Practitioner
Brief Series

Legal Rights:
The Overrepresentation of Culturally and Linguistically Diverse Students in Special Education



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NATIONAL CENTER FOR
Culturally Responsive
Educational Systems

The mission of the National Center for Culturally Responsive Educational Systems is to support state and local school systems to assure a quality, culturally responsive education for all students.

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Office of Special Education Programs

The U.S. Department of Education's Office of Special Education Programs funds the National Center for Culturally Responsive Educational Systems (NCCRESt) to provide technical assistance and professional development to close the achievement gap between students from culturally and linguistically diverse backgrounds and their peers, and reduce inappropriate referrals to special education. The project targets improvements in culturally responsive practices, early intervention, literacy, and positive behavioral supports.

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No Need to Read the Legalese

The laws governing special education, and overrepresentation issues in particular, can be intimidating. Lost in the mishmash of federal and state laws and regulations, however, are some fairly basic rules. This practitioner brief explains and outlines those rules.

Introduction to the Laws

Special education in the United States is largely controlled by federal statutes (that is, laws). These statutes cover two related issues: the guarantee of a free and appropriate public education and anti-discrimination laws protecting students with disabilities. The following is a quick introduction to those federal statutes.

Laws that Protect Individuals with Disabilities

IDEA: The Individuals with Disabilities Education Act (IDEA), originally passed in 1975 as the Education for All Children Handicapped Act (P.L. 94-142), and most recently reauthorized in 1997, guarantees a "free and appropriate" public education for all children. Before IDEA, many children with disabilities were simply turned away from public schools. Now, IDEA provides protections to students with physical, emotional, or learning disabilities. The Office of Special Education Programs, part of the U. S. Department of Education, is charged with implementing and enforcing the law.

Section 504: Section 504 of the Rehabilitation Act of 1973 is an anti-discrimination law, prohibiting discrimination on the basis of disability in any program or activity receiving or benefiting from federal financial assistance. This includes all public schools. The Office of Civil Rights, also part of the Department of Education, is charged with enforcing Section 504.

ADA: Title II of the Americans with Disabilities Act (ADA) is very similar to Section 504. One difference is that Title II applies to state and local government agencies, even if they do not accept federal financial assistance. However, for purposes of this brief they can be thought of as overlapping, so any reference to Section 504 can be treated as also including Title II of the ADA.

Laws that Protect Individuals from Racial and Language Discrimination

Title VI: Like Section 504, Title VI of the 1964 Civil Rights Act is an anti-discrimination statute enforced by the Office of Civil Rights. However, Title VI is focused on race, color, and national origin, not disability. Since overrepresentation implicates issues of racial, cultural, and linguistic diversity, as well as disability status, Title VI is included in the legal mix. For instance, the Office of Civil Rights prevents school districts from assigning students to special education programs solely on the basis of the students' inability to speak English.

EEOA: English language learners (sometimes referred to as Limited English Proficient students) are also protected by the Equal Educational Opportunities Act (EEOA), which prohibits discrimination in the provision of educational services to any student on account of race, color, sex, or national origin. This Act includes a provision (§1703(f)) setting the standard for determining whether a school district is meeting its legal obligations to students who are English language learners. That provision prohibits "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." The Office of Civil Rights is in charge of enforcing the EEOA.

IDEA: The Individuals with Disabilities Act also includes rules for how culturally and linguistically diverse students should be assessed for possible special education placement. IDEA says that all students have the right to be tested in ways that are free from racial or cultural bias. Federal guidelines specify that evaluations should meet three criteria to be considered fair and nonbiased:

1) The assessment should be conducted in the student's native language;
2) Any evaluation material or test should be used for the specific purpose for which it was validated (designed); and
3) Tests should be administered by a professional with the appropriate training and expertise.

Important Difference Between IDEA and Section 504

There are many differences between these two statutes, but there is one particularly important difference for people concerned about overrepresentation. IDEA applies only to students who, because of their disability, need special education and related services. Therefore, if a culturally and linguistically diverse student were identified as, for example, mentally retarded, but did not, in fact, have a disability, that student would not need special education services and IDEA would not apply. However, if the student were harmed by the wrongful placement, he or she would be eligible for a free and appropriate public education under Section 504. This is because Section 504's definition of "qualified handicapped person" includes people *misclassified* as having a mental or physical impairment that substantially limits one or more major life activities.

Practical Application of the Laws

Special education placement generally begins with a referral, which can be made by anyone, including the child's parents and the child's general education teacher, who should refer students based on observed special needs. The teacher must not use the special education referral process as a way of removing undesirable students from the regular education classroom. Moreover, if the referral does result in special education placement, the general education teacher should participate in the development of the child's individualized educational plan (IEP), and that IEP should mainstream the child in the regular education classroom to the maximum extent appropriate. The teacher must then comply with the IEP provisions.

When a school places a child in a special education program, the placement must comply with provisions set forth in IDEA. Initially, the school must ask the parent's permission to evaluate the child for special education. Parents can refuse the evaluation or, alternatively, they have the right to an outside evaluation that they pay for. Throughout the process, from the initial evaluation to the development and modifications of the IEP, parents have the right to be extensively involved. If the school reaches a decision with regard to such important matters as the child's special education categorization or IEP, the parents have a right to a "due process hearing" if they disagree. During this IDEA-mandated process, parents can raise the question of whether the child's race or language proficiency status influenced the placement.

While these IDEA procedures provide the framework for challenging the misplacement of individual students, the anti-discrimination statutes summarized above cover broader patterns of overrepresentation. Complaints challenging discriminatory practices can

be addressed through lawsuits filed by aggrieved parents on behalf of their children. Such lawsuits may be appropriate or even necessary in some situations, but these anti-discrimination laws all create a streamlined procedure (called an "administrative remedy") designed to be less costly in terms of time, effort, and money.

Complaints under Title VI, Section 504, and the EEOA can be filed with the Office of Civil Rights. Parents can file these complaints, as can community organizations on the behalf of parents and students in a given school district. Importantly, while private lawsuits cannot succeed unless the plaintiffs prove that the school acted with a discriminatory *intent* and effect, claimants in administrative actions may win their cases on the basis of only a discriminatory *effect*. That is, no proof of motive is needed. A school policy that may initially appear to be nondiscriminatory but that disproportionately burdens a protected culturally and linguistically diverse group may put the school district on the wrong side of the law, even though the district did not intend to discriminate.

However, a parent who files an administrative complaint can not recover any monetary damages, even if the Office of Civil Rights determines that the school has violated a law. The Office of Civil Rights complaint mechanism is designed only to correct wrongful practices. It does not punish schools or districts that have acted in discriminatory ways.

Examples

Two examples will help illustrate how these legal procedures might work in reality.

Example 1: Teacher disapproves of Student's behavior and asks that Student be evaluated as perhaps having an emotional disturbance disability. Parents can refuse. If they agree, they can also hire their own outside evaluator. If School, on the basis of the evaluation(s) decides to place Student in special education, with an emotional disturbance, Parents have the right to stay involved in the decision-making outlined earlier.

The next year, Parents are sitting at a soccer game with some neighbors, and they learn that many culturally and linguistically diverse kids attending this school seem to be categorized as emotionally disturbed. Worse still, they learn that School's preferred placement is in a separate classroom, which is at odds with the intent of IDEA – that special education students should be included in regular classrooms whenever possible. They conduct their own informal study and find out that culturally and linguistically diverse students at School are 2.5 times more likely to be classified as emotionally disturbed as compared to white students.

Parents have several options at this point. If they have proof that School is engaging in intentional discrimination, they may wish to file a lawsuit, alleging equal protection violations and violations of Title VI. (Proof might involve, for example, a history of intentional discrimination, or an errant email message admitting an intent to segregate the culturally and linguistically diverse children.) In the more likely event that no such motive evidence is available, Parents can file a complaint with the U.S. Office of Civil Rights, relying on Section 504 and Title VI. The Office of Civil Rights will then conduct an investigation to determine whether School is in violation of the regulations for either statute.

Example 2: As another example, fourth-grade Teacher finds that Student is reading at only a first-grade level. Student's primary language is Spanish and she is trying to learn English in school. Teacher asks that Student be evaluated as perhaps having a learning disability. Many of the issues and procedures with regard to this scenario are the same as the first one, but the key issue here is that Student's status as a Limited English Proficient student must be taken into consideration by someone knowledgeable about English language acquisition and related issues. Further, Student must be evaluated in Spanish as well as English when attempting to determine if she has a learning disability. In addition, the EEOA may be added to the list of statutes potentially violated by the school district.

Office of Civil Rights Complaint Process

Complaints filed with the Office of Civil Rights must be in writing, cannot be anonymous, and must explicitly request assistance. Generally, complaints must be filed within 180 days of the last act of alleged discrimination, although a waiver may be granted extending this time period.

The Office of Civil Rights is empowered to issue a "letter of violation" if the situation is appropriate. In such a case, the Office of Civil Rights can withdraw all federal funding from the violator. However, the more likely and frequent practice is for the Office of Civil Rights to negotiate an agreement (a contract or "consent decree") with the offending school district. This agreement describes the past practices of the district, the legal concerns, and the future actions that the school district will undertake.

An Office of Civil Rights complaint can now be filed online at the Department of Education Web site at http://www.ed.gov/about/offices/list/ocr/complaintintro.html

As part of its enforcement duties, the Office of Civil Rights regularly requests data from school districts for so-called "compliance reviews." If the data show a troubling pattern, the Office of Civil Rights may then launch its own investigation. However, this compliance review mechanism is limited and can only be expected to discover a fraction of overall violations; private complaints therefore play a very important role in helping to assure that school districts are in compliance with the law.

For Further Information

Filing with the Office of Civil Rights: U.S. Department of Education, Office for Civil Rights, Customer Service Team, May E. Switzer Building, 330 C Street, SW, Washington, DC 20202. E-mail: OCR@ED.Gov. The Washington office does not handle complaints, but will direct you to one of twelve regional enforcement offices that accept complaints. For complete information call 1-800-421-3481 or visit their web page at http://www.ed.gov/about/offices/list/ocr/index.html.

Legal service providers in each state: National Association of Protection and Advocacy Systems (NAPAS) 900 2nd St., NE, Suite 211 Washington DC 20002., Voice (202) 408-9514; TTY: (202) 408-9521. http://www.protectionandadvocacy.com, E-mail: napas@earthlink.net

Disability law resources listed for every state: NICHCY National Information Center for Children and Youth with Disabilities, P.O. Box 1492, Washington, DC 20013, (800) 695-0285 (Voice/TTY), (202) 884-8200, http://www.nichcy.org. E-mail: nichcy@aed.org

Direct parent assistance in every state: Parent Training and Information (PTI) Centers exist in every state to assist parents in understanding their rights under federal and state law. They are available from NICHCY, above.

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About the Author

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Notes

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