

Annotated Checklist for Addressing Racial Disproportionality in Special Education

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INTRODUCTION

Introduction: The reauthorized Individuals with Disabilities Education Act (IDEA) makes racial disproportionality in special education one of three priority areas for implementation of the law. The law encourages states and districts to look closely at issues in regular education, as well as special education, in addressing potential causes of overrepresentation. This checklist was designed as a tool to aid states and districts that are now required to analyze special education data, and take proactive steps to reduce racial disproportionality. Districts that have used it report that it does help educators analyze racial and ethnic disparities in special education identification, restrictiveness of setting and discipline, identify inappropriate policies and practices that may be contributing, and to design proactive early interventions to reduce such disparities, even where specific causes are not identified.

Where research has revealed likely contributing factors, rarely are intentional actions or blatant incidents of discrimination identified as the cause of the racial disparities in special education. Research does suggest, however, that far more subtle and unconscious forms of race, gender, and class bias may contribute in some cases. Research also indicates that the racial disparities in special education are reflective of problems in general education equally with problems in special education. For this reason, the federal government encourages districts with data revealing large racial disparities to engage in a broad inquiry into the policies, procedures and practices in a school district's regular education program as well as compliance with the IDEA. Therefore, this checklist tool contains many general education probes intended to help educators identify contributing factors outside the realm of special education, yet within the control of schools and districts.

Using the Checklists and the Endnotes: The probing questions on the lists suggest possible root causes and help districts develop hypotheses and action plans for more detailed exploration of racial disproportionality. In each area, potentially inappropriate policies, practices, or inadequate programs are discussed. The checklist is meant to highlight possibilities for change. Ideally, each of the three checklists should be reviewed and used as a diagnostic tool. In no case should the check list be used to rule out inappropriate policies or non-compliance. In some cases a factor may suggest non-compliance with the IDEA or other federal law.

¹ © (2008) Daniel Losen. This Checklist was developed in close collaboration with the Wisconsin Department of Public Instruction and reflects the contribution of ideas, feedback, revisions, and editing by members of the Disproportionality Workgroup, a team of educators assigned to address disproportionality in that state. This document also reflects the contributions of Harvard Law student Dan Klaff and the work of the Civil Rights Remedies Initiative, a collaborative working relationship with The Civil Rights Project at Harvard, and Martha Minow of Harvard Law School. Please do not disseminate in whole or in part without the express permission of Daniel J. Losen.

Most of the questions reflect a legal requirement and are also derived from research on the factors that may contribute to disproportionality in special education. Most of the endnotes contain both the legal provision and a reference to the relevant research finding. The endnotes make these legal and research connections easily accessible. In electronic versions the endnote text should pop up on the screen when the cursor touches the number. In most cases an affirmative response to a question suggests one or more areas for further inquiry.

Some of the checklist items are not specific to racial disproportionality, but an affirmative response may mean that some policies, procedures, or practices with unintended negative consequences may disproportionately burden racial and ethnic subgroups. For example: a particular teacher-assignment policy or practice may result in students with the greatest academic needs having reduced access to the most experienced and capable teachers. Further analysis may reveal that this diminished access is most pronounced for students of color who are struggling academically.

Hypothesis Development: There are usually multiple, and often inextricably linked, causes of racial disproportionality. This tool should help districts form hypotheses about likely contributors to disproportionality as it arises in the context of their particular district. Administrative decisions will likely need to be made as to which areas to concentrate on first. What works in one district might not match the cause in another. Therefore, interventions to address suspected causes should reflect the contextual data, policies and practices of each school district. Districts should think through possible contributing factors under their control, rather than pinpointing factors they cannot realistically change.

Interventions and Evaluations: Once a district develops a hypothesis to match the data and other information, it will need to think closely about practices and policies it wants to explore more closely, and interventions to pursue. Districts should refine their interventions over time and develop methods for evaluating their hypotheses on an ongoing basis. Ideally, districts will evaluate the effect of the intervention driven by the hypothesis. If districts reduced racial disparities by changing identified policies or practices the accuracy of the underlying hypothesis would be supported by the efficacy of the intervention, but not necessarily proven. The capacity of most districts to evaluate an intervention and to rule out potentially contributing factors may be limited because school level implementers do not usually have the experimental capacity of social science researchers. Therefore issues with proper implementation may cloud the districts ability to pinpoint causes or fully evaluate interventions. For this reason if district efforts fail to yield desired results, they may find it useful to use the checklist each year.

Each of the three lists includes a brief paragraph explaining how inappropriate practices or policies in that area might contribute to racial disproportionality in special education identification, placement or discipline.

There are three checklists that follow:

1. **District and School Resource Issues**
2. **System Policy, Procedure, and Practice Issues at District, School and Classroom Levels**
3. **Environmental Factors**

CHECKLIST I: District and School Resource Issues

Introduction: Resource inequities among districts and among schools within districts often flow along lines of race and class. Resource shortages may reveal themselves as overburdened or inadequately trained school psychologists, lack of rigorous pre-referral interventions or early intervening services, or inadequate parent/school communications. Inequities in areas like these may be contributing to racial disparities in identification, placement, and discipline. For example, under resourced districts and schools often do not provide adequate training and support to develop and retain

highly qualified teachers. Qualitative studies indicate that less qualified and poorly trained teachers tend to refer more students for special education evaluations. Special education identification or restrictive placement may sometimes be used because regular educators regard such placements as the only source of available support. Such “benign” placements, develop from inadequate support in general education, rarely benefit students. The following questions should help you analyze whether resource linked factors may be contributing to disparities in your district.

A: Resource distribution policies¹	In the space provided briefly state your reasons for identifying this item as an issue in your school or district.
1. Are all students provided equal access to highly qualified and experienced teachers? ²	
2. Do school psychologists have ample time to conduct culturally responsive evaluations? ³	
3. Do ELL students have a proven-effective program of instruction? ⁴	
4. Are there schools or classrooms serving predominantly minority children? How do the class sizes and other resources in those schools and classrooms compare to the average for the district?	

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B: Teacher Training⁵	
	1. Are there effective supports for inexperienced and struggling teachers? ⁶
	2. Have all regular and special education teachers been trained to effectively participate in pre-referral interventions and RTI (response to intervention)? ⁷
	3. Are there any educators who are trained in both ELL and in working with students with disabilities? How confident are you that your staff would know when an ELL also needed special education supports and services (delivered in the primary language), and could provide both? ⁸
	4. Are teachers or counselors trained in approaches and strategies for identifying and working with children who may be traumatized? ⁹
C: Administrator Training and Awareness¹⁰	
	1. Have administrators been trained to understand and use data on special education referral, identification and placement? ¹¹
	2. Do all administrators and staff understand district procedures and requirements regarding referral, evaluation, identification, placement, discipline, and the student's right to be

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	educated in the least restrictive environment? Are these disseminated and reviewed on an annual basis?	
	3. Have administrators been trained on how to foster more effective inclusion? ¹²	
	4. Have district staff been trained in sensitivity to racial bias in instruction and assessment? ¹³	
	5. Do administrators at each school have high levels of training, experience and education with regard to working with diverse learners? ¹⁴	
<p>D: Time for Collaboration:</p> <p>There is no question that time is a scarce resource for many public school educators. Students with disabilities are clearly entitled to be educated in the least restrictive environment to the maximum extent appropriate. Coordinating the collaboration between special and regular education teachers in order provide adequate support in an inclusive regular education setting requires time for collaborators to meet together. The incentives to place students in more restrictive settings may be higher where schools and districts provide few opportunities to collaborate during normal working hours.¹⁵ Moreover, designing and implementing effective interventions will require collaboration between regular and special educators at both the school and district levels.</p>		
	1. Does the school or district allocate time for special education and regular education collaboration on a routine basis? ¹⁶	
	2. Are the data on educational environments reviewed jointly by both regular and special education staff at the district and school levels?	
	3. Do regular and special educators regularly meet to discuss issues of racial disproportionality in regular and special education, pre-referral intervention	

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	strategy and efficacy, or early intervening services aimed at reducing racial disproportionality? How often?	
E: Data Collection Capacity, Review and Analysis		
	1. Do schools have access to data collection methods and analysis tools? ¹⁷ Are the data analyzed and discussed soon after it is collected? Is that data used and discussed regularly by general and special educators?	
	2. Is the special education data on racial disparities and other factors collected for all the categories required? ¹⁸ Restrictiveness of placement? Discipline?	
	3. Do school leaders vary dramatically in their understanding and use of data to identify issues, discuss remedies with staff, and evaluate interventions?	

¹In the IDEA, Congress finds that “a more equitable allocation of resources is essential ... to provide an equal educational opportunity for all individuals”. 20 USC § 1400(c)(7) (2005); According to the National Research Council’s Book, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION, “[A] key factor in addressing disproportion in special and gifted education is support for minority student achievement in general education.” (See *id.* at 169-181). Not only is it well established in research that school resource inequities track racial and class divides fairly closely, but within a school district if a neutral, policy or practice consistently, but unintentionally leaves children of color with fewer resources, that policy or practice is likely “inappropriate.” Unless there is a sound educational necessity for the unequal resource distribution, there would be grounds for a complaint or investigation on the basis of discriminatory disparate impact by the U.S. Department of Education’s Office for Civil Rights pursuant to the regulations under Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 100.3(b)(2) (2003). An inequitable resource distribution may be grounds for determining that the distribution practice is an inappropriate contributing factor in many districts even though formal complaints and reviews by OCR are uncommon.

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²In the context of student achievement it is well established that access to highly qualified teachers is critical if students are to meet academic standards and if poor and minority students are to close the achievement gap. The National Research Council states, “The quality of instructions and behavior management in a classroom and school are important contributors to the context in which student achievement and behavior problems arise.” (NRC Report at 170) This principle is codified in The No Child Left Behind Act which requires states to ensure that poor and minority students have the same access to highly qualified teachers as their non-disadvantaged peers. In their state plan, states shall describe the “steps they will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures they will use to evaluate and publicly report the progress of the SEA with respect to such steps.” 20 U.S.C. 6311 (b)(8).” This provision was recently targeted by the Department of Education as a priority area for NCLB implementation. The NCLB further specifies the minimum requirements for teachers to be considered highly qualified. Similarly, the IDEA requires public school districts to have special education teachers who have “obtained full State certification as a special education teacher ... or passed the State special education teacher licensing examination, and [hold] a license to teach in the State as a special education teacher.” 20 USC § 1401(10)(B)(i) (2005). The IDEA requires that states “ensure that teachers are “adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities”. 20 USC § 1412 (a)(14)(A) (2005). Where a state applies for personnel development grants they must meet numerous additional requirements including how they are meeting the NCLB requirement and must “describe the steps the SEA will take to ensure that poor and minority children are not taught at higher rates by teachers who are not highly qualified.” 20 USC §1454 (b)(8) (2005). The IDEA also calls for the Secretary to provide grants to eligible educational agencies to meet one of a number of objectives including to “ensure that regular education teachers have the necessary skills and knowledge to provide instruction to students with disabilities in the regular education classrooms” and that ensure “all special education teachers are highly qualified.” 20 USC § 1462(a)(4-5) (2005). The IDEA has specific requirements that implicate inadequate instruction as a source of inappropriate identification. Moreover, a special rule requires that a child shall not be determined to be a child with a disability if the predominant factor for such determination is a lack of appropriate instruction in reading, math or limited English Proficiency. 20 USC § 1414(b)(5). Recent research by Harry and Klingner suggests that the quality of instruction in the regular education classroom likely contributes to higher frequency of special education referrals, yet the qualitative studies suggest that evaluators rarely analyze whether deficiencies in instruction are an issue. (NRC supra note 1 at 170 citing Klingner and Harry (2001)). See also, Beth Harry and Janette Klingner, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS, Teacher College Press (2005) [Hereinafter WHY SO MANY]

³There are extensive requirements that touch on this issue, including that each district ensure that assessments and other evaluation materials “are selected and administered so as not to be discriminatory on a racial or cultural basis.” 20 USC § 1414(b)(2-3) (2005). Evaluators should be aware of potential bias in the assessment materials and their administration as well as culturally responsive methods of evaluation. For a detailed description of how bias can impact every aspect of the evaluation process See Harry and

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Klingner, *Of Rocks and Soft Places: Using Qualitative Methods to Investigate Disproportionality*, in RACIAL INEQUITY IN SPECIAL EDUCATION, Losen and Orfield, eds., Harvard Education Press (2002) [Hereinafter RACIAL INEQUITY].

⁴Trends of over and under-representation of ELL students are complicated. One study reveals that ELL students tended to be under-identified in elementary school, yet overrepresented in the more restrictive educational environments as they got older. See Artiles et al., *English Language Learner Representation in Special Education in California Urban Schools*, in RACIAL INEQUITY supra note 3. One hypothesis that might explain both these trends is that when ELLs enter school they get ELL support first, and are only deemed eligible for IDEA where there is little doubt that the student is eligible from the beginning. As a result, many students with disabilities in ELL programs may go unidentified until they are much older. The Artiles study bears this out as older ELL students with disabilities were often taught in substantially separate environments. See id.

⁵The IDEA authorizes the use of funds to “provide teacher mentoring, team teaching, reduced class schedules and case loads, and intensive professional development”. 20 USC § 1454(a)(1)(A) (2005). Secretary Spellings addressed the need to meet NCLB’s teacher quality provisions in her April 27, 2006, remarks at the NCLB Summit. See <http://www.ed.gov/news/pressreleases/2006/04/04272006.html>. According to “The Special Education Connection” (DEC 2005), the U.S. Education Department has cited about a fifth of states because their special education teachers failed to meet highly qualified standards, a review of monitoring reports found. Like Illinois, most states were cited in the reports because their procedures didn’t require special education instructors teaching core subjects to demonstrate mastery of those subjects. Qualitative research suggests that poor teacher quality is among the leading contributing factors to racial inequity in special education. See WHY SO MANY, Supra note 2.

⁶The IDEA authorizes state educational agencies to use IDEA funds to “improve the knowledge of special education and regular education teachers and principals ... concerning effective instructional practices.” 20 USC § 1454(a)(3)(B) (2005).

⁷Id.

⁸Id.

⁹See Massachusetts Advocates for Children, *Helping Traumatized Children Learn: A Report and Policy Agenda* (2005).

¹⁰The law calls for training of principals not just teachers recognizing the importance of having well trained school leadership. See notes 6 and 7.

¹¹Id.

¹²The IDEA requires States to develop plans that ensure, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1416(a)(3)(A) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... supporting

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high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities” and that “the education of children with disabilities can be made more effective by ... ensuring their access to the general education curriculum in the regular classroom to the maximum extent possible”. 20 USC § 1400(c)(5) (2005).

¹³There is a good deal of evidence to support that racial overrepresentation, in part, may be due to unconscious racial bias. See Losen and Orfield, RACIAL INEQUITY supra note 4. The IDEA requires safeguards against racial and cultural bias in evaluation, and researchers have pointed to the need for culturally responsive interventions in regular classroom in the context of Response to Intervention Models. See, Klingner and Edwards, *Cultural Considerations With Response to Intervention Models*, Reading Research Quarterly, 108 (2006). The IDEA also authorizes the Secretary of Education to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having a disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005).

¹⁴The IDEA emphasizes the importance of training including for administrators. If students in the district are substantially more likely to be educated in schools with less qualified administrators, the research on teacher quality suggests that the distribution of experienced and effective leaders may be a contributing factor as well.

¹⁵The IDEA authorizes states to use funds to “encourage collaborative and consultative models”. 20 USC § 1454(a)(1)(C) (2005); The IDEA requires States to develop plans that ensure, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1415(a)(3)(A) (2005); The IDEA also authorizes the Secretary of Education to enter into agreements to provide personnel development supporting activities designed encourage teachers to “[work] collaboratively in regular education classroom settings”. 20 USC § 1462(b)(2)(A)(i) (2005).

¹⁶Id.

¹⁷The IDEA requires IEP evaluators to “use a variety of assessment tools and strategies to gather relevant ... information”. 20 USC § 1414(b)(2)(A) (2005); The IDEA requires extensive data collection and reporting by States. 20 USC § 1418 (2005); The IDEA provides for the use of funds to encourage the effective use of technology to “collect, manage, and analyze data to improve teaching, decision-making, school improvement efforts, and accountability”. 20 USC § 1454(a)(2)(a) (2005); One of the purposes of the IDEA is “to assess, and ensure the effectiveness of, efforts to educate children with disabilities”. 20 USC § 1400(d)(4) (2005).

¹⁸The IDEA requires extensive data collection and reporting by States. 20 USC § 1418 (2005). States must also report annually on each district for each priority area for monitoring and enforcement. See 20 USC § 1416 (b)(2)(C) (2005).

CHECKLIST II: System Policy, Procedure, & Practice Issues at the District, School & Classroom Levels

Introduction: There is a consensus among researchers that school policies and practices in regular education likely contribute to racial disparities in special education. Policies intended to boost test scores, provide remediation, reduce student disruptions, eliminate “social promotion,” and lower administrative costs may directly or indirectly result in higher rates of special education identification or greater likelihood of placement in restrictive educational environments. Likewise, the failure to conduct appropriate pre-referral interventions and to provide culturally responsive evaluation may contribute to racial and ethnic disproportionality. While not all inappropriate practices violate the law, all should be eliminated.

The earlier problems in the regular classroom can be addressed, the better. Effective early interventions can reduce the numbers

of students identified as having disabilities. Furthermore, students with mild disabilities that receive no special services or are unnecessarily restricted from mainstream settings may develop more severe disabilities or experience increased risk of school failure.

Decisions that educators make about referring, placing or disciplining individual students may reflect unconscious bias, lack of training and support, a failure to provide adequate instruction, or lack of cultural awareness, yet be expressed as if the child in question possessed a deficit which was the only possible source of the child’s low achievement or poor behavior. When racial disparities are significant, the possible existence of contributing factors located in the classroom, rather than the student, should be examined.

A: Special Education Evaluation	In the space provided briefly state your reasons for thinking this item may be an issue.
1. As a matter of policy, procedure, or practice, is the quality of instruction and classroom management of the referring regular education classroom teacher routinely examined during the pre-referral intervention process, and by the IEP Team once the referral has been made? ¹	
2. Are issues of the cultural responsiveness of the curriculum and instruction considered at the pre-referral intervention stage? ²	
3. Are the school and district rigorous in attempts to rule out ELL status, and	

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	instructional deficiencies as predominant factors before progressing with a determination of eligibility? ³ If so, how often are factors found to be determinant and eligibility avoided as a result?	
	4. Are there educators and supports in place to identify and meet the needs of students who have experienced trauma? ⁴	
	5. Is either IQ disparity, or low IQ, used as the primary tool in diagnosing any disability category or for limiting certain educational opportunities? ⁵	
B: Special Education: Reasons for Referral and Placement in Restrictive Settings		
	1. Are students who are deemed eligible for a particular disability category removed to a more restrictive environment because that environment has become, officially or unofficially, the place where students with that disability are sent? ⁶	
	2. Discipline: Are racial groups that tend to be disproportionately identified, also disproportionately removed from the classroom for discipline? ⁷	
	3. Could incentives to boost test scores in regular education contribute to increased identification or use of more restrictive placements? ⁸	
	4. Is there a serious reconsideration	

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	each year for each student's placement, regardless of disability category, to ensure that each student is educated in the least restrictive environment? ⁹	
	5. Do students get referred for special education only after grade retention was tried once? ¹⁰	
	6. Are new teachers more likely to have minority students or students with disabilities placed in their class? ¹¹	
C: Using the Data to Reflect on the Procedures for the Identification, Placement, and Disciplinary Decisions¹²		
	1. Are there subgroups of children in poverty that are under represented? ¹³	
	2. Are racially disproportionate numbers of students being identified as possibly special education eligible in more than one category? ¹⁴	
	3. What is the eligibility rate for students referred for an evaluation? Does this rate differ by racial or ethnic group, or by gender within a group? ¹⁵	
	4. Do certain disability labels nearly always yield the same level of removal from the regular education environment? ¹⁶	
	5. Do certain racial or ethnic groups tend to be less likely to be in an inclusive setting regardless of disability category? ¹⁷	
	6. Are there appropriate procedural	

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	protections in place for students with disabilities who are suspended or expelled? ¹⁸	
D: Data Collection and Use by District and School¹⁹		
	1. Does the district collect and analyze data on students with disabilities disaggregated by race? ²⁰ By gender? ²¹	
	2. Is the disaggregated data routinely shared and analyzed among both regular and special educators within the district?	
	3. Has the district fulfilled the IDEA's requirement to collect and report data disaggregated by race and ethnicity on identification, placement, and discipline? ²²	
	4. Can the district tell from the data whether large numbers of students are referred by certain teachers or certain schools within the district? ²³	
E: Parental Outreach by Schools and by District²⁴		
	1. Do teachers or other school representatives ever meet with parents in the parent's home? 2. Prior to referral or short term suspension, do teachers and administrators make serious efforts to reach out to parents of minority children who are displaying poor behavior in the classroom? ²⁵	
	3. Might the expression of concerns	

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	and resistance to stigma associated with certain disabilities contribute to disproportionality? ²⁶	
	4. Do culturally diverse or economic disadvantaged parents have adequate knowledge about their children's rights and access to legal support? ²⁷	
	5. Is the information on parental rights provided according to the requirements of IDEA so that it's easily understood and presented in the parent's language of origin whenever feasible to do so? ²⁸ Are language minority parents provided with the same quality and quantity of information as English speaking parents? ²⁹	
F: Prior or Related Racial Equity Issues³⁰		
	1. Do school administrators and teachers ever make disparaging, or negative remarks about culturally diverse and/or economically disadvantaged people? ³¹	
	2. Do the racial disparities in special education mirror similar disparities in rates of discipline; achievement; placements in academic tracks; reading groups; or gifted and talented programs? ³² Have these areas ever been compared, side by side?	
	3. Has the district been effective in	

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	closing racial gaps in achievement? ³³	
	4. Have any parents expressed a belief that some staff members in the district have racial bias? ³⁴	
	5. Is there a history of possible racial discrimination in the school district, unconscious or otherwise, which is documented by complaints against the district, OCR investigations, or other racially tinged conflicts in the schools or greater community? ³⁵	
	6. Has the poverty of students and families from a given racial or ethnic group been previously accepted as the reason for overrepresentation without further analysis? ³⁶	
	7. Are administrators and staff in the district reluctant to discuss the possibility that unconscious bias may be a contributing factor?	
	8. Do students in poverty have higher risk for all disabilities in the district or is the higher risk only found in those disability categories where the evaluation is based on subjective eligibility criteria? ³⁷	
G: Attracting and Retaining Good Teachers³⁸		
	1. Are there enough special educators in each school to provide all the supports and services to which the students are entitled in the least	

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	restrictive environment? ³⁹	
	2. Are teachers assigned to work with students by disability label? If using a cross-categorical model, do you ensure that the teacher assigned has the skills to meet the child's needs? ⁴⁰	
	3. Do teachers have a system of support in place for when they feel they are struggling to meet the needs of students with disabilities? ⁴¹ Students generally?	
	4. Do teachers who are struggling with classroom management get all the support they need? ⁴²	
	5. How has the district addressed the possibility that unconscious bias may be a contributing factor?	
H: IEP Team Meetings (Accounting for All Factors)		
	1. Does the district review IEPs to ensure that careful consideration of LRE is being made? ⁴³	
	2. Are most members of the IEP team that conduct evaluations knowledgeable about cultural differences and culturally appropriate assessments?	
	3. Has a student's eligibility ever changed after consideration of cultural bias, or after adding a culturally sensitive assessment? ⁴⁴	
	4. If the information from parents	

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	conflicts with the test results, does the IEP team weigh these conflicting sources of information equally? ⁴⁵	
I: IEP Team Meetings (Relationship with Parents) ⁴⁶		
	1. Does the district or school encourage IEP members to actively listen to economically disadvantaged, minority, or less educated parents during IEP meetings? ⁴⁷	
	2. Are members of the IEP Team provided with adequate training on how to work more successfully with culturally diverse or economically disadvantaged parents? ⁴⁸	
	3. Do IEP team members ever discuss whether parents are considered equal team members and do they make concerted efforts to ensure such is the case? ⁴⁹	
	4. Are evaluators skilled in presenting evaluation information and data in a clearly understandable manner to parents with varying educational backgrounds or limited language proficiency?	
J: Response to General Education Policy Including Discipline		
	1. Are students retained at grade based primarily on their scores on achievement tests? ⁵⁰	

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	2. Are some low achieving students without disabilities referred for special education to enable them to receive test accommodations on high stakes tests?	
	3. Does a focus on teaching to the test make inclusion more challenging for regular education teachers? ⁵¹	
	4. Are students with disabilities suspended more often than their non-disabled peers? Does every school fully implement all the due process procedures when suspensions of students with disabilities beyond ten days, including cumulative shorter term suspensions for similar infractions? ⁵²	
K: Pre-referral Interventions⁵³		In the space provided briefly state your reasons for thinking this item may be an issue.
	1. To what extent are pre-referral interventions engaged in? Are they rigorously designed to help the teacher and school meet the educational needs of the student?	
	2. Do all students with apparent, but mild, behavioral issues receive the supports or services they need from school counselors prior to referral for evaluation? ⁵⁴	
	3. Do students with academic issues fail to get consideration for both special education support and ELL services? ⁵⁵	
L: Individual Teacher and Administration Attitudes and Bias⁵⁶		
	1. Have special educators expressed the	

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	belief that regular education teachers are poorly trained to work with students with disabilities?	
	2. Have some regular education teachers expressed the believe that students who are struggling academically are likely better off in special education where they assume they will receive intensive individualized instruction even if they are not convinced that the student has a disability?	
	3. Are students with disabilities commonly excluded from test-prep sessions?	
	4. Is there a racial disparity pattern among teacher referrals? By race of teacher? By attitude of teacher with regard to special education? By experience of teacher?	
	5. Do some teachers actively resist the inclusion of students with disabilities in their regular education classroom ⁵⁷ How are resistant teachers responded to?	
	6. Have any teachers or administrators expressed the opinion there are racial biases among the staff? What about class bias?	

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¹Id. The National Research Council states, “In recent years, interventions appropriate for the general education classroom to improve reading instruction and classroom management have been demonstrated to reduce the number of children who fail at reading or are later identified with behavior disorders.” MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION, at 7, Criss Cross ed., National Academy Press (2002) [Hereinafter NRC Report]. For more extensive analysis See Id at 167-209. See also Beth Harry and Janette Klingner, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS, Teacher College Press (2005) [Hereinafter WHY SO MANY].

²While not specifically required by the law, if these issues are raised and examined during the pre-referral stage the influence of cultural bias can be reduced and the IEP team will be adequately prepared to judge whether inadequate instruction was a determinant factor. In the IDEA, Congress finds that “greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities”. 20 USC § 1400(c)(12)(A) (2005). There is a good deal of evidence to support that racial overrepresentation, in part, may be due to unconscious racial bias. See Losen and Orfield, *Introduction in RACIAL INEQUITY IN SPECIAL EDUCATION*, Harvard Education Press (2002)[Hereinafter RACIAL INEQUITY]. The IDEA requires safeguards against racial and cultural bias in evaluation, and researchers have pointed to the need for culturally responsive interventions in regular classroom in the context of Response to Intervention Models. See Klingner and Edwards, *Cultural Considerations With Response to Intervention Models*, Reading Research Quarterly, 108 (2006).

³As described in note 1, ruling out these factors is required by law. See, 20 USC § 1414(b)(5) (2005). The law is informed by a wealth of research which supports the conclusion that what is regarded as an individual’s deficit may actually reflect an inadequate opportunity to learn. See generally, Jim Ysseldyke, *Reflections on a Research Career: Generalizations from 25 years of research on Assessment and Instructional Decision Making*, 67 EXCEPTONAL CHILDREN 295, 304 (2001). As the NRC Report stresses in the executive summary, “The same child can perform very differently depending on the level of effective or ineffective classroom management. In practice, it can be quite difficult to distinguish internal child traits that require the ongoing support of special education from inadequate opportunity or contextual support for learning and behavior. See NRC Report, supra note 1 at 3, and 197-204.

⁴New research has found that children who have been traumatized after witnessing violent acts or being subjected to abuse and are experiencing PTSD may be inappropriately identified as cognitively disabled. The failure to diagnose PTSD may contribute to mislabeling of minority students. Traumatized students who get something other than the psychological treatment they need may subsequently develop more long term emotional disturbance. Some studies estimate that as many millions of children are at risk of experiencing a trauma from exposure to domestic violence or abuse in a given year. For a comprehensive review of this issue see *Helping Traumatized Children Learn*, a report and policy agenda by Massachusetts Advocates for Children, (2005)available at http://www.massadvocates.org/uploads/images/203/Help_Tram_Child-Med.pdf

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⁵In California the use of an IQ test to determine mental retardation for Black students was held to violate Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. 793 F. 2nd 969 (9th Cir. 1984). While not a strict legal requirement in other states, the IDEA 2004 discourages use of the IQ discrepancy for eligibility determination for specific learning disabilities in clarifying that “a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability. See 20 USC § 1414(b)(6)(A) (2005). The National Research Council recommends against efforts to assess students’ decontextualized potential or ability calling them “inappropriate and scientifically invalid.” See NRC Report *supra* note 1 at 364.

⁶Part of the concern is where removal from the classroom is a predictable special education outcome there is a greater incentive to use referrals as a form of classroom management or discipline. The law requires that placement decisions are made based on a student’s individual needs, not an automatic decision based on disability category. For example, the IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability”. 20 USC § 1401 (a)(29) (2005). In a well known case *Corey H. v. Chicago*, the city and the State of Illinois plaintiffs successfully established systemic denial of the right to be educated in the least restrictive environment because a categorical system was used to assign students with disabilities to school classrooms. See *Corey H. v. Bd. of Educ.*, 27 Individuals with Disabilities Educ. L. Rptr. 688 (N.D. Ill.1998) (approving a settlement with the school district). The case was continued to judgment against the state. The IDEA requires the Secretary of Education to gather data on “the number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who are ... in separate classes, separate schools or facilities”. 20 USC § 1418 (a)(1)(A)(iii) (2005).

⁷See NRC Report, *supra* note 1; WHY SO MANY *supra* note 1.

⁸Provisions of both the No Child Left Behind Act and the IDEA that require that students with disabilities be tested, that the scores be reported, and that they be held to high standards for the purpose of annual yearly progress under No Child Left Behind should reduce the incentive to use special education as an accountability loophole. However, in practice, where there is lax monitoring of these particular requirements, the incentive to identify students who are struggling academically as IDEA eligible still remains and may in fact be intensified. See, e.g., Klingner and Harry, WHY SO MANY, *supra* note 1 at 107-111 discussing how NCLB accountability seemed to add a greater incentive to identify and remove students. Moreover, research on NCLB suggests that there have been numerous attempts to avoid accountability for test scores for students with disabilities and that some states have negotiated more flexibility than others in this regard. Even if NCLB is not violated, it would be inappropriate for concerns about accountability for a school (or classroom) to influence eligibility decisions, and doubly so if concerns about performance contributed to overrepresentation of minority children. The IDEA requires States to develop plans that ensure, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. See e.g. 20

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USC § 1415(a)(3)(A) (2005); IDEA requires that “a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education”. 20 USC § 1412(a)(5)(B)(i) (2005); One of the purposes of the IDEA is “to ensure the rights of children with disabilities and parents of such children are protected”. 20 USC § 1400(d)(1)(B) (2005).

⁹Id.

¹⁰If such was the policy or practice, it would be an inappropriate reason to identify a student as eligible and violate many of the provisions stated in this segment.. Moreover, such practice would suggest that the grade retention policy is not effective and that earlier interventions are needed to ensure that students have an adequate opportunity to learn.

¹¹Given that NCLB requires states to demonstrate how they were ensuring that minority students were not more likely than majority students to be educated by less experienced teachers, doing what NCLB seeks to prevent at the local level as a matter of practice or policy would certainly be inappropriate and likely unlawful. With regard to students with disabilities the practice would likely violate Section 504 of Rehabilitation Act of 1973 and the regulations that prohibit even unintended methods of administration that have a disparate impact on students with disabilities.. 29 U.S.C. §794 (1994); 34 C.F.R. § 104.4(b)(4). Likewise, the federal regulations pursuant to Title VI of the Civil Rights Act of 1964, and some states, including the State of Wisconsin, interpret as unlawful even racially neutral policies and practices that have a negative and disparate impact on protected racial and ethnic groups, when such policies are not educationally justifiable or have less discriminatory alternatives. *See e.g.*, 34 C.F.R. § 100.3 (2003). Beyond determining whether a district treats differently students based on a protected class, in some states, such as Wisconsin, the department of education or other administrative body may have the authority to determine whether a district’s policies and/or practices unintentionally discriminate, based on a protected class, against a group of students. For example PI 9.02(5), Wis. Admin. Code describe the pupil non-discrimination code includes a disparate impact standard. In reviewing an appeal under such a “disparate impact” theory of discrimination, the first step is determining whether the challenged educational policy or practice has a demonstrated disparate impact. In addition to statistical significance, sometimes issues of “practical significance” are considered (placing the disparities in an educational, historical, and sociological context). While there is “no rigid mathematical threshold to overcome a facially neutral practice, statistical disparities must be sufficiently large to raise an inference that the challenged practice caused the disparate results.” Decision for Pupil Nondiscrimination Appeal, 05-PDA-05 (School District of Rib Lake) (March 2006). In addition, “Part two of a disparate impact analysis requires justification of use of the challenged practice or policy as "educational necessity." Part three of a disparate impact analysis requires proof of an alternative educational practice that would reduce the disproportionately adverse effects while also serving the legitimate educational interests. See Footnote 3 in Decision for Pupil Nondiscrimination Appeal 03-PDA-01 (Franklin Public School District) (2004).

¹²The IDEA requires that “assessments and other evaluation materials ... are selected and administered so as not to be discriminatory on a racial or cultural basis”. 20 USC § 1414(b)(3)(A)(i) (2005).

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¹³The issue is critically important for two reasons: One, because providing high quality services to students with disabilities early on may substantially decrease the likelihood of a more severe disability, one that requires a restrictive setting, later on. See David Osher, et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and The Juvenile Justice System*, in RACIAL INEQUITY, supra note 2. The second reason is that if different racial groups share poverty in common but have divergent patterns of identification, placement and discipline, then poverty unlikely explains the racial disparities. See Losen and Orfield, Introduction to RACIAL INEQUITY, supra note 3.

¹⁴If your district has been identified because of disproportionality in a specific disability category, disproportionality in other categories, even if they are not as great, are likely related or share the same inappropriate causal roots. In most cases where there are multiple causal factors and disproportionality of varying degrees, it would be inappropriate to ignore these other areas. The IDEA prioritizes Federal and State monitoring of “disproportionate representation of racial and ethnic groups in special education”. 20 USC § 1415(a)(3)(C) (2005).

¹⁵This issue is complicated. For example, if large numbers of students are referred for evaluation, the initial concern is that some portion are inappropriate referrals. If the evaluation process is working well, the inappropriate referrals would be weeded out and there would be a noticeable difference between the referral rate and the identification rate. However, where the pre-referral interventions, response to intervention, and other systems are in place and working well, one would expect that referrals would be lower, and that a high percentage of those referred would wind up identified as eligible because the systems had successfully reduced referrals to remove all inappropriate referrals. In Madison Wisconsin, for example, as the district sought to reduce the number of referrals significantly they also hoped to increase the legitimacy of the referrals that were made and thereby hoped the rate of eligibility determinations would actually increase. See Jack Jorgenson, Presentation at NCCRESt National Forum on *Disproportionality*, Denver, CO (February, 2006) (on file with author). An earlier version of this presentation is available at: <http://www.dpi.wi.gov/sped/ppt/dis-jorgensen.ppt>.

¹⁶See Corey H., supra note 7. The IDEA requires an Individualized Education Program for each child that includes “a statement of the child’s present levels of academic achievement, ... a statement of measurable annual goals, ... a description of how the child’s progress toward meeting the annual goals ... will be measured, ... a statement of the special education and related services ... to be provided to the child, ... and explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class”. 20 USC § 1414(d)(1)(A)(i) (2005); The IDEA requires, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1415(a)(3)(A) (2005); The IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability”. 20 USC § 1401 (a)(29) (2005).

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¹⁷Researchers have documented that Black and Latino students, and especially black males, are more likely to be removed from the general education classroom even compared within a disability category. See Fierros and Conroy, in RACIAL INEQUITY, supra note 2.

¹⁸A recent study of principals in two districts in Delaware found that about half did not know the procedural requirements for long-term suspension of students with disabilities. See, Elizabeth Palley, Report to the State of Delaware on the Implementation of the IDEA's Disciplinary Amendments. Unpublished report Palley, (2002). See also, Elizabeth Palley, Balancing Student Mental Health and Discipline: A Case Study of the IDEA. Social Service Review.78 (2), 243-266 (2004). Given the numerous and detailed procedural requirements and safeguards found in 20 USC § 1414, it is nearly certain that if school administrators are unaware of the requirements and have suspended students with disabilities, that they are not in compliance with the IDEA. The IDEA requires states to examine data “to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities”. 20 USC § 1412(a)(22)(A) (2005).

¹⁹Districts that don't review their data broken down by race and ethnicity along with other categories like gender, socio-economic status, disability category, placement and discipline will not be properly prepared to find inappropriate policies, procedures or practices that contribute to the disparities. Under the IDEA, States are required to report data on discipline disproportionality by race, ethnicity, gender, LEP status, and category of disability, including incidence and duration of suspensions of one day or more, and the number and percentage of students who are subjected to long-term suspension or expulsion and the state is obligated to review the data on incidence, duration and disciplinary actions for racial disproportionality. 20 USC § 1418(a & d) (2005). Furthermore the Department of Education's revised guidance added racial disproportionality as a required indicator for monitoring and enforcement with regard to discipline.

²⁰The IDEA requires the Secretary of Education to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005).

²¹Further analysis of data by race with gender, for example, may suggest an inappropriate factor that might not be noticed when the data is analyzed by race or gender separately. In most cases the state must have the districts data disaggregated by race, ethnicity, LEP status, disability category, and gender. 20 USC § 1418 (a) (2005).

²²The IDEA requires states to examine data “to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities”. 20 USC § 1412(a)(22)(A) (2005); Under the IDEA, States are required to report and analyze data on disproportionality. 20 USC § 1418(a - d) (2005); The IDEA prioritizes Federal and States monitoring of “disproportionate representation of racial and ethnic groups in special education”. 20 USC § 1416(a)(3)(C) (2005). This includes reporting “annually to the public on the performance of each local educational agency in the state...” 20 USC § 1416(b)(2)(C)(ii)(I) (2005).

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²³Research indicates that approximately 90% of students with disabilities were first evaluated after being referred by a classroom teacher, and of those 90% approximately 73% wound up identified as eligible for IDEA. See Yssledyke supra note 4 at 295-309. In their qualitative research, Klingner and Harry found that teachers could be identified as high or low referring teachers and that even very strong teachers could be high referrers depending on their personal beliefs about special education and the reasons for student low achievement. WHY SO MANY supra note 2 at 97-103.

²⁴Under the IDEA, “each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child”. 20 USC § 1414(e) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents”. 20 USC § 1400(c)(5)(B) (2005); Under the IDEA, Congress finds that “parent training and information activities assist parents of a child with a disability in ... ensuring the involvement of parents in planning and decision-making with respect to early intervention, educational, and transitional services”. 20 USC § 1450(11)(B) (2005).

²⁵The IDEA stipulates the parent is a full member of the IEP team that determines eligibility, the IEP and the placement. 20 USC § 1414(b)(4) and (c). Qualitative research indicates that this is not always the case. See WHY SO MANY, supra note 1 at 70-122. The IDEA authorizes the use of funds to “provide training to enable personnel to work with and involve parents in their child’s education, including parents of low income and limited English Proficient children with disabilities”. 20 USC § 1454(a)(3)(B)(iv) (2005).

²⁶Although many parents of children of color may be resistant to disability eligibility, their voices may be muted in official IEP team meetings. See e.g., Beth Harry and Janette Klingner, WHY SO MANY, supra note 1. See also, NATIONAL COUNCIL ON DISABILITIES, BACK TO SCHOOL ON CIVIL RIGHTS, ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND, 2000, (Finding, “The ongoing struggles of many students with disabilities, their parents, and advocates to obtain services under IDEA leaves them with the impression that the Federal Government is not enforcing the law effectively.”). Available at http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm.

²⁷Under the IDEA, States are required to report data on disproportionality. 20 USC § 1418(d) (2005); The IDEA requires the Secretary of Education to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having a disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005).

²⁸In many ways IDEA requires parental involvement and has clear notice requirements and a host of procedural protections to ensure such participation. See e.g. 20 USC § 1415. In 1997, The United States Commission on Civil Rights issued a finding numerous barriers to parental involvement including, “ ...an absence of sufficient communication mechanisms, problems with interpersonal dynamics between educators and parents, and parents’ lack of understanding of their legal rights...” See U.S. Commission on Civil Rights, Equal Educational Opportunity of Section 504, at 389 (September 1997). One of the purposes of the IDEA is “to ensure the rights of children with disabilities and parents of such children are protected”. 20 USC § 1400(d)(1)(B) (2005); Another purpose is to

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“ensure that ... children with disabilities and their parents receive training and information on their rights, responsibilities, and protections under [the IDEA]”. 20 USC § 1470(2) (2005); Under the IDEA, Congress finds “parent training and information activities assist parents of a child with a disability ... are of particular importance in ... providing such parents information on their rights, protections, and responsibilities under [the IDEA] to ensure improved early intervention, educational, and transitional results”. 20 USC § 1450(11)(D) (2005).

²⁹The law requires, for example, that parents are provided with procedural safeguards “written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner. 20 USC § 1414(d)(2) (2005). The IDEA authorizes the use of funds to “provide training to enable personnel to work with and involve parents in their child’s education, including parents of low income and limited English Proficient children with disabilities”. 20 USC § 1454(a)(3)(B)(iv) (2005); Congress also authorizes States to spend funds “for support and direct services, including technical assistance, personnel preparation, and professional development and training”. 20 USC § 1410(e)(2)(C)(i) (2005); The IDEA requires the Secretary to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having a disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005); One of the purposes of the IDEA is “to ensure the rights of children with disabilities and parents of such children are protected”. 20 USC § 1400(d)(1)(B) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents”. that “the education of children with disabilities can be made more effective by ... supporting high-quality, intensive pre-service preparation and professional development for all personnel who work with children with disabilities” and that “greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities”. 20 USC § 1400(c)(5, 12)(A) (2005); Under the IDEA, Congress also finds that “parent training and information activities assist parents of a child with a disability in ... ensuring the involvement of parents in planning and decision making with respect to early intervention, educational, and transitional services”. 20 USC § 1450(11)(B) (2005).

³⁰The reauthorized IDEA prioritizes Federal and State monitoring of “disproportionate representation of racial and ethnic groups in special education.” 20 USC § 1416(a)(3)(C) (2005). However, most of the state obligations to identify racial disproportionality have been in place since 1994. 20 USC § 1418 (1994)

³¹In addition to being inappropriate, such comments, and their tolerance may be evidence of unlawful discrimination on the basis of race, ethnicity or disability.

³²Such racial disparities are not uncommon and should be warning signs to educators that racial bias may be at least having an impact, even if unintended and unconscious, on the decisions that educators routinely make about children. To the extent bias and stereotypes may be reflected, these inappropriate influences should be addressed even if direct causal evidence is not available.

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³³The No Child Left Behind Act specifically requires that students with disabilities, students from major racial and ethnic groups, LEP students and socio-economically disadvantaged students make adequate yearly progress in reading and math toward 100% proficiency. Where the school district is not meeting the academic goals for these subgroups, there may be similar factors contributing to special education disproportionality. In some contexts, the interventions needed to improve the conditions in general education might also contribute to remedying the special education issues and visa versa.

³⁴Addressing racial disproportionality in a district should involve community members and parents of the overrepresented racial group. If school district leaders have not engaged with the community around issues of race or culture, now is the time to start. Failure to have a dialogue with parents and community leaders may reflect a pattern of poor communication which may in turn be contributing to the trends at issue.

³⁵Racial disproportionality in special education is not a new issue. In 1994, the U.S. Department of Education, Office for Civil Rights made this a priority area for federal anti-discrimination law enforcement. Many districts, including some that are identified under the reauthorized IDEA may have a long history of disproportionality and been the subject of civil rights complaints and investigations. Whether or not the old issues were resolved to the satisfaction of investigators or complainants in the past, being identified once again calls for an exploration of whether the policies or practices challenged as potentially discriminatory in the past, may be inappropriately contributing factors to be eliminated regardless of their technical legality.

³⁶While often offered as a blanket explanation, the research indicates that race is a significant factor even when poverty is accounted for, and that poverty, while a likely contributor, usually fall far short of explaining the specific racial disparities that tend to arise in given special education categories, placement decisions and discipline disparities. See, e.g., Losen and Orfield, Introduction to RACIAL INEQUITY IN SPECIAL EDUCATION, supra note 2.

³⁷The research shows that for the many disability categories that involve little subjectivity for diagnosis, like visual, hearing and orthopedic impairments, little or nor racial disparities appear. The evidence calls into question the argument that poverty is the true cause as differential rates of poverty do contribute to higher risk for all disabilities categories, but racial differences are only pronounced in the categories where subjective criteria determine eligibility. See id.

³⁸The IDEA requires that State educational agencies ensure that teachers are “adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities”. 20 USC § 1412(a)(14)(A) (2005). The IDEA also encourages states to use funds to “promote the recruitment and retention of highly qualified special education teachers”. 20 USC § 1454(a)(4) (2005); and to use of funds for “developing, evaluating and disseminating innovative models for the recruitment, induction, retention, and assessment of new, highly qualified teachers to reduce teacher shortages”. 20 USC § 1454(a)(1)(C) (2005).

³⁹Failure to dedicate the resources necessary to offer a full continuum of placements to meet each students individualized needs is likely a violation of the IDEA which requires States to develop plans that ensure, “to the maximum extent appropriate, children with

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disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005). In 2004 IDEA prioritized required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1416(a)(3)(A) (2005).

⁴⁰Id. The IDEA also requires the Secretary of Education to gather data on “the number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who are ... in separate classes, separate schools or facilities”. 20 USC § 1418 (a)(1)(A)(iii) (2005).

⁴¹The IDEA encourages the use of funds to “provide teacher mentoring, team teaching, reduced class schedules and case loads, and intensive professional development” and to “promote the recruitment and retention of highly qualified special education teachers”. 20 USC § 1454(a)(1,4) (2005).

⁴²Id.

⁴³In developing each Individualized Education Program (IEP) that the IEP includes a statement describing the educational services, modifications and supports that will be provided so that the child can “be educated and participate with other children with disabilities and non-disabled children...” 20 USC § 1414 (d)(1)(IV) (2005). The IDEA requires States to develop plans that ensure, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1415(a)(3)(A) (2005); The IDEA also requires IEP evaluators to determine “the context of a child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum”. 20 USC § 1414(b)(2)(A)(ii) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... ensuring their access to the general education curriculum in the regular classroom to the maximum extent possible”. 20 USC § 1400(c)(5)(A) (2005).

⁴⁴In addition to the many relevant provisions already cited, it should be noted that the IDEA authorizes the Secretary to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having a disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005).

⁴⁵The IDEA requires a reevaluation of a child’s status “if the child’s parents or teacher requests a reevaluation”. 20 USC § 1414(a)(2)(A)(ii) (2005); Under the IDEA, “each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child”. 20 USC § 1414(e) (2005); The IDEA authorizes the use of funds to “provide training to enable personnel to work with and involve parents in their child’s education, including parents of low income and limited English Proficient children with disabilities”. 20 USC § 1454(a)(3)(B)(iv) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents”. 20 USC § 1400(c)(5)(B) (2005); Congress also finds that “parent training and

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information activities assist parents of a child with a disability in ... ensuring the involvement of parents in planning and decision-making with respect to early intervention, educational, and transitional services”. 20 USC § 1450(11)(B) (2005).

⁴⁶Under the IDEA, “each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child”. 20 USC § 1414(e) (2005); The IDEA requires a reevaluation of a child’s status “if the child’s parents or teacher requests a reevaluation”. 20 USC § 1414(a)(2)(A)(ii) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents”. 20 USC § 1400(c)(5)(B) (2005).

⁴⁷See *id.* The IDEA authorizes the use of funds to “provide training to enable personnel to work with and involve parents in their child’s education, including parents of low income and limited English Proficient children with disabilities”. 20 USC § 1454(a)(3)(B)(iv) (2005); Congress also finds that “parent training and information activities assist parents of a child with a disability in ... ensuring the involvement of parents in planning and decision-making with respect to early intervention, educational, and transitional services”. 20 USC § 1450(11)(B) (2005).

⁴⁸The IDEA authorizes the use of funds to “provide training to enable personnel to work with and involve parents in their child’s education, including parents of low income and limited English Proficient children with disabilities”. 20 USC § 1454(a)(3)(B)(iv) (2005); Congress also authorizes States to spend funds “for support and direct services, including technical assistance, personnel preparation, and professional development and training”. 20 USC § 1410(e)(2)(C)(i) (2005); One of the purposes of the IDEA is “to ensure the rights of children with disabilities and parents of such children are protected”. 20 USC § 1400(d)(1)(B) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents”. that “the education of children with disabilities can be made more effective by ... supporting high-quality, intensive pre-service preparation and professional development for all personnel who work with children with disabilities” and that “greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities”. 20 USC § 1400(c)(5, 12)(A) (2005); Under the IDEA, Congress also finds that “parent training and information activities assist parents of a child with a disability in ... ensuring the involvement of parents in planning and decision-making with respect to early intervention, educational, and transitional services”. 20 USC § 1450(11)(B) (2005).

⁴⁹Qualitative research on this topic suggests that not only are parents not given full respect or opportunity to contribute on equal footing at IEP team meetings but that the failure to listen to parents contributes to many of the trends for racial overrepresentation and increased likelihood of removal from the classroom. See, Beth Harry and Janette Klingner, WHY ARE SO MANY *supra* note 2.

⁵⁰The IDEA requires evaluators to “use a variety of assessment tools and strategies to gather relevant ... information ... in determining ... whether the child is a child with a disability”. 20 USC § 1414(b)(2)(A)(i) (2005); The IDEA requires that “assessments and other evaluation materials ... are selected and administered so as not to be discriminatory on a racial or cultural basis”. 20 USC § 1414(b)(3)(A)(i) (2005); In the IDEA, Congress finds that “greater efforts are needed to prevent the intensification

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of problems connected with mislabeling and high dropout rates among minority children with disabilities”. 20 USC § 1400(c)(12)(A) (2005).

⁵¹Id.

⁵²The law requires manifestation determinations and usually functional behavioral assessments in such cases. 20 USC § 1415(k)(1)(F). Correct implementation of the law may reduce the likelihood of inappropriate suspensions, especially where children with disabilities are suspended significantly more often. If functional behavioral assessments are done correctly, a more effective behavioral plan should be developed to reduce the problem behavior and become part of the student’s IEP. Research suggests that this step is often ignored or poorly implemented. Research also indicates that racial disparities in this area are quite large, especial for Black students. See David Osher, in RACIAL INEQUITY, supra note 3.

⁵³The IDEA requires each State to report “the number and percentage of children with disabilities, by race, gender, and ethnicity, who are receiving early intervention services”. 20 USC § 1418(a)(1)(B) (2005); The IDEA allows up to 15 percent of a district’s funding under the act to be devoted to early intervening services. 20 USC § 1412(f) (2005); Early intervening services are permissive use of funds under the IDEA 20 USC § 1412(a)(4)(A)(ii) (2005); In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... providing ... early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children”. 20 USC § 1400(c)(5)(F) (2005).

⁵⁴See Osher, RACIAL INEQUITY, supra note 3. In the IDEA, Congress finds that “the education of children with disabilities can be made more effective by ... providing ... early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children”. 20 USC § 1400(c)(5)(F) (2005).

⁵⁵The IDEA requires that a child is not determined to have a disability if “the determinant factor for such a determination is ... limited English proficiency”. 20 USC § 1414(a)(5)(C) (2005); The IDEA requires the Secretary of Education to enter into agreements for personnel development supporting activities that “prevent the misidentification, inappropriate over-identification, or under-identification of children as having a disability, especially minority and limited English proficient children”. 20 USC § 1462(b)(2)(A)(iii) (2005); The IDEA requires the Secretary of Education to gather data on “the number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who are ... in separate classes, separate schools or facilities”. 20 USC § 1418 (a)(1)(A)(iii) (2005).

⁵⁶See generally, NRC Report supra note 1 at 172-204. For a detailed exploration and documentation of the existence of unconscious racial bias see Mahzarin Banaji, & Anthony Greenwald, *Implicit Stereotyping and Prejudice, in THE PSYCHOLOGY OF PREJUDICE* (1994); Mahzarin Banaji, Ordinary Prejudice, *Psychological Science Agenda* (2001). There is a website available where one can anonymously test whether they may hold unconscious bias. More information and the test are available at: <https://implicit.harvard.edu/implicit/demo/index.jsp>

CHECKLIST II: System Policy, Procedure, & Practice Issues at the District, School & Classroom Levels

⁵⁷The IDEA requires States to develop plans that ensure, “to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled”. 20 USC § 1412(b)(5)(A) (2005); The IDEA prioritizes required Federal and State monitoring of the “provision of a free appropriate public education in the least restrictive environment”. 20 USC § 1416(a)(3)(A) (2005); The IDEA authorizes the use of funds to “encourage collaborative and consultative models”. 20 USC § 1454(a)(1)(C) (2005), and to “provide teacher mentoring, team teaching, reduced class schedules and case loads, and intensive professional development”. 20 USC § 1454(a)(1)(A) (2005); The IDEA requires an Individualized Education Program for each child that includes “a statement of the child’s present levels of academic achievement, ... and explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class”. 20 USC § 1414(d)(1)(A)(i) (2005).

CHECKLIST III: Environmental Factors

Introduction: Both unconscious racial bias and environmental factors may contribute to racial disproportionality in special education. They are not mutually exclusive. However, far closer analysis would be required in order to attribute racial disparities in particular special education categories to environmental factors. Unfortunately, environmental factors sometimes get blamed for these disparate trends to the exclusion of the consideration of other factors and without a close contextual examination of the evidence. As a result, the possible contribution of unconscious racial bias often goes unexamined. Studies designed to account for the influence of

poverty and related environmental factors find that race remains a strong indicator for identification. Often districts theorize that other school districts are responsible for inappropriate identification because of students transferring from one district to the next. But every district has an obligation to reevaluate students as soon as eligibility questions are raised. And in most districts the numbers of eligible students that transfer out, are similar to those that transfer in. The exploration of the following questions could help illuminate the extent to which environmental and other external factors are major contributing factors in your district.

A: Exposure to Environmental Toxins (In School)	In the space provided briefly state your reasons for thinking this item may be an issue.
1. Are children of color differentially exposed to environmental hazards at the school level (poor air quality and exposure to lead in water for example)? ¹	
2. Do certain schools serve communities that are known to have an unusually high incidence of disability in children? Has the possibility of environmental pathogens in those schools been explored? Have all potential hazards in the school been explored?	
B: Exposure to Environmental Toxins (Out of School)	
1. Does the kindergarten screening process, or special education	

CHECKLIST III: Environmental Factors

	evaluation process ask questions that would reveal exposure to environmental risk factors in the home?	
	2. Are there certain communities known to have high exposures to environmental risk factors? Have you reviewed any documents about these risks and implications for student health?	
C: Other Health Issues		
	Are there other health issues such as experiencing trauma, poor eyesight, hearing or others that might be contributing to high levels of referral, but that are not reflected in the evaluation for special education eligibility?	
D: Access to and Coordination with Other Health and Human Services		
	1. Are students regularly screened for lead levels or mild visual and hearing impairments?	
	2. Is there a factual record for students in your district of higher exposure to lead or other environmental factors for certain racial groups that have been shown to correlate with racial disparities in identification? Do all student subgroups with the similar risk for exposure wind up with similar risk for identification)?	
	3. How strongly does the number	

CHECKLIST III: Environmental Factors

	of children at risk for exposure correlate with the numbers identified as having cognitive disabilities?	
	D: Transfers From Other Districts²	
	1. Does your district re-evaluate students that were identified in another district within a year of enrollment in the district?	
	2. When transfers out are also considered, is there a significant gain, by race, among students with disabilities?	
	3. Are there racial disparities in the district with regard to any of the following: placement of students in restrictive educational settings; students who are suspended; or identified as being gifted?	
	4. Would eliminating the student transfers into and out of the district eliminate all or most of the racial disparity?	

¹The influence of poverty and external factors are discussed in some detail in the NRC Report. MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION, at 93-140, Criss Cross ed., National Academy Press (2002) [Hereinafter NRC Report]. However, the NRC Report does not reveal any research directly linking poverty or exposure to environmental factors, in any actual school district, to racial disproportionality in any of the more subjective categories. While there is no doubt that poverty is a contributing factor increasing the risk of disabilities generally, and therefore to racial disproportionality too, the research on poverty invariably demonstrates that race and gender are substantial factors even when poverty is controlled for. See Losen and Orfield,

CHECKLIST III: Environmental Factors

Introduction, to RACIAL INEQUITY IN SPECIAL EDUCATION, Harvard Education Press (2002). However, poverty and race are likely too intertwined to completely control for either factor in this context. Id. While intentional racial bias is difficult to prove, the research does support the conclusion that some inappropriate practices in general education including unconscious forms of bias do contribute to the racial disproportionality at issue. (See NRC Report Id at 167-212); Beth Harry and Janette Klingner, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS, Teacher College Press (2005).

²In an unpublished study by a district in Wisconsin the district found that transfers did contribute, but that racial disproportionality was also found to be significant for students that were not transfers. Further, a high degree of racial disproportionality was found in the district among each socio-economic group, ruling out poverty as the main contributing factor. See Presentation by Jack Jorgenson <http://www.dpi.wi.gov/sped/ppt/dis-jorgensen.ppt>