

THE PROBLEM WITH PARTICIPATION

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I. Introduction

My son is six. He is a really good kid (if I do say so myself); he is friendly, respectful, funny, and smart. At home we struggle with the same sorts of issues as other parents of six-year-olds. He does not always listen, he whines, and he complains. His room is often messy, and when we point out that there are things still on the floor, waiting to be put away, he complains that he did not see those things the first time around. He stuffs food in his mouth, and hates to use utensils. He is a picky eater, preferring food that looks pretty much like how it grew out of the ground or walked on the earth, with little to no modification before it reaches his plate. He chews on things, including toys and his clothes. He also gets joy out of annoying his little sister.²

At home, these things are all minor annoyances, and seemingly not much to worry about. At school he reads two grade levels above his first grade peers, and his math skills are excellent. He has friends that live next door to us, and they frequently knock on our door to see if he can come out and play. At home, he is just a normal kid who has some quirks.

But at school, my little black boy has “worrisome” behaviors. The chewing indicates stress or anxiety. His messiness indicates poor motor planning. His pickiness indicates an oral hypersensitivity. His tendency to bump into people, including annoying his little sister, indicates a spatial recognition disorder. Despite his superior academic skills, his teachers have contacted me for informal meetings several times these past two years. Even the principal suggested convening a Student Study Team, or “SST,” which is a step that could possibly lead to assessment, labeling, and placement in a special education program for children with disabilities.

If my son were not black, it is possible that I would take the school’s concern for his well being as a welcome opportunity to partner for the betterment of my child. But he is black, and so I am wary.

Nationally, black children are significantly more likely than other children to be in special education. Black children are 17% of the public school population, but represent about a quarter of all children receiving special education services.³ In addition, they are three times as likely to be labeled mentally retarded (“MR”) and twice as likely to be labeled emotionally disturbed (“ED”).⁴ As I discuss below, these two diagnoses are associated with particularly negative in-school and post-school outcomes. Black children are underrepresented among those diagnosed with autism and speech/language disorders, and approximately equally represented in the other categories of disability.⁵ These trends, however, are uneven in school districts across the country. Racial disproportionality in special education is greatest where one might least expect to find it, in middle income or affluent districts with a relatively low proportion of black students and a high proportion of white students – exactly the type of district in which my family lives.⁶

While special education may be useful for some children, outcomes for black children are markedly negative. Placement in special education can lead to in-school racial segregation through the use of “special day classes.”⁷ In addition to the social isolation, black children in special education have less access to the general curriculum, making it more difficult for them to continue their education past the twelfth grade; indeed, many black children receiving special educational services fail to receive a regular high school diploma, and more of them drop out of school altogether than receive a regular diploma.⁸

Furthermore, black children eligible to receive services under Individuals with Disabilities Education Act (“IDEA”) comprise of a large percentage of juvenile offenders in correctional facilities.⁹ For these reasons, the overrepresentation of black children, especially black boys, in special education is cause for national concern.

I will fight tooth and nail to make sure these outcomes never become a reality for my son. I am likely the type of parent that Congress envisioned when they mandated parental participation under IDEA.¹⁰ IDEA’s findings in the latest reauthorization cite both the problem of racial disproportionality and the need to strengthen parental participation in the process.¹¹ Scholars have identified parental participation in special education as one of three enforcement mechanisms, along with federal and local enforcement. Congress seems to have believed in the power of parents to protect their children from negative treatment as a result of a disability diagnosis. The Supreme Court says as much in *Board of Education v. Rowley*, the first case to interpret IDEA:

“[A]s this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.”¹²

This is not the case for many parents, especially many black parents, who are not like me. I have been highly educated at some of the nation’s best and well-known schools. My husband and I are middle-income, and if push came to shove, we could opt-out of the public school system, hire outside evaluators, or pay for services and/or treatment. More importantly, I am also an active member of the educational community, and I am on a first name basis with the Superintendent, the Board of Education members, and the school principal. I can leverage these connections to gain information and directly advocate for my son to get the best placements and best treatment the district offers, or to prevent the school from labeling him at all.

In general, however, black parents have more modest access to these resources, and therefore are at a disadvantage when faced with a situation like mine. The problem is not primarily one of class, as other

commentators have suggested,¹³ but of relative *status*. Status refers to the relative positions of an individual’s social group within a particular context.¹⁴ In the United States, race is an important determinant of status, and status is an important factor in educational stratification.

While IDEA identifies parents as the enforcers of the law, many parents, especially black parents who occupy lower relative status positions in society, lack the specific economic, social, and cultural capital to provide the parental protection envisioned by IDEA. Despite the potential for parental participation to improve outcomes for minority children and close educational gaps, scores of black children in special education are being left behind, apparently not receiving the protective benefits of their parents’ participation. Many have referred to this disproportionate placement as the new form of school segregation.¹⁵

There is literature examining the problem of racial disproportionality in special education. Scholars, however, have typically examined racial disproportionality through the lens of structural theories of racial stratification, which emphasize institutional racism inherent in the processes that govern how students are tested, evaluated, and placed in special education.¹⁶ This institutional racism is manifested in the “certain basic assumptions, worldviews, beliefs, and epistemologies used by some special education knowledge producers”¹⁷ that see black children as less intelligent or “disabled” when they exhibit differences in learning or behavior from their white peers.¹⁸ To date, however, no one has exposed the connection between racial disproportionality in special education placement and the parental participation mandate of IDEA.

In this essay I explain why and how parental participation fails to protect black children from segregation in special education placements. In addition, I argue that the very process of mandated parental participation exacerbates and legitimizes the racial inequities parental participation is meant to lessen. The status quo can appear legitimate because parents were supposedly given a meaningful opportunity to participate, even though the reality is that some parents are unable to participate in a meaningful way. Perversely, then, a formal legal right of participation can actually reinforce exclusion.

Participation in legal processes is generally thought to be a fair way of allocating resources and ensuring justice.¹⁹ Participation, however, can only be a fair way to distribute resources if those called to participate are equitably equipped to be full participants, and to capture scarce resources in the form of services and attention. In order for parental participation to be effective for black children, black parents must already possess specific forms of economic, social and cultural capital to effectively advocate within the institutions that comprise formal K-12 schooling.

Black parents in general have stratified access to these capitals and stratified opportunities to activate the capital for their children's benefit. This is especially the case in majority-white districts where racial disproportionality in special education is particularly evident. Where resources are limited, only those parents who are best able to mobilize resources realize the promise of participation.

In Part II, I describe the problem of racial disproportionality in special education placements. I briefly set out the leading theories on why these disparities exist. Rather than argue that racial discrimination plays prominently in identification and evaluation, I pay particular attention to the extent to which black children in special education are denied access to the general education curriculum through in-school and in-district segregation, particularly in middle-class districts with relatively low proportions of black students. It is in securing services and appropriate placements that parents have the greatest opportunity to influence decision-making.

In Part III, I outline how Congress sought, at least in part, to protect children from discrimination in schools through parental participation. I describe the legal process of parental participation, and explain the sociological theories behind why parental participation is thought to be beneficial for children's school outcomes and experiences.

In Part IV, I present an argument based on race-related differences in economic, social, and cultural capital to explain why parental participation, as currently envisioned by Congress, fails to adequately protect black children from discriminatory placement in special education. I also outline why, despite Congressional intent, parental participation actually works as a legitimizing force for unequal treatment,

making it an unrealistic enforcement mechanism to ensure equitable educational access for all children in special education.

In Part V, I discuss a range of reforms to IDEA's participation mandate that could lead to more just outcomes.

II. Racial Disproportionality in Special Education Placement

In order to receive services pursuant to IDEA, a child must be identified as having one or more of the thirteen disabilities. Of the thirteen disabilities, six are physical disabilities, including hearing impairment and visual impairment.²⁰ Of the remaining seven, three are specific learning disorders: speech and language impairment, specific learning disability, and developmental delay.²¹ The remaining four are mental retardation (more recently known as intellectual disability), emotional disturbance, autism, and other health impairments (typically attention-deficit (hyperactivity) disorder).²²

Racial disproportionality can be seen in the last seven categories of disability.²³ Across all thirteen categories taken as a whole, black children tend to be overrepresented. This overrepresentation, however, is actually concentrated in just a few categories. While black children make up only 17% of U.S. public school enrollment,²⁴ they made up approximately 30% of the ED and MR special education enrollment.²⁵ In comparison, white children displayed little disproportionate representation in the ED category and slight under representation in the MR category.²⁶ Asian children, who represent 4.8% of public school enrollment, comprised only 2.23% of the ED category and 1.17% of the MR category.²⁷ Whites are overrepresented in the other health impairment (ADD/ADHD) category, while Asian children are overrepresented in the autism category.²⁸

Perhaps more concerning is the racial differences in educational placements of children receiving special education services. Understanding the profound effects educational setting can have on educational outcomes, Congress requires that children receiving special educational services be educated in the least restrictive environment ("LRE").²⁹ The restrictiveness of a schooling environment is measured

by the extent to which “children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.”³⁰ The law also requires that “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”³¹

Calls for “inclusion” in special education have largely ignored the problem of the racial segregation of black students with disabilities, despite the apparent overlap between the history of racial segregation in schools and the exclusion of children with disabilities from general education. Cases related to inclusion and restrictiveness of educational placement have yet to deal directly with the racial dimension of restrictiveness, focusing instead on the extent to which judges should defer to school district decisions,

the extent to which services in restrictive placements could be provided in a less restrictive environment, the extent to which a less restrictive placement would affect the education of other children, and whether the educational agency has tried a less restrictive placement before resorting to a more restrictive placement.³²

Nationally, black children are more likely to be in the most restrictive placements, as shown in Table 1. Black children with disabilities are four times more likely than non-black children to be receiving special educational services in correctional facilities, and about 50% more likely to be receiving services in a separate school or a residential facility. They are also less likely than non-black children to be in a general education classroom for more than 80% of the school day, with only Native Hawaiians and Pacific Islanders having a lower likelihood to be in the general education classroom more than 80% of the day.

Table 1: Risk Ratio³³ for Special Education Placements³⁴

| | Inside general education classroom | | | Sep. School | Res. Facility | Home/Hosp. | Corr. Facility | Parent Placed Private School |
|---|------------------------------------|-------------|-------------|-------------|---------------|-------------|----------------|------------------------------|
| | > 80% | 40%–79% | < 40% | | | | | |
| Hispanic/Latino | 0.97 | 1.00 | 1.26 | 0.75 | 0.46 | 1.00 | 0.63 | 0.59 |
| American Indian or Alaska Native | 1.00 | 1.25 | 0.79 | 0.56 | 1.15 | 0.89 | 0.83 | 0.37 |
| Asian | 0.93 | 0.85 | 1.51 | 1.31 | 0.69 | 0.75 | 0.18 | 0.92 |
| Black/African American | 0.87 | 1.07 | 1.42 | 1.54 | 1.45 | 0.98 | 4.56 | 0.31 |
| Native Hawaiian or Other Pacific Islander | 0.70 | 1.69 | 1.45 | 0.68 | 0.79 | 0.86 | 1.10 | 0.25 |
| White | 1.12 | 0.95 | 0.64 | 0.90 | 1.20 | 1.05 | 0.37 | 2.53 |
| Two or more races | 1.02 | 0.98 | 0.97 | 0.87 | 1.19 | 0.89 | 0.99 | 1.00 |

Black children with disabilities are also far more likely to be suspended from school than any other racial group of children with disabilities.³⁵ A recent national report found that one of every four black children with disabilities in grades K-12 were suspended at least once in a recent school year.³⁶ In some states, the suspension rate for black children with disabilities was over 40%.³⁷

Disproportionate diagnosis and placement in and of themselves are not necessarily bad outcomes. If black children are more likely to have learning difficulties, then we would want them to have access to the services they require. Likewise, the more severe the disability, the more it would be necessary for children to be segregated from their typical peers. Racial disproportionality is therefore only an issue to the extent we believe black children are being either over diagnosed or improperly placed in settings that unnecessarily segregate them. Due to the fact that much ink has been spilled attempting to question this empirical question without much agreement,³⁸ this article does not attempt to resolve the competing explanations.

Instead, I take as a starting point the assumption that black children are being improperly placed in more restrictive placements, and that the placements themselves lead to negative outcomes due to their segregate properties.³⁹ In other words, I assume that the mere fact of being in a more restrictive setting has negative consequences regardless of the disability that may lie beneath.

III. The Solution: Parental Participation

Prior to the mid-1970s, children with disabilities were not guaranteed access to a public education, and therefore, largely went uneducated.⁴⁰ It was not until 1975, after pressure from parents of children with disabilities, that Congress passed the Education for All Handicapped Children Act. This law was reauthorized as IDEA most recently in 2004.⁴¹ The stated purpose of IDEA was, in part, to “assure that all handicapped children have available to them . . . a free appropriate public education . . . designed to meet their unique needs.”⁴²

A. *The Theory Behind Parental Participation in (Special) Education*

In the findings of the latest reauthorization, Congress acknowledged the problem of racial disproportionality and parental participation in special education:

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.⁴³

In the same findings, Congress highlighted the need for greater participation by parents:

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

....

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . [including more avenues for] [p]arents and schools . . . to resolve their disagreements in positive and constructive ways.⁴⁴

Congress's reliance on procedural compliance to achieve the substantial goals of IDEA suggests that Congress believes that procedural compliance will not only protect individual students, but also classes of students, namely racial minorities. The Supreme Court has interpreted IDEA as Congress "plac[ing] 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" and, such emphasis "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an Individualized Education Program (IEP)."⁴⁵ In other words, if school districts followed the procedural guidelines under IDEA they would likely fulfill whatever substantive goals Congress envisioned.

One of the IDEA's substantive goals is to reduce racial disproportionality, and a key procedure involves parental participation. IDEA requires that schools obtain informed consent from parents to have any child identified, assessed, evaluated, and placed in a special education program.⁴⁶ As part of the informed consent process, parents are full participants in the development of their child's IEP, including meeting with school officials at least once a year.

The reasons behind the Congressional requirements of parental participation are likely two-fold. First, current theories of administrative law and procedural justice show how decisions are more likely to be seen as legitimate when those affected by such decisions are included in the decision-making process.⁴⁷ Legitimacy is important in order to have compliance with law without instilling a complete police state. Legitimacy, and hence compliance, turns on "people's reactions to legal authorities," which are "based to a striking degree on their assessments of

the fairness of the process by which legal authorities make decisions and treat members of the public."⁴⁸ Participation is therefore thought to be a way to increase the legitimacy of the law by making individuals feel that fair laws are those in which people have played a part in creating or enforcing. Specifically,

participation does have an important indirect influence over procedural justice judgments, because people are more likely to rate the quality of decision making and the quality of interpersonal treatment to be high when the procedure includes opportunities for them to participate.⁴⁹

Second, a plethora of evidence exists for the proposition that racial and class differences in parental characteristics and activities can help explain racial and class differences in educational achievement and attainment.⁵⁰ For example, Ogbu's cultural ecology theory posits that black parents' negative experiences with educational discrimination causes them to impress upon their children a distrust of dominant society, including schools. Children then do not view schooling as a mode for socioeconomic mobility, and hence do poorly in schools.⁵¹ Lareau found that middle class parents, unlike poor and working class parents, engage in a childrearing style that "fits" with the cultural expectations of traditional schooling.⁵² As a result, middle class children do noticeably better in school than do their poor and working class peers. Education researchers have consistently found positive effects of parental participation on academic achievement.⁵³ Research shows that some types of parental activities, including having high educational aspirations and expectations and home supervision, have positive effects on children's academic outcomes.⁵⁴ Consequently, districts focus a lot of time and effort towards closing racial and class achievement gaps by getting parents involved.⁵⁵

B. The Process of Participation in Special Education

For each child with a disability, IDEA requires schools, with the cooperation of parents, to create an IEP.⁵⁶ It is through the IEP development that Congress imagined parents as protectors.

Under IDEA, parents are participants at each stage of the referral/evaluation/placement process. When the school suspects a child of having a disability, the school is required to first notify the parent and then obtain informed consent from a parent prior to any evaluation of the child.⁵⁷ The purpose of the evaluation is to determine eligibility for IDEA special education and related services.⁵⁸ The school must also notify the parent, prior to requesting consent, of the procedures used in the evaluation.⁵⁹ After the evaluation, the parent is a member of a team, along with a “group of qualified professionals,” that determines if the child indeed has a disability.⁶⁰ Under IDEA, a parent who disagrees with a school’s evaluation has the right to request one independent educational evaluation,⁶¹ to be provided at no cost to the parent. A parent need not give any reason for why they are requesting the second evaluation.⁶² The school can either accept the request, or file a due process complaint to determine whether the second evaluation is necessary or appropriate.⁶³ In the case that the school files a due process complaint, the parent must decide whether to obtain that second opinion prior to the resolution of the complaint, which will not be financed by the school.⁶⁴ In any case, if the second evaluation meets the school district’s criteria for appropriateness, the IEP team must take that evaluation into account.⁶⁵

If the team determines that the child is eligible for services, this team, now known as the IEP team, then discusses what, if any, services and accommodations need to be provided to the child.⁶⁶ They must also discuss and document the measurable annual goals they expect to see out of the child during the course of the school year, and any alternate assessments if the standard assessments will not be used. In IEP meetings, parents are to be given opportunities to contribute to any discussion regarding “identification, evaluation, and educational placement of the child . . . and the provision of FAPE [“free appropriate public education”] to the child.”⁶⁷

The IEP must also document the environment in which the child will be educated. IDEA requires, “to the maximum extent appropriate,” that children with disabilities be educated in the least restrictive environment, or classrooms and schools with children who are not disabled.⁶⁸ The law specifically calls for procedures that mitigate racial, linguistic, and

cultural biases in testing, evaluation, and placement into disability categories, and provides procedural safeguards that allow parents to present complaints.

The parent must also consent to the provision of services.⁶⁹ If a parent refuses to consent for services, the school is also not responsible for providing FAPE, despite the child being eligible under IDEA.⁷⁰ A parent can accept some services and reject other services; they need not consent to every service offered by the school. In this way, parents have the “power of veto” over any placement, service, or treatment.

Schools are to bear the responsibility to make sure parents are welcomed as members of the IEP team.⁷¹ Interpreters are to be present at the meetings to ensure language-minority parents understand the proceedings.⁷² School officials have to give ample notice of IEP meetings, and come to an agreement with the parent regarding the logistics of the meeting, including the time (e.g., before school) and place (e.g., the classroom or principal’s office.)⁷³ That notice must include who will be present at the meeting and the nature of topics to be discussed. Schools can hold IEP meetings without a parent if they extensively document their efforts to include the parent.⁷⁴

At any point in this process, the parent can file a due process complaint or a civil complaint in state or federal court after having gone through a due process hearing.⁷⁵ A parent can also request mediation for any area of conflict, even before filing a due process complaint if mediation is available in the state.⁷⁶ If such services are available in the area, the school must provide the parent with information about local free or low-cost legal assistance. The school has thirty days to resolve the parent’s issue to the satisfaction of the parent; otherwise a due process hearing will occur.⁷⁷ At the hearing, parents are entitled to have their child in attendance, open the hearing to the public, and receive a record of the findings of fact and decisions.⁷⁸

Parents can always appeal the due process hearing decision to the State Educational Agency (usually a state’s Department of Education) if they were not the agency that conducted the hearing. They can also file a civil complaint in a state court or federal court without regard to the amount in controversy. In 2007, the Supreme Court found that parents are allowed to represent their FAPE claims pro se, or without the guidance of an attorney.⁷⁹

IV. The Critique: The Problem with Participation

Research shows that participation tends to increase both legitimacy and the quality of decision-making and that parental participation leads to positive outcomes for children in schools.⁸⁰ Even though the procedures are intended to make parents full participants in the special education process, many parents are unable to be effective advocates against the racial bias that leads to restrictive placements for children with disabilities. Despite Congressional intentions, many parents, especially those who possess a relatively lower social status, are unable to adequately advocate for their children. I argue that inequitable access to economic, social, and cultural resources at the parental level coupled with a legal and institutional structure that privileges these various forms of resources explains why racial disparities persist in educational setting placements. I also argue that the very existence of participation legitimizes the status quo when participation is ineffective.

A. Parental Capital Differences

Status refers to “a structure of relations of perceived, and in some degree accepted, social superiority, equality, and inferiority among individuals.”⁸¹ Sociologists typically look to three forms of capital to understand an individual’s social status. First, economic capital is money that can be used to create more money, otherwise known as wealth. Homes, stocks, businesses and the like are all forms of economic capital that can “immediately and directly be converted into money.”⁸² Second, social capital refers to the value of social networks; it is the “benefits accruing to individuals by virtue of participation in groups and . . . the deliberate construction of sociability for the purpose of creating this resource.”⁸³ Social capital is both shared resources as a result of a relationship between individuals as well as the relationship itself. Third, cultural capital denotes those “micro-interactional processes whereby individuals’ strategic use of knowledge, skills, and competence comes into contact with institutionalized standards of evaluation.”⁸⁴ In other words, those with more knowledge of how institutions work and more ability to leverage that knowledge have a distinct advantage in extracting more resources from that

context than do others without such knowledge and ability.

These capitals do not exist in isolation, and often the expenditure of one can lead to an increase in another. For example, in schools, parents who can afford to have one parent stay-at-home (economic capital) are better able to create relationships with teachers and school administrators (social capital) due to their volunteer activities during school hours. During the process of volunteering, these same parents acquire knowledge about the inside workings of the school (cultural capital) that parents who work during the school day lack the opportunity to acquire.

In relation to special education, I argue that even middle-class black parents as a group have less opportunity than their white counterparts to acquire and activate these various forms of capital for the benefit of their children. While the relative differences in these forms of capital have implications for general education, the differences are amplified in special education. Notice that class, while relevant, is not the core difference between parents in this argument. Instead, *racial* inequality between families and parents directly affect the substance of parental participation, leading to inappropriate special education placements for black children into segregated environments, even in middle-class contexts.

1. Economic Capital

It is an understatement to say money matters. In the simplest way, money matters in special education by giving parents options. The more money a family has available, the easier it is to avoid the pitfalls of discrimination and stigmatization. It is not just income that matters, but wealth. Wealth – homes, stocks, businesses and the like – is a resource that can “immediately and directly be converted into money.”⁸⁵ The wealthy have access to economic resources that allow them to send their children to private school if they are unhappy with the public school, or to hire outside evaluators without depending on the school, or to obtain the assistance of legal counsel.

Suppose a parent consented to a school evaluation of their child and was unhappy when the school’s psychologist labeled that child as ED. A wealthy parent is able under IDEA to hire their own evaluator to assess their child’s academic and physical

functioning. For parents without access to monetary resources, this option is only available if the school voluntarily chooses to provide it. If the school refused to pay for this second opinion, a less wealthy parent would be forced to wait for the outcome of a due process hearing granting the outside evaluation at no cost to the parent. While waiting, however, precious months are wasted during which the child could be receiving services.

While wealth disparities exist across racial groups, blacks tend to have only one-eighth the wealth of comparable white families.⁸⁶ Even among the “middle-class,” black children typically come from families with less wealth, regardless of income,⁸⁷ due to the myriad processes that have restricted black access to wealth-making opportunities throughout the history of this country.⁸⁸ Wealth contributes to a sense of financial security, especially when needing to acquire things that are not necessities. Hence a middle-income black family will, in general, have less ability to hire a lawyer, opt-out of the public school system, or hire outside evaluators.

Wealth’s impact on the experiences of parents of children with disabilities is significant. First, parents can use the independent, private evaluator as a “check” on the school during the diagnostic process. While the school’s evaluator may suggest eligibility for services under one disability category, or deny certain services, the private evaluator may be able to be pressured by the parent to say otherwise. Therefore if choosing between an autism diagnosis or an ED/MR diagnosis, a parent with an outside evaluator has leverage to push for the diagnosis she thinks would best serve her child. Those without funds to independently hire outside evaluators are instead solely at the mercy of the school. This exacerbates inequality; wealthier parents are able to lobby more effectively for the things they want because they have evidence to back up their requests. Parents without economic resources are left with only their personal opinions and requests. These requests allow wealthier parents to extract more services and resources than less wealthy parents.

Wealthy parents can also take advantage of IDEA’s provision that allows parents to bring an advocate to the IEP meetings, such as lawyers and other informed advocates. If they are available, schools are required to inform parents of low-cost or no-cost legal assistance in their communities. This is a great

resource in communities where these resources exist. There is, however, no substitute to having an actual lawyer in the room. A lawyer with special education experience brings information and expertise to the table, sometimes more than the school officials themselves have. Symbolically, the implicit threat of facing legal consequences is enough to garner more attention and resources toward that child than others.

In hearings, parents with lawyers are more able to “call[] more witnesses, offer[] more exhibits, present[] their case more effectively, and cross-examine[] the school’s witnesses” and therefore are more likely to win their case than parents who are unable to do these things.⁸⁹ Even in mediation, parents who have a lawyer find the mediation process, the agreement, and the implementation fairer than those parents who have a lay advocate or no advocate at all.⁹⁰ In addition, the school almost always has a lawyer, meaning those parents without legal assistance are in a less powerful position.

Wealth is also directly related to social and cultural capital, as discussed below.

2. Social Capital

Much of what a parent knows about parenting comes from other parents. Nowhere is this truer than when it comes to information regarding schools. Parents trade stories and advice about teachers (including which to avoid), administrators, and activities. My children’s involvement in their current extra-curricular activities is a direct result of information I have gathered from other parents.

Sociologists refer to this resource as social capital. Social capital refers to the value of social networks; it is the “benefits accruing to individuals by virtue of participation in groups and . . . the deliberate construction of sociability for the purpose of creating this resource.”⁹¹ Social capital is both shared resources as a result of a relationship between individuals as well as the relationship itself. In schools, it is “the material and immaterial resources that individuals and families are able to access through their social ties” with the purpose of using those “network ties to . . . resolv[e] problems with schools to secure advantageous outcomes for their children.”⁹²

Families vary dramatically in the composition of their social networks. According to studies, middle-class parents know approximately twice as many of the

other children's parents as do working-class parents.⁹³ Unsurprisingly, middle-class parents also know more professionals, such as doctors, lawyers, psychologists and teachers than do working-class parents.⁹⁴ This is not to say that working-class and poor parents are unconnected, but rather that their networks are of a different nature; working class and poor parents have much stronger ties with extended family than do middle-class parents.⁹⁵

Even among the middle class, although black parents are likely to have the same professional connections as white parents have, black parents report feeling ostracized in the school environment⁹⁶ and thus have to work much harder than white parents to establish social ties in schools. In predominately white middle-class neighborhoods, middle-class blacks feel shut out of parent networks and organizations.⁹⁷ Not only then are they unable to extract the benefits of parent networks in school, but they also feel disengaged from the school itself.⁹⁸ For example, in a study of a middle-class, suburban school district that was 80% white, 12% black, 6% Asian, and 2% Latino, parents of color routinely felt unwelcome at schools due to the actions of other parents.⁹⁹ At this school district, PTA mothers tended to resist recruiting new members through channels other than personal recommendations.¹⁰⁰ Black mothers who wanted to be involved felt excluded, partly because meetings were sometimes held during the day when many black mothers worked, but also because the white parents would bristle when black parents complained about school policies that had a disparate impact on black children.¹⁰¹

Within my children's school, my ability to be around due to my flexible schedule means that I know many of the parents of my children's classmates, and see their teachers every day. I am also able to develop a relationship with the teacher by volunteering in the classroom once a week. The principal knows me by name, as I often stop to talk to her in the morning. I attend board meetings, and know many district-level officials. These relationships highlight the other aspect of social capital: I can have easier interactions with people of authority in the school and district due to being an active member of the community. Having relationships within a tight-knit community is a benefit.

My location in these various overlapping social networks highlights the social cohesion of my

networks and my ability to be embedded within them.¹⁰² In this context, being embedded refers to the "fact that . . . social action and outcomes . . . are affected by actors' dyadic (pairwise) relations and by the structure of the overall network of relations."¹⁰³ The structure of the "overall network of relations" helps to explain how a network tie is related to other network ties within a larger social group:

[T]o the extent that a dyad's mutual contacts are connected to one another, there is more efficient information spread about what members of the pair are doing, and thus better ability to shape behavior. Such cohesive groups are better not only at spreading information, but also at generating normative, symbolic, and cultural structures that affect our behavior.¹⁰⁴

As a result of being embedded in these socially cohesive groups, I am in a good position to be able to effectively advocate for my son in the special education discussions. My relationships in the community mean that the information I receive can be effectively and efficiently used in various ways. I have information about child development that assure me that many of my child's behaviors are typical of a six-year-old; those same psychologists and child development experts are connected to the school district either as parents or influential community members. I know about appropriate interventions short of a special education placement that can help him strengthen areas where he is weak, and his teachers recognize the legitimacy of those interventions because they also know about them. I have recommendations for good psychologists and even good schools outside of the public school system if we were to decide to pull him out of this school. When the school noticed his problematic behaviors, the principal was able to casually approach me at the drop-off one morning without having to resort to a more formal communication. Additionally, if and when the time comes to challenge the schools assessment of my son, I have information drawn from my many social resources to leverage in the negotiation.

Of course, many of these relationships would be inaccessible without the economic capital discussed previously. Parents at our suburban school interact

the most at drop-off in the morning and pick-up in the afternoon. If I were a working parent with a 9-5 job instead of a student with a flexible schedule, I would not be able to devote the time in the morning to chat with other parents, and I likely would not be able to physically pick up my children from school everyday. The parents of children who do not live in our community are similarly not able to engage in the informal parental relationships that are forged at these times because their children ride the bus. Much of my information is amassed from my association with colleagues from my Ivy-League undergraduate experience. For a parent who has not attended college, these resources are likely out of reach.

Yet I am still disadvantaged because of my unique position as a black parent in a majority-white school district. Often black parents in white districts cannot effectively use the more formal avenues for complaints and communication because concerns relevant to a minority of students are not seen as the problem of the entire body of parents. For example, in a previously referenced study, a black mother voiced her concerns related to race in the schools at a PTA meeting. In commenting on that black parent's concerns, a white parent remarked to the interviewer that

all she [the black parent] does is complain at meetings. 'There are bad things happening everywhere, but this place is pretty good,' [the white parent] says. 'Why does she have her kids here if she doesn't like it?'¹⁰⁵

These sentiments can make black parents feel like their issues are not relevant to other parents, and often, to the school itself. In turn, black parents can be discouraged from developing school ties or using them to the benefit of their children. Other parents could also be sometimes put-off by a "black" communication style that is interpreted as overtly hostile or angry.¹⁰⁶

The inability to create these social bonds can cut black families out of informational networks where parents are the gatekeepers to crucial information that is only passed through word-of-mouth.

3. Cultural Capital

"It's like saying you . . . can have a partnership with the doctors who are going to treat you . . . You can't really have as much say because it's too complicated."¹⁰⁷

By referring to special education placement as "complicated," this school administrator implies that unless a parent has sophisticated knowledge about the process of diagnosis, true participation that is likely to influence decisions will be elusive. The most effective advocates are, therefore, those parents who are "in the know" and possess cultural capital.

Special education is its own cultural field, a "space[] in which dominant and subordinate groups struggle for control over resources."¹⁰⁸ In special education, those resources include spaces in the most desirable placements and access to services and treatments. It is parents who possess the most sophisticated knowledge of special education policies and procedures that therefore have cultural capital, and are able to secure the best resources for their children.

There are many ways in which the benefits of cultural capital manifest. First, parents with sophisticated knowledge of the special education process are able to manipulate the disability category into which their child is placed. For example, in one study, a middle-class white mother states a preference for an autism diagnosis over one of emotional disturbance: "I shouldn't say this, but it's [ED] . . . almost like it's a write-off. It's like, the most you could do for an ED kid by middle school is try to put out fires."¹⁰⁹ While the diagnosis does not change her child's actual behavior, she recognizes that the way others will treat her child is drastically different depending on the label; "[o]nly a tiny percentage of students identified as seriously emotionally disturbed perform at or above grade level, and the evidence shows that they fall farther behind each year they attend school."¹¹⁰ Parents with this knowledge about the stigmatizing effects associated with the different categories are able to have considerable influence to actually change what should be an objective medical diagnosis.

The value of cultural capital is also apparent when parents understand the procedures associated

with special education. More savvy parents are able to manipulate the procedural rules in order to get benefits for their children. For example, a parent who wants their child to have a private school placement can carefully construct a narrative that explains why the school district's placement violates a child's right to FAPE. Parents with cultural capital can also request services that he or she knows is available in the school district, even if the school did not make them aware of those options. For parents with less cultural capital, however, lack of knowledge about options and procedures can lead to lack of true participation in the process. For example, many parents are unaware that the IEP is supposed to be a collaborative process between school officials and teachers. For those parents, schools often will enter an IEP meeting with the document already drawn up in final form and encourage a parent to simply sign it without getting feedback from the parent or encouraging the parent to take the document home to examine prior to signing. Unfortunately, the procedural notices that IDEA requires¹¹¹ schools to provide to parents may not be enough to guarantee that all parents and children with disabilities are equally protected.¹¹² Only 4-8% of Parent's Rights materials across the country are readable at the recommended reading level, which falls between a seventh and ninth grade reading level.¹¹³ On the other hand, 20-50% of the documents are at a college reading level or above.¹¹⁴

Cultural capital can also take the form of a sense of entitlement to true participation. Many black parents do not come to the IEP experience with an expectation of equality.¹¹⁵ Some parents actually see this as a plus in their interaction with the IEP team; they are afraid, because they are less educated, that they would make bad decisions if they had too much decision-making power.¹¹⁶ Black families sometimes feel "wholesale suspicion, distrust, and hostility toward schools"¹¹⁷ where their children are a numerical minority, and often assume that schools will not see them as equals.

Comparatively, white middle-class parents are explicit in their belief that they are equals with teachers and other school administrators. For example, in one study, a middle class white parent says:

I don't think of teachers as more educated than me or in a higher position than me. I don't have any

sense of hierarchy. I am not higher than them, and they are not higher than me. We are equals. We are reciprocals.¹¹⁸

Middle-class white parents will find communication with schools relatively easier because the cultural communication norms between schools and middle-class white parents tend to match. One study showed that at an open house in a middle-class school, interaction between parents and teachers consisted of "almost all of the parents talk[ing] to the teacher or to the teacher's aide; these conversations were often long and were punctuated by jokes and questions."¹¹⁹ At a working-class school at a similar event, on the other hand, the interaction between parents and teachers is "stiff and awkward," where parents and teachers rarely even speak to one another.¹²⁰

This lack of cultural capital in special education can be seen as either a cause or an effect of black parents' tendency to separate home from school. For black parents, this stems from post-integration experiences in schools where black teachers and administrators were replaced by white teachers and administrators. These white professionals rarely lived in the neighborhoods in which they worked, a stark contrast to the days of segregation where schools were truly community spaces¹²¹. Black parents subsequently came to feel alienated by the schools, and maintained distance from the schools.¹²² Oftentimes black parental childrearing choices are often seen as incompatible with school norms, making them less likely to engage with schools that are making negative judgments about them.¹²³ Ironically, however, black parents also tend to be more distrustful of schools and their intentions than do their white middle class parents.¹²⁴

Cultural capital flows directly from economic and social capital. Parents learn about the intricacies of the process through their connection to other parents and through their professional networks. They can extract information that other parents may not be privy to through their connection to school officials. They can also pay for this cultural knowledge by attending parent education classes. Acquisition of this cultural capital takes time, time that can be afforded by those with economic capital.¹²⁵ Deep knowledge of the special education process and parental rights

are crucial in protecting children from inappropriate placements. Only the most knowledgeable parents will be able to act on an equal footing with school officials. Black parents are therefore at a significant disadvantage in their ability to capture scarce resources for their children.

B. The Legitimizing Force of Participation

Furthermore, the process of participation serves to reinforce existing inequalities. Children with heavily resourced parents already have an advantage in school. In general education, parents who are able to volunteer during the school day, parents who are able to create social networks and build their cultural competencies about their particular school environment are able to create advantages for their children. These parents are able to get their children the best teachers, access to the most beneficial extra-curricular activities, and tend to create relationships with other parents and school officials that directly enhance their children's educational experiences. If a child of a highly resourced parent is found to be eligible for special education services, those same resources will be used to lessen the impact of that child's disability on their educational outcomes. Participation will likely be a rich experience for the parent who can bring those resources to bear in IEP meetings. An already advantaged child is also advantaged in special education.

Participation therefore provides a way to legitimize the inequitable treatment of black children in special education. As long as parents are at least marginally participating, schools can point to IEP attendance and signatures as proof of their compliance with the law. Such marginal participation for parents with fewer resources legitimizes the disadvantage with which middle-class black children already exhibit *outside* of special education. For example, a child whose parents have relatively less economic capital is more likely to enter kindergarten with a smaller vocabulary than a child of wealthy parents.¹²⁶ Parental characteristics have already led to a disadvantage. If that child is believed to have a disability, the parent brings the same resources to a participatory process, and those resources are not effective in a participatory process. An already disadvantaged child is also disadvantaged in special education. This disparity in parental resources can help to explain why, despite

parental participation, black children tend to receive the most restrictive placements. The law's insistence on this type of parental involvement – participation in developing an IEP and informed consent – fails to take these factors into account. As a result, racial disproportionality in the judgmental categories of disability will continue to be an issue unless other ways of protecting individual children against discriminatory placement are developed.

V. Suggestions for Reform

What might rectify this problem of participation? Removing parents from the process could possibly remove the multiplicative effect of capital differentials, but is unlikely to gain support politically, and participation is not an inherently negative objective. Parents were the driving force behind IDEA and parental involvement, and those parents who are effective advocates will balk at having their power taken away.

I propose three ways in which some aspects of capital resources and inequality can be mitigated: litigation, amendments to IDEA, and changes in IDEA implementation.

A. Litigation

While an extensive discussion of litigation options to address the problem of parental inequalities in the special education participatory process is beyond the scope of this essay, there are a few options that should be noted as possible avenues of legal reform. Title VI of the Civil Rights Act of 1964 states 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.¹²⁷

These programs and activities include local educational agencies that receive IDEA funds.¹²⁸ Under many federal agency Title VI regulations, the discrimination does not have to be intentional; instead the regulations allow for discrimination to

be shown using an “effects” standard where agencies receiving federal funding

may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect of* defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.¹²⁹

In the case of special education, a convincing case can be made that the current system of using parents to enforce equitable outcomes has a discriminatory effect on black children for all the reasons I have outlined in this essay. Upon a showing of discriminatory effects, a school district would have to show that “that the challenged decision was necessary to meeting a goal that was legitimate, important, and integral to the defendant’s institutional mission.”¹³⁰ Parental participation is certainly not an educational necessity to provide a free appropriate public education to students with disabilities. This does not mean that parents would be excluded from the process, but they would not be placed in the role of a private enforcer.

One potential stumbling block for any disparate impact claim under Title VI, however, is that a plaintiff class would have to demonstrate that another “equally effective alternative practice[] . . . would result in less racial disproportionality or [that] the justification proffered by the recipient is actually a pretext for discrimination.”¹³¹ As mentioned above, however, parents will likely not support removing parents from the process altogether. Perhaps, however, parental participation as amended by the non-litigation suggestions I have outlined below could replace the current system if the current system is found to be a violation of Title VI.

Another litigation option would be to follow the lead of school funding reformers who are challenging school financing schemes under state constitutional protections. For example, in California, students and parents have filed a lawsuit under the California state constitution challenging various

aspects of the state’s educational funding scheme claiming that it violates children’s fundamental right to a free education in a system of common schools and an equal opportunity to become proficient in the state’s educational standards.¹³² Parents may be able to file a similar suit regarding the inequitable distribution of special education resources within a state or school district. These suits would be premised on state constitutional guarantees of equal access to education as a fundamental right. Of course, this option seemingly relies on parents being well organized with access to information necessary to file a successful complaint – the very resource deficits that inhibit participation in the first place. Overall, I am skeptical about the likely benefits of focusing on litigation.

B. IDEA Amendments

There are three ways in which IDEA could be amended to mitigate the impact of racial differences in economic, social, and cultural capital.

First, for economic capital, schools should be required to provide an Independent Educational Evaluation (IEE) free of charge based on the economic resources of the parent, and schools should not have the right to prevent that evaluation. As the law currently stands, a school district can challenge the need for an IEE,¹³³ and only those parents who can afford to get their own evaluation without school permission have access to the information an IEE can provide.

In addition, IDEA should set more substantive guidelines for what is considered an “appropriate” district evaluation. The availability of an IEE at the public expense depends on the extent to which the district can show that their evaluation – provided by professionals either affiliated with or employed by the district – was appropriate, rendering a second opinion unnecessary.¹³⁴ Currently, many lower courts “have deferentially upheld the appropriateness of school district evaluations or reevaluations based on facial compliance with the relevant federal and state regulations” and using a clear error standard when evaluating the IEE decisions of review officers.¹³⁵ Yet even the findings of IDEA, highlight the racially disproportionate identification of black children as emotionally disturbed or mentally retarded by schools.¹³⁶ In lieu of, or in addition to, mandating IEEs at public cost, at the very least school district evaluations should be explicitly required to document how they have

used the most up-to-date methods that significantly mitigate racial bias in evaluation and assessment.

Second, providing more equitable access to information can help mitigate racial inequalities in social capital. IDEA should therefore be amended not only to require that parents be given an opportunity to inspect educational records,¹³⁷ but that the schools actually provide those records at least once a year without a parent needing to make a request. Moreover, schools are not forthcoming about what services and programs are available to students with disabilities,¹³⁸ meaning that parents often have no basis by which to contest the services they are being offered because they do not know what the alternatives might be. IDEA should require schools to provide a list of available services, programs, and treatments that the school district currently uses or have used in the past, along with an overall evaluation of the efficacy of said services.

Third, schools can lessen the impact of cultural capital differences by providing more opportunities for parents to be *true* participants in the process. Rather than requiring only one IEP meeting per year,¹³⁹ IDEA should be amended to require that a child's disability and goals are discussed at the same time that parents of students in general education are appraised of their children's educational progress. This would most likely be during report card conferences, which in my children's school district occur each quarter or tri-annually. During these meetings, school officials should make sure that parents fully understand the IEP and their child's goals. Having more regular meetings would increase communication between black parents and schools, giving more opportunities for schools to teach parents about special education and the culture of schools in general.

C. IDEA Implementation

School districts have several resources available to them that could lessen the impact of capital differences that hamper black parents ability to be effective advocates. First, while it may be prohibitively expensive to provide an advocate for each black parent, the school district could provide regular trainings for parents to learn about the special education process and their role. These trainings would be outside of any parent's individual IEP context, and would go beyond procedural issues alone to address substantive concerns as well. Many non-

profit organizations already provide such trainings, but those parents who are less likely to be "in the know" about the resources – due to their differences in economic, social, and cultural capital – would benefit from having the trainings on school district property and advertised by the school district. Not only would the trainings decrease information asymmetries and increase the bargaining power of black parents,¹⁴⁰ but if trainings were held at schools, they would provide more opportunities for black parents to become embedded in school culture.

Second, schools should pay close attention to how special education resources are being distributed across groups. While each child is entitled to services and placement that is individually crafted, the truth is that some children are monopolizing scarce special education resources as a result of their parents' ability to negotiate for such resources.¹⁴¹ Ability to negotiate is directly related to a parent's economic, social, and cultural capital. Rather than parents having to police equitable resource distribution, state agencies that oversee IDEA implementation should track the demographic characteristics of how resources are being spent. Schools would then have to justify inequitable spending.

VI. Conclusion

While writing this essay, my son's first grade teacher sent me an email requesting an "informal meeting." He stated that he's had some time to observe my son and wanted to talk with me about a few things that he's noticed. I agreed to the meeting, but requested that he be a little more specific about his observations. His response was that he was "mostly talking about social emotional/behavioral observations" and that he wanted to "get [my] input and observations as his mom and re: his home life etc. so that we can come up with some ideas and a plan to help" my son.

As I mentioned in the introduction to this essay, I am wary of this kind of interaction. I worry that this informal meeting is a precursor to a more formal meeting. The fact that my son's "issues" are "social emotional" and "behavioral" leads me to believe that his teacher is viewing the things he does in a very subjective manner, comparing him to other children around him. It also suggests that he will need

to be pulled out of the regular education classroom to address these social issues.

Fortunately, I am in a position to effectively advocate for my child, but I am not like many black parents. As I have explained in this essay, most parents do not have my economic, social, or cultural capital. Parental participation that is called for in special education law is therefore highly unbalanced in favor of parents who possess these capitals.

For black children, who are consistently at the bottom of the achievement ladder, effective parental participation in an equal world might very well be helpful. Even middle-class black parents who live in majority-white communities, however, tend to have inequitable access to the critical capitals needed to be effective advocates for their children to receive their fair share of scarce special education resources. First, they have, in general, lower levels of economic capital, due to racist barriers to wealth accumulation. Second, they have different social networks from which to accumulate social capital, and are less embedded in the resource-rich communities in which they live due to unfriendly cultures and less economic capital to be able to access the network. Lastly, they lack the cultural capital valued in schools, due to historical processes that pushed black parents out of schools and the relative lack of economic and social capital. Black parents are therefore the least able to effectively advocate for their kids, meaning their children can be easily labeled and treated as uneducable. The very process of participation, which should help mitigate inequality in special education, is currently serving to legitimize it.

(Endnotes)

¹ JD Candidate, Stanford Law School; PhD Candidate in Sociology, Stanford University. I gratefully acknowledge support from Stanford University in the form of the Stanford Graduate Fellowship and the Diversifying Academia Recruiting Excellence Fellowship. I offer a sincere thank you to Shelley Correll, Prudence Carter, Norman Spaulding, Ralph Richard Banks, and the participants of the Legal Studies Workshop, including Barbara Fried and Mark Kelman of Stanford Law School for their advice and helpful comments. To William Clark, Ahmir, Amina, and Ahmad, thank you for your continuing and unwavering support. Any and all errors are mine.

² In this essay, I use personal narrative as an introduction to why I became interested in the topic of special education and parental participation. For explanations of the value of storytelling in academic writing, especially in legal scholarship, see PATRICIA J. WILLIAMS, *THE*

ROOSTER'S EGG (Harvard Univ. Press 1995); see also Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (containing articles by Mari J. Matsuda, Derrick Bell, Milner S. Ball, Steven L. Winter, and Richard Delgado). For a critique of legal storytelling, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1992-1993).

³ U.S. Dep't of Educ., Off. of Special Educ. Programs, Data Analysis System (DANS), OMB #1820-0043: "Children with Disabilities Receiving Special Education Under Part B of the Individuals with Disabilities Education Act." (2008).

⁴ *Id.*

⁵ *Id.*

⁶ See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-1487 (2004) [hereinafter IDEA] (stating that studies have found that schools with predominately white students and teachers have placed disproportionately high numbers of their minority students into special education); see also U.S. COMMISSION ON CIVIL RIGHTS, MINORITIES IN SPECIAL EDUCATION 11 (2007) (reporting the testimony of Dr. Matthew Lander, where he cites various works, including a joint study by the Progressive Policy Institute and the Thomas B. Fordham Foundation titled "Rethinking Special Education for a New Century," which found that minority students in predominantly white schools are placed in special education at much higher rates than minorities in predominantly minority schools. Specifically, Dr. Lander noted an inverse relationship in which as a school's minority numbers diminish, minority representation in special education increases).

⁷ 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) ("Depending on context, both social class and racial biases can increase the risk of minority children being labeled and placed in segregated classrooms.").

⁸ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 6, at 31.

⁹ See generally U.S. Dep't. of Educ., Off. of Special Educ. Programs, Data Analysis System (DANS), OMB #1820-0517: "Part B, Individuals with Disabilities Education Act, Implementation of FAPE Requirements." (2011).

¹⁰ IDEA, *supra* note 6, at §§ 1400-1487.

¹¹ *Id.*

¹² Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 209 (1982).

¹³ See, e.g., Beth Harry, *An Ethnographic Study of Cross-Cultural Communication With Puerto Rican-American Families in the Special Education System*, 29 AM. EDUC. RES. J. 471 (1992); Maya Kalyanpur et al., *Equity and Advocacy Expectations of Culturally Diverse Families' Participation in Special Education*, 47 INT'L J. DISABILITY, DEV. & EDUC. 119 (2000).

¹⁴ Tak Wing Chan & John H. Goldthorpe, *Class and Status: The Conceptual Distinction and its Empirical Relevance*, 72 AM. SOC. REV. 512 (2007).

¹⁵ See, e.g., Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TEACHERS C. REC. 453 (2005); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954) (noting that to separate black students from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone).

¹⁶ See, e.g., Amanda L. Sullivan & Alfredo J. Artiles, *Theorizing Racial Inequity in Special Education: Applying Structural Theory to Disproportionality*, 46 URB. EDUC. (2011) (“In this theory, stratification refers to the patterned and differential distribution of resources, life chances, and costs/benefits among groups of the population. These social systems are dynamic, hierarchical, and socially constructed, resulting in racial ideology (or racism) that influences the behaviors of individuals within the system. There are no universal manifestations of inequity and the nature of the relations in any given locale is dependent on the sociohistorical context. The importance of the social construction of the categories is particularly salient in the consideration of disproportionality because of the convergence of race and disability, the latter of which is based largely on the judgment of professionals within schools and clinical settings. Thus, professional actions that arise within these stratified systems may result in differential treatment of certain groups within those systems.” (internal citations omitted)); see also Zanita E. Fenton, *Disabling Racial Repetition*, 31 J. L. & INEQUALITY. 77, 78 (2012) (“All too often, schools treat children whose emotional disabilities lead them to behave inappropriately as bad children who deserve to be punished rather than as children who need to learn to understand and control their own behavior. In a corresponding manner, teachers discipline Black children, especially boys, more than they discipline non-minority children for similar or lesser behaviors.” (internal citations omitted)).

¹⁷ J. M. Patton, *The disproportionate representation of African Americans in special education: Looking behind the curtain for understanding and solutions*, 32 J. SPECIAL EDUC. 25 (1998).

¹⁸ See, e.g., Ray McDermott, Shelley Goldman & Herve Varenne, *The Cultural Work of Learning Disabilities*, 35 EDUC. RESEARCHER 12 (2006).

¹⁹ TOM TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006).

²⁰ *IDEA*, *supra* note 6, at § 1401 (identifying the following disabilities as eligible for special education services: intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities).

²¹ *Id.*

²² *Id.*

²³ While this essay is more concerned with the placements of black children that leads to particularly negative in-school and post-schooling outcomes, it is helpful to understand the diagnostic standards under which many black children are evaluated. *IDEA* defines emotional disturbance as “a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree” and includes “an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain *satisfactory* interpersonal relationships with peers and teachers; *inappropriate* types of behavior or feelings under *normal* circumstances; a general pervasive mood of unhappiness or depression; a tendency to develop physical symptoms or fears associated with personal or school problems.” 34 C.F.R. § 300.8(c)(4) (2007)

(emphasis added). Similarly, *IDEA* defines mental retardation as “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child’s educational performance.” *Id.* at § 300.8(c)(6). In many states, IQ testing is not a feasible resource for diagnosing mental retardation, so other means must be used. See, e.g., Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1984) (holding that because the use of IQ tests have a discriminatory impact on black children, assigning them to MR classes is a prima facie case of discrimination that is not otherwise valid due to educational necessity under Title VII of the 1964 Civil Rights Act). These alternatives include close observations of a child’s developmental function in communication, social interactions, daily self-care, and skills needed to live independently (managing money, using transportation, etc.). See generally Donna K. Daily, Holly H. Ardinger & Grace E. Holmes, *Identification and Evaluation of Mental Retardation*, 61 AM. FAM. PHYSICIAN 1059 (2000).

²⁴ U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “Public Elementary/Secondary School Universe Survey,” 2007–08.

²⁵ *Supra* note 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ While these disparities may also be a cause for concern, I will not address them in this essay. For more information on these disparities, see for example, Jason C. Travers et al., *A Multiyear National Profile of Racial Disparity in Autism Identification*, J. SPECIAL EDUC. (2011).

²⁹ 34 C.F.R. §300.114 (2007).

³⁰ *IDEA*, *supra* note 6 at § 1412.

³¹ *Id.*

³² Stephen B. Thomas & Mary Jane K. Rapport, *Least Restrictive Environment: Understanding the Direction of the Courts*, 32 J. SPECIAL EDUC. 66 (1998).

³³ In this table, risk measures the probability that students of a given racial/ethnic group who are receiving special education services will be placed in a particular educational environment. The risk ratio compares the risk of students receiving special education services in a particular racial/ethnic group being placed in a particular educational environment to the risk for a comparison group. Here, that comparison group is all other students not in that racial ethnic group who are receiving special education services. See Julie Bollmer, James Bethel, Roberta Garrison-Mogren & Marsha Brauen, *Using the Risk Ratio to Assess Racial/Ethnic Disproportionality in Special Education at the School-District Level*, 41 J. SPECIAL EDUC. 186 (2007).

³⁴ See generally *supra* note 9.

³⁵ DANIEL LOSEN & JONATHAN GILLESPIE, *OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL* (Civil Rights Project 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., GREG J. DUNCAN & JEANNE BROOKS-GUNN, *CONSEQUENCES OF GROWING UP POOR* (Russell Sage Foundation 1997); Sullivan & Artiles, *supra* note 16, at 317; Jacob Hibel, George Farkas & Paul L. Morgan, *Who Is Placed into Special*

Education? 83 SOC. EDUC. 312 (2010); Ray McDermott, Shelley Goldman & Herve Varenne, *The Cultural Work of Learning Disabilities*, 35 EDUC. RES. 12 (2006); Anita Ho, *To Be Labeled or Not to be Labeled: That Is The Question*, 32 BRIT. J. LEARNING DISABILITIES 86 (2004); W. Jean Yeung, Miriam R. Linver & Jeanne Brooks-Gunn, *How Money Matters for Young Children's Development: Parental Investment and Family Processes*, 73 CHILD DEV. 1861 (2002); Dalun Zhang & Antonis Katsiyannis, *Minority Representation in Special Education: A Persistent Challenge*, 23 REMEDIAL & SPECIAL EDUC. 180 (2002); Patton, *supra* note 17, at 25.

³⁹ See generally, Chandra Muller, Catherine Reigle-Crumb, Kathryn S. Schiller, Lindsey Wilkinson & Kenneth A. Frank, *Race and Academic Achievement in Racially Diverse High Schools: Opportunity and Stratification*, 112 TEACHERS C. REC. 1038 (2010); Pat Rubio Goldsmith, *Schools or Neighborhoods or Both? Race and Ethnic Segregation and Educational Attainment*, 87 SOC. FORCES 1913 (2009); Christy Lleras & Claudia Rangel, *Ability Grouping Practices in Elementary School and African American/Hispanic Achievement*, 115 AM. J. EDUC. 279 (2009).

⁴⁰ Mitchell L. Yell, David Rogers & Elizabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!* 19 REMEDIAL & SPECIAL EDUC. 219 (1998).

⁴¹ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (*amended* Individuals with Disabilities Educational Improvement Act, 20 U.S.C. § 1400 et. seq. (2004)).

⁴² *Id.*

⁴³ *IDEA*, *supra* note 6, at § 1400.

⁴⁴ *Id.*

⁴⁵ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982).

⁴⁶ While this is the case under IDEA, students who are found to have a disability outside of the 13 categories in the IDEA, are governed by Section 504 of the 1973 Rehabilitation Act instead. See Vocational Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 701 et. seq.). These disabilities are often considered “hidden disabilities” because they are not apparent to others, and include chronic illness (e.g., diabetes), epilepsy, or allergies. Under Section 504, parents are not entitled to informed consent when a child is evaluated or assessed, but, they are entitled to notice, preferably (although not required) in writing. Parents are still entitled to an impartial due process hearing if they are dissatisfied with any part of their child's identification, evaluation or placement. *Id.*

⁴⁷ See Tom R. Tyler, *Procedural Justice, Legitimacy and the Effective Rule of Law*, 30 CRIME & JUSTICE 283 (2003). This is mostly the case when people are seeking the law's help to settle a dispute rather than when they are seeking the law to help them solve a problem. Special education, for better or worse, is often more adversarial than cooperative, and hence participation is likely to be a legitimizing force.

⁴⁸ *Id.* at 284.

⁴⁹ *Id.* at 300.

⁵⁰ See generally PRUDENCE L. CARTER & LA'TOYA BALDWIN CLARK, *Social Reproduction*, in ENCYCLOPEDIA OF DIVERSITY IN EDUCATION (James A. Banks ed., 2012); LAREAU, *supra* note 50;

ANNETTE LAREAU, HOME ADVANTAGE: SOCIAL CLASS AND PARENTAL INTERVENTION IN ELEMENTARY EDUCATION (Rowman & Littlefield Publishers, Inc. 2000); Ralph B. McNeal, *Parental Involvement as Social Capital: Differential Effectiveness on Science Achievement, Truancy and Dropping Out*, 78 SOCIAL FORCES 117 (1999); Golam Mannan & Jacqueline Blackwell, *Parent Involvement: Barriers and Opportunities*, 24 URBAN REVIEW 219 (1992).

⁵¹ JOHN U. OGBU, *African-American Education: A Cultural Ecological Perspective*, in BLACK FAMILIES (Harriette Pipes McAdoo ed., 2007).

⁵² LAREAU, *supra* note 50.

⁵³ Joyce L. Epstein, *Attainable Goals? The Spirit and Letter of the No Child Left Behind Act on Parental Involvement*, 78 SOC. EDUC. 179 (2005).

⁵⁴ Xitao Fan & Michael Chen, *Parental Involvement and Students' Academic Achievement: A Meta-Analysis*. 13 EDUC. PSYCH. REV. 1 (2001).

⁵⁵ Epstein, *supra* note 53, at 179. Today much of the rhetoric around “failing” schools and racial achievement gaps focuses on the roles of parents. Parental involvement is near the center of the No Child Left Behind Act (“NCLB”). See No Children Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C.A. § 6301). NCLB's stated goal is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” *Id.* In response to NCLB, the National Parent Teacher Association (“PTA”) has outlined six national standards for parental involvement in schools: communication between families and school; promotion of parenting skills; parental assistance in student learning; parental volunteering in the school; parental involvement in school decision making; and community collaboration. According to the National PTA, achieving the NCLB goals of 100% proficiency in math and reading by 2014 for all students requires that “we expect more from their parents and families.” See NATIONAL TEACHER PARENT ASSOCIATION. PTA NATIONAL STANDARDS FOR FAMILY SCHOOL PARTNERSHIPS: AN IMPLEMENTATION GUIDE. (2009).

⁵⁶ *IDEA*, *supra* note 6, at § 1401.

⁵⁷ This consent is only for evaluation; “parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.” 34 C.F.R. § 300.300(a)(1)(ii) (2008). At this time, schools are required to inform parents of their procedural rights under the *IDEA*, and give instructions for how to obtain a copy of those rights. *Id.* at § 300.504.

⁵⁸ *IDEA*, *supra* note 6, at § 1401 (“The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education,

and includes the early identification and assessment of disabling conditions in children.”).

⁵⁹ If a parent cannot be found to notify, or declines to consent to the evaluation, a school may pursue the evaluation through the due process procedures provided by *IDEA*. They are not required to do so though, and if a parent fails to consent to the evaluation, the school therefore does not violate its obligation to provide a “free appropriate public education” to a child it believes has a disability. *IDEA*, *supra* note 6, at § 1414.

⁶⁰ 34 C.F.R. § 300.321. The team is to consist of no less than: the parents; one regular education teacher; one special education teacher; a school representative that will either provide or supervise the provision of educational services to the child; someone who can interpret the instructional implications of the evaluation; the child, if appropriate; and any other persons that have “knowledge or expertise” that will be helpful in determining services and placement, to be decided by either the parents or the school.

⁶¹ *Id.* at § 300.502.

⁶² *Id.* at § 300.502(b)(4).

⁶³ *Id.* at § 300.502(b)(2)(i-ii).

⁶⁴ *Id.* at § 300.502(b)(3).

⁶⁵ *Id.* at § 300.502(c)(1).

⁶⁶ *IDEA*, *supra* note 6, at § 1414 (stating that an IEP is to be a “written statement for each child with a disability . . . that includes . . . (I) a statement of the child’s present levels of academic achievement and functional performance . . . (II) a statement of measurable annual goals, including academic and functional goals . . . (III) a description of how the child’s progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is making toward meeting the annual goals . . . will be provided; (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child . . . [and] (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.”).

⁶⁷ 34 C.F.R. § 300.501(b)(1)(ii).

⁶⁸ Stephen B. Thomas & Mary Jane K. Rapport, *Least Restrictive Environment: Understanding the Direction of the Courts*, 32 J. SPECIAL EDUC. 66 (1998) (explaining that the Supreme Court has not directly defined LRE. They categorize how the lower federal courts have decided LRE cases into four categories: *qualified deference* (courts, due to their lack of expertise, defer to school officials decisions on LRE, as long as procedural standards are met); *portability* (asks whether the same services provided in a more restrictive environment can be provided in a less restrictive environment; i.e., are they portable); *inclusion* (asks whether the child can be educated in a general education classroom with support); *balancing* (asks about academic and nonacademic costs and benefits to both child with disability and nondisabled peers)).

⁶⁹ 34 C.F.R. § 300.300.

⁷⁰ *Id.* at § 300.300(3)(i-ii).

⁷¹ *Id.* at § 300.322.

⁷² *Id.* at § 300.322(e).

⁷³ *Id.* at § 300.322(a).

⁷⁴ *Id.* at § 300.322(d).

⁷⁵ Under *IDEA*, parental complaints would first be heard in an impartial due process hearing conducted according to state rules, as long as the officer is not involved with the child’s education. The decision could be appealed to the state educational agency, which conducts an independent review. Regardless of the outcome, either party unhappy with the result can initiate a civil suit in state or district court. *IDEA*, *supra* note 6, at § 1415.

⁷⁶ If the dispute is resolved through mediation, the written resolution is legally binding, and must state that all conversations that occurred within the mediation are confidential and cannot be used against either party in subsequent filings. *Id.*

⁷⁷ 34 C.F.R. §300.510(b).

⁷⁸ *Id.* at § 300.512(c).

⁷⁹ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). Parents can also be awarded attorney’s fees if they win their case, but they or their attorney may be subject to paying the school’s attorney fees if the suit is found to be frivolous, unreasonable, or with the intention to harass or unnecessarily increase the cost of litigation.

⁸⁰ See, e.g., Ann Mooney & Anthony G. Muntun, *Quality in Early Childhood Services: Parent, Provider and Policy Perspective*, 12 CHILD. & SOC’Y, 101, 101-112 (1998).

⁸¹ Chan & Goldthorpe, *supra* note 14, at 514.

⁸² PIERRE BOURDIEU, *The Forms of Capital*, in HANDBOOK OF THEORY OF RESEARCH FOR THE SOCIOLOGY OF EDUCATION 47 (J.E. Richardson ed., 1986).

⁸³ Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1, 3 (1998).

⁸⁴ Annette Lareau & Elliot B. Weininger, *Cultural Capital in Educational Research: A Critical Assessment*, 32 THEORY & SOC’Y 567, 597 (2003).

⁸⁵ Bourdieu, *supra* note 82.

⁸⁶ W. Jean Yeung & Dalton Conley, *Black-White Achievement Gap and Family Wealth*, 79 CHILD DEV. 303 (2008); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (Routledge, 2006).

⁸⁷ Amy J. Ott, *Black-White Differences in Achievement: The Importance of Wealth*, 76 SOC. EDUC. 281 (2003).

⁸⁸ IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* (W.W. Norton & Co. 2005).

⁸⁹ Peter Kuriloff & Steven Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997).

⁹⁰ *Id.*

⁹¹ Portes, *supra* note 83; Bourdieu, *supra* note 82.

⁹² Erin McNamara Horvat, Elliot B. Weininger & Annette Lareau, *From Social Ties to Social Capital: Class Differences in the Relations Between Schools and Parent Networks*, 40 AM. EDUC. RES. J. 319, 323 (2003).

⁹³ *Id.* at 327-28.

⁹⁴ *Id.* at 330.

⁹⁵ See generally, Horvat, Weininger & Lareau, *supra* note 92; Protes, *supra* note 83; Bourdieu, *supra* note 82.

⁹⁶ Annette Lareau & Erin McNamara Horvat, *Moments of Social Inclusion and Exclusion: Race Class and Cultural Capital In Family-School Relationships*, 72 SOC. EDUC. 37, 44 (1999).

- ⁹⁷ Daniel J. McGrath & Peter Kuriloff, “They’re Going to Tear the Roof Off This Place”: Upper-Middle-Class Parent School Involvement and the Educational Opportunities of Other People’s Children, 13 EDUC. POL’Y 603 (1999).
- ⁹⁸ KARYN R. LACY, BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS (Univ. of Cal. Press 2007); McGrath & Kuriloff, *supra* note 97.
- ⁹⁹ McGrath & Kuriloff, *supra* note 97.
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Id.*
- ¹⁰² My thanks to Calvin Morrill for suggesting the usefulness of social embeddedness to this analysis.
- ¹⁰³ MARK GRANOVETTER, *Problems of Explanation in Economic Sociology, in NETWORKS AND ORGANIZATIONS: STRUCTURE, FORM, AND ACTION* (N. Nohria & R. G. Eccles eds. 1992).
- ¹⁰⁴ *Id.*
- ¹⁰⁵ McGrath & Kuriloff, *supra* note 97.
- ¹⁰⁶ See generally THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT (Univ. of Chi. Press 1981) (illustrating the different cultural styles associated with African-Americans and whites and how those styles can be misinterpreted by the other group in interpersonal communications).
- ¹⁰⁷ David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 189 (1991).
- ¹⁰⁸ Susan A. Dumais, *Cultural Capital, Gender, and School Success: The Role of Habitus*, 75 SOC. EDUC. 44, 46 (2002).
- ¹⁰⁹ Audrey Trainor, *Reexamining the Promise of Parent Participation in Special Education: An Analysis of Cultural and Social Capital*, 41 ANTHROPOLOGY & EDUC. Q. 245, 253 (2010).
- ¹¹⁰ Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities* 60 TENN. L. REV. 295, 305 (1993).
- ¹¹¹ IDEA, *supra* note 6, at § 1415 (d).
- ¹¹² Julie L. Fitzgerald & Marley W. Watkins, *Parents’ Rights in Special Education: The Readability of Procedural Safeguards*, 72 EXCEPTIONAL CHILD. 497 (2006).
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ Maya Kalyanpur, Beth Harry & Tom Skrtic, *Equity and Advocacy Expectations of Culturally Diverse Families’ Participation in Special Education*, 47 INT’L J. DISABILITY, DEV. & EDUC. 119 (2000).
- ¹¹⁶ Engel, *supra* note 107.
- ¹¹⁷ Lareau & Horvat, *supra* note 96, at 44.
- ¹¹⁸ Annette Lareau, *Social Class Differences in Family-School Relationships: The Importance of Cultural Capital*, 60 SOC. EDUC. 73, 80 (1987).
- ¹¹⁹ *Id.* at 78.
- ¹²⁰ *Id.*
- ¹²¹ Patricia A. Edwards, *Before and After School Desegregation: African-American Parents’ Involvement in Schools*, 7 EDUC. POL’Y 340 (1993).
- ¹²² *Id.*
- ¹²³ LAREAU, *supra* note 50.
- ¹²⁴ *Id.*
- ¹²⁵ Bourdieu, *supra* note 82.
- ¹²⁶ RICHARD J. COLEY, AN UNEVEN START: INDICATORS OF INEQUALITY IN SCHOOL READINESS (Policy Info. Ctr. 2002).
- ¹²⁷ Civil Rights Act of 1964, Pub. L. 88-352, § 600, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2000)).
- ¹²⁸ 42 U.S.C. § 2000d-4a(B)(2) (2000).
- ¹²⁹ 34 C.F.R. §100.3(b)(2) (emphasis added). In *Alexander v. Sandoval*, the Supreme Court found that these regulations did not entitle private individuals to a right of action under Title VI. See 532 U.S. 275, 290-294 (2001). Instead, individuals who have been harmed must appeal to federal agencies to pursue actions on their behalf. Individuals can also lodge Title VI complaints with the Office of Civil Rights in the Department of Education. See *id.*
- ¹³⁰ *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412-13 (11th Cir. 1993) (“It is more reasonable in a case like this to ask that defendants meet the more abstract requirement which underlies the context-specific “educational necessity” requirement and which applies in Title VI disparate impact cases generally: showing that the challenged decision was necessary to meeting a goal that was legitimate, important, and integral to the defendant’s institutional mission. Thus, in our view defendants can show a substantial legitimate justification for their siting decision if they can show that the decision was necessary to meeting a legitimate, important goal integral to their mission of administering educational institutions—i.e. that their decision was necessary to meeting an educational goal in a broader sense.”).
- ¹³¹ *Id.* at 1413 (“Even if we assume *arguendo* that plaintiffs have made a prima facie case of disparate impact, defendants have met their rebuttal burden, placing the onus on plaintiffs either to proffer a comparably effective alternative practice which would result in less racial disproportionality, or to show that defendants’ justification was pretextual.”).
- ¹³² See *Robles-Wong v. State*, No. RG10515768, 2011 WL 5902812 (Cal. Nov. 3, 2011).
- ¹³³ 34 C.F.R. § 300.502(b)(i) (2006).
- ¹³⁴ *Id.*
- ¹³⁵ Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J. L. & EDUC. 223, 236 (2009).
- ¹³⁶ See IDEA, *supra* note 6, at § 1400-1417.
- ¹³⁷ 34 C.F.R. §300.501(a)
- ¹³⁸ Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 391 (1994) (“As previously discussed in too many cases the achievement of the Act’s goals is compromised by a lack of full disclosure of programming options . . .”).
- ¹³⁹ 34 C.F.R. § 300.323.
- ¹⁴⁰ Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 194 (2005) (“Because the negotiation process leading to the formulation of an IEP is so crucial, proper distribution may arguably be achieved by improving the equities of the bargaining process. This means making the process uniformly accessible and reaching out to all families so as to equip them with ‘real’ bargaining tools.”).
- ¹⁴¹ MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (Harvard Univ. Press 1997).