV describes evidence suggesting that the intersection of race and special education creates racialized outcomes in the form of the overrepresentation[12] of Black students in special education programs and in the intellectual disability and emotional disturbance classifications.[13] Part V offers proposals to limit or eliminate the intersection of race and special education, identifying steps that states and school districts can take without congressional approval, and then actions that only Congress can take. Part VI concludes this piece.

II. RACE DISCRIMINATION AND THE LEGISLATIVE HISTORY OF THE IDEA

This section describes the legislative history of the IDEA relating to race discrimination in special education when Congress passed the IDEA in 1975 and amended it in 1997 and 2004, and the limited steps it took on all three occasions to address this discrimination. This description puts the IDEA's structural inequities in historical context, sheds light on how they developed, and underscores the extended

special education was further inflated by the COVID-19 pandemic. *See* Crystal Grant, *COVID-19's Impact on Students with Disabilities in Under-Resourced School Districts*, 48 Fordham Urb. L.J. 127, 128, 130, 133–36 (2021) (citing differences in the availability of computer technology, homework settings, availability of parents to help with take-home assignments, delivery of real-time instruction, individual and small-group tutoring, and enrichment and summer programming). Relatedly, the Supreme Court has given its blessing to racially isolated and underfunded school districts in *Milliken v. Bradley*, 418 U.S. 717, 721–22, 744–45, 752–53 (1974), in which it prohibited federal courts from imposing metropolitan-wide desegregation decrees absent proof of metropolitan-wide discrimination, and in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54–55 (1973), in which it upheld an inequitable state school finance scheme against a constitutional challenge.

This article does not focus on the impact of such funding inequity on special education. Its focus is on how the structural inequities of the IDEA allow for racially driven outcomes for individual children, and on Black school-aged students in particular. This is not meant to diminish the experiences of other groups of students, but to recognize that different groups of students experience the IDEA's structural inequities differently, and that describing all of these differences is beyond the scope of one article. However, the focus on Black students is not exclusive, and when discrimination against other groups of students is embedded in the narrative, it is included.

12. In this article, "overrepresentation" means that a higher percentage of the subject group of students is enrolled in special education programs than its percentage of the overall school population. *See* Margaret E. Shippen et al., *A Qualitative Analysis of Teachers' and Counselors' Perceptions of the Overrepresentation of African Americans in Special Education: A Preliminary Study*, 32 Tchr. Educ. & Special Educ. 226 (2009).

13. "Classification" and variations thereof are terms of art in special education that relate to the process of determining whether a child has a disability and, if so, which one. *See* Lani Florian & Margaret J. McLaughlin, Disability Classification in Education 15 (2008).

and continued duration of the intersection of race, wealth, and special education and the need for immediate, meaningful reform.

A. The 1975 Passage of the IDEA

The legislative history of the IDEA's passage includes evidence that school districts were discriminating against Black and Latino students by misclassifying them with intellectual disabilities or emotional disturbance and placing them in separate classrooms. The evidence pointed to school districts' use of the results of racially discriminatory standardized tests as the primary culprit.[14] There was also evidence that intentional discrimination and an insufficient number of educators qualified to evaluate the educational performance of children of color were to blame.[15] Despite this evidence of race discrimination, Congress took limited steps to eliminate it.

1. Litigation Alleging Race Discrimination in Special Education

The legislative history[16] includes examples of several pending lawsuits alleging that school districts discriminated against children of color in special education programs.[17] The lawsuits alleged that the school districts utilized the results of culturally-biased IQ and other standardized tests to improperly classify plaintiffs as having intellectual disabilities and then inappropriately placed them in separate

14. *See, e.g.*, Lucille P. *ex rel.* Larry P. v. Riles, 343 F. Supp. 1306, 1313–14 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963, 964–65 (9th Cir. 1974).

15. *Id.* at 1314 (suggesting that a qualified educator would be "prepared to consider the cultural background of the child, preferably a person of similar ethnic background as the child being evaluated").

16. *See Education of the Handicapped Act Amendments: Hearings on H.R. 4199 Before the Select Subcomm. on Educ. of the H. Comm. on Educ. & Lab.*, 93d Cong. 119–27 (1973) [hereinafter *House EHA Amendments Hearings*]. Those lawsuits are also described in Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Rev. 1037, 1051–55 (1972), which was attached as an exhibit to the hearing record concerning amendments to the Education of the Handicapped Act. *See Education of the Handicapped Act Amendments: Hearings on S. 896 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 154–76 (1973).

17. *See*, *e.g.*, Diana v. State Bd. of Educ., No. C-70-37, 1973 U.S. Dist. LEXIS 15618, at *1–6 (N.D. Cal. June 18, 1973) (approving and adopting as the court's order a stipulation in which the parties agreed that the defendant school district must correct its inappropriately placing Mexican American students from Spanish-speaking homes into classes for children with intellectual disabilities based on assessments that, to quote Weintraub & Abeson, *supra* note 16, at 1052, "placed heavy emphasis on verbal skills requiring facility with the English language, [contained] questions [that] were culturally biased, and . . . were standardized on white, native[-]born Americans"); *Larry P.*, 343 F. Supp. at 1307–08 (challenging placement of Black elementary school students, whom the school district diagnosed as having intellectual disabilities, in special education classrooms because that placement, according to Weintraub & Abeson, *supra* note 16, at 1053, was based on "a testing procedure which fails to recognize [a Black child's] unfamiliarity with the white middle class cultural background and which ignores the learning experiences which they may have had in their homes"); Lebanks v. Spears, 60 F.R.D. 135, 153 (E.D. La. 1973) (alleging that the tests and procedures the school district used to diagnose students discriminated against Black children); Guadalupe Org. *ex rel.* Cmty. of Guadalupe v. Tempe Elementary Sch. Dist. No. 3, No. 71-435-Phx., at *1 (D. Ariz. Jan. 24, 1972) (stipulation and order) (alleging that the school district assigned a disproportionately high number of bilingual children to classes for children with intellectual disabilities).

classrooms for such children.[18] The lawsuits also alleged that school personnel were unqualified to administer or interpret the test results of children of color.[19] As a result of these discriminatory practices, Black and Latino students were overrepresented in segregated special education classes where they received "a substantially different education than children retained in regular programs."[20]

The plaintiffs in the 1972 cases of *Larry P. v. Riles* and *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3* and in the 1973 case of *Lebanks v. Spears*, reached successful results. In *Larry P.*, the court issued a preliminary injunction prohibiting the defendants from placing Black students in separate classes for students with intellectual disabilities based primarily on the students' IQ scores.[21] The school district in *Lebanks* agreed to set clear rules for placing students in classes for children with disabilities, including accounting for sociocultural factors when evaluating a student's IQ and adaptive behavior skills.[22] Similarly, in *Guadalupe*, a settlement reached between the school district and the plaintiffs required the district to follow a number of directives, including reevaluation of all bilingual children presently enrolled in special education programs in their primary language and examination of a child's "developmental history, cultural background, and school achievement" prior to assigning them to a separate class for children with intellectual disabilities.[23]

2. Testimony and Studies

Witnesses presented evidence of race discrimination in special education to Congress that mirrored and expanded on the allegations in the lawsuits. This included evidence of standardized test bias against students of color,[24] intentional discrimination against Black students by placement in special education classes,[25]

18. *See*, *e.g.*, *Larry P.*, 343 F. Supp. at 1307–08; *Lebanks*, 60 F.R.D. at 153.

19. *E.g.*, *Larry P.*, 343 F. Supp. at 1314 (seeking a preliminary injunction requiring the school district to hire Black and other psychologists of color who are "adequately prepared" to interpret test scores by accounting for the "cultural background of the child").

20. *House EHA Amendments Hearings*, *supra* note 16, at 123–24; *see*, *e.g.*, *Larry P.*, 343 F. Supp. at 1307–08; *Guadalupe Org.*, No. 71-435-Phx., at *4.

21. *Larry P.*, 343 F. Supp. at 1314–15.

22. *Lebanks*, 60 F.R.D. at 139–41.

23. No. 71-435-Phx., at *2–4. The stipulation and order also imposed a "compelling educational justification" standard on the school district, which it must meet if there exists a "disproportionate enrollment" of children of color in special education classes. *Id.* at *4.

24. One witness criticized standardized tests as biased because they were scored based on the performance of white students. *Education for All Handicapped Children, 1973–74, Part 2: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 787 (1974) [hereinafter *1973–74 Hearings*, *Part 2*] (statement of Dr. Oliver L. Hurley, Associate Professor of Special Education, University of Georgia, Athens).

25. Another witness cited a study showing a school district that assigned the majority of Black students who scored between fifty and seventy on IQ tests to special education classes, but less than half of white children who scored in the same range to such classes. *Id.* at 764–65 (statement of Fred Weintraub,

power imbalances between educators and parents of color,[26] and culturally incompetent educators.[27] These factors resulted in the overrepresentation of Black and Latino students in classes for students with emotional disturbances and intellectual disabilities.[28]

3. Congressional Response

Congress' response to evidence of race discrimination in special education was limited. Congress required states to include assurances in their applications for IDEA funding that their respective school districts would utilize non-discriminatory evaluative materials for determining whether a child has a disability, administer them in a non-discriminatory way, provide the materials in a child's native language, and not use a single procedure as the sole criterion for determining whether a child has a disability.[29] Although these requirements are important, they fall short of the

Assistant Executive Director, Council for Exceptional Children). The average score on the WISC-R—the IQ test administered to those under age sixteen—was approximately 102 in 1970. Evan J. Giangrande et al., *Genetically Informed, Multilevel Analysis of the Flynn Effect Across Four Decades and Three WISC Versions*, 93 Child Dev. e47, e55 fig.3 (2021).

26. *1973–74 Hearings*, *Part 2*, *supra* note 24, at 670 (statement of Dr. Charles Barnett, Comm'r, South Carolina Department of Mental Retardation) (stating that a parent of a child of color might not be "able to speak out, [or] doesn't know how to speak out sometimes, to raise questions about the services provided").

27. *See Education for All Handicapped Children, 1973–74, Part 1: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 579 (1973).

28. *See, e.g.*, *1973–74 Hearings*, *Part 2*, *supra* note 24, at 669 (statement of Dr. Dorothy Fleetwood, Director, Habilitation Services, Partlow State School & Hospital, Alabama Department of Mental Health) (stating that she observed more Black children than she expected in special education classes and that, in her opinion, they were misclassified); *id.* at 760 (statement of Dr. Jan Mercer, University of California, Riverside) (presenting a study which showed that, in Riverside, California, approximately five times more Mexican American students were in special education classes than their proportion in the overall school population, and roughly three times more Black students were in such classes than their proportion in the school-age population); *Education for All Handicapped Children, 1975: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 94th Cong. 228–29 (1975) (statement of Kate Long, Special Education Professional, Oak Hill, West Virginia) (presenting a study of 505 school districts that showed 80 percent of children enrolled in special education classes were Black despite Black children making up "less than 40 percent" of these districts' total school-age population); *Education for All Handicapped Children, 1973–74, Part 3: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 1289 (1974) (statement of Dr. Maynard C. Reynolds, Professor of Special Education, College of Education, University of Minnesota) ("A large city school system enroll[ed] Black children in [classes for children with intellectual disabilities and for children with emotional disturbances] at two to four times the rate applied to white children.").

29. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780–81 (codified at 20 U.S.C § 1412(a)(6)(B)) (conditioning federal funds in part on a state establishing "procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of [children with disabilities] will be selected and administered so as not to be racially or culturally discriminatory"). Congress did not prescribe a specific penalty for states that did not enforce these requirements. *See id.*

remedial measures that the evidence showed were necessary to address race discrimination in special education effectively.[30]

B. The 1997 Amendments to the IDEA

Congress next addressed race in special education when it amended the IDEA in 1997.[31] Congress found that children of color were disproportionately represented in special education programs.[32] It stated that "[g]reater efforts are needed" to prevent this overrepresentation,[33] including bringing more people of color into education.[34] Congress required states to report the numbers and percentages of children by race and ethnicity who were receiving special education.[35] The legislation required states to review and, if necessary, revise a school district's policies relating to class placement if the state found that the district had a "significant disproportionality" of children by race or ethnicity in special education.[36] The legislation did not define "significant disproportionality" and did not impose specific penalties on states that failed to comply with this requirement.[37]

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30. For a discussion of steps Congress can and should take to remedy race discrimination in special education, see *infra* Section V.B. The plaintiffs in *Larry P.* suggested that "nothing short of elimination of all culturally biased tests and immediate evaluation of [B]lack students already in [special education] classes" would be a sufficient remedy. Lucille P. *ex rel.* Larry P. v. Riles 343 F. Supp. 1306, 1314 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

31. S. Rep. No. 105-17, at 5 (1997) (stating that one goal of the 1997 amendments to the IDEA was to give "increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling").

32. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, §§ 601(c)(8)(A)–(D), 111 Stat. 40–41 (codified as amended at 20 U.S.C. §§ 1400(c)(12)(A)–(E)). Congress found that, at the time, Black children from low-income households were 2.3 times more likely to be identified as having intellectual disabilities than white students and that Black students represented 16 percent of elementary school students but 21 percent of the special education population. *Id.* §§ 601(c)(8)(C)–(D) (codified as amended at 20 U.S.C. §§ 1400(c)(12)(C)–(D)).

33. *Id.* § 601(c)(8)(A) (codified as amended at 20 U.S.C. § 1400(c)(12)(A)).

34. *Id.* § 601(c)(7)(E) (codified as amended at 20 U.S.C. § 1400(c)(10)(D)).

35. *Id.* § 618(a) (codified as amended at 20 U.S.C. §§ 1418(a)(1)(A), (b)).

36. *Id.* § 618(c) (codified as amended at 20 U.S.C. § 1418(d)).

37. The IDEA allows the federal government to withhold education funding or refer the matter to the U.S. Department of Justice for appropriate enforcement action when states fail to comply with the act. 20 U.S.C. §§ 1416(e)(2), (3). However, these remedies are rare. *See generally* Nat'l Council on Disability, IDEA Series: Federal Monitoring and Enforcement of IDEA Compliance (2018).

> When [the Office of Special Education Programs (OSEP)] determines that a state's data discloses deficiencies in IDEA implementation, OSEP will point out those deficiencies but will not impose sanctions; rather, OSEP will simply offer technical assistance to the state to help correct the problem. Some [stakeholders, such as U.S. Department of Education officials, state and local administrators, researchers, representatives from disability rights organizations, and parent organizations reported] that while technical assistance is welcomed and can work, in many instances, use of more severe sanctions authorized by IDEA (e.g., withholding of federal funds, referral to DOJ for enforcement action) should be employed, or at least explored, more than

Finally, Congress required school districts to utilize non-discriminatory tests and procedures to evaluate children for disabilities,[38] adding this to the pre-existing requirement that states ensure that school districts do so. But again, Congress did not create a specific remedy for parents when school districts failed to comply.[39]

C. The 2004 Amendments to the IDEA

When Congress amended the IDEA in 2004, evidence continued to show overrepresentation of children of color in special education programs.[40] One area of concern was the overrepresentation of Black students classified with an intellectual disability or emotional disturbance.[41] One reason for this concern was that school districts often moved students with these disabilities to separate special education classrooms where they did not have access to the core academic curriculum.[42] Congress responded to the continued evidence of race discrimination in special education by expanding the disproportionality requirement it passed in 1997 to require school districts with significant disproportionality to use 15 percent of their IDEA funds to provide early intervening services to children who are struggling prior to referring them for evaluations.[43]

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they are now. The view of some was that there is insufficient follow-up by OSEP, and problems can be left unremedied.

Id. at 44. Additionally, parents who believe that a school district has violated this provision can request an impartial hearing to challenge this failure and seek an appropriate remedy. 20 U.S.C. § 1415(f).

38. Suggested best practices for non-discriminatory testing and procedures can be found at 34 C.F.R. § 300.304 (2022).

39. *See* 143 Cong. Rec. S4299 (daily ed. May 12, 1997) (statement of Sen. Tom Harkin (D-IA)) (describing the requirements of non-discriminatory testing); Individuals with Disabilities Education Act Amendments of 1997 § 612(a)(6)(B) (codified at 20 U.S.C § 1412(a)(6)(B)).

40. H.R. Rep. No. 108-77, at 84 (2003); *Overidentification Issues within the Individuals with Disabilities Education Act and the Need for Reform: Hearing Before the H. Comm. on Educ. & the Workforce*, 107th Cong. 2–3 (2002) [hereinafter *2001 House Hearing*] (statement of Rep. John Boehner (R-OH), Chairman, House Committee on Education and the Workforce); *id.* at 35 (statement of Rep. Chaka Fattah (D-PA)); *id.* at 108 (statement of Dr. Thomas Hehir, Director, School Leadership Program, Harvard Graduate School of Education) [hereinafter Hehir, *2001 House Hearing*]; *id.* at 7, 77–78 (statement of Roderick R. Paige, Secretary of Education, U.S. Department of Education) [hereinafter Paige, *2001 House Hearing*].

41. H.R. Rep. No. 108-77, at 84, 98. Black students were more than twice as likely as all other students to be identified as having an intellectual disability and 1.5 times more likely to be identified as having an emotional disturbance; specifically, 2.2 percent of all Black students were identified as having an intellectual disability compared to 0.8 percent of other students, and 1.3 percent of Black students compared to 0.87 percent of all white students were identified as having an emotional disturbance. Paige, *2001 House Hearing*, *supra* note 40, at 7; *see also* Hehir, *2001 House Hearing*, *supra* note 40, at 109.

42. H.R. Rep. No. 108-77, 84, 98; Hehir, *2001 House Hearing*, *supra* note 40, at 109.

43. H.R. Rep. No. 108-77, at 84. In doing so, Congress essentially required school districts to take money from one group of struggling students and give it to another. *See id.* This is a disincentive for states to find significant disproportionality. *Id.*

D. Summary

Faced with compelling evidence that school districts were discriminating on the basis of race in special education when it passed and amended the IDEA, Congress did not take decisive steps to prevent it. Instead, it made findings, stated aspirations, and required school districts to use non-discriminatory assessment procedures and tools, but did not create a specific penalty for school districts that failed to do so. Further, Congress required school districts with significant disproportionality to take IDEA funds away from students whom they had identified as having disabilities and use the funds instead for students whom they had not identified as having disabilities but were nevertheless struggling.

III. THE IDEA'S INFLECTION POINTS AND THEIR RACIAL IMPACT

The IDEA's inflection points are presented in three categories that reflect its structure. First, the IDEA creates an extensive set of procedures for developing and providing special education to a child with a disability. These include identifying a child whom the school district reasonably believes has a disability, evaluating the child, determining whether the child is eligible for special education, and preparing the child's individualized education program (IEP). The second category includes the IDEA's substantive educational provisions, which require school districts to provide children with disabilities a free appropriate public education (FAPE) in the least restrictive environment (LRE). Finally, the IDEA creates enforcement mechanisms that give parents the opportunity to challenge the provision of special education to their child. These enforcement mechanisms include the final three inflection points: advocacy rights and opportunities, remedies, and the administrative exhaustion requirement.

A. The IDEA's Procedures for Developing and Providing Special Education

1. Inflection Point One: Identifying a Child Suspected of Having a Disability

"Child-find" is the common name given to the IDEA's requirement that a school district identify and refer for evaluation a child it reasonably suspects has a disability.[44] Child-find is not an exact science, and case law gives educators significant discretion in deciding whether to refer a child for evaluation.[45] The Office of Civil Rights (OCR) of the U.S. Department of Education recognizes that "referr[ing] . . . a student for evaluation is one of a series of decision points" that raise concerns about race discrimination, "especially to the extent that it entails the subjective exercise of

44. 20 U.S.C. §§ 1412(a)(3), 1414(a)(1)(A); *see, e.g.*, Stephen K. *ex. rel.* D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012) (referring to the IDEA's "child-find" requirement).

45. *D.K.*, 696 F.3d at 250–52 (ruling that the process for determining whether a child is eligible for special education begins when the school district reasonably suspects that a child has a disability); *see also* Archer & Marsico, *supra* note 6, at 333–39 (collecting cases).

unguided discretion in which racial biases or stereotypes . . . may be manifested."[46] The OCR's concerns are justified. A 2005 article suggested that white teachers are more likely than teachers of color to refer Black students for evaluations[47] and that white teachers are also more likely to refer Black students than white students for evaluations.[48] Finally, as the percentage of Black teachers in a school district increases, the percentage of Black children in that district's special education program decreases.[49]

The 2007 case of *Lee v. Lee County Board of Education* provides an example of how the exercise of discretion can lead to racialized outcomes in child-find and how to prevent them.[50] In *Lee*, Black students were overrepresented in the emotional disturbance and intellectual disability classifications. The district reformed its child-find process by providing awareness training,[51] requiring teachers to include more information on special education referral forms, and requiring special education review teams to consider whether a child's poor academic performance could be attributed to environmental, cultural, linguistic, or economic issues, rather than to a disability.[52] In

46. U.S. Dep't of Educ. Off. for C.R., Dear Colleague Letter: Preventing Racial Discrimination in Special Education 11 (2016) [hereinafter Dear Colleague Letter]; *see* J. John Harris III et al., *African Americans and Multicultural Education: A Proposed Remedy for Disproportionate Special Education Placement and Underinclusion in Gifted Education*, 36 Educ. & Urb. Soc'y 304, 318 (2004); Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU Educ. & L.J. 179, 185 (2001) ("An unfortunate outgrowth created by the combination of vague legal classifications defining 'disability' and the broad discretion left to teachers and other school personnel involved in student placement is the disproportional placement of [B]lack and other minority students in special education programs."); Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 Am. U. J. Gender, Soc. Pol'y & L. 163, 164 (2011) (citing unconscious bias as a cause of disproportionate representation of children of color in special education); Rebecca Vallas, Note, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 Va. J. Soc. Pol'y & L. 181, 188 (2009) ("[P]ossible bias or prejudice on the part of teachers is often raised as a potential contributing factor in the disproportionality problem."); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 Nw. J.L. & Soc. Pol'y 263, 264 (2008) (listing "teachers' unconscious cultural biases" as a reason for the disproportionate representation of children of color in special education programs).

47. Garda, *supra* note 10, at 1092.

48. *Id.*; *see also infra* notes 159–63.

49. Linehan, *supra* note 46, at 192 ("[W]here there is a high percentage of African American teachers in a school district, there is a decrease in the overrepresentation of [B]lack students in special education.").

50. 476 F. Supp. 2d 1356, 1359–60, 1367–68 (M.D. Ala. 2007).

51. *Lee* describes "awareness training" as follows:

> [Awareness training] was designed to inform the educators about the reasons for racial disproportionality in the areas of [intellectual disability], [emotional disturbance], and [specific learning disability], the characteristics of students who actually met the criteria to be deemed eligible under those exceptionalities, and the purpose and significance of placement of a student in special education.

Id. at 1362.

52. *Id.* at 1362–63.

six years, the overrepresentation of Black students classified with an intellectual disability or emotional disturbance declined.[53]

2. Inflection Point Two: Evaluating a Child for a Disability

Once a school district identifies a child for an evaluation, the district must conduct a "full and individual" evaluation of the child.[54] Similar to identifying a child, evaluating a child is not an exact science, and bias, subjectivity, and power imbalances can affect the outcome.[55] Parents without sufficient means are not in a good position to secure favorable evaluation results.[56]

The IDEA requires a school district to notify parents if it plans to evaluate their child, describe the evaluative procedures it plans to use, and receive parental consent.[57] This gives parents with sufficient resources the opportunity to ensure that the district complies with the IDEA's mandates relating to evaluations, including using a variety of assessment tools and strategies that are technically sound and administered by qualified personnel,[58] that are not racially or culturally discriminatory, and that are administered in the child's native language.[59]

Once the school district completes the evaluation, it must provide a copy to the child's parents.[60] Evaluation reports can be many pages long and contain jargon, data, and charts that are not easy to understand without training or expert assistance. Parents who can afford to do so can secure evaluations at their expense and provide them to the district for its consideration.[61] Parents who disagree with the district's evaluations, are familiar with the IDEA's intricacies, and have the resources, can ask

53. *Id.* at 1364. The likelihood that Black students would be diagnosed with an intellectual disability compared with white students dropped from 3.24:1 to 2.18:1, and from 1.14:1 to 1.11:1 for emotional disturbance diagnoses. *Id.*

54. 20 U.S.C. §§ 1414(a)(1)(A), (b)(3)(B).

55. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 Harv. C.R.-C.L. L. Rev. 407, 420 (2001) (identifying bias in the content of assessment tools, subjectivity in conducting and interpreting evaluations, and power imbalances between school administrators and parents as factors that influence evaluation results).

56. Joseph Fluehr, Note, *Navigating Without a Compass: Incorporating Better Parental Guidance Systems into the IDEA's Dispute Resolution Process*, 8 Drexel L. Rev. 155, 171 (2016) (citing difficulties that low-income families have with obtaining professional assistance in the evaluation of their children); Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 Colum. J. Race & L. 265, 305 (2019) (asserting that parental race, class, social capital, and agency can make a difference in the evaluation process).

57. 20 U.S.C. §§ 1414(a)(1)(D), (b)(1).

58. *Id.* §§ 1414(b)(3)(B), (b)(2)(A)–(C), (b)(3)(A)(iv).

59. *Id.* §§ 1414(b)(3)(A)(i)–(ii).

60. *Id.* § 1414(b)(4)(B).

61. *See id.* § 1415(b)(1); Z.B. v. District of Columbia, 888 F.3d 515, 525 (D.C. Cir. 2018) ("[N]ot all parents have the resources or expertise to obtain an accurate evaluation." (citing Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1437–39 (2011))).

the school district to reimburse them for the cost of an independent educational evaluation by an expert of the parents' choice.[62]

3. Inflection Point Three: Determining Eligibility for Special Education

To be eligible for special education, a child must be classified with at least one of the IDEA's thirteen enumerated disabilities.[63] The regulatory definitions of "intellectual disability" and "emotional disturbance" require subjective judgments about vague criteria that can be applied in a racially discriminatory way.[64] A child with an "intellectual disability" is one who shows "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior . . . that adversely affects a child's educational performance."[65] Classifying a child as having an "emotional disturbance" requires educators to determine whether the child has a "condition" that shows one of five characteristics over a "long period of time and to a marked degree that adversely affects a child's educational performance."[66] In addition, culturally- and racially-biased standardized tests continue to be the most common assessments educators use to diagnose children with intellectual disabilities.[67]

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62. 34 C.F.R. § 300.502(b)(1) (2022); *see* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender, Soc. Pol'y, & L. 107, 126–28 (2011) (describing the challenges in obtaining an independent educational evaluation); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 Yale L.J. 1802, 1827–29 (2008) (citing procedural obstacles to requesting and obtaining an independent educational evaluation).

63. 20 U.S.C. § 1401(3)(A). The thirteen disabilities are autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 C.F.R. § 300.8(c)(1)–(13) (2022); 20 U.S.C. § 1401(3)(A)(i).

64. *See* Garda, *supra* note 10, at 1079 ("[D]iagnosing a child with [an intellectual disability or emotional disturbance] is a subjective clinical judgment that merely reflects social and cultural beliefs about appropriate learning and behavior in the school setting."); Nanda, *supra* note 56, at 311 ("Diagnosing a child with [an emotional disturbance] requires a subjective assessment and interpretation of key elements such as 'long period of time,' 'marked degree,' 'satisfactory,' 'inappropriate,' and 'unhappiness.'"); Vallas, *supra* note 46, at 183 (using "behavior, intelligence, social skills, and communication abilities" to diagnose cases of intellectual disability and emotional disturbance).

65. 34 C.F.R. § 300.8(c)(6) (2022).

66. *Id*. § 300.8(c)(4)(i). The five characteristics are:

> (A) [a]n inability to learn that cannot be explained by intellectual, sensory, or health factors[;] (B) [a]n inability to build or maintain *satisfactory* interpersonal relationships with peers and teachers[;] (C) [*i*]*nappropriate* types of behavior or feelings under *normal circumstances*[;] (D) a *general pervasive* mood of *unhappiness* or *depression*[;] (E) [a] *tendency* to develop physical symptoms or fears associated with school or personal problems.

Id. (emphasis added).

67. Vallas, *supra* note 46, at 188 ("[S]tandardized tests remain the tool most frequently used for assessing whether students have [intellectual disabilities] and [learning disabilities], likely causing many [B]lack students to be inappropriately identified as needing special education services on the basis of poor test scores that fail to accurately assess their actual disabilities.").

School districts have used the intellectual disability and emotional disturbance categories to perpetuate racial segregation.[68] In the 1987 case of *United States v. Yonkers Board of Education*, the Second Circuit Court of Appeals affirmed the district court's ruling that Yonkers operated its special education program in "an unlawfully discriminatory manner."[69] The Second Circuit found Yonkers' practices to be motivated by racial animus and agreed with the district court that such practices

> resulted in the placement of a disproportionate number of minority children in [special education] classes for the emotionally disturbed, [and] "operated in an unlawfully discriminatory manner." The evaluative process was particularly prone to unwarranted racial assumptions and was unusually discriminatory in its impact. No race-neutral factor was likely to explain the disproportionately high numbers of minority children in such classes . . . .[70]

School districts also assign students to the intellectual disability and emotional disturbance classifications to undermine desegregation orders.[71] Indeed, the existence of a desegregation order has a positive correlation with a higher proportion of Black students in programs for students with intellectual disabilities.[72]

Parents with sufficient resources can challenge a school district's decision to classify their child as having an intellectual disability or emotional disturbance and seek to change it to another disability that schools treat more inclusively, such as a

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68. Marcia C. Arceneaux, *The Impact of the Special Education System on the Black-White Achievement Gap: Signs of Hope for a Unified System of Education*, 59 Loy. L. Rev. 381, 386 (2013) ("[S]tudents with [intellectual disabilities] continued to attend special, segregated schools whose student population was disproportionately African-American—resulting in effectively de facto segregation."); Jonathan Feldman, *Racial Perspectives on Eligibility for Special Education for Students of Color Who Are Struggling, Is Special Education a Potential Evil or a Potential Good?*, 20 Am. U. J. Gender, Soc. Pol'y & L. 183, 187 (2011) ("[S]chool districts hostile to integration used special education as a means to exclude children of color . . . ."); Vallas, *supra* note 46, at 193 ("An additional means by which schools sought to fight the effects of desegregation was the referral of large numbers of African-American students to special education classes.").

69. 837 F.2d 1181, 1212–13, 1222, 1239 (2d Cir. 1987) (quoting United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1461 (S.D.N.Y. 1985)).

70. *Id.* at 1212 (quoting *Yonkers Bd. of Educ.*, 624 F. Supp. at 1461).

71. Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 Tchrs. Coll. Rec. 453, 454, 456 (2005). The latest Civil Rights Data Collection from 2017 to 2018 showed that 317 school districts nationwide reported having desegregation orders or plans in place. *2017–18 State and National Estimations*, C.R. Data Collection, https://ocrdata.ed.gov/estimations/2017-2018 (last visited Apr. 16, 2022) (click "Restraint and Seclusion" then click "Seclusion IDEA/Non IDEA" from dropdown).

72. *See* Tamela McNulty Eitle, *Special Education or Racial Segregation: Understanding Variation in the Representation of Black Students in Educable Mentally Handicapped Programs*, 43 Socio. Q. 575, 582–84 (2002). In *Vaughns ex rel. Vaughns v. Board of Education of Prince George's County*, it was successfully alleged that an increase in Black students in special education corresponded with a court-ordered decrease in segregated schooling. 758 F.2d 983, 991 (4th Cir. 1985) (burdening the school district to "prov[e] that present racial disparities in placement in the special education program[were not] causally related to [its] pre-1973 segregation").

learning disability.[73] In *Lee*, for example, after the district took remedial action to change its evaluation procedures, the number of Black children it classified as having an intellectual disability or emotional disturbance decreased, and the number of Black children it classified with learning disabilities increased.[74]

4. Inflection Point Four: Preparing a Child's Individualized Education Program

If a school district determines that a child is eligible for special education, the district's next step is to convene a meeting to prepare the child's IEP.[75] The IEP is the foundational document for providing special education to a child with a disability.[76] Recognizing this, the IDEA creates, and the courts have recognized, a significant role for parents in preparing the IEP, but this role is difficult to play for parents without sufficient resources.

a. Contents of the IEP

An IEP is not readily understandable to a parent without training or the assistance of experts. It is lengthy, often containing more than a dozen pages.[77] It includes testing data, medical terminology, detailed teacher observations, educational acronyms and jargon, the child's disability classification, information about the child's academic and functional performance levels, the capacity of the child to be educated in a general education setting, measurable annual goals, and progress report mechanisms.[78] It also includes the special education, related services, supplementary aids, services, program modifications, and supports the school district will provide to the student.[79]

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73. *See Fast Facts: Inclusion of Students with Disabilities*, Nat'l Ctr. for Educ. Stats. [hereinafter NCES Inclusion Statistics], https://nces.ed.gov/fastfacts/display.asp?id=59 (last visited Apr. 16, 2022).

74. *See* Lee v. Lee Cnty. Bd. of Educ., 476 F. Supp. 2d 1356, 1364 (M.D. Ala. 2007).

75. 20 U.S.C. §§ 1401(14), 1414(d)(1)(A).

76. The Supreme Court has referred to the IEP as "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988).

77. New York's IEP template is eight pages. *Individualized Education Program (IEP) and Optional Student Information Summary Form*, N.Y. State Educ. Dep't., http://www.p12.nysed.gov/specialed/formsnotices/IEP/home.html (Dec. 31, 2015) (click "Word" hyperlink following "Individualized Education Program Form" under "Attachments"). It is divided into fourteen sections and twenty subsections, which concern, for example, the student's level of performance, interaction with students without disabilities, individual needs relating to special factors, post-secondary goals, and annual goals; progress reports to parents; recommended special education programs and services, and placement recommendations; state- and district-wide assessments; and transportation. *Id.* California IEPs include seventy-two components, which concern, for example, the student's level of academic achievement and functional performance, annual goals, and interaction with non-disabled persons; evaluative reports and accommodations; and special education and related services. Cal. Educ. Code § 56345 (Deering, LEXIS through Ch. 14 of 2022 Reg. Sess.); *see also* Phillips, *supra* note 62, at 1826.

78. 20 U.S.C. § 1414(d)(1)(A)(i).

79. *Id.*

b. Preparing the IEP

The IEP is prepared annually by a unique team for each student that includes administrators, experts, and the student's parents and teachers.[80] The annual IEP meeting is perhaps the most important opportunity the IDEA offers for parents of a child with a disability to advocate on behalf of their child. It is so important that failure to include willing parents in an IEP meeting without a very good reason violates the IDEA.[81] Parents who are able to take advantage of this opportunity can have a prominent role in the IEP meeting.[82] They can provide additional information about their child, challenge the district's proposed disability classification, raise questions about their child's assessments and progress reports, provide input about the child's goals, ask questions about the educational services the district proposes to provide to the child, make their own suggestions, and share their thoughts about the child's participation in the general education curriculum. School administrators must listen and remain open to parents' descriptions of their child's needs and abilities, and thoughts and proposals regarding their child's educational program and services.[83]

Despite the opportunity the IEP meeting offers to parents to advocate for their child, parents without sufficient means to hire attorneys or educational advocates to accompany them or advise them prior to the meeting are not readily able to benefit from it.[84] The IEP meeting is generally held in a school district conference room where the parents are outnumbered by district administrators and teachers, who are trained professionals and possibly unknown to the parents.[85] Parents generally are not familiar with the legal requirements of the IDEA, do not know how to measure a child's academic potential or progress, and are not familiar with the instructional practices

80. *Id.* § 1414(d)(1)(B).

81. *See* Shapiro *ex rel.* Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1077–79 (9th Cir. 2003), *superseded on other grounds by* U.S.C. § 1414(d)(1)(B).

82. *See* Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 Rutgers L. Rev. 333, 341 (2001) ("[T]he IEP conference becomes the central focus of the process and effective parental input at that level may determine whether a child will receive an appropriate education . . . ."); Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 Clinical L. Rev. 271, 276 (2005) ("The IDEA statute and regulations envision the parent as an equal member of the [IEP] planning team, along with school personnel."); Stephen A. Rosenbaum, *When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. Davis J. Juv. L. & Pol'y 159, 165 (2001) ("Parents are assigned a substantial role in decisionmaking [sic] . . . through the IEP.").

83. *See* Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857–59 (6th Cir. 2004) (holding that predetermining the terms of a child's IEP before the IEP team meeting violates the IDEA).

84. Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 Cornell J.L. & Pub. Pol'y 171, 178 (2005) (providing that parents with more financial and educational resources have greater bargaining power to obtain IEPs with greater educational benefits); Wakelin, *supra* note 46, at 278 ("[T]he problems that hinder parents from employing the due process protections of the IDEA fall disproportionately on low-income, minority parents." (citing Massey & Rosenbaum, *supra* note 82, at 281)).

85. *See* Wakelin, *supra* note 46, at 275.

available to meet their child's needs or the jargon that educators use to describe them.[86] In contrast, educators come to the meeting on familiar ground, armed with authority from the Supreme Court, which has made clear that courts must defer to their educational judgments.[87] Educators are allowed to hold planning meetings without parents prior to an IEP meeting as long as they have not "predetermined" the child's educational program and come to the IEP meeting with an open mind, but courts do not strictly enforce this rule.[88] Educators tend to see the IEP meeting as an opportunity to present information to parents rather than to collaborate with them to develop a program that meets their child's unique needs.[89] Parents, on the other hand, can be intimidated when speaking with school officials.[90] This feeling is often exacerbated in relationships between parents of color and school officials.[91]

86. Marchese, *supra* note 82, at 343 (stating that parents might not be aware of educational alternatives, the child's right to a FAPE, or the procedural mechanisms to challenge the district's decisions); Phillips, *supra* note 62, at 1828 (citing parents' inability to diagnose a child's disability, lack of awareness of educational options, and difficulty interfacing with school officials); Wakelin, *supra* note 46, at 275 ("Parents are placed at a disadvantage because they do not know when schools are in noncompliance with IEPs, when the IEPs are not resulting in academic progress, or what the best instructional practices are for their children's disabilities." (citing David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 187)).

87. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 207 (1982) ("In assuring that the requirements of the [IDEA] have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States."); Joseph F. *ex rel.* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) (stating that the Court's new educational benchmark for children with disabilities is not an "invitation" to courts to abandon deference to the decisions of state educators announced in *Rowley*).

88. T.P. *ex rel.* S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 (2d Cir. 2009) ("IDEA regulations allow school districts to engage in 'preparatory activities . . . to develop a proposal or response to a parent proposal that will be discussed at a later meeting' without affording the parents an opportunity to participate." (quoting 34 C.F.R. §§ 300.501(b)(1), (b)(3) (2022))); Archer & Marsico, *supra* note 6, at 371–73 (collecting cases). Studies have shown that educators most frequently decide on the child's educational program prior to the IEP meeting. Phillips, *supra* note 62, at 1834.

89. Phillips, *supra* note 62, at 1834 & n.151 ("IEP conferences frequently are highly formal, noninteractive, and replete with educational jargon." (quoting William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 L. & Contemp. Probs. 7, 33 (1985))); Wakelin, *supra* note 46, at 275 ("Most teachers and school administrators view the IEP conference as a time to disseminate information to the parent, rather than an opportunity to collaboratively plan the child's education." (citing Engel, *supra* note 86, at 187)).

90. Massey & Rosenbaum, *supra* note 82, at 280 (listing factors that interfere with a parent's ability to advocate for their children, including "fear of retaliation against the student," "cultural norms that place educators in positions of unquestioned authority," and "a sense of powerlessness"); Wakelin, *supra* note 46, at 275 (reporting that parents feel "terrified and inarticulate" at IEP meetings (quoting Rosenbaum, *supra* note 82, at 166)).

91. *See* Togut, *supra* note 46, at 164 (citing power differentials between parents of students of color and school officials as a reason for the disproportionate representation of students of color in special education).

B. The IDEA's Substantive Educational Requirements

1. Inflection Point Five: Determining the Elements of a Free Appropriate Public Education

The IDEA requires school districts that receive federal special education funds to provide a FAPE to children with disabilities.[92] This section of Part III examines the broad discretion that the IDEA gives educators to define the elements of a FAPE and the educational services they will provide to children with disabilities. This section also examines the burden the Supreme Court has placed on parents to ensure that their children receive a FAPE. This combination of educator discretion and parental burden makes it very difficult for parents without sufficient economic resources to challenge the discretion educators have in designing a FAPE and securing a positive outcome for their child.

a. Discretion in Determining the Elements of a FAPE

i. Lack of an Educational Benchmark

The IDEA defines a "FAPE" as having two components that must be made available by the state to qualifying schoolchildren: "special education" and "related services."[93] This definition does not include a substantive student achievement benchmark to determine whether a state, or more precisely, a school district, has met the unique educational needs of a child with a disability. The Supreme Court has twice rebuffed parents who argued that the IDEA requires school districts to give students with disabilities an opportunity to reach their potential that is equal to the opportunity they give to children whom the school district has not identified as having a disability.[94] Instead, the Court has ruled that a district provides a FAPE if it develops an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[95] This is a vague standard that is open to subjective interpretation and discretionary implementation, leaving several critical questions to the discretion of educators, including the meaning of "reasonably calculated," how much "progress" is "appropriate," and which "circumstances" are relevant.

ii. Open-Ended Definitions of 'Special Education' and 'Related Services'

The definitions of the two statutory components of a FAPE—"special education" and "related services"—are vague. "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[96]

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92. 20 U.S.C. § 1412(a)(1)(A).

93. *Id.* §§ 1401(9), (26), (29) (defining "FAPE" and then "related services" and then "special education").

94. Joseph F. *ex rel.* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 198 (1982).

95. *Endrew F.*, 137 S. Ct. at 999.

96. 20 U.S.C. § 1401(29).

The IDEA does not include examples of "specially designed instruction."[97] Instead, special education takes many forms that are not specifically described in the IDEA. These include education in a private school for students with disabilities; pedagogical methods that address different disabilities such as autism or learning disabilities in math and reading; resource room services; special education teacher support services; special education itinerant teacher services; study skills training; extended-school-year services; integrated co-teaching classes; and separate, smaller classes with specially designed curricula for teaching Mathematics, Social Studies, Science, and English.[98] The IDEA does not provide any guidance regarding the services that children with particular disabilities should receive, leaving this instead to the discretion of educators.[99]

"Related services" are "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[100] The IDEA includes a list with thirteen specific examples.[101] Although the definition for "related services" is thus more specific than the definition of "special education," it excludes many important details, particularly the eligibility criteria for each service, the appropriate duration and frequency of a given service, and whether services should be provided individually or in a group, leaving these important details to the discretion of educators.

b. An Unrealistic Role for Parents?

The open-ended nature of a FAPE reinforces the importance of the role parents can play in advocating for their children. The IDEA recognizes this, as it provides two scenarios in which a school district may be found to have denied a FAPE. First, a school district denies a FAPE if it fails to provide an education that is appropriate in light of the child's circumstances.[102] Second, a school district denies a FAPE if it "significantly impede[s] the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child."[103]

97. The IDEA notes that "specially designed instruction" can be provided in a classroom, at home, or in a hospital or similar setting. *Id.*

98. *See* L.R. v. N.Y.C. Dep't of Educ., 193 F. Supp. 3d 209, 216 (E.D.N.Y. 2016) (deferring to school district's decision on class size and instructional programming); C.U. v. N.Y.C. Dep't of Educ., 23 F. Supp. 3d 210, 231 (S.D.N.Y. 2014) (deferring to school district's discretion as to the sufficiency of educational goals and strategies); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 192 (2d Cir. 2012) (deferring to school district's decision to provide a 1:1 aide instead of a teacher to a student).

99. *See supra* note 98 and accompanying text.

100. 20 U.S.C. § 1401(26)(A).

101. *Id.* Examples given for "related services" include transportation, speech-language pathology, audiology, interpreting, psychological services, physical therapy, occupational therapy, recreation, social work, school nurse services, counseling, orientation and mobility services, and medical services for diagnostic and evaluation purposes only. *Id.*

102. *Id.* § 1415(f)(3)(E)(ii)(I).

103. *Id.* § 1415(f)(3)(E)(ii)(II).

The Supreme Court also recognizes the important role that parents play in developing their child's special education program. It has elevated their role to one of great significance, essentially relying on parents to ensure that their child receives a FAPE.[104] Although this exalted role has a nice echo in the halls of justice, it does not fully capture reality. While it empowers some parents, it places unrealistic expectations on parents who do not have sufficient resources to embrace it.[105]

2. Inflection Point Six: Identifying the Least Restrictive Environment

A school district must provide a FAPE in the LRE, meaning that "[t]o the maximum extent appropriate," the school district must restrict children with disabilities from the general education classroom "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[106] The definition of the LRE leaves many questions to the discretion of educators: What are the criteria for determining the maximum extent appropriate? How do we know if education in the general education classroom cannot be achieved satisfactorily? Which objective yields when there is a conflict—educational progress or access to the general education classroom?

The criteria for making placement decisions are subject to the discretion of educators. The standard guiding this discretion is "reasonableness," requiring school districts to make "reasonable efforts to accommodate the child in a regular classroom," to determine the benefits the child will receive therein "with appropriate supplementary aids and services," and to consider the "possible negative effects" of including the child in the general education classroom.[107] If a school district determines that it cannot

104. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 205–06 (1982).

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Id. (citation omitted); *see also* Marchese, *supra* note 82, at 341 ("[E]mphasis on procedure places great weight on parental involvement to ensure compliance with the statute." (citing Engel, *supra* note 86, at 179–80)); Massey & Rosenbaum, *supra* note 82, at 277 (noting procedural protections as a counterbalance to the lack of substantive protections).

105. "[T]he Supreme Court may have relied too heavily on the IDEA's procedural terms and the alleged 'ardent advocacy' that would be pursued by parents to the detriment of a substantive standard." Hyman et al., *supra* note 62, at 149 (footnote omitted); *see also* Marchese, *supra* note 82, at 337 (footnote omitted) ("[M]any parents lack the skills, education, money, or time to effectively participate in the process of their children's education.").

Several conditions have contributed to parental success in advocating for their children, including knowledge of their rights and their child's disability, willingness and ability to speak out, an understanding of what is happening at the IEP meeting, and the ability to utilize legal resources. Massey & Rosenbaum, *supra* note 82, at 279. "[I]n a school with more limited resources or professional expertise, well-intentioned parental advocacy is often not enough to prevent children from falling through the proverbial cracks." Phillips, *supra* note 62, at 1806.

106. 20 U.S.C. § 1412(a)(5)(A).

107. *See* Oberti *ex rel.* Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1217–18 (3d Cir. 1993), *abrogated on other grounds by* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 62 (2005).

appropriately educate a child with a disability in a general education classroom, it must include the child in school programs with children whom the school district has not identified as having a disability "to the maximum extent appropriate."[108]

There are several different placement alternatives, each along a continuum from less to more restrictive, giving educators a significant amount of discretion in determining what constitutes the LRE for a particular child. The placements on the continuum include the general education classroom; an integrated co-teaching classroom that includes one general education and one special education teacher, where roughly 60 percent of the students have not been identified as having a disability and 40 percent have; a "self-contained" classroom populated exclusively by children with disabilities, with student-teacher ratios that are lower than average, such as 15:1, 12:1, and 8:1, and often accompanied by a full-time classroom aide; a private school; and an institutional setting.[109]

C. The IDEA's Enforcement Mechanisms

1. Inflection Point Seven: Advocacy Rights and Opportunities

The seventh inflection point is the IDEA's elaborate set of procedural rights and protections for parents that give them the opportunity to advocate for the special education rights of their children.[110] The procedures are complex and difficult to navigate successfully, even with annual notice of these procedural safeguards and the support and assistance of experts. The Supreme Court has contributed to this difficulty by issuing decisions that assign to parents the burden of proof in special education administrative hearings and prohibit parents who prevail in administrative hearings from recovering expert witness fees, making it nearly impossible for parents with limited financial resources to advocate successfully for their children.[111] The lower courts have also contributed to these difficulties by restricting the IDEA's fee-shifting provision.

a. Notices

Parents of children with disabilities receive an annual procedural safeguards notice.[112] The notice is lengthy, dense, and not readily accessible.[113] Buried in the

108. *Id.* at 1218 (citation omitted); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998), *abrogated on other grounds by Schaffer*, 546 U.S. at 62.

109. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8, § 200.6 (LEXIS through Apr. 22, 2022).

110. 20 U.S.C. § 1415.

111. *Schaffer*, 546 U.S. at 62; Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297–300 (2006).

112. 20 U.S.C. § 1415(d).

113. *See* Phillips, *supra* note 62, at 1805 & n.4 ("These safeguards often require an additional level of ability and knowledge: [M]any documents detail the processes in dense, inaccessible language."). Virginia's notice is forty-one pages and "frequently employs acronyms unknown to the average parent." *Id.* (citation omitted). New York's notice is forty-six pages and holds its own with acronyms. N.Y. State

notice is crucial information about the right to an independent educational evaluation, parental consent requirements, and access to records.[114] Parents must also receive prior written notice of any action the district proposes relating to their child's special education, which gives parents with sufficient resources the opportunity to advocate for their children.[115]

b. Impartial Hearings

i. The Basics

Parents have a right to file a complaint with their school district about any aspect of their child's special education.[116] The school district must immediately schedule a resolution session to discuss and attempt to resolve the complaint.[117] The district must also provide an impartial hearing, presided over by an impartial hearing officer (IHO), to address the complaint.[118] The impartial hearing is relatively formal and not designed for parents without training in litigation skills. Parties must exchange evidence five business days before the hearing;[119] they have the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; and parents have a right to be represented by counsel (but not to appointed counsel) and to bring other persons with knowledge or training in special education.[120]

ii. The Burden of Proof

The IDEA does not specify the burden of proof in impartial hearings. In the 2015 case of *Schaffer ex rel. Schaffer v. Weast*, the Supreme Court ruled that the burden of proof is on the moving party, which is most frequently the parent.[121] The parents in *Schaffer* argued that, because the IDEA places an affirmative obligation on school districts to provide a FAPE, the burden in impartial hearings should be on the school district to show that they provided one. They also argued that placing the burden on school districts to come forward with evidence would adjust the information and resource imbalance between school districts and parents. The Supreme Court rejected these arguments, finding no reason to abandon the

Educ. Dep't, Procedural Safeguards Notice: Rights for Parents of Children with Disabilities, Ages 3–21 (2017).

114. 20 U.S.C. § 1415(d)(2).

115. *Id.* §§ 1415(b)(3), (c)(1)(B), (E)–(F).

116. *Id.* § 1415(b)(6)(A).

117. *Id.* § 1415(f)(1)(B)(i).

118. *Id.* § 1415(f)(1)(A).

119. *E.g.*, Off. of Special Educ., N.Y. State Educ. Dep't, Questions and Answers on Impartial Due Process Hearings for Students with Disabilities 12–13 (2018).

120. 20 U.S.C. § 1415(h).

121. 546 U.S. 49, 62 (2005).

"traditional" rule that the party seeking relief has the burden of proof.[122] It shrugged off concerns about the imbalance of power, stating that the procedural protection the IDEA provides to parents level the playing field.[123]

The Court's confidence was misplaced. Understanding the burden of proof—let alone carrying it—is beyond the capacity of most lay persons.[124] Additionally, the Court's confidence did not account for the economic inequities built into the IDEA's procedural protections and the difficulties parents with limited means have with taking advantage of them. The procedural protections are also too weak to accomplish the mission the Supreme Court gave them. The protections neither require a district to provide all of its information about a child to the parents nor equalize a parent's ability to carry the burden of proof; nor do they provide parents with the resources to enable them to hire attorneys or experts to help them carry the burden of proof. As a direct consequence of *Schaffer*, parents who cannot afford counsel to represent them will find it very difficult to advocate for their children successfully in impartial hearings.[125]

c. The Ban on Recovering Expert Fees

The IDEA states that a court may award "costs" to prevailing parties.[126] In the 2006 case of *Arlington Central School District Board of Education v. Murphy*, the Supreme Court ruled that "costs" do not include expert fees.[127] Although there was a vigorous dissent that pointed out the clear intent of Congress to include expert fees as costs,[128] the majority decided that "costs" traditionally cover things like filing fees and deposition transcripts and do not refer to expert fees.[129]

Experts such as doctors, psychologists, educators, and therapists are essential to assist parents in proving that a school district denied their child a FAPE.[130] Experts can explain evaluation reports, review treatment and placement options, conduct evaluations, and help attorneys prepare to cross-examine the district's experts. They

122. *Id.* at 61–62.

123. *Id.* at 60–61.

124. *See* Phillips, *supra* note 62, at 1835 ("In what is already a complicated and difficult process, parents must now attempt to gather evidence to satisfy their burden of proof in an administrative hearing challenging an IEP.").

125. *See* Hyman et al., *supra* note 62, at 143–44 (describing the disparate impact of *Schaffer*); Massey & Rosenbaum, *supra* note 82, at 278–82 (highlighting several factors that make it difficult for parents to represent themselves at impartial hearings, including "lack of negotiation skills or familiarity with 'educationese'" and "limited training in evaluating and marshalling evidence"); Wakelin, *supra* note 46, at 278 n.166 (noting that the most important factor in succeeding at an impartial hearing is representation by counsel (citing Melanie Archer, Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997–2002, at 7 (2002))).

126. 20 U.S.C. § 1415(i)(3)(B)(i).

127. 548 U.S. 291, 293–94 (2006).

128. *Id.* at 308–09 (Breyer, J., dissenting).

129. *Id.* at 297–98 (majority opinion).

130. Fluehr, *supra* note 56, at 177–78.

can testify at trial, both in opposition to the district's experts and in support of their own evaluations, and in support of claims for compensatory education. Prohibiting parents from recovering expert fees creates a substantial burden on parents with limited resources seeking to enforce their child's rights.

d. Judicial Review

The IDEA provides for limited judicial review of impartial hearing decisions.[131] Parents have their own right to a FAPE and as a result can represent themselves pro se if they appeal the decision of an IHO to state or federal court.[132] This right is important, as it gives parents without the resources to hire an attorney the power to bring their case to court, but it is also illusory for parents without the training, capacity, or financial means to take advantage of this opportunity.

e. Restrictions on Attorney Fees

Parents do not have a right to appointed counsel at impartial hearings, and many cannot afford to hire an attorney.[133] The IDEA addresses this through a fee-shifting provision that allows courts in their discretion to award attorneys fees to the "prevailing party."[134] The courts, however, have construed "prevailing party" narrowly to require a judicially approved change in the legal relationship between the parties.[135] This creates a disincentive for attorneys to take IDEA cases. If a case settles without an agreement on attorney fees, fees are not available. This places attorneys and parents in IDEA cases in an adverse position, creating an additional disincentive for attorneys to take cases. The IDEA creates another disincentive by prohibiting recovery of attorneys fees for time spent participating in crucial parts of the IDEA process, including IEP meetings, resolution sessions, and mediations.[136]

2. Inflection Point Eight: Remedies

The IDEA's remedial provision is open-ended and gives courts and IHOs discretion to award "appropriate" relief.[137] The courts have decided that "appropriate"

131. 20 U.S.C. § 1415(i)(2)(A).

132. Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 535 (2007).

133. Wakelin, *supra* note 46, at 277–78.

134. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

135. *See, e.g.*, Doe v. Bos. Pub. Schs., 358 F.3d 20, 25 (1st Cir. 2004) (holding that the victor in a private settlement was not a "prevailing party" for purposes of the IDEA's fee-shifting provision); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 474 (7th Cir. 2003) ("'[P]revailing party' [i]s 'a legal term of art,' which signifie[s] . . . the party . . . granted relief by a court." (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 603 (2001), *superseded by statute*, OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552(a)(4)(E)))); *see also* Archer & Marsico, *supra* note 6, at 709–10, 714–17 (collecting cases).

136. 20 U.S.C. §§ 1415(i)(3)(D)(ii)–(iii).

137. *Id.* § 1415(i)(2)(C)(iii).

relief does not include monetary damages.[138] Instead, the courts have ruled that appropriate relief includes only equitable remedies and have recognized two main types: tuition reimbursement[139] and compensatory education.[140] This two-tiered remedial system together with the unavailability of monetary damages has a disproportionately negative impact on people with limited economic resources.

a. The Two-Tiered Remedial System

If a parent of a child with a disability removes her child from public school because she believes her child is not receiving a FAPE and subsequently places her child in a private school, that parent is entitled to tuition reimbursement from her child's school district if she can prove three things: (1) the school district denied her child a FAPE; (2) the private school provided the child with an appropriate education; and (3) the equities favor the parent.[141] In contrast, if a parent who believes that the school district is denying her child a FAPE but who lacks the means to pay private school tuition files a complaint, her child remains in an educational setting the parent believes is inappropriate. If the parent prevails, the child will be eligible for an award of compensatory education.

Compared with tuition reimbursement, compensatory education is inequitable and inadequate. While the child with wealthy parents is in a private school that his parents select, the child whose parents lack similar resources remains in a school setting that his parents believe is inappropriate. Additionally, courts generally do not provide one hour of compensatory education for each hour the child did not receive a FAPE. Instead, the majority approach is to award the amount of compensatory education that is necessary to restore the child to where he would have been academically had the school district provided a FAPE.[142] This is an elusive standard that is difficult for parents to meet in general, but it is especially difficult if they do not have the resources to hire attorneys or experts to establish the threshold. Some courts, recognizing the inequities and inadequacies of compensatory education, have issued creative awards that reduce these inequities, but these decisions are not the

138. Sellers *ex rel.* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 525 (4th Cir. 1998); *see also* Archer & Marsico, *supra* note 6, at 671 (collecting cases).

139. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 232 (2009); Florence Cnty. Sch. Dist. Four v. Carter *ex rel.* Carter, 510 U.S. 7, 9–10 (1993); Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). The right to tuition reimbursement has been codified at 20 U.S.C. § 1412(a)(10)(C).

140. Miener *ex rel.* Miener v. Missouri, 800 F.2d 749, 751, 753–54 (8th Cir. 1986); *see also* Archer & Marsico, *supra* note 6, at 671 (collecting cases).

141. *Forest Grove*, 557 U.S. at 247; *Florence*, 510 U.S. at 9–10, 15–16; *Burlington*, 471 U.S. at 374.

142. Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); *see also* Archer & Marsico, *supra* note 6, at 684. Some courts calculate compensatory education awards using an hour-for-hour approach or a hybrid approach that considers both the total number of hours lost and an individualized analysis of the child's needs. *See id.* at 684–86.

norm, not codified in the IDEA, and in some cases, rely on private schools to be flexible in their financial arrangements with parents.[143]

The IDEA's inequitable two-tiered remedial structure has a secondary impact on parents with limited resources. A court order requiring a school district to reimburse parents for private school tuition can cost the district tens of thousands of dollars in tuition, and its attorneys fees, the parents' attorneys fees, and the IHO's fee can add tens of thousands of dollars more to the bill. The school district also suffers the intangible costs of administrators, therapists, and teachers taking time away from their teaching and other responsibilities to prepare for and participate in the impartial hearing. Public school budgets are limited, and the money and time school districts lose in tuition reimbursement cases is money that is not being spent on children with disabilities who must remain in the district without a FAPE because their parents do not have the resources to send them to private school in the hopes of receiving reimbursement.

b. The Ban on Monetary Damages

Courts have decided that monetary damages are not available under the IDEA, largely on grounds that such awards would be difficult to calculate and would constitute "educational malpractice" claims.[144] These decisions are questionable because, for example, monetary damages are available for violations of section 504 of the Rehabilitation Act,[145] which protects rights in educational settings that are similar to the rights protected by the IDEA.[146]

The ban on monetary damages disproportionately harms parents with limited resources who could use monetary damages to obtain services for their child not covered by a compensatory education award. In addition, they would benefit from the secondary effects of monetary damages in IDEA cases, including the incentive that the potential liability for monetary damages would create for school districts to comply with the IDEA and for attorneys to take IDEA cases on contingency. The

143. *See, e.g.*, A. *ex rel.* D.A. v. N.Y.C. Dep't of Educ., 769 F. Supp. 2d 403, 430 (S.D.N.Y. 2011) (ordering school district to pay tuition directly to private school even though the parents had not yet paid tuition); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1286–87 (11th Cir. 2008) (ordering prospective payment of private school tuition); Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138, 147 (W.D.N.Y. 1999) (ordering school district to place student in private school and pay tuition).

144. *See* Sellers *ex rel.* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 526–27 (4th Cir. 1998); Archer & Marsico, *supra* note 6, at 647–49 (collecting cases). Educational malpractice claims have taken two main forms, both of which courts generally decline to entertain. *Id.* One such form concerns the general education context—"failure of the school system to provide basic academic skills." Frank D. Aquila, *Educational Malpractice: A Tort* En Ventre, 39 Clev. St. L. Rev. 323, 327 (1991). The other concerns the special education context—"failure [of the school system] to implement its guaranteed policies and procedures in a specific area such as special education." *Id.*

145. Section 504 prohibits discrimination based on disability in federally-funded programs. 29 U.S.C. § 794. Monetary damages are also available under this provision. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 70–71 (1992).

146. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities, including by schools. 42 U.S.C. §§ 12101–12213.

judicial ban on monetary damages also has a disparate impact on Black children who are disproportionately classified with intellectual disabilities or emotional disturbances.[147] They suffer tangible harm by spending much of their time separated from the general education classroom and curriculum to their educational detriment but are ineligible for monetary damages to compensate them accordingly.[148]

3. Inflection Point Nine: The Administrative Exhaustion Requirement

The IDEA does not prohibit race discrimination in special education. Thus, a parent who claims that her child's school district discriminated against her child in the provision of special education cannot obtain relief for this in an impartial hearing. However, the Equal Protection Clause[149] and Title VI of the Civil Rights Act of 1964[150] prohibit race discrimination in education, including special education.[151]

Even though it is not possible to pursue a race discrimination claim in an impartial hearing, the IDEA's exhaustion requirement, as construed by the courts, creates an obstacle for parents who want to file a special education race discrimination claim in court pursuant to the Equal Protection Clause and Title VI. The exhaustion requirement states that, before a plaintiff may file a case under a law seeking relief "that is also available" under the IDEA, the plaintiff must exhaust the IDEA's "administrative remedies."[152] Despite this plain language, the Supreme Court requires plaintiffs to exhaust their administrative remedies, even if they are not seeking relief that is also available under the IDEA, if the "gravamen" of the complaint is an IDEA

147. *See Sellers*, 141 F.3d at 528 (holding that monetary damages are generally unavailable under the IDEA); *see also Indicator 9: Students with Disabilities*, Nat'l Ctr. for Educ. Stats., https://nces.ed.gov/programs/raceindicators/indicator_rbd.asp (Feb. 2019) (showing that Black students make up the highest percentage of students served under the IDEA for an intellectual disability).

148. *See* Dear Colleague Letter, *supra* note 46, at 5 (stating that special education services that are inappropriate for particular students "may have negative consequences for the[ir] educational development . . . by limiting [their] access to proper instruction"); Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. Cent. L. Rev. 1, 26–27 (2006) (providing that the placement of Black male students in special education classes has a negative impact on progress in school).

The court in *Larry P.*, in granting a preliminary injunction, found irreparable injury in part because the curriculum in separate classes was "minimal academically." Lucille P. *ex rel* Larry P. v. Riles, 343 F. Supp. 1306, 1308 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

149. U.S. Const. amend. XIV, § 1, cl. 2.

150. 42 U.S.C. §§ 2000d–2000d-4. Title VI provides that, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

151. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). The OCR interprets Title VI to require that "students of all races, colors, and national origins have equitable access to general education interventions and to a timely referral for an evaluation under the IDEA." Dear Colleague Letter, *supra* note 46, at 3. According to the OCR, "Title VI requires students of all races and national origins to be treated equitably in the evaluation process, in the quality of special education services and supports they receive, and in the degree of restrictiveness of their educational environment." *Id.*

152. 20 U.S.C. § 1415(l).

violation.[153] Most courts that have applied the exhaustion provision to Title VI and equal protection claims have ruled that plaintiffs must first exhaust the IDEA's administrative procedures.[154] This has a disparate impact on parents of color who wish to challenge race discrimination in special education, particularly if they lack the resources to file an administrative complaint followed by a civil action.

IV. DATA SHOWING RACIALIZED OUTCOMES IN SPECIAL EDUCATION

Because of limits in federal and state information disclosure requirements, most of the public data regarding race and special education is limited to the outcome of the first three inflection points: the decision whether to place a child in special education, and if so, the child's disability classification. There are limited data showing racialized outcomes relating to placement in the least restrictive environment,[155] school suspensions,[156] and access to and success in impartial

153. Fry *ex rel.* E.F. v. Napoleon Cmty. Schs., 137 S. Ct. 743, 755 (2017).

154. *E.g.*, Waters v. S. Bend Cmty. Sch. Corp., No. 98-3365, 1999 U.S. App. LEXIS 17743, at *11–12 (7th Cir. July 22, 1999) (dismissing for failure to exhaust administrative remedies); Henry v. Sch. Dist. of Phila., No. 19-1115, 2019 U.S. Dist. LEXIS 151933, at *25–29 (E.D. Pa. Sept. 6, 2019) (dismissing for failure to exhaust administrative remedies when gravamen of complaint sought redress for failure to provide IDEA services); Mixon *ex rel.* A.M. v. Fresno Unified Sch. Dist., No. 16-cv-725, 2017 U.S. Dist. LEXIS 202559, at *26–29 (E.D. Cal. Dec. 8, 2017) (dismissing for failure to exhaust administrative remedies when gravamen of complaint sought redress for denial of FAPE); Reyes v. Bedford Cent. Sch. Dist., No. 16-CV-2768, 2017 U.S. Dist. LEXIS 159568, at *23 (S.D.N.Y. Sept. 27, 2017) (dismissing for failure to exhaust administrative remedies when complaint "focused on the deprivation of educational services owed . . . under the IDEA"); Ely v. Mobile Cnty. Sch. Bd., No. 15-566, 2016 U.S. Dist. LEXIS 73665, at *9–12 (S.D. Ala. May 11, 2016) (dismissing because claim was "inextricably intertwined" with IDEA); Barnett v. Baldwin Cnty. Bd. of Educ., 60 F. Supp. 3d 1216, 1229–30 (S.D. Ala. 2014) (same); Wang *ex rel.* KG v. Williamsville Cent. Sch. Dist., No. 8-CV-575S, 2010 U.S. Dist. LEXIS 39468, at *5–6 (W.D.N.Y. Apr. 21, 2010) (same); Karlen *ex rel.* J.K. v. Westport Bd. of Educ., 638 F. Supp. 2d 293, 299–300 (D. Conn. 2009) (same); DiStiso *ex rel.* DiStiso v. Town of Wolcott, No. 05cv01910, 2006 U.S. Dist. LEXIS 83835, at *1, 4–5 (D. Conn. Nov. 16, 2006) (same); M. v. Bridgeport Bd. of Educ., 96 F. Supp. 2d 124, 127, 130–31, 134–35 (D. Conn. 2000) (dismissing for failure to exhaust administrative remedies when claim alleged district misidentified Black children as having intellectual disabilities); Hope v. Cortines, 872 F. Supp. 14, 23 (E.D.N.Y. 1995) (dismissing claim alleging discriminatory educational services).

One court allowed a Title VI claim to proceed even though the plaintiffs did not exhaust the IDEA's administrative remedies. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 271 (3d Cir. 2014) (delineating exceptions to the "strong" exhaustion policy in the IDEA context).

155. *See* Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 How. L.J. 303, 327 & n.134 (2011) ("[Black] children were more likely than their peers with the same disability to be placed in more restrictive settings and less likely than their peers with the same disability to be served in the least restrictive environment." (alteration in original) (quoting Russell J. Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 Exceptional Child. 411, 420 (2006))).

156. Black students with disabilities are suspended at higher rates than other students. *See* U.S. Comm'n on C.R., Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities 11 (2019); Renee Ryberg et al., *Despite Reductions Since 2011–12, Black Students and Students with Disabilities Remain More Likely to Experience Suspension*, Child Trends (Aug. 9, 2021), https://www.childtrends.org/publications/despite-reductions-black-students-and-students-with-disabilities-remain-more-likely-to-experience-suspension; Ciolfi & Ryan, *supra* note 155, at 326 (reporting that Black students in Indiana were more than three times

hearings.[157] There are virtually no public data about the contents of IEPs or the special education and related services that children receive. It is thus not easy, if even possible, to determine whether there is an uneven distribution based on race of desirable special education placements and programs, related services, or supplemental aids and accommodations. Nor are there public data about relief in IDEA cases, again making it impossible to know the distribution by race of tuition reimbursement and compensatory education awards.[158] Given these limits in the data, Part IV focuses on data relating to placement in special education and disability classifications.

A. Placement in Special Education

As described in Part II, evidence before Congress when it passed and amended the IDEA showed that Black children were overrepresented in special education programs. Studies dating from 1955 and continuing until the present are consistent with this.[159]

as likely than their peers to be suspended or expelled for ten or more days); Nanda, *supra* note 56, at 307 n.145 (citations omitted) (finding that children of color were disproportionately subject to discipline).

The IDEA includes protections for students with disabilities who face discipline, but they apply only after the school has decided to discipline the child. *See* 20 U.S.C. §§ 1415(k)(1)–(4). As with other provisions of the IDEA, the rules for disciplining children are vague and formalistic and are difficult for parents without sufficient economic resources, education, or familiarity with the law to utilize effectively. Archer & Marsico, *supra* note 6, at 310–21. For purposes of this article, discipline is not included as an inflection point because discipline originates from school disciplinary codes that are neither part of nor governed by the IDEA. *Cf.* Goss v. Lopez, 419 U.S. 565, 581 (1975) (requiring school districts to provide limited due process protection to public school students prior to suspension).

157. Black parents use the IDEA's advocacy opportunities less frequently than white parents and are less likely to succeed when they do. *See* Garda, *supra* note 10, at 1084–85.

158. This article attempts to make the case that race discrimination in these areas can be inferred from the structural inequities of the IDEA. *See id.* at 1072–75.

159. Russell J. Skiba et al., *Risks and Consequences of Oversimplifying Educational Inequities: A Response to Morgan et al. (2015)*, 45 Educ. Researcher 221, 221 (2016) ("Disproportionality in special education, primarily expressed as racial and ethnic overrepresentation for certain groups, has been among the key educational equity issues in the field for nearly 50 years."); *see also* Linehan, *supra* note 46, at 186–87 (referencing a 1955 study that showed four predominantly Black census tracts in Milwaukee, Wisconsin, accounting for twice as many referrals of students for evaluations than the rest of the city); Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. Special Educ. 410, 410–15 (1994) (describing a disproportionately high representation of children of color in special education since 1968); Togut, *supra* note 46, at 164 (studying findings from the 1970s that Black children were the most disproportionately represented group among special education programs); Losen & Welner, *supra* note 55, at 411–12 (finding a disproportionately high representation of children of color in special education classes since 1982); Weatherspoon, *supra* note 148, at 27–28 (showing Black students disproportionately represented in special education programs).

Courts have also acknowledged the overrepresentation of Black children in special education programs. *E.g.*, Spain v. Mecklenburg Cnty. Sch. Bd., 54 F. App'x 129, 131 (4th Cir. 2002) ("[T]he OCR concluded that there was a disproportionate assignment of African-American students to special education curricula and a failure to place African-American students in available accelerated programs in the county."); Vaughns *ex rel.* Vaughns v. Bd. of Educ. of Prince George's Cnty., 758 F.2d 983, 991 (4th Cir. 1985) (noting the OCR's ranking of the county school system "as fourteenth worst in the nation with regard to minority overrepresentation in special education"); Lee v. Lee Cnty. Bd. of Educ., 476 F. Supp. 2d 1356, 1359–60 (M.D. Ala. 2007) (finding Black students to be "greatly overrepresented" among the intellectual disability and emotional disturbance categories).

In the 2018–2019 academic year, there were approximately 1.3 million Black children in special education programs.[160] They were 1.2 times more likely than all children to be assigned to special education programs.[161] If Black children were assigned to special education programs at the same rate as all students, there would have been roughly 1.1 million Black children in special education, a reduction of more than 180,000 children.[162] Thus, nearly one in seven Black children in special education programs should not be there.

One team of researchers disputes whether students of color are overrepresented in special education. They concluded, based on their study that controlled for factors relating to assignment to special education, that more children of color should be receiving special education.[163] These findings have fueled a debate over whether children of color are overrepresented or underrepresented in special education.[164] Resolving this debate will require further study and analysis by social scientists and is beyond the scope of this legal analysis of the IDEA's structural inequities. However, the debate invites a pause: if students of color are underrepresented in special education programs, what are the implications for the hypothesis of this article, that the IDEA's structural inequities lead to discriminatory outcomes?

This article offers two responses. First, even if children of color are underrepresented in the special education system, this does not mean that no children of color are improperly placed in special education programs. School districts diagnose children at the individual level.[165] A school district can improperly place some children in special

160. NCES Statistics II, *supra* note 7.

161. *Id.* The data showed that 16.3 percent of Black students were assigned to special education programs compared to 14.1 percent of students overall. *Id.*

162. *See id.*; NCES Statistics I, *supra* note 7. These numbers were calculated as follows: The total number of Black students in public school was 7,648,150, derived by dividing the total number of children enrolled in public school (50,650,000) by the percentage of Black children enrolled in public school (15.1 percent). *Id.* There were 1,251,037 Black children in special education programs, comprising 16.3 percent of all children in special education programs. NCES Statistics II, *supra* note 7. If Black children represented 15.1 percent (their proportion of all enrollment in public school) of all children in special education programs, there would have been 1,078,389 Black children in special education, a reduction of 172,648 from the 1,251,037 Black children enrolled in special education at the time the studies were taken. *See* NCES Statistics I, *supra* note 7.

163. *See* Skiba et al., *supra* note 159, at 305 ("Among children who were otherwise similar in their academic achievement, poverty exposure, gender, and English language learner status, racial or ethnic minority children were consistently *less* likely than [w]hite children to be identified as having disabilities.").

164. Nanda, *supra* note 56, at 308 n.148.

165. *See* Feldman, *supra* note 68, at 189.

> While disproportionality comparisons at the national level are instructive . . . fundamentally, disproportionality must be measured at the school district or [local] level. Eligibility determinations are made at the school district level, and "true disproportionality" only arises, as a statistical matter, if students of color within a given school or school district are classified at a higher rate than white students.

Id. (citations omitted).

education and improperly fail to place other children in special education.[166] Aggregate data might show underrepresentation based on race, but this does not change racialized outcomes in individual cases. The OCR has recognized this, as it has described the possibility of teachers referring white students for special education but not comparable students of color, and vice versa.[167]

Second, if children of color are underrepresented in special education, this would invite an analysis of whether this could be the result of structural inequities in the IDEA. There is evidence that this could be the case. Many parents seek special education programs for their child if they perceive that their child is struggling in school, seeing special education as a way to secure the resources their child needs.[168] Parents with sufficient economic resources are more likely able to afford to take the necessary steps to obtain special education for their children, including hiring experts to evaluate their child, challenging the school district's evaluations, requesting an independent educational evaluation, and taking advantage of the opportunities to advocate for their child during the identification and evaluation processes, and at an impartial hearing, if necessary.[169]

B. Disability Classification

Also as described in Part II, evidence before Congress when it passed and amended the IDEA showed that Black students were overrepresented in the intellectual disability and emotional disturbance classifications. Studies going back decades support this.[170]

166. *See* Dear Colleague Letter, *supra* note 46, at 2, 11.

167. *Id.* at 11.

168. *See* Wakelin, *supra* note 46, at 271 ("[P]arents in wealthy, majority-white school districts use special education laws to gain additional resources, accommodations, and assistance for their children with disabilities." (citing Losen & Welner, *supra* note 55, at 419)).

169. *See* Losen & Welner, *supra* note 55, at 422 (comparing white parents' power with the relative lack of power of parents of color).

170. *See*, *e.g.*, Togut, *supra* note 46, at 164–65 (reporting that, in the 1980s, Black students represented 16 percent of the public school population but 38 percent of classes for children with intellectual disabilities, and that nearly forty years later the respective numbers were virtually unchanged at 17 percent and 33 percent); Vallas, *supra* note 46, at 184–85 (finding Black students 2.5 times more likely than white students to be classified as having an intellectual disability and 1.5 times more likely than white students to be classified as having a serious emotional disturbance); Wakelin, *supra* note 46, at 264 ("[Children of color are] more likely than other students with disabilities to be isolated within the school and experience educational disenfranchisement."); Ferri & Connor, *supra* note 71, at 459 (describing Black students as more likely to be placed in segregated settings than white students (citing The C.R. Project at Harvard Univ., Racial Inequity *in* Special Education, at xv (Daniel J. Losen & Gary Orfield eds., 2002))); Harris III et al., *supra* note 46, at 314 (finding Black students represented only 16 percent of the public-school population but 27 percent of those classified with an intellectual disability or emotional disturbance); Eitle, *supra* note 72, at 576 (recording particularly high racial disparities in classes for children with intellectual disabilities); Losen & Welner, *supra* note 55, at 412–13 (observing overrepresentation of Black students in the emotional disturbance category in all fifty states); Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/ability, and Class Actions*, 47 Fordham Urb. L.J. 293, 315 (2020) (finding Black students three times more likely than their peers to be diagnosed with an intellectual disability); Nanda, *supra* note 56, at 309 & n.152 ("Black boys are twice as likely as their [w]hite male peers

The most recent data do as well.[171] In the 2018–2019 academic year, Black students nationwide were 1.6 times more likely than all other students to be classified with an emotional disturbance and 1.7 times more likely to be classified with an intellectual disability.[172]

Overall, approximately 83,000 Black children were classified with an emotional disturbance and more than 112,000 with an intellectual disability.[173] If Black children were classified in these categories at the same rate as all students, there would have been roughly 62,000 Black students diagnosed with emotional disturbance, a reduction of more than twenty thousand students,[174] and slightly more than 77,000 Black students diagnosed with an intellectual disability, a reduction of more than 35,000 students.[175] Otherwise stated, based on these data, one in four Black children in programs for children with emotional disturbance should not have been there, and one in three Black children in programs for students with intellectual disabilities should not have been there.

Among the various disability classifications, children classified with an intellectual disability spend the least amount of time in the general education classroom.[176] They are often placed into separate classrooms, where they are deprived of the opportunity to participate in the general education curriculum.[177] Students

to be put into this category." (first citing Off.of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., Thirty-Eighth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, at xxvi (2016); and then citing Nat'l Ctr. for Educ. Stats., Children and Youth with Disabilities (2017))).

171. NCES Statistics II, *supra* note 7.

172. The data showed that 1.1 percent of Black students were diagnosed with an emotional disturbance compared to 0.7 percent of all students and that 1.5 percent of all Black students were diagnosed as having an intellectual disability compared with 0.9 percent of all students. *Id.*

173. *Id.*

174. This number was calculated by multiplying the total number of Black students assigned to special education programs (1,251,037) by the percentage of all students diagnosed with an emotional disturbance (5 percent) and subtracting the result (62,552) from the actual number of Black students diagnosed with an emotional disturbance (83,356). *Id.*

175. This number was calculated by multiplying the total number of Black students assigned to special education programs (1,251,037) by the percentage of all students diagnosed with an intellectual disability (6.2 percent) and subtracting the result (77,564) from the actual number of Black students diagnosed with an intellectual disability (112,719). *Id.*

176. The "general education classroom" is the idealized version of a classroom in which there are mostly children whom the school district has not identified as having a disability and a few children whom the district has identified as having a disability but whose needs are relatively low and can be met by a combination of education in the general classroom and limited support services. *See* Jeff Grabmeier, *Kids with Intellectual Disabilities Spend Too Little Time in General Classes*, Ohio State Univ. Coll. Educ. & Hum. Ecology (May 24, 2018), https://ehe.osu.edu/news/listing/kids-intellectual-disabilities-spend-too-little-time-general-classes (reporting that between 55 percent and 73 percent of students with intellectual disabilities spend most or all of the school day in self-contained classrooms).

177. NCES Inclusion Statistics, *supra* note 73. In 2018, nearly half (48.5 percent) of all students with intellectual disabilities spent less than 40 percent of their time in the general education classroom and less than 20 percent spent more than 80 percent of their time in the general education classroom. *Id.*; *see also*

classified with an emotional disturbance also spend a significant amount of time outside of the general education classroom, with less than half spending 80 percent of their time in general education.[178]

C. The Data Point to Discriminatory Disability Placement and Classifications

The data about the placement of Black children in special education and on their particular disability classifications support the hypotheses that school districts apply the vague definitions of "emotional disturbance" and "intellectual disability" to discriminate against Black children, and that Black parents lack the resources to combat this effectively. Further, racial disparities in disability diagnoses are less prominent in disability categories with medical definitions that are more objectively identified and measured, thus limiting teacher discretion in making referrals.[179] Data from the 2018–2019 academic year are consistent with these findings. Although Black children were disproportionately diagnosed with emotional disturbance and intellectual disability, they were diagnosed with hearing impairment, orthopedic impairment, and traumatic brain injury—which are medically defined—at the same rate as other students.[180]

V. PROPOSED SOLUTIONS

In recognition of the unlikelihood of congressional action to address the IDEA's structural inequities as well as the ability of states to expand IDEA rights, the proposed solutions in the first section of Part V can be implemented at the state or

Ferri & Connor, *supra* note 71, at 165 (referencing a 2002 study showing children with an intellectual disability or emotional disturbance spent an average of 21 percent of their time away from the general education classroom); Linehan, *supra* note 46, at 191 (adding that teachers of general education view special education classes "as an easily available option to reduce the demands of the [general] education classroom"); Losen & Welner, *supra* note 55, at 417–18 ("[I]t is . . . well established . . . that students with disabilities benefit most when they are educated with their [general] education peers to the *maximum* extent appropriate." (citing U.S. Dep't of Educ., To Assure the Free Appropriate Public Education of All Children with Disabilities: Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (1996))).

178. NCES Inclusion Statistics, *supra* note 73. Among students diagnosed with an emotional disturbance, 17.2 percent spend less than 40 percent of their time in the general education classroom. *Id.* This is less than average, which is 13.1 percent for all students with disabilities. *Id.*

179. One commentator has suggested that there are two categories of disability. *See* Vallas, *supra* note 46, at 183. The first category includes "medical model" disabilities, which are "typified by clearly identified and standardized diagnostic criteria and are made by a student's physician." *Id.* In contrast, "social model" disabilities such as intellectual disability and emotional disturbance, "are defined by less readily measured and more context-dependent criteria, such as behavior, intelligence, social skills, and communication abilities . . . and are most often the result of referral by a teacher rather than a medical professional." *Id.* at 183–84 (footnote omitted) (citation omitted); *see also* Losen & Welner, *supra* note 55, at 419-20 (adding that "social model" disabilities are typically diagnosed by the student's physician who also often makes the referral for evaluation).

180. NCES Statistics II, *supra* note 7.

local school district level.[181] The proposals are brief. They are intended as starting points for discussion about remediating the structural inequities in the IDEA that lead to racialized outcomes. Because not all structural inequities in the IDEA can be addressed at the state and school district level, the second section of Part V lists some steps that only Congress can take to address the IDEA's inequities.[182]

A. State and Local Action

1. Reducing the Number of Children Who Inappropriately Receive Special Education

Many school districts adopted Response to Intervention (RTI) programs following the 2004 IDEA amendments that allowed school districts to use "scientific, research-based intervention as a part of the evaluation procedures" to determine whether a child is eligible for special education.[183] Through RTI, school districts identify and work with children who are struggling academically by providing them with a series of progressively more intense interventions before referring them for evaluation for special education.[184] RTI can thus serve as a screen to ensure that children who are struggling are not referred for evaluation based on culturally biased assumptions or test scores, and that referrals occur only after research-based interventions have failed.[185] For example, in *Lee*, the school district adopted a pre-

181. *See* Taylor *ex rel.* I.L. v. Knox Cnty. Bd. of Educ., 257 F. Supp. 3d 946, 964 (E.D. Tenn. 2017) ("If a state special-education law is more protective than the IDEA, a violation of state law can amount to a violation of the IDEA."), *aff'd on other grounds sub nom.* Taylor *ex rel.* I.L. v. Tenn. Dep't of Educ., 739 F. App'x (6th Cir. 2018); Margaret A. Dalton, *Forgotten Children: Rethinking the Individuals with Disabilities Education Act Behavior Provisions*, 27 Am. U. J. Gender, Soc. Pol'y & L. 147, 157–63 (2019) (crediting state statutory provisions designed to enhance protections for students who have behavioral issues); Hyman et al., *supra* note 62, at 131 & n.132 ("Most of the IDEA's rights are considered to be a 'floor'; states may adopt greater rights for parents but may not reduce parent rights below those afforded by the IDEA." (citing 20 U.S.C. § 1407(a))).

For example, in contrast to the holding in *Schaffer*, the burden of proof in impartial hearings in New York State is on the school district, except the parents seeking tuition reimbursement for placing their child in private school must prove that the placement was appropriate. *Compare* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 62 (2005) (placing the burden of proof in an administrative impartial hearing challenging an IEP on the party seeking relief which could be either the parent or the school district), *with* N.Y. Educ. Law § 4404(1)(c) (Consol., LEXIS through Chs. 1–55, 57, 58, 61–174) (burdening school district).

182. This section does not purport to be the final authority on which proposals may be implemented by state and local school districts and which must be implemented by Congress. The distinction is based on informed judgments about the nature of the IDEA and its federalist structure.

183. 20 U.S.C. § 1414(b)(6)(B); *see* James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 Geo. L.J. 1455, 1474–75 (2012). Thanks to Caitlin McGuire for her help with framing the issues around RTI and the IDEA.

184. *See* Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. Mich. J.L. Reform 733, 774–75 (2014); *What Is RTI?*, *Learn About RTI*, RTI Action Network, http://www.rtinetwork.org/learn/what/whatisrti (last visited Apr. 17, 2022); Ryan, *supra* note 183, at 1474–76.

185. *See* Ciolfi & Ryan, *supra* note 155, at 318 (weighing RTI's potential to reduce disproportionate representation against the risk that it could delay the identification of children having legitimate disabilities).

referral program that, although not technically an RTI program, was similar. The program reduced the number of Black students who were identified as having a disability.[186]

2. Reducing the Power Imbalance Between Parents and Educators

States and local school districts can reduce their power imbalance with parents by passing legislation that places the burden of proof in impartial hearings on school districts.[187] One commentator has also suggested that school districts should employ trained facilitators as a way to level the playing field between parents and school districts at, for example, IEP meetings and resolution sessions.[188] For example, during an IEP meeting, the facilitator could ask the school district informed questions about the range of educational services available for children similar to the subject child, ask for information about placement options, and ensure that parent voices are heard. During the mandatory resolution session, which occurs after a parent files a special education complaint, the facilitator could help the parents articulate their concerns about their child's education and present their own proposals, evaluate the district's proposals, and guide the parents' understanding of next steps if resolution fails.

3. Standardizing Special Education Services

The IDEA's requirement that a school district provide individualized education to a child with a disability and the judicial rule that prohibits districts from predetermining a child's special education program act as a double-edged sword. Although they have the beneficial effect of ensuring that school districts recognize that each child is unique, the rules also hide from parents—especially those without the resources to find them—the types of services the district typically provides to and has available for children with particular disabilities.[189] While the school district would continue to

186. Lee v. Lee Cnty. Bd. of Educ., 476 F. Supp. 2d 1356, 1362–64 (M.D. Ala. 2007). In *Lee*, every school in the district created a student support team designed to assist students struggling with academic and behavioral issues. *Id.* at 1363. The goal of each team was to "solve the instructional and behavioral issues of students through interventions, thus obviating any need for a referral to special education." *Id.* While the particular school in *Lee* did not implement an RTI program, other schools in the district did. *Id.* at 1362.

RTI data also ensures that parents can give informed consent to a school's evaluation request and then, if their child is identified as having a disability, to the special education services rendered thereafter. *Cf.* M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 855 (9th Cir. 2014) (holding that defendant school district breached its procedural duty to share with parents their child's RTI data); Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 209 (5th Cir. 2019) ("[RTI] is a general—not special—education methodology that offers tiers of progressively intensified support depending on a student's response to instruction.").

187. Several states have already done this. *See, e.g.*, Burroughs v. W. Windsor Bd. of Sch. Dirs., 420 A.2d 861, 864 (Vt. 1980); K.H. v. N.Y.C. Dep't of Educ., No. 12-CV-1680, 2014 U.S. Dist. LEXIS 108393, at *7 (E.D.N.Y. Aug. 6, 2014).

188. Fluehr, *supra* note 56, at 178–79 (encouraging facilitator participation in the IEP process).

189. Phillips, *supra* note 62, at 1821–22, 1831. One commentator has suggested that a school district could publish a menu of services for children with autism from which the district would choose to meet the needs of a particular child with autism. *Id.*

be required to individualize the special education for a particular child, requiring school districts to also reveal this information would at least create baseline expectations for parents and help them navigate through the complicated process of ensuring that their children receive appropriate special education services.[190]

4. Keeping Children Together

Two related pedagogical strategies can help school districts make the general education classroom an appropriate setting for more students with disabilities and reduce their reliance on separate classrooms for children with disabilities. Universal Design for Learning, for example, is a pedagogical strategy through which the teacher designs an educational program to accommodate a wide range of learning needs through differentiating instruction, assessments, and assignments.[191] Integrated co-teaching is another teaching model in which two teachers—one special education teacher and one general education teacher—co-teach a class comprised of students whom the school district has and has not identified as having disabilities.[192]

5. Expanding Information Disclosure

Most of the research about racialized outcomes in special education has focused on the results of the first three inflection points—identification, evaluation, and eligibility—because most of the data that Congress requires states to disclose about race and special education relates to those points.[193] Congress does not require states to disclose data about the other inflection points. States can close this information gap by requiring school districts to gather and report, by race, family income level, disability diagnosis, home address of child, and address of school, the following data: placement in restrictive classrooms; placement in private schools; reimbursement payments for parental placement in private school; compensatory education awards; impartial hearings requested; representation by counsel at impartial hearings; impartial hearing results; special education, related services, and supplemental aids and services; and program modifications and support. One commentator, for example, has proposed that state agencies analyze IEPs to determine the quality of services children from families with lower incomes receive compared to the services children from families with higher incomes receive.[194]

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190. Czapanskiy, *supra* note 184, at 768.

191. Jason S. Palmer, *"The Millennials Are Coming!": Improving Self-Efficacy in Law Students Through Universal Design in Learning*, 63 Clev. St. L. Rev. 675, 676–79 (2015); Czapanskiy, *supra* note 184, at 773.

192. N.Y. Comp. Codes R. & Regs. tit. 8, § 200.6(g) (LEXIS through Apr. 22, 2022); State Educ. Dep't, Univ. of the State of N.Y., Continuum of Special Education Services for School-Age Students with Disabilities 11 (2013).

193. *See* 20 U.S.C. § 1418(a)(1)(A).

194. Pasachoff, *supra* note 61, at 1474–77. Such a study could show whether "wealthier children with learning disabilities are receiving an in-class aide and several hours in a resource room while poor children receive a self-contained class." *Id.* at 1475.

B. Congressional Action

There are several steps that only Congress can take to address the structural inequities in the IDEA. These steps are listed here but the necessity of each is described more fully in Part III, above. They include passing legislation that (1) allows courts to order school districts to make direct tuition payments to private schools even if the parents have not yet paid that tuition, and further allows courts to issue prospective orders to place students in private schools; (2) requires courts to issue compensatory education awards that provide one hour of compensatory education for each hour lost; (3) allows courts to award monetary damages for IDEA violations; (4) defines "prevailing party" to include a plaintiff who achieves a successful settlement; (5) repeals the IDEA's provisions that prohibit the recovery of attorneys fees for participating in IEP meetings, resolution sessions, and mediation sessions; (6) supersedes *Schaffer* and *Arlington* and places the burden of proof in impartial hearings on school districts, and further allows parents who are prevailing parties to recover expert witness fees; and (7) creates incentives for state and local school districts to develop, recruit, and hire teachers of color.[195]

VI. CONCLUSION

We have come full circle. When the IDEA was passed in 1975, thousands of Black children were inappropriately placed in separate classrooms for students with disabilities based on inappropriate assessments, the cultural incompetence of teachers and administrators, and race discrimination. Now, nearly fifty years later, more than one hundred thousand Black children are receiving special education services that they likely do not need, and tens of thousands of these children have been inappropriately separated from the general education classroom and curriculum based on disability classifications that are likely incorrect.

Along the way, Congress took minimal steps to address over and underrepresentation, and instead established a regime that allowed race to intersect with special education through a combination of the discretion that the IDEA gives to educators and the advantages that parents with economic resources have to secure favorable outcomes for their children. States and local school districts must take immediate steps to limit the

195. Educators of color are less likely to assign Black students to special education programs. Linehan, *supra* note 46, at 190–92. However, there is a wide gap between the percentage of Black students and Black teachers in public schools. Vallas, *supra* note 46, at 189 & n.52 (showing that 40 percent of public school students were of color while no more than 10 percent of public school teachers were of color (citing Beth A. Ferri & David J. Connor, *In the Shadow of* Brown*: Special Education and Overrepresentation of Students of Color*, 26 Remedial & Special Educ. 93, 94 (2005))). In 2018, for example, there was more than twice as many Black students in public schools than there were Black teachers. Nat'l Ctr. for Educ. Stats., Racial/Ethnic Enrollment in Public Schools 1 (2021) (showing 15 percent of public-school students in fall 2018 were Black); Nat'l Ctr. for Educ. Stats., Characteristics of Public School Teachers 2 (2021) (showing 7 percent of public-school teachers in 2017–2018 were Black).

To help remedy this gap, Congress could pass legislation creating recruitment and incentive programs to help school districts hire Black educators. *See* Linehan, *supra* note 46, at 179–80, 212 (proposing race-conscious hiring by school districts to close the gap between Black students and teachers and reduce inappropriate special education placements).

impact of the structural inequities, discretion, and economic advantage on special education, and to reduce the harm to the hundreds of thousands of Black children who, as a result of the inequities, are in classrooms that do not meet their needs.