S2: Over-identification, Misidentification and Disproportionality in Special Education: What to Do Before OCR Comes Knocking

Presented by: Geneva L. Englebrecht-Taylor

Monday, April 24, 2017
3 – 4:15 p.m.

Tuesday, April 25, 2017
10:15 – 11:30 a.m.
• Introduction.
• In the news.
• Over-identification, misidentification, and disproportionality.
• Prevalence and statistics.
• Common causes.
• Impact on students and schools.
• Office of Civil Rights.
• Discipline.
• Policies and procedures.
• When OCR calls.
Recent Headlines
Media Headlines

“NAACP Launches Movement to Make Ethnic Studies Mandatory in Seattle Schools.”

“The data on racial disparities in Seattle schools deserves emphasis, especially with regard to African-American students … in September 2014, a full one-third of English-speaking, African-American male students had been placed in special education, and nearly half of all suspensions and expulsions in the district were given to African-American children.”
“Is your kid ‘Gifted’? It Might Depend on His Race.”


“Race can affect who is referred to gifted programs — and to special education.”
Media Headlines (continued)

“Students of color in Lawrence school district face uneven odds.”


- Of 500 students identified as gifted, only eight are black.
- “Instead, a black student in the district is more likely to be identified as having a learning disability than being gifted.”
Defining Our Terms
Over-identification

Too many typically developing students are being identified as eligible for special education in a school district.

It is estimated that between 3 percent and 8 percent of total students are eligible for special education.
Misidentification

- Is it other health impairment due to ADHD or emotional disturbance?
- Is it a specific learning disability or an intellectual disability?
- Does the student actually qualify for autism or speech or language impairment?
In 1968, U.S. Office of Education statistics reported that approximately 60 to 80 percent of students in MMR classes were children from low status backgrounds, including African-Americans, American Indians, Mexican-Americans, Puerto Rican Americans, non-English speaking homes, broken homes, and disorganized or inadequate homes.

Disproportionality
IDEA Regs Issued on Dec. 19, 2016

ED detailed that each state has “considerable discretion in how it defines significant disproportionality.” 81 Fed. Reg. 92,376 (2016).
U.S. Department of Education Fact Sheet on New Regulations

Disproportionality occurs “when districts identify, place in more restrictive settings, or discipline children from any racial or ethnic group at markedly higher rates than their peers.”

34 CFR 300.647(b)(1)

• In determining whether significant disproportionality exists in a state or district, the state must set a: 1) reasonable risk ratio threshold; 2) reasonable minimum cell size; 3) reasonable minimum n-size; and 4) standard for measuring reasonable progress.
OCR’s position

- “If districts or schools select criteria, policies, practices, or procedures that result in an adverse impact on students of a particular race in order to meet their obligations under Section 504 or the IDEA, OCR will determine whether a comparably effective alternative policy or practice would meet the district's Section 504 or IDEA obligations with less of a burden or adverse impact on the disproportionately affected racial group.” Dear Colleague Letter, 69 IDELR 42 (OCR 2016).
Quick History Lesson

• 1997: Reauthorization of the IDEA added a requirement that states collect data for purposes of monitoring and reducing disproportionality. 34 CFR 300.755.

• The U.S. Department of Education tabulates the data and prepares an annual report to Congress.
Prevalence
Misconception

All minority groups are over-identified or disproportionately identified in special education.

Not True:

Under: Asian/Pacific Islander.
Proportional: Hispanic & Whites.
What do the Numbers Say?

U.S. Commission on Civil Rights — Minorities in Special Education Briefing Report, April 2009

In 2003:

1. African-American and American Indian/Alaska Native Students were 1.5 times more likely to receive special education than all other groups combined.
2. Asian/Pacific Islander (0.5), Hispanic (0.9), and white (0.9) students were less likely to receive special education than all other groups combined.

3. 54.7 percent of white students with disabilities were educated in the regular classroom for most of the day, compared to 38.6 percent of African-American students.

http://www.usccr.gov/pubs/MinoritiesinSpecialEducation.pdf
Common Causes?
Negative Consequences

• Lower expectations on the part of teachers and family members.
• Restricted access to the general education program.
• Restricted access to higher education and post-high school employment.

U.S. Commission on Civil Rights.
Additional Consequences to Student

• Receive services that do not meet their needs.
• May be socially stigmatized.
• May display greater behavioral problems requiring disciplinary action.
• More likely to either not complete school or complete school with less skills than other students.
Impact on School Districts

- Strain on already limited resources.
- Takes away existing resources from those students who are really in need of them.
- Unnecessarily taxing on staff:
  - Attending IEP meetings.
  - Preparing assessments.
  - Implementing IEPs.
  - Addressing discipline.
  - Ensuring procedural safeguards are provided.
Impact on School Districts (continued)

• Limits the disciplinary options available for the student’s misconduct.
  • Limited number of removals.
  • Manifestation determination.
• Entitles a student to “stay-put.”
• Right to a due process hearing.
Office of Civil Rights has Taken Notice

*Dear Colleague* letter on preventing racial discrimination in special education (Dec. 12, 2016).

— *Dear Colleague Letter*, 69 IDELR 42 (OCR 2016).
Dear Colleague:

I write to remind States, districts, and public schools, including charter schools, of their obligation under Title VI of the Civil Rights Act of 1964 (Title VI) not to discriminate on the basis of race, color, or national origin in the administration of special education or related aids and services.
OCR has found through its enforcement:

1. Over-identification of students of color as having disabilities.
2. Under-identification of students of color who have disabilities.
3. Unlawful delays in evaluating students of color for disabilities and their need for special education services.
OCR Reminds Educational Agencies …

• Title VI requires that students of all races, colors, and national origins have equitable access to general education interventions and to a timely referral for an evaluation under the IDEA or Section 504 if a district has a reason to believe that a student has a disability.
OCR Reminds Educational Agencies (continued) …

• Students must be treated equally in the evaluation process.

• The quality of special education services and supports, including the degree of restrictiveness, must be equitable.
Discipline
U.S. Department of Education

- Of the 49 million students enrolled in public schools in 2011-2012:
  - 3.5 million students were suspended in school.
  - 3.45 million students were suspended out of school.
  - 10,000 students were expelled.
• Various data sources show clearly that students with disabilities and students of color are disproportionately impacted by such practices.

• Students with disabilities are twice as likely to receive an out-of-school suspension as their non-disabled peers.

• Black students are suspended and expelled at a rate three times greater than white students.
Common Cause?
Policies and Procedures to Prevent & Rectify
Prevention

- Teacher and staff training (refer when it is appropriate).
- Teacher support and relief (prevent burnout).
- Nondiscriminatory and thoughtful assessments.
- Sensitivity to diversity and disadvantage.
Prevention (continued)

• Communication between the school and home.
• Effective use of general education resources.
• Equitable access to special education.
• Equity in discipline.
Training & Support

• Lack of understanding about different cultures and the way children learn may lead to students being over- or under-identified, especially for behavior concerns.

• Not every child is able to sit in a chair for six hours a day learning.

• It must be established whether the student has a skill deficit/performance deficit or has a disability.

• Teacher burn-out.
Assessments

34 CFR 300.304:

Assessments and other evaluation materials must be selected and administered so as not to be discriminatory on a racial or cultural basis.
Larry P. v. Riles,
557 IDELR 433 (9th Cir. 1986)

Education agencies that used unvalidated and racially and culturally biased IQ tests, without being able to show that the tests were required by educational necessity, violated Title VI since the tests had a discriminatory impact on black students.
Assessments

34 CFR 300.304:
Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.
Prevention

- Teacher & staff training (refer when it is appropriate).
- Teacher support.
- Non-discriminatory & thoughtful assessments.
- Communication between the school and home.
Prevention (continued)

• Sensitivity to diversity & disadvantage.
• Effective use of general education resources.
• Equitable access to special education.
• Equity in discipline.
Rectification

• Procedures to reduce inappropriate referrals
  ➢ Are your current practices working?

• Training on continuum of intervention options
  ➢ What resources do you already have?

• General education interventions
  ➢ What are you missing?
  ➢ It’s more than RTI/academic. Don’t forget behavior and social.
• Teacher & assessor training.
• Assess.
• Reassessment.
• Staff empowerment training.
  — It’s your legal responsibility.
• Exit students who no longer qualify.
• Equitable & thoughtful disciplinary sanctions.
Side Notes to Keep in Mind

- Policies and procedures that are facially neutral but have a disparate impact violate Title VI.
- Do your own internal audits for equity:
  - Discipline.
  - Placement.
  - Services.
  - Referrals to special ed.: over- and under-identification.
  - Exiting/dismissal.
If OCR Investigates

• Make sure your policies and procedures are up to date.
• Make sure your files/records are in order.
  o Be prepared to explain disparities.
• Staff interviews:
  o Understand policies and procedures.
  o Received training.
• BE HONEST.
Resources for Additional Information

Resources for Additional Information (continued)

Resources for Additional Information (continued)

Thank You!

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