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Here's an IDEA: Providing Intervention Services for At-Risk Youth under the Individuals with Disabilities Education Act

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HERE'S AN IDEA: PROVIDING INTERVENTION SERVICES FOR AT-RISK YOUTH UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

I. INTRODUCTION

From 1988-1990, author Jonathan Kozol traveled to some of the poorest school districts in the nation and recorded his observations.[1] One neighborhood Kozol observed was North Lawndale, located on the south side of Chicago.[2] When Kozol entered a classroom, the fifth-grade students were completing a handwriting lesson usually taught to second-grade students because many of the students were classified as "learning disabled."[3] In New York City's Public School 79, a racially-integrated school of 825 children, most minority students were placed in separate special education programs.[4] In East Saint Louis, Illinois, furthermore, students faced major environmental setbacks to their education due to chemical plants contributing to one of the highest rates of child asthma in the country—raw sewage backup containing toxins from the chemical plants flowing into playgrounds, as well as lead found in the city's soil poisoning thirty-two children in one apartment complex directly affected the students' health.[5] One health official commented

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1 JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 2 (Crown Publishers 1991) [hereinafter, "SAVAGE INEQUALITIES"]. During the visits, Kozol talked with the teachers, students, parents, community members, and community leaders of approximately thirty neighborhoods throughout the United States. *Id.* Most of these schools were composed of 95-99 percent minority students. *Id.* at 3.

2 *Id.* at 40-42. The city had one bank, one super market, and ninety-nine licensed bars and liquor stores. *Id.* at 41. According to the 1980 census, fifty-eight percent of the population of at least seventeen years of age was unemployed and gangs were prevalent. *Id.* at 42. Almost 1,000 infants in poor south side Chicago neighborhoods die each year, and 3,000 are born with brain damage or other brain impairment. *Id.* at 43.

3 *Id.* at 46. One teacher explained, "It's all a game . . . Keep them in class for seven years and give them a diploma if they make it to eighth grade. They can't read, but give them the diploma." *Id.* Even with this low expectation, the graduation rate at the high school these elementary children will attend is a mere 38 percent. *Id.* at 45.

4 *Id.* at 93. "The school therefore contains effectively two separate schools: one of about 130 children, most of whom are poor, Hispanic, black, assigned to one of the 12 special classes; the other of some 700 mainstream students, almost all of whom are white or Asian." *Id.*

5 *Id.* at 7-11. Raw sewage backup was a problem not merely for residences; the schools were frequently evacuated because of sewage backup, sometimes in food preparation areas. *Id.* at 23-24. Lead poisoning experts found an "astronomical 10,000 parts per million" lead level in a resident's soil due to chemical dumping in the area. *Id.* at 11. For children, lead poisoning causes sleep disorders, stomach pains, hyperactive behavior, and permanent brain damage. *Id.*

that the poison was "chipping away at the learning potential of kids whose potential has already been chipped away by their environment."[6]

In gang-ridden Long Beach, California, a teacher created a successful educational program for students considered "unteachable," below average, and delinquent; these students referred to themselves as the Freedom Writers because of the program's emphasis on reading and writing.[7] In 1998, 150 Freedom Writers graduated high school, many of which subsequently pursued bachelors degrees, masters degrees, and even Ph.Ds.[8] In a New York inner-city school, where half the students were on reduced or free lunch programs and sixty-percent of the students were Hispanic or African American, Principal George Albano implemented an intensive program that resulted in a ninety-nine percent passage rate for the fourth grade state-wide achievement test.[9]

The approaches like those taken by the aforementioned Freedom Writers, as well as George Albano, assist in preventing at-risk students from failing or dropping out of school or being mislabeled as in need of

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6 *Id.* at 11. *See infra* note 95 (discussing the effects that environmental factors have on racial disproportion in special education).

7 The Freedom Writers, *About Freedom Writers*, http://www.freedomwritersfoundation.org (last visited Jan. 27, 2007). Teacher Erin Gruwell discovered that many of her students had "first-hand exposure to gang violence, juvenile detention, and drugs." *About Erin Gruwell*, http://www.freedomwritersfoundation.org (2006). To help the students relate their situation to others, Gruwell assigned readings such as Anne Frank and Zlata Filipovic's diaries. *Id.* Further, the students wrote anonymously in diaries about their own lives. *Id.* The students called themselves "The Freedom Writers," published a book, and inspired a movie. *Id.*

8 *Success Stories,* (2006), http://www.freedomwritersfoundation.org (last visited Jan. 27, 2007). The Freedom Writers Foundation, created by Erin Gruwell, reaches out to teachers facing similar difficulties and helps them to teach tolerance in their classrooms. *Id.*

9 John Merrow, *Meeting Superman*, 85 PHI DELTA KAPPAN 455 (2004), http://www.pbs.org/merrow/news/phi_delta_kappan.html (last visited Jan. 23, 2007). Albano recognizes that many of the students in his school suffer from hardships in their homes, but, he argues, "I think we have an obligation that, no matter what's happening outside, we have to push that aside and make this youngster succeed." *Id.* To ensure success in his school, Albano hired experienced and dedicated teachers from many backgrounds (for instance, an opera singer and a former NASA director), incorporated art and music in the curriculum, increased parental involvement, and demanded respect from teachers and students to each other. *Id.* One teacher noted, "[t]he culture of Lincoln is success. Whatever it takes to help children succeed. To get higher than they were. To bring them up, so that they enjoy life, because they can read better, so they can do math, so they get along with each other." *Id.* Though the school is composed of sixty percent minority students, students and teachers had difficulty in estimating the percentage of minority students in part because, Merrow noted, "when all the children are succeeding, there's no reason to focus on anyone's race." *Id.*

special education.[10] As a result of the Individuals with Disabilities Education Act ("IDEA"), which mandates the right to a free public education to all children with disabilities, over six million children with disabilities are provided a free, appropriate public education, and graduation rates among students with disabilities have increased.[11] Minorities, however, specifically African Americans, are consistently misidentified as learning disabled, receive inadequate services, are over-represented in special education programs, or are treated unequally.[12] Many factors contribute to the racial disproportionality in special education.[13]

In 2004, Congress amended the IDEA in an effort to solve the problem of racial inequality in special education.[14] Congress mandated neutral evaluation procedures used to determine whether a student qualifies for special education, implying that achievement and I.Q. testing should no longer be used as a primary factor in determining student eligibility.[15] Obstacles arise, however, because neither the IDEA nor the Department of Education provide schools with reliable alternatives to using achievement test scores as a tool in evaluating students for special education.[16] In addition, the IDEA prioritizes the use of early intervention programs to target students with disabilities in order to ensure later success in their academic careers.[17] Unfortunately, these intervention programs only target students already diagnosed as needing special education and provide little assistance for students like

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[10] For instance, Merrow notes that some students educated in Albano's elementary school classrooms will "be lost" when they graduate to middle and high schools in the city because these schools expect their students to fail and do not follow Albano's teaching methodology. *Id*.

[11] 20 U.S.C. § 1400 (2006); Daniel J. Losen & Gary Orfield, *Introduction: Racial Inequity in Special Education*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION xv (Daniel J. Losen & Gary Orfield eds., 2001) [hereinafter "RACIAL INEQUITY"]. *See infra* Part II.B.1 (discussing the Individuals with Disabilities Education Act ("IDEA"), which provides that students with disabilities must be provided a free public education).

[12] *See* RACIAL INEQUITY, *supra* note 11, at xv.

[13] *See infra* Part II.D.1 (discussing the role that poverty, language, funding, and evaluation procedures contribute to the racial disparity in special education).

[14] *See infra* Part II.D.2 (outlining two provisions specifically targeted toward improving the racial disparity problem in special education programs).

[15] *See infra* note 21 and accompanying text (quoting the IDEA and the evaluation neutrality requirement).

[16] *See infra* Part II.C (outlining the requirements under the IDEA and the Department of Education regulations for assessing students with disabilities).

[17] *See infra* note 18.

those in George Albanos's classroom, who are at-risk of being identified with a learning disability later in their academic careers.[18]

First, Part II of this Note provides the historical background of the IDEA, its current provisions, and how it relates to over-identification issues in special education.[19] Then, Part III of this Note analyzes the effect the 2004 IDEA amendments and their impact on racial disproportion in special education.[20] Finally, Part IV of this Note proposes that schools should be required to provide students who are at-risk of being diagnosed with disabilities with intervention services and it proposes some race-neutral evaluation procedures that schools should employ to comply with the new IDEA amendments, which are intended to prevent misidentification and over representation among minority students.[21]

II. BACKGROUND

Before launching into the various problems and explanations that surround the racial problems associated with special education, it is important to understand the context of the IDEA's enactment.[22] Part II.A provides the historical and constitutional backdrop to the enactment of the IDEA.[23] Part II.B lays out specific provisions that protect children with disabilities, particularly the IDEA, Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act ("Section 504").[24] Part II.C explores IDEA requirements for evaluation techniques, as well as different methods schools employ to identify children as needing services under the IDEA.[25] Finally, Part II.D illustrates the problems and difficulties that schools and students face in light of special education.[26]

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18 *See infra* Part III.A.

19 *See infra* Part II.

20 *See infra* Part III.

21 *See infra* Part IV. It has been argued that students who perform poorly in school and on standardized tests should be included as needing special services under the IDEA in order to provide educational services that target their needs. *See* Tamara J. Weinstein, Note, *Equal Educational Opportunities for Learning Deficient Students*, 68 GEO. WASH. L. REV. 500 (2000). *But see infra* notes 82-84 and accompanying text (explaining that the stigma resulting from being placed in special education is detrimental to student performance).

22 *See* discussion *infra* Part II.A.

23 *See* discussion *infra* Part II.A.

24 *See* discussion *infra* Part II.B.

25 *See* discussion *infra* Part II.C.

26 *See* discussion *infra* Part II.D.

A. Special Education Students and the Right to an Education

1. The Right to an Education

In *Meyer v. Nebraska*,[27] the Supreme Court first held that people have a constitutional liberty interest in acquiring knowledge.[28] Furthermore, in the landmark case *Brown v. Board of Education*,[29] the Court ruled that the Equal Protection Clause required the desegregation of African American students in education.[30] In holding racially segregated schools unconstitutional, the Court determined that education provides the

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[27] Meyer v. Nebraska, 262 U.S. 390 (1923).

[28] *Id.* at 399. The Court declared that a state law prohibiting the teaching of foreign languages to students prior to the eighth grade did not have a legitimate state interest and was therefore contrary to state law. *Id.* at 403. The state asserted that its interest was in ensuring that all children within the state were proficient in the English language. *Id.* at 401. Though the Court said that this interest was justifiable, the means that the state took to achieve it exceeded state authority. *Id.* at 402. The Court gave several examples of liberty interests protected by the Fourteenth Amendment:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

[29] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[30] *Id.* at 493. Justice Warren, writing for the Court:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. In *Brown*, students in Virginia, Kansas, South Carolina, and Delaware alleged equal protection violations under the Fourteenth Amendment because they were denied access to public schools solely based on their race. *Id.* at 486-87. Though the students were not completely barred from obtaining an education, they were barred from entering certain schools based on their race. *Id.* at 488. The trial court in Kansas determined that excluding African Americans from white schools "has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494 (quoting Brown v. Bd. of Educ. of Topeka, Shawnee Co. Kansas, 98 F. Supp. 797 (1951)).

foundation for people to succeed in the United States and should not be denied to someone because of race, economic status, or other factors.[31]

2. Special Education Students and the Right to an Education

Although in 1954 with *Brown v. Board of Education* the Court expressly recognized that people of all races have the right to a free public education, it was not until 1975 when Congress enacted the Education of All Handicapped Children Act[32] that all students with disabilities were guaranteed the right to public education.[33] Prior to this

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[31] *Id.* at 493. The Court explained, "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* However, when laws are facially race-neutral, the Court has held that there must be proof of a discriminatory purpose in order for courts to be able to treat those laws under the strict scrutiny test. Washington v. Davis, 426 U.S. 229, 241 (1976). Here, two African-Americas brought suit against the Commissioner of the District of Columbia alleging that the hiring process for police officers was discriminatory. *Id.* at 233. The procedure at issue was a written test that was administered during the recruiting process that excluded a disproportionately high number of African American applicants. *Id.* The Court stated:

> [t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Id. at 239 (emphasis in original). The Court established that there must exist, in addition to a discriminatory impact, an "invidious discriminatory" purpose, which may be inferred from the totality of the circumstances. *Id.* at 241. However, because proving intent to discriminate is difficult, Professor Ortiz argues that a court should instead evaluate outcomes of specific laws. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107 (1988-1989). *But see* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (where a plaintiff proves that the school district intentionally discriminated in one geographical area, courts presume intent for other geographical areas). Title VI of the Civil Rights Act of 1964 protects students from being discriminated against. 42 U.S.C. § 2000(d) (2002). It provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000(d) (2002). Courts apply a three-pronged test to actions involving Title VI of the Civil Rights Act of 1964. Daniel J. Losen and Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, *in* RACIAL INEQUITY, *supra* note 11, at 177. First, the plaintiff must prove that there is a negative and disparate impact on a protected class. *Id.* Once proven, the defendant bears the burden in establishing that the school's practice is an "educational necessity." *Id.* Then, the plaintiff must establish that there are less restrictive alternatives to reaching the same result. *Id.*

[32] Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. § 1400 (2006). For a discussion of the IDEA and its provisions see *infra* Part II.C.1, II.D.2.

[33] Pub. L. 94-142, 89 Stat. 775 Sec. 3(c) (current version at 20 U.S.C. § 1400 (2006)); *see also supra* note 11 and accompanying text (quoting the original purpose of the IDEA).

enactment, several suits were brought in federal and state courts that challenged the constitutionality of preventing children with disabilities from obtaining a public education, and these decisions helped to shape the statutory provisions of the IDEA.[34]

In 1972, the Pennsylvania Association for Retarded Children ("PARC") brought an action against the state of Pennsylvania alleging equal protection violations because the state did not provide educational opportunities for all of its students with special needs.[35] In accepting the parties' pre-trial agreements, the court expressed its desire that Pennsylvania would embark on a "noble and humanitarian" effort to ensure that "retarded children who heretofore had been excluded from a public program of education and training will no longer be so excluded."[36] During the same year, in *Mills v. Board of Education*, disabled students denied access to public education in the District of Columbia sued the school district to compel admission into special education programs.[37] In ordering the District to provide the students

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[34] *See* ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 7-11 (Allyn and Bacon 1996) (providing a synopsis of landmark cases leading up to the enactment of the IDEA in 1975).

[35] Pennsylvania Ass'n for Retarded People v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). PARC brought a class action lawsuit on behalf of all students between the ages of six and twenty-one who had been denied access to a free public education because of their mental or physical disabilities. *Id.* at 281-82. Pennsylvania school districts had been using four state statutes to deny access to public education for children with disabilities. *Id.* at 282. These statutes: (1) allowed the State Board of Education to disallow education of a child who was deemed "uneducable and unattainable" by a school psychologist; (2) prevented any child who did not have a "mental age" of at least five years from going to school; (3) allowed a child whom a psychologist finds unable to profit from public education to be exempt from compulsory attendance laws; and (4) "define[d] compulsory school age as 8 to 17 years but ha[d] been used in practice to postpone admissions of retarded children until age 8 or to eliminate them from public schools at age 17." *Id.* at 282. The plaintiffs alleged that the Pennsylvania schools denied these children due process because the statutes did not provide for notice and a hearing before students were placed in special education programs or they denied the children a public education all together. *Id.* at 283. In addition, they alleged that the provisions violated the equal protection clause because the statutes assumed that some students were uneducable and the schools did not provide adequate information to support these contentions. *Id.* On its own initiative, Pennsylvania worked out a Consent Agreement and Stipulation in which the state agreed to provide due process to students with disabilities and to provide access to a free public education to all people between the ages of six and twenty-one. *Id.* at 302-303. The court expressed its approval to the Agreement, stating that disabled students "will have new hope in their quest for a life of dignity and self-sufficiency." *Id.* at 302.

[36] *Id.* at 302.

[37] Mills v. Bd. of Educ., 348 F. Supp. 866, 868 (D.D.C. 1972). As in *PARC*, the school district admitted that many otherwise eligible students were being completely denied an education based on their mental abilities—as many as 12,340 disabled children were not served with a public education in the 1971-72 school year. *Id.* at 868-69.

with an education, the court rejected the school's excuse that it lacked adequate funding to provide all the children with educational services.[38] In sum, the courts in these two cases clearly outlined a policy that disabled students should be allowed free access to public education, which Congress later adopted.[39]

B. Federal Laws Protecting Students with Disabilities

In 1975, in response to *PARC* and *Mills*, Congress mandated that all children with disabilities be provided a free public education through the enactment of the Education of All Handicapped Children Act, which was later amended as the Individuals with Disabilities Education Act ("IDEA").[40] The primary goal of the Act is as follows:

> to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children,

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[38] *Id.* at 868.

[39] *See also* Tyce Palmaffy, *The Evolution of the Federal Role*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 1, 4 [hereinafter "RETHINKING"] (Chester E. Finn et al. eds., Thomas B. Fordham Foundation 2001). Palmaffy argues that the *Mills* and *PARC* decisions established three principles that remain tenants of special education law. *Id.* The first is that the Constitution, under the Due Process and Equal Protection clauses, prohibits schools from denying students access to education solely based on their disabilities. *Id.* Second, parents of a child with a disability must have access to and a say in their child's education. *Id.* Third, a school's lack in funding does not excuse it from providing students with disabilities an education. *Id.* at 5.

[40] Pub. L. 94-142, 89 Stat. 775 Sec. 3(b)(1-3) (1975). This Note will refer to both acts as the IDEA or the Act. *See* H.R. Rep. No. 94-332, 3-4 (1975) (citing *Mills* and *PARC* as the most influential cases contributing to the enactment of the Education for All Handicapped Children Act.). Prior to the enactment of the IDEA, Congress discovered that more than half of the eight million "handicapped" children in the United States were not receiving education appropriate to their disabilities. Pub. L. 94-142, 89 Stat. 775 Sec. 3(b)(1-3) (1975) (current version at 20 U.S.C. § 1400 (2006)). Moreover, one million of these students were not receiving a public education at all. Pub. L. 94-142, 89 Stat. 775 Sec 3(b)(4) (1975). *See also,* Palmaffy, *supra* note 38, at 2. Palmaffy writes that, of the eight million children with disabilities, 2.5 million were receiving an inappropriate education, and 1.75 million were receiving no education at all. *Id.* The latter usually consisted of students with severe disabilities. *Id.*; *see also* Osborn, *supra* note 33, at 9 (discussing the *Mills* case and its influence on the language that was later incorporated into the IDEA).

> and to assess and assure the effectiveness of efforts to educate handicapped children.[41]

Although the primary purpose was to provide education to students with disabilities, today students are increasingly misidentified as needing special education services and are consequently provided with unnecessary services under the IDEA.[42] In Congress's most recent reauthorization of the IDEA in 2004, Congress specifically addressed the disproportionate number of minorities enrolled in special education programs as compared with white student enrollment.[43]

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41 Pub. L. 94-142, 89 Stat. 775 Sec. 3(c) (current version at 20 U.S.C. § 1400 (2006)).

42 *See infra* Part II.D (explaining the misidentification of minorities in special education programs). *But see* Matthew Ladner and Christopher Hammons, *Special but Unequal: Race and Special Education, in* RETHINKING, *supra* note 39 , at 85. Overrepresentation of minority students in special education is a recognized problem. *Id.* at 101. Yet, data shows that school districts with higher percentages of minorities in fact have lower percentages of special education students, suggesting that some students in these districts are never identified as needing special education when, in fact, they need it. *Id.* at 90. Ladner and Hammons propose four reasons for this anomaly. *Id.* at 90-104. First, minority-majority districts that typically have large classroom sizes also place smaller percentages of students in special education programs. *Id.* at 91. Second, urban districts which are typically underfunded and serve largely minority student bodies, have lower rates of special education referral. *Id.* at 94-95. Third, parents in majority-minority districts resist special education placement because of the stigma attached with being labeled as needing special education. *Id.* at 99. Fourth, predominately white school districts place more of their minority students in special education. *Id.* at 101. Thus, Ladner and Hammons conclude that "minority students are treated differently in predominantly white districts and in predominantly minority districts." *Id.* at 104.

43 Individuals with Disabilities Education Improvement Act of 2004. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (current version at 20 U.S.C. § 1400 (2006)). For example, Congress found that:

> [t]he opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

20 U.S.C. § 1400(c)(13)(B) (2006). For a comparison of the 1997 and 2004 versions of the IDEA, see, e.g., Paolo Annino, *The Revised IDEA: Will It Help Children with Disabilities?*, 29 MENTAL & PHYSICAL DISABILITY L. REP., Jan.-Feb. 2005, at 11 (providing an overview of changes to the IDEA and expressing concern that some provisions will not be effective in providing disabled students better services); Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1 (2004). Prior to the reauthorization, the President established a Commission on Excellence in Special Education. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (July 1, 2002) [Hereinafter "PRESIDENT'S COMMISSION"], http://www.ed.gov/inits/commissionsboards/whspecialeducation/ (last

This Section outlines the basic provisions of the IDEA, in addition to the two provisions that supplement the IDEA, Title II of the American with Disabilities Act ("ADA")[44] and Section 504 of the Rehabilitation Act of 1973 ("Section 504").[45] First, Section B.1 will provide the protections IDEA offers to students with disabilities.[46] Second, Section B.2 will discuss how the ADA and Section 504 influence special education.[47]

1. The Individuals with Disabilities Education Act

The IDEA provides federal assistance to states as long as the states comply with the Act.[48] In order to comply with the Act, all disabled children between the ages of three and twenty-one must have an opportunity to receive a free appropriate public education ("FAPE") that includes an individualized education program ("IEP") favoring an education in the least restrictive environment ("LRE"), which integrates disabled children into the regular classroom.[49] The Act also provides

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visited Jan. 3, 2007). On July 1, 2002, the Commission issued its report, in which it recommended changes to be made to the 2004 reauthorization of the IDEA. *Id.* For example, the Commission recommended that schools "identify and intervene early." *Id.* at 21. Furthermore, the Commission recommended that I.Q. test scores not be recognized as indicative of a student's having a learning disability. *Id.* at 25. To address the problem that minorities were overrepresented in special education, the Commission found that culturally biased I.Q. tests and teacher referrals played a substantial role in identifying minorities with learning disabilities. *Id.* at 26; *see, e.g.*, 20 U.S.C. §§ 1400(c)(10)-(13) (2006).

44 42 U.S.C. §§ 12101-12213 (2000).

45 29 U.S.C. § 794 (2000).

46 *See infra* Part II.B.1.

47 *See infra* Part II.B.2.

48 20 U.S.C. § 1412(a) (2006).

49 20 U.S.C. §§ 1412(a)(1), 1412(a)(4), 1412(a)(5) (2006). The Act defines an FAPE: "available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A) (2006). An Individualized Education Program ("IEP") 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 . . .
> (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 . . .
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class . . .

procedural safeguards to ensure that parents are well-informed regarding a child's need for special education and progress.[50]

> (VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child . . .
> (VII) the projected date for the beginning of the services and modifications described . . .
> (VIII) [postsecondary goals and transition services upon completion of public education]

20 U.S.C. § 1414(d)(A) (2006). The least restrictive environment ("LEP") requires:

> [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2006). Students with disabilities benefit from being integrated in the regular classroom. Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, *in* RACIAL INEQUITY, *supra* note 11, at 40. However, research shows that, in every state, minority students with special needs are less likely to be integrated in the regular classroom than white students. *Id.* This is especially true among students identified with mental retardation ("MR"), emotional disturbance ("ED"), or specific learning disabilities ("SLD"). *Id.* at 50. For instance, thirty-one states restrict over eighty percent of their MR students. *Id.* at 51. Fierros and Conroy point to a National Research Council report that argues that teachers use special education as a way to deal with "discipline problems and insufficient resources." *Id.* at 40; *see also*, Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 773 (2001) (arguing that teachers used the special education system to exclude minority children from their classrooms because of behavioral problems and not because of learning disabilities). *But see* Steve Heise, *Mainstreaming of Handicapped Children in Education*, 8 J. JUV. L. 105, 111 (1984) (arguing that schools use the LRE requirement to ease expenses and integrate students in the general classroom who would not benefit from being in the general classroom); Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 790 (2006) (arguing that the LRE requirement "was borrowed from the racial civil rights movement without any empirical justification.").

[50] 20 U.S.C. § 1415 (2006). However, these procedural safeguards often take a lot of time, are expensive, and require an attorney to navigate through the requirements. *See* Kevin J. Lanigan et al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, *in* RETHINKING, *supra* note 38, at 213 (explaining the difficulties attorneys and parents faced in Due Process hearings in the 1997 version of the IDEA). Generally, the IDEA provides that schools must report to parents about their child's educational progress, include parents in decisionmaking regarding their child's placement and evaluations, and guarantee a neutral forum parents can use to challenge the appropriateness of the school's placements. *Id.* at 215. The authors point to two weaknesses in due process hearing practice. *Id.* at 227. First, the schools and parents often harbor strong hostility and suspicion against each other during the proceedings. *Id.* Second, the IDEA does not encourage parties to negotiate and come to a mutually agreeable solution thus creating a long and drawn out proceeding that adversely affects the child's placement during the

The Supreme Court's first opportunity to interpret the Act arose in *Board of Education v. Rowley*.[51] As a result of *Rowley*, the term "free appropriate education" was simply interpreted as meaning that students with disabilities should receive "some educational benefit" from public education.[52] The Eighth Circuit extended *Rowley* in *Gill v. Columbia 93 School District*,[53] when it determined whether an autistic child should be

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process. *Id.* The authors suggested that Congress amend the 1997 IDEA to include a statute of limitations, limit hearing duration and attorney fees, and require states to employ trained judges as hearing judges. *Id.* at 228-29; *see also* Daniel J. Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, *in* RACIAL INEQUITY, *supra* note 11, at 173 (arguing that the National Council on Disabilities reports that no state is near full compliance with the IDEA, and individual parents and children bear the burden of enforcing the requirements of it). In fact, in an article dedicated to providing parents with tips to improve their child's special education, attorney Wayne Steedman warns parents to use due process hearings only as a "last resort." Wayne Steedman, *10 Tips: How to Use IDEA 2004 to Improve Your Child's Special Education*, Wrightslaw, http://www.wrightslaw.com/idea/art/10.tips.steedman.htm (last visited Jan. 27, 2007).

[51] 458 U.S. 176, 187 (1982). Parents of a child with limited hearing ability brought a claim against the school, claiming that the school did not provide a "free *appropriate* education" pursuant to the IDEA (emphasis added). *Id.* at 186. The student had the capacity to lip read and was provided a hearing aid to assist her hearing. *Id.* at 184. Her IEP provided that she would be instructed in the regular classroom but would receive instruction from a tutor and speech therapist, but her parents claimed that the IEP was insufficient and that she should also be provided with a sign-language interpreter in her classes. *Id.* The school contended that, although she may benefit from the interpreter, it was complying with the Act by providing her with the accommodations set forth in her IEP and that it needed to do no more to maximize her potential. *Id.* at 185. Justice Rehnquist, writing for the majority, determined that Congress only intended to "open the door" for an education for children with disabilities. *Id.* at 192.

[52] *Id.* at 201. Justice Rehnquist, writing for the Court, stated in *dicta*, "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21. In making its decision, the Court reasoned that people with disabilities in most cases will be able to contribute to society and achieve at least some self sufficiency if provided with adequate education. *Id.* at 201. Justice Rehnquist rejected the argument that the goal of the Act was to provide disabled students equal educational opportunities as their mainstreamed peers because "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential." *Id.* at 198. Justice White, in his dissent, however, contends that Congress designed the Act so that each disabled child's IEP was tailored "'to achieve his or her maximum potential.'" *Id.* at 214 (quoting H.R. Rep. No. 94-332, 13, 19 (1975)). Furthermore, Justice White disagrees with the majority's refusal to look beyond the question of whether the state complied with the requirements set forth in the Act to the merits of the case. *Id.* at 216-18. *But see* Daniel J. Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, *in* RACIAL INEQUITY, *supra* note 11, at 184-85. The authors argue that, under the 1997 amendments to the IDEA after the *Rowley* decision, schools are expected to provide a higher quality education to students than that required by *Rowley*. *Id.* at 185.

[53] 217 F.3d 1027, 1036 (8th Cir. 2000).

provided special education designed to maximize academic performance if the state undertook that duty.[54] The Court decided that, because the child would have received adequate services and benefits from the school's proposed IEP, the school was not required to reimburse the child's parents for the educational treatment program the parents provided to their child which was contrary to the program outlined in the IEP—even if the parents' program was more effective.[55]

2. The Americans with Disabilities Act and Section 504

The IDEA is the primary statute governing students with disabilities and the schools they attend, but both Title II of the ADA and Section 504 provide protections for children with disabilities.[56] Title II of the ADA

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[54] *Id.* at 1035. The parents alleged that a state statute which provided that it would provide services to students in order to "develop their maximum capacity" trumped the federal standard adopted by *Rowley*. *Id.* at 1036. However, the court refused to accept this, reasoning that courts had previously used the *Rowley* standard in the state and the state manifested no intent to override *Rowley*. *Id*.

[55] *Id.* at 1038. The parents filed an administrative action against the school, and the court determined that the school's proposed IEP was sufficient to the needs of the child. *Id.* at 1034. *Gill* involved an autistic child whose parents disagreed with the school and demanded their child be provided the Lovaas method as part of the child's IEP. *Id*. at 1032. The Lovaas method is an intensive, at-home treatment that preferably begins before autistic children reach age five. National Autistic Society, Lovaas, http://www.nas.org.uk/nas/jsp/polopoly.jsp?d=297&a=3345 (last visited Jan. 15, 2007). The treatment reinforces good behavior by providing rewards, such a food, praise, and social interaction, such as hugs and kisses. *Id.* The program boasts that this intensive early intervention program allows some autistic children to function at a normal intellectual and educational rate by age seven. *Id.* In *Gill*, the parents hired Lovaas instructors who tutored the child thirty-five hours a week; consequently, the parents reduced the child's school attendance to two days per week. *Gill,* 217 F.3d. at 1032. While the child's verbal skills improved as a result of the tutoring, his social skills declined. *Id.* The Court determined that the state had not intended to override the congressional enactment because the state had defined its intention before Congress spoke on the matter. *Id.* at 1036. *See also* Schaffer v. Weast, 126 S. Ct. 528, 531 (2005). *Shaffer* involved a child who suffered from learning disabilities and speech-language impairments and had attended private school until the seventh grade. *Id.* at 533. Because of poor academic performance, the school informed the student's parents that he needed to be reevaluated and an IEP team was convened to determine whether the student needed a school that could better accommodate his needs. *Id.* The parents disagreed with the results from the IEP hearing, concluding that their son needed more intensive services. *Id.* The parents wanted the Court to adopt a standard that assumed every IEP is invalid until the school district demonstrates that it is not, but the Court refused to do so. *Id.* at 536. The Court held that, in an administrative hearing assessing the appropriateness of an IEP, the party bringing suit bears the burden of persuasion. *Id*. at 536.

[56] Daniel J. Losen & Kevin G. Welner, *supra* note 50, at 172 (stating Section 504 protects students covered by the IDEA as well as students with disabilities that "substantially impair one or more major life activities, or have a record of a disability, or are regarded as having a disability"). Students misidentified as needing special education may also seek remedies through enforcement of Section 504. *Id.* Furthermore, Section 504 identifies that

prohibits public entities from excluding qualified disabled people from their programs.[57] Section 504 prohibits federally-funded programs from excluding people with disabilities from their programs solely because of their disability.[58] While the IDEA provides "procedural and substantive protection for students who have been misclassified and/or placed in overly restrictive settings," Section 504 and Title II prohibit federally funded programs from discriminating based on disability.[59] Nonetheless, before being protected by these statutes, a student must be identified as disabled.[60]

C. How are Children with Disabilities Identified?

In evaluating whether students are disabled, several types of assessment techniques exist.[61] Schools possess an affirmative duty to

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"appropriate" education includes services that are designed to meet the educational needs of disabled students as much as is provided to non-disabled students. *Id.* at 173.

[57] 42 U.S.C. §§ 12131-12132 (2000). The ADA protects children with disabilities by providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132 (West 2002). In 2001, the President issued an executive order in which he explained that "[u]njustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by [the ADA]." Exec. Order 13217, 66 Fed. Reg. 33155 Sec. 1(c) (2001).

[58] 29 U.S.C. § 794(a) (2000) (providing, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). One way in which the IDEA and Section 504 are integrated is that failure to provide a FAPE under the IDEA is considered disability discrimination under Section 504. Daniel J. Losen & Kevin G. Welner, *supra* note 52, at 171. Furthermore, while the IDEA only regulates educational services that students with disabilities receive, Section 504 impacts *all* students with disabilities, regardless of whether they received educational services under the IDEA. *Id.* at 172.

[59] Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 423-24 (2001). *See also* Christopher J. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-*Shaffer *Public School*, 58 STAN. L. REV. 1563 (2006) (arguing that Section 504 protects equal treatment within federally funded program that the IDEA does not protect). Walker argues that the IDEA's main focus is on providing disabled children access to a public education; consequently, it does not protect students against discrimination. *Id.* at 1567.

[60] *See infra* Part II.C (discussing the criteria a student must meet to be identified as needing special education).

[61] *See generally* LAURA R. FOTHSTEIN, SPECIAL EDUCATION LAW 91 (3d ed. 2000); ASSESSING AND SCREENING PRESCHOOLERS: PSYCHOLOGICAL AND EDUCATIONAL DIMENSIONS (Ena Vazquez Nuttall et al. eds., 2d ed. 1999); IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE (Reneé Bradley et al. eds., 2002). Fothstein explains "group assessment," under which schools will screen all students for certain types of problems, is an effective tool to help screen all students for disabilities. Fothstein, *supra,* at 92. Most

assess all students for disabilities under the IDEA.[62] In assessing individual students for disabilities, the process is three-fold: (1) does a disability exist?; (2) does the disability impact educational achievement?; and, finally, (3) is there a need for special education?[63] Usually, school systems administer tests to evaluate students, but the effectiveness of several common tests can be called into question.[64] There is an

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commonly, schools will have school-wide, routine assessments that screen for things like hearing and vision impairments. *Id.* Other types of this "sweep screening" process include "fine motor skills" testing (such as the ability to move small objects), "gross motor skills" testing (such as jumping on one foot), and "basic perceptual motor skills" testing (such as drawing a particular shape, like a triangle). *Id.* Additionally, schools use achievement tests and ability tests to evaluate students against their peers to detect a possible learning disability. *Id.* In the classroom setting, students are also constantly being evaluated due to math tests, spelling tests, and the like. *Id.* Individual assessments, in contrast, are triggered by someone affirmatively noticing a specific child might have a disability. *Id.* at 93. Fothstein explains that the purpose for group assessment is to "provide a quick and efficient means to obtain data to determine whether to refer the student for in-depth comprehensive assessment." *Id.* In contrast, individual assessment determines eligibility for special education services under the IDEA. *Id*

[62] 20 U.S.C. § 1412(a)(3)(A) (2006) states:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

[63] Fothstein, *supra* note 61, at 93. These questions mirror the provisions in the IDEA, discussed *infra* Part II.C.1.

[64] *See infra* Part II.D.1.d. *See also* Jay P. Heubert, *Disability, Race, and High-Stakes Testing of Students*, National Center for Accessing the General Curriculum (2002), http://www.cast.org/publications/ncac/ncac_disability.html (last visited 19 Oct. 2006). The National Center for Accessing the General Curriculum provides seven elements that schools should include in their testing procedures, whether they assess students in general education or special education. *Id.* First, states "should adopt standards for what students should know." *Id.* Second, states should look to these assessments and align them with curricula and teaching instruction. *Id.* Third, tests must not be used as the primary means to "justify educational decisions that are demonstrably harmful to students." *Id.* Fourth, the tests should take into account students with disabilities, limited English proficiency students, minority students, and other groups to ensure that the test does not discriminate against these groups. *Id.* Fifth, test scores should not be used as the sole means of grade promotion or retention. *Id.* Sixth, tests should be used to increase early intervention to prevent grade retention in later years. *Id.* Seventh, schools must examine test scores in a meaningful way that instructs them on how best to meet the needs of their students and promote their learning. *Id.* The article also states that it is imperative that schools conduct additional research to make sure they are maintaining quality instruction and education for their students. *Id.*

increasing push for schools to be accountable for their students' results.[65] Advocates of this approach insist that increased accountability will "provide the political and legal leverage needed to improve resources and school effectiveness so that students with disabilities get the help they need *in time to meet demanding academic standards.*"[66]

Before a school can provide adequate services, however, it must determine that a student needs special education.[67] This Section will first discuss the IDEA provisions that regulate what schools may use in evaluating students as needing special education services.[68] Then, this Section will outline the October 2006 Department of Education regulations to the IDEA.[69]

1. Individuals with Disabilities Education Act Provisions

To be protected by the IDEA, ADA, and Section 504, a student must qualify under an IDEA disability category.[70] The first requirement is that

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[65] *See generally* President's Commission, *supra* note 43 (proposing throughout that increased teacher and school accountability should help improve education). The Commission found that one reason schools had difficulty providing adequate education in part resulted from lack of teacher training and retention. *Id.* at 51. For instance, for the 1999-2000 school year the U.S. Department of Education reported that more than 12,000 special education teacher openings were left unfilled. *Id.* at 52. Nationally, over ten percent of special education teacher positions—responsible for over 600,000 students—are filled by uncertified personnel. *Id.* As a result, the Commission recommended that states be required to report about the performance and success of their teachers and special education programs. *Id.* at 51. Additionally, reasoning that many schools and teachers fail students at risk for reading difficulties, the Commission recommended that states implement programs to train teachers to teach reading more effectively. *Id.* at 56.

[66] Jay P. Heubert, *Disability, Race, and High-Stakes Testing of Students*, National Center for Accessing the General Curriculum (2002), http://www.cast.org/publications/ncac/ncac_disability.html. *But see* Patrick J. Wolf & Bryan C. Hassel, *Effectiveness and Accountability (Part 1): The Compliance Model*, *in* RETHINKING, *supra* note 38, at 73 (arguing that the accountability method adopted in the 1997 IDEA did not significantly alter or increase teacher accountability that was in place in the past).

[67] *See infra* Parts II.C.1-2 (describing the procedures a school must follow in order to ensure students are reliably assessed for disabilities).

[68] *See infra* Part II.C.1.

[69] *See infra* Part II.C.2.

[70] *See generally* 20 U.S.C. § 1414 (2006). The Act defines a child with a disability as a child

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and
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> (ii) who, by reason thereof, needs special education and related services.

a parent, state or local educational agency, or other state agency, initiate the evaluation process to determine whether the child has a disability.[71] The tests used in the evaluations must not discriminate on a cultural basis; as a result, the tests are provided in the language "most likely to yield accurate information" on the child's academic, developmental, and functional abilities.[72]

2. Department of Education Regulations

In October 2006, the Department of Education promulgated rules to regulate state implementation of the IDEA 2004 amendments.[73] The regulations assist states in implementing the IDEA by providing definitions and criteria a student must meet in order to be classified as needing special education under the Act.[74] When determining whether a

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20 U.S.C. § 1401(3)(A) (2006). *See* 34 C.F.R. § 300.7 (2006) (more narrow terms for disability).

71 20 U.S.C. § 1414(a)(1)(B) (2006). The school first obtains parental consent to conduct the evaluation. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2006). If the parent refuses to consent to or fails to respond to a request for an initial evaluation, the state may still pursue this permission by presenting a complaint with the parent to compel parental consent. 20 U.S.C. § 1415(b)(6) (allowing any party to present a complaint regarding "any matter relating to the identification, evaluation, or educational placement of the child. . .").

72 20 U.S.C. §§ 1414(b)(3)(A)(i)-(iii) (2006). *See infra* note 123 for the full text of the statute. Furthermore, a child must not be determined to need special education if the "determinant factor" for such a finding is "lack of appropriate instruction in reading," "lack of instruction in math[,]" or "limited English proficiency." 20 U.S.C. § 1414(b)(5) (2006).

73 *See* 34 C.F.R. §§ 300.532-536 (2006). The rules require that the tests and evaluation materials "[a]re selected and administered so as not to be discriminatory on a racial or cultural basis; and [a]re provided and administered in the child's native language or other mode of communication." 34 C.F.R. §§ 300.532(a)(1)(i)-(ii). The regulations further require that standardized tests given to students to assess whether they are in need of special education must be tailored for the "specific purpose for which they are used." 34 C.F.R. 300.532(c)(1)(i). In other words, the tests must not simply measure general intelligence and must be "tailored to assess specific areas of educational need. . ." 34 C.F.R. § 300.532(d); *see also* Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981) (requiring that school districts use educational theories that are recognized as sound by some experts in the field or that are at least considerate legitimate educational strategies when determining eligibility for special education).

74 *See* 34 C.F.R. § 300.7(c). Minorities are most at-risk of being identified as having mental retardation, emotional disturbance, or a specific learning disability. Daniel J. Losen & Gary Orfield, *supra* note 11, http://www.gse.harvard.edu/hepg/introduction.html (last visited Aug. 30, 2006). In 2001, the national rate of whites classified as mentally retarded was 0.75 percent, but in at least thirteen states, the rate for African Americans was more than 2.75 percent. *Id.* To qualify as being emotionally disturbed, a student must exhibit one of the following characteristics over a long period of time and to a degree that it adversely affects the child's educational performance:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or heath factors.

student is disabled, the regulations require that schools employ assessment techniques that are varied, and that "[n]o single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child."[75] Regardless of these efforts to ensure quality assessment of disabilities, schools continue to misidentify students as needing special education.[76]

D. Racial Inequality in Special Education

Today, many minority students are misidentified as needing special education and are either over or under represented in special education programs.[77] The 2004 amendments to the IDEA aim to address, confront,

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> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
> . . .
> The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 C.F.R. § 300.7(c)(4). "Mental retardation means 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." 34 C.F.R. § 300.7(c)(6). Specific learning disability is defined as:

> a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia". . . . The term "does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

34 C.F.R. § 300.7(c)(10).

[75] 34 C.F.R. § 300.532(f). *See infra* Part II.D.1.d (discussing case law development regarding testing techniques used by schools to determine qualifications).

[76] *See infra* Part II.D.

[77] *See generally* RACIAL INEQUITY, *supra* note 11 (analyzing the problem of racial disproportion in special education, reasons for this disproportion, and recommendations to solve it). Although minority underrepresentation in special education is also a concern in special education, this Note will primarily discuss overrepresentation of minority students, particularly African Americans, in special education programs. Minority overrepresentation in special education also has detrimental implications for the juvenile system. David Osher et. al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, *in* RACIAL INEQUITY, *supra* note 11, at 93. While African Americans represent fifteen percent of the U.S. school system,

and resolve the inequality in special education.[78] Yet, knowledge of minority overrepresentation in special education is long-standing.[79] Researchers first discovered and noted the problem as early as the 1960s.[80] Today, African American students are almost three times more likely than whites to be diagnosed as needing special education.[81]

While being misidentified as in need of special education results in an inappropriate education for the child, the stigma attached to being labeled with a learning disability is potentially damaging to students'

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they account for over twenty-six percent of youth classified as emotionally and behaviorally disturbed. *Id.* Moreover, African American males are five times likelier than white females to be classified as emotionally disturbed. *Id.*

[78] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 18 U.S.C. § 1400 (2006)). 20 U.S.C. §§ 1400(c)(10)-(14) recognizes the overrepresentation of minorities in special education and that "[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities." 20 U.S.C. § 1400(c)(12)(A) (2006). Another problem that minorities, particularly African Americans, face is a large failure rate in standardized tests. *See* THE BLACK-WHITE TEST SCORE GAP 1 (Christopher Jencks and Meredith Phillips eds., Brookings Institution Press 1998) (explaining that the average African American student scores below 75 percent of Caucasians on most standardized tests, and sometimes this gap increases to 85 percent). *See also* JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (Crown Publishers 2005). In an effort to bridge the test gap, Kozol describes one school's attempt to bridge the test gap:

> during the three months prior to the all-important state exam, fifth grade teachers had to set aside all other lessons from 8:40 to 11:00, and from 1:45 to 3:00, to drill the children for their tests. In addition to this, two afternoons a week, children in the fourth and fifth grades had to stay from 3:00 to 5:00 for yet another session of test preparation.

Id. at 113. Though this Note does not discuss the standardized test movement in the United States, standardized tests scores are one means by which students are often identified as learning disabled. *See supra* Part II.D.1.d.

[79] For example, in 1982, the National Academy of Sciences released a study based on 1970 data in which it is revealed that minorities, especially African Americans, were represented disproportionately in special education programs. Losen and Welner, *supra* note 50, at 411-12.

[80] Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality, in Special Education*, 56 ALA. L. REV. 1071, 1075 (2005).

[81] Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, *in* RACIAL INEQUITY, *supra* note 11, at 21. In 2002, while African Americans represented fifteen percent of the national school population, they represented over twenty percent of the students referred to special education programs. Garda, *supra* note 80, at 1077. Moreover, when scholars look to the disparities between "hard" disabilities (those disabilities objectively ascertainable, such as deafness or blindness), and "soft" disabilities (requiring more subjectivity, such as learning disabled), the disparity is even more clear. Parrish, *supra* note 11, at 25 (showing that blacks and whites have are almost equally as likely to be identified for hard disabilities, but blacks are 2.88 times more likely than whites to be identified as mentally retarded and 1.92 times as likely to be identified as emotionally disturbed).

self esteem and post-education success.[82] However, the stigma does not merely have prospective effects; being labeled as having a disability not only results in isolation, but also in a reduction of "value in the eyes of others."[83] Once students are labeled as learning disabled, teachers tend to lower their expectations of such students and such students then lower their expectations of themselves.[84] Scholars suggest various reasons for the creation of racial inequality in special education, but the

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[82] *See* Garda, *supra* note 80, at 1082-86. For instance, about seventy-five percent of African American students with disabilities are not employed two years out of high school. Donald P. Oswald, Martha J. Coutinho, & Al M. Best, *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, *in* RACIAL INEQUITY, *supra* note 11, at 1. However, the number of unemployed disabled students decreases to forty-seven percent of white students with disabilities – an almost thirty percent difference between African Americans and whites. *Id.* Dropout rates among general education students also varies according to race. *See* JOHN M. BRIDGELAND ET AL., THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS (Civic Enterprises ed., Peter D. Hart Research Associates for the Bill & Melinda Gates Foundation 2006), *available at* http://www.civicenterprises.net/pdfs/thesilentepidemic3-06.pdf (conducting a survey of students who dropped out of public high school). The authors note that almost one third of all public high school students fail to graduate school each year. *Id.* at i. This number increases to one half for African Americans, Hispanics, and Native Americans. *Id.* Sixty-nine percent of those students reported that they "were not motivated or inspired to work hard" in school, thirty-five percent said that failing grades substantially contributed to their decision to dropout, and forty-five percent reported that they "started high school poorly prepared by their earlier schooling." *Id.* at iii. The authors recommended that, to improve student motivation to stay in school, schools should "[i]mprove instruction, and access to supports, for struggling students" and to ensure that students have at least one strong relationship with an adult in the school. *Id.* at iv–v.

[83] Garda, *supra* note 80, at 1083 (arguing that special education is a "self-fulfilling prophecy" because teachers and students lower their expectations of student performance which leads to lower performance, which ultimately results in the students' performing substantially lower than his peers). *See also* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995). Professor Glennon explains, "[t]eachers often have diminished expectations for students identified as disabled. Nondisabled peers tease or ostracize special education students. Moreover, placement in special education may diminish students' self-esteem and lead to feelings of humiliation, alienation and failure." *Id.* at 1240. *But see* Robert Cullen, *Special Education at Coles Elementary School*, *in* RETHINKING, *supra* note 39, at 116. Cullen spoke with a principal in Virginia who reported that in 1973 the school only had six percent of its children labeled disabled but that number has more than doubled since. *Id*. The principal believes that one reason for this dramatic increase in labeled students is that parents do not consider special education to have as negative a stigma as it has in past years. *Id.* He states, "[i]t's an acceptable handicap . . . it's a perfect excuse for why a child isn't performing." *Id.*

[84] Garda, *supra* note 80, at 1083. For instance, the court in *Hobson v. Hansen*, discussed *infra* notes 107 and accompanying text, concluded that "[w]hen a student is placed in a lower track, in a very real sense his future is being decided for him; the kind of education he gets there shapes his future progress not only in school but in society in general." 269 F. Supp. 401, 473 (D.D.C. 1967).

reasons are difficult to discern.[85] Section D.1 of this Note examines the socioeconomic status, language, and special education identification procedures and their effects on racial inequity in special education.[86] Section D.2 of this Note examines provisions in the 2004 IDEA amendments aimed at repairing racial disproportion in special education.[87]

1. Reasons for Racial Inequality

There are several reasons for racial inequality in special education.[88] This Section will discuss the effects that socioeconomic status, inadequate school funding, student English language proficiency, and disability evaluation techniques have on the tendency for schools to refer more African Americans to special education than whites.[89]

a. Socioeconomic Status

First, a student with a low socioeconomic status has an increased risk of being identified as requiring special education.[90] As a result, African American children, because they tend to come from lower income backgrounds, are more likely to be diagnosed.[91] Children in poverty, no matter their race, face a number of disadvantages that are largely absent in more affluent communities, including large family size, residential

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85 *See generally* RACIAL INEQUITY, *supra* note 11; Matthew Ladner & Christopher Hammons, *Special but Unequal: Race and Special Education*, *in* RETHINKING, *supra* note 38, at 85; Peter Zamora, Note, *Children in Poverty: In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413 (2003).

86 *See* discussion *infra* Part II.D.1.

87 *See* discussion *infra* Part II.D.2.

88 *See generally* RACIAL INEQUITY, *supra* note 11.

89 *See infra* Parts II.D.1.a, II.D.1.b, II.D.1.c, II.D.1.d.

90 Ladner & Hammons, *supra* note 42, at 86. *See also* Zamora, *supra* note 85, at 413 (discussing the general education achievement gap between African Americans and whites and the influence of poverty on that outcome). Zamora names poverty as another "achievement gap" in education because low-income students "consistently perform worse on achievement tests than students who attend schools that serve wealthier students." *Id.* at 414. In fact, low-income students tend to perform well when in better-funded schools with more affluent students. *Id.*

91 Ladner Hammons, *supra* note 42, at 86. According to the 2003 census, 34.1 percent of children in poverty are African American, while only 14.3 percent of white children live in poverty. RUBY K. PAYNE, A FRAMEWORK FOR UNDERSTANDING POVERTY 5 (4th ed. 2005). Socioeconomic status is considered a risk factor and is directly related to race; "African American students are three times more likely than their mainstream peers to reside in low-income homes." Carol McDonald Connor & Holly K. Craig, *African American Preschoolers' Language, Emergent Literacy Skills, and use of African American English: A Complex Relation*, 49 J. OF SPEECH, LANGUAGE, AND HEARING RESEARCH 771, 772 (2006).

instability, harsh discipline, few learning materials, low birth weight, and young parents.[92] However, these risk factors, though they apply to minority as well as non-minority low-income children, are especially apparent among African Americans.[93] Furthermore, children born in poverty tend to face increasing biological harms as a result of being born in poverty.[94] The disadvantages poor students face may help to account for the underachievement of minorities in general education and may help explain why many of these students are placed in special education programs, but it is not the only factor that affects these children.[95]

b. Low Funding

Poor students tend to attend poor school districts which struggle to provide basic provisions, such as teachers and textbooks.[96] As Kozol illustrates, teachers in poor school districts tend to expect less of their

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92 Greg J. Duncan & Katherine A. Magnuson, *Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?*, 15 THE FUTURE OF CHILDREN 35, 37 (2005). The authors explain, "[i]n almost every case, more than twice as many poor as nonpoor children suffer the given hardship and for several hardships . . . the rate is more than three times as high." *Id. See also* Payne, *supra* note 91, at 7-9. Payne's definition of poverty is: "the extent to which an individual does without resources." *Id.* at 7. These resources include financial, emotional, mental, spiritual, physical, support systems, relationships, and knowledge of the hidden rules of a particular class. *Id.* Payne explains, "[e]ducators have tremendous opportunities to influence some of the non-financial resources that make such a difference in students' lives. For example, it costs nothing to be an appropriate role model." *Id.* at 25. Principal George Albano's philosophy that "what's happening outside, we have to push that aside" and subsequent success rate at his students' success reflects the ability for teachers to provide, and help, students living in poverty. *See supra* note 9 and accompanying text.

93 Duncan and Magnuson, *supra* note 92, at 35, 37. For instance, "prevalence of single-parent families, low birth weight, harsh parenting, and maternal depressive symptoms is highest among black children." *Id.*

94 Garda, *supra* note 80, at 1086. These biological effects include lower birth weight, poor nutrition, and increased exposure to toxins like lead, alcohol, tobacco, and drugs. *Id. See generally* Part I; Kozol, *supra* note 1 (demonstrating that students in St. Louis, Missouri had increased risk of brain damage due to lead poisoning in their city).

95 Duncan & Magnuson, *supra* note 92, at 43-47. For instance, the authors discuss an experience in which some families moved from high-poverty to low-poverty neighborhoods. *Id.* at 44. Yet, even though the children of these families lived in better homes, they scored no higher on achievement tests. *Id.* One possible explanation for this was that the students did not attend better schools, pointing to a larger problem with the education system as a whole having a substantial influence on the achievement rates of impoverished students. *Id.* at 45.

96 Ladner and Hammons, *supra* note 42, at 94-98. The 1990 census shows that urban districts in Texas and Florida generally have a larger percentage of minority students. *Id.* Nationally, it is estimated that 53.8 percent of urban schools are made up predominantly African American students. *Id. See generally* Kozol, *supra* note 1 (exposing the vast under-funding many major urban school districts face).

students as a whole, which accounts for minorities sometimes being *under*represented in special education. Thus, students in poor school districts who may need special educational services may not receive them.[97] Indeed, data shows that "the more urban a school district, the lower the percentage of minority students enrolled in special education programs in that district."[98] Three possible explanations exist for this discrepancy: (1) quality teachers are difficult to hire and retain; (2) urban districts are preoccupied with many different issues; and, (3) inner-city schools do not prioritize disability assessment.[99]

While it is difficult to measure school competency because no standardized evaluation exists, high school dropout rates may indicate school districts' failure to identify students with special needs.[100] Thus, even though students in school districts with low funding tend to be under identified as needing special education, the teachers also tend to teach with proportionally lower expectations. In effect, these schools tend to teach *all* students as if they were learning disabled.[101] While socioeconomic status and lack of school funding largely contribute to racial disproportion in special education, they are not the only factors.[102]

c. Language Barriers

Third, some African Americans, though they do not usually speak a different language such as Spanish, may have limited skills in Standard American English and instead use Black English Vernacular, which could account for, at least in part, their low scores on standardized

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97 Thus, some scholars dispute the contention that poverty is the sole reason why there are more African Americans enrolled in special education programs. *See, e.g.*, Losen & Welner, *supra* note 50, at 413-17 (arguing that, as wealth increased, African Americans were more at risk of being diagnosed with a disability). Ladner and Hammons show a paradox in public education: Although African Americans are over represented in special education, school districts with the highest concentration of minorities tend to have the lowest numbers of students enrolled in special education classes. Ladner & Hammonds, *supra* note 42, at 101. Furthermore, "[a]lthough districts with higher proportions of white students may have greater percentages of students in special education programs than minority districts, it does not necessarily follow that white districts place higher percentages of *white* children in these programs." *Id.* (emphasis in original). Studies found that a higher percentage of minorities are enrolled in special education programs in predominately white districts than in "majority-minority" districts. *Id.* at 102.

98 Ladner & Hammons, *supra* note 42, at 95.

99 *Id.*

100 *Id*.

101 *See generally* SAVAGE INEQUALITIES, *supra* note 1, at 2.

102 *See infra* Parts II.D.1.c, II.D.1.d.

reading tests.[103] Schools provide a variety of programs designed to improve English proficiency skills to students whose native language is not English, and the government increasingly recognizes the need to provide such services.[104] For example, the Department of Education, in 1991, released a statement regarding school policy toward minority students with Limited English Proficiency ("LEP").[105] Yet, there are no programs for those African American students who struggle to understand the standard English that is taught in schools because they speak an English dialect which deviates from standard English used by mainstream American schools and on disability assessment tests.[106] In fact, in 1996, the Oakland Schools Board passed a resolution and declared Black English Vernacular to be the language of the African American students in their district with the hope of implementing programs designed to increase the standard English proficiency among

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[103] McDonald, Conner, & Craig, *supra* note 91, at 771-72. For example, on the 2003 fourth grade National Assessment of Educational Progress test, sixty-one percent of African American children failed to achieve basic reading levels, while only twenty-six percent of their white peers failed. *Id.* at 771. Language differences that African Americans typically encounter include using unconventional spellings such as those found in trademarks and having a rich oral storytelling history but relatively few experiences with daily storybook readying. *Id.* at 772. *See also* Jeanne Brooks-Gunn & Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, 15 THE FUTURE OF CHILDREN 139, 150 (2005). The authors explain that difference in "speech cultures" are associated with social class and race. *Id.* "The educated middle-to-upper-middle-class 'speech culture' provides more language, more varied language, more language topics, more questions, and more conversation" and "predict how fast young children learn words." *Id.* Furthermore, of students identified with specific learning disabilities, over eighty percent are there for the sole reason that they do not know how to read. PRESIDENT'S COMMISSION, *supra* note 42, at 3.

[104] Alfredo J. Artiles et al., *English-Language Learner Representation in Special Education in California Urban School Districts*, *in* RACIAL INEQUITY, *supra* note 11, at 117.

[105] Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, to Office of Civil Rights Senior Staff, *Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited English Proficiency* (Sept. 27, 1991), http://www.ed.gov/about/offices/list/ocr/docs/lau1991.html (last visited Nov. 9, 2006). The report advises that schools, in dealing with students who lack proficient English skills, should use such approaches as "transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language (ESL)." *Id*. Once students are identified and placed in these programs, they must remain there until they are proficient enough in the English language to be able to participate in the regular classroom. *Id.*

[106] John Baugh, *Comprehending Ebonics,* http://www.pbs.org/speak/seatosea/americanvarieties/AAVE/ebonics/ (last visited Jan. 30, 2007). In 1973, social psychologist Robert Williams coined the term Ebonics to refer to the English that African Americans developed during the slave trade. *Id.* Williams defined Ebonics as, "linguist and paralinguistic features which on a concentric continuum represent the communicative competence of the West African, Caribbean, and United States slave descendant of African origin." *Id.*

these students.[107] However, the resolution was met with outrage and hostility and ultimately failed.[108] In sum, the language used in disability evaluation procedures can be racially and culturally biased against many African Americans and leads, therefore, to African American over representation in special education.[109]

d. Evaluation Techniques

Additionally, assessment techniques that require standardized testing may contain cultural biases and lead to misidentification of minority students.[110] The push for more cultural-neutral evaluation techniques results, in part, from schools using special education as a tool to maintain school segregation within schools in the post-*Brown v. Board of Education* era.[111] In 1979, California offered three reasons why African

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[107] *Id.*

[108] *Id.* Baugh states:

> Imagine the budgetary impact of expanding bilingual education programs to include African Americans; clearly, neither educators nor politicians had ever pondered or planned for such a prospect. Moreover, the highly articulate speech of African Americans who are in the public eye, such as Bryant Gumble, Colin Powell, Condoleezza Rice and Oprah Winfrey serve as constant reminders that many blacks have mastered standard English without any benefit of (or apparent need for) special educational programs. . . Yet, I know of no fair-minded U.S. citizen who would claim that black students are any different from other American students who are far more likely to succeed if they can be helped to obtain greater standard English fluency.

Id.

[109] Payne, *supra* note 91, at 28; *see also* Part III.B (analyzing the IDEA amendments that require racial and cultural neutrality in special education assessments).

[110] Beth Harry, *Response to "Learning Disabilities: Historical Perspectives", in* IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE 76 (Renée Bradle et al. eds., Lawrence Erlbaum Associates 2002). Harry explains, "It is not that the items directly discriminate against race, per se, but that they discriminate against any group of children whose daily and educational experiences have provided them with less opportunity to master the material . . . It is not enough to say that children in poor, minority communities in the United States should have inculcated the information on IQ tests simply through being members of the society." *Id.* Ways in which these tests tend to favor mainstream white, middle class education include: factual questions that require a student to have been in a school setting when the facts were being taught; comprehension questions that seek a child's knowledge of accepted moral behavior require that the child was brought up in an environment that taught the behavior; and, questions involving analogies between items require that the child has had first-hand experience with the items. *Id.* at 76; *see also* Hobson v. Hansen: *Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1511-16 (1968) (arguing that Congress should consider the economic consequences from mislabeled students).

[111] *See* Beth A. Ferri & David J. Connor, *Special Education and the Subverting of* Brown, 8 J. GENDER RACE & JUST. 57 (2005). Schools were motivated to maintain segregation in part

Americans performed worse on tests than whites: (1) blacks were genetically inferior and therefore performed worse than whites on standardized tests; (2) black students typically hailed from "inferior home and neighborhood environments;" and (3) standardized tests were culturally biased.[112]

In 1967, African American children in the District of Columbia challenged the constitutionality of the District's use of the track system in its schools.[113] Because it was extremely difficult for a student to rise

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because white parents felt that integrated schools would result in lower academic standards; to prove to parents that standards would remain the same, schools invented various tools in order to maintain segregation *within* schools such as "pupil placement laws, ability tracking, and persistent over-referral of students of color for segregated special education classes." *Id.* at 58, 59. *See also* Glennon, *supra* note 83, at 1317-25 (arguing that the intentional segregation and overt racism in the aftermath of *Brown* resulted in teachers, administrators, parents, and students unconsciously labeling minority students as inferior).

[112] Larry P. v. Riles, 495 F. Supp. 926, 955-57 (N.D. Cal. 1979). The court rejected the genetic argument based on "weak evidence" which failed to explain the genetic nexus between race and I.Q. *Id.* at 955. Furthermore, the court stated, even if the genetic argument were true, "it is not to be assumed that black persons are less intelligent as a group than white persons as a group." *Id.* at 956. Second, the court rejected the socioeconomic status, explaining that "socio-economic status by itself cannot explain fully the undisputed disparities in I.Q. test scores and in E.M.R. placements." *Id.* Last, the court concluded that the cultural bias of standardized I.Q. tests accounted for at least some of the disparity. *Id.* at 957. Because the tests were geared towards a primarily white population, nothing was done later to eliminate cultural bias in the tests, and looking towards the fact that black students raised in white families performed better on the tests, the court concluded that the tests were culturally biased. *Id.* at 957-58. In *Larry P.*, African American students brought a class action against California schools alleging that they were improperly placed in classes for the "educable mentally retarded" ("EMR"). *Id.* at 931. California used I.Q. tests to determine special education eligibility, and African Americans had a mean score fifteen points lower than white children on the I.Q. tests—African Americans represented ten percent of the student population in the state but accounted for about twenty-five percent of those enrolled in EMR classes. *Id.* at 931, 966. The court found that the EMR classes focused primarily on social adjustment and "economic usefulness," neglecting academics. *Id.* at 941-42. Thus, "children wrongly placed in these classes [were] unlikely to escape as they inevitably lag farther and farther behind the children in regular classes." *Id.* at 942.

[113] Hobson v. Hansen, 269 F. Supp. 401, 406 (D.D.C. 1967). The District had a practice of administering standardized IQ tests in order to evaluate an individual's ability to learn. *Id.* at 442. The district classified the students into four groups: "the intellectually gifted, the above-average, the average, and the retarded." *Id.* at 444. The plaintiffs contended that African Americans were disproportionately and consistently placed in lower tracks. *Id.* at 451-57. The plaintiffs presented evidence that the standardized tests were culturally biased towards the white middle class. *Id.* at 514. In the 1965 school year, for example, 64.8%-87.9% of low income students were placed in the special academic and general tracks. *Id.* at 453. In contrast, among high income students, the percentage in these two low tracks ranged between 8.1%-40.1%. *Id.* The track system used by the school was supposed to be flexible and allow for students to move up and down in curriculum based on their

out of the lower tracks once placed there, the Court determined that the students were denied their equal protection rights.[114] However, the court in *Parents in Action on Special Education ("PASE") v. Hannon* refused to declare an Equal Protection violation because Chicago public schools used other methods in addition to standardized I.Q. tests to evaluate whether students needed special education services.[115] Yet, in *Georgia State Conference of Branches of NAACP v. Georgia*,[116] the court reached an

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improvement. *Id.* at 512. However, in practice, students rarely graduated to another track. *Id.* at 463-68. In reaching its decision, the court relied heavily on the premise that:

> the skills being measured are *not* innate or inherited traits. They are learned, acquired through experience . . . As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socioeconomic or racial status, or—more precisel—according to environmental and psychological factors which have nothing to do with innate ability.

Id. at 478, 514 (emphasis in original). Because the evaluation procedures did not effectively reflect students' innate abilities but rather the school's failure to teach appropriately, the court held that the tests used were invalid. *Id.* at 496.

[114] *Id.* at 513-14. The Court concluded, "rather than being classified according to ability to learn, these students are in reality been classified according to their socioeconomic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability." *Id.* at 514.

[115] Parents in Action on Special Educ. ("PASE") v. Hannon, 506 F. Supp. 831, 878 (N.D. Ill. 1980). These procedures included an attempt to make the tests not culturally biased, providing hearings for parents, teacher evaluation and referral before administering an I.Q. test, and instituting a screening committee to ensure the child is being placed properly. *Id.* at 878-79. As in *Hanson*, *PASE* involved a challenge about the constitutionality of standardized tests used in diagnosing students for disabilities. *Id.* at 833. This time, the suit was brought against the Chicago Board of Education. *Id.* For the 1978-79 school year, eighty-two percent of the people in "educable mentally handicapped" ("EMH") classes were African American. *Id.* The EMH courses were geared towards socialization, language skills, and vocational training and did not focus on the academics as much. *Id.* at 834. The court recognized in *PASE* that misdiagnosis into one of these programs "is clearly an educational tragedy." *Id.* Additionally, the court conducted a question-by-question review of the tests at issue to determine whether the test was culturally biased. *Id.* at 837. *See* Glennon, *supra* note 83, at 1280 (suggesting that the trial judge lacked the training and expertise to conduct the review). Professor Glennon argues, "[i]f, indeed, there is a minority black culture in this country that is distinct from a, white culture, a white federal court judge would seem to be an unlikely source of expertise for information regarding these differences or their relationship to intelligence tests." *Id.* The court concluded, based on its own analysis, that any cultural bias the tests possessed was very limited and in any case did not substantially affect the rates of placement in EMR classes. *PASE,* 506 F. Supp. at 876. Additionally, the court concluded that the racial disparities were the result of higher levels of poverty among African American children. *Id.* at 878; *see also Larry P. v. Riles*, 495 F. Supp 926, discussed *supra* note 112. *See* Glennon, *supra* note 83, at 1280-82, for a discussion about the *PASE* case and how it differs from *Hobson* and *Larry P.*

[116] Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985). The children claimed that the method that the school's use of achievement grouping had a disparate impact on African Americans and therefore violated the Fourteenth Amendment. *Id.* at 1408.

opposite conclusion.[117] In *NAACP*, forty-five black children sued schools in Georgia, claiming that they were placed in EMR classes in a discriminatory manner.[118] The court concluded that, even though there was evidence that some students were misplaced in these programs, the students failed to prove that the school districts acted intentionally or in bad faith when placing students.[119] These cases show the courts adopting a clear policy that favors the use of race-neutral alternatives, and the 2004 amendments to the IDEA attempt to codify this policy.[120]

2. 2004 Amendments to the IDEA

In its recommendations to improving the IDEA, the President's Commission on Excellence in Special Education ("President's Commission") recommended that states implement early identification and intervention services in order to lower minority overrepresentation in special education.[121] To ease the over identification and the disproportionate number of minorities in special education, the IDEA requires states to implement "policies and procedures designed to prevent the inappropriate over identification or disproportionate representation by race and ethnicity of children as children with disabilities. . ."[122] One provision, aimed at decreasing the amount of racial minorities overrepresented in special education, ensures that

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117 *Id.* at 1429.

118 *Id.* at 1407.

119 *Id.* at 1429.

120 *See supra* notes 107-13 and accompanying text.

121 PRESIDENT'S COMMISSION, *supra* note 43, at 26. The Commission found that teacher referral accounts for over eighty percent of all special education referrals. *Id.* "To the extent that teachers are not prepared to manage behavior or instruct those with learning characteristics that make them 'at risk' in general education, minority children will be more likely to be referred." *Id.*

122 20 U.S.C. § 1412(a)(24) (2006). Additionally, the IDEA requires states to research their special education programs and evaluation procedures to determine if or to what extent minority overidentification exists in special education. 20 U.S.C. § 1418(d)(1) (2006). If a state finds that significant minority disproportion exists, the state must:

> (A) provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this chapter;
> (B) require any local educational agency identified . . . to reserve the maximum amount of funds . . . to provide comprehensive coordinated early intervening services to serve children in the local educational agency . . .
> (C) require the local educational agency to publicly report on the revision of policies, practices, and procedures . . .

20 U.S.C. § 1418(d)(2) (2006).

children are assessed in ways that are not discriminatory.[123] A second IDEA provision that seeks to repair minority disproportion is the requirement that schools provide early intervention programs.[124] These

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[123] 20 U.S.C. § 1414(b)(2) (2006). First, the statute requires that schools:

> (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist it in determining–
> (i) whether the child is a child with a disability; and
> (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
> (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
> (C) use technically sound instruments that may asses the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Id. Second, the IDEA requires that the evaluation materials used:

> (i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
> (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administered

20 U.S.C. §§ 1414(b)(3)(A)(i)-(iii) (2006). Furthermore, the IDEA forbids schools to conclude that a student has a disability if the primary reason for that determination is:

> (A) lack of appropriate instruction in reading, including in the essential components of reading instructions . . .
> (B) lack of instruction in math; or
> (C) limited English proficiency.

20 U.S.C. § 1414(b)(5) (2006). Finally, in identifying students with specific learning disabilities, one of disability categories in which African Americans are most identified, the Act requires that:

> a local educational agency shall not be required to take into consideration whether a child has severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

20 U.S.C. § 1414(b)(6)(A) (2006).

[124] 20 U.S.C. § 1413(f)(1) provides:

> A local educational agency may not use more than 15 percent of the amount such agency receives . . . to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

Id. In addition, the IDEA provides funding for states to implement early intervention programs for infants and toddlers identified with a disability. 20 U.S.C. § 1433 (2006). The

provisions, while not exhaustive of the provisions targeted toward decreasing minority overrepresentations, may substantially contribute to improving minority special education services.[125]

III. ANALYSIS

Congress aimed to address and solve some of the problems surrounding racial disproportion in special education through the 2004 IDEA amendments.[126] Specifically, two provisions can help ease the racial problem—the neutrality requirement in evaluation procedure and intervention programs. Although the 2004 IDEA Amendments include provisions to protect minority students from being incorrectly evaluated and placed in special education programs, it does little to protect these students from the academic disadvantages due to factors such as socioeconomic status.[127] One reason education fails students is because it inadequately teaches language skills.[128] In fact, the President's Commission in 2002 pointed out that eighty percent of special education students with "specific learning disabilities" were in those programs for the sole reason that they did not know how to read.[129] To address this problem, the Commission recommended an increase in early intervention programs.[130]

First, Part III.A will analyze *Hobson* in light of the new requirement under the IDEA that requires some early intervention services.[131] Second, Part III.B will examine the IDEA requirement that disability

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state may, in its discretion, include at-risk infants and toddlers in their programs. 20 U.S.C. § 1432(5)(B) (2006). An at-risk infant or toddler "means an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual." 20 U.S.C. § 1432(1) (2006).

125 *See infra* Part IV.A (proposing that the IDEA should require that schools provide intervention programs to at-risk youth as well as students already identified with disabilities).

126 *See supra* note 42 and accompanying text.

127 *See supra* Part II.D.1.a.

128 *See supra* Part II.D.1.c.

129 PRESIDENT'S COMMISSION, *supra* note 43, at 3.

130 PRESIDENT'S COMMISSION, *supra* note 43, at 22-23. The Commission pointed to a National Research Council study that showed that early screening coupled with effective early intervention programs prevented many students from later being put in special education classrooms at all. *Id.* at 23. Significantly, the study showed that early intervention programs targeted at improving reading skills and "positive behavior programs" among high-risk, predominantly minority children not only improved academic achievement but also reduced behavioral problems. *Id.*

131 *See infra* Part III.A.

identification be racially and culturally neutral and its impact on the *PASE* and *NAACP* cases.[132]

A. Early Intervention Programs

Misidentification of learning disabilities poses problems for the mislabeled students because they are provided with an inadequate education to suit their needs. [133] Inaccurate special education diagnosis is a self-fulfilling prophecy—once children are labeled as needing special education, teachers often lower their expectations of that student, which in turn lowers students' expectations of themselves.[134] Careful differentiation between students who truly have learning disability and those who do not is therefore crucial.

As seen in *Hobson* and similar cases, however, the cultural and language barriers between African Americans and their mainstream peers present severe problems and barriers to identifying students who need educational services.[135] In *Hobson,* although some grouping among students was rationally related to the state's interest in providing appropriate education tailored to the many different academic needs of its students, the school districts failed to satisfy equal protection.[136] The grouping employed by the school districts, although not intentional, disparately impacted African American students.[137]

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[132] *See infra* Part III.B.

[133] *See, e.g.*, Glennon, *supra* note 83, at 1240 (stating that special education presents a "paradox" because, while it is intended to increase educational benefits to the learning disabled, it also "stigmatizes and severely limits educational opportunities"); *see also supra* notes 79-81 and accompanying text.

[134] Garda, *supra* note 80, at 1083-84. The most common factor for minority disproportion in special education is the cultural difference between white teachers and black students. *Id.* About sixty percent of teachers are white females and ninety percent of students referred by teachers are later identified as disabled. *Id.* at 1089-90. Another reason for this is that "teachers view the exact same behavior by white and black students differently." *Id.* at 1091. *See also* Glennon, *supra* note 83, at 1241 (arguing that subconscious racial "constructs" contribute to racial disproportion in special education).

[135] *See supra* Part II.D.

[136] *Hobson,* 269 F. Supp. at 512. The court further explains, "[i]f classification is reasonably related to the purposes of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend." *Id.* at 511.

[137] *Id.* at 512. This alone, however, was not enough for the court to find a violation of Equal Protection. *Id.* The government may classify based on ability grouping as long as the inclusion or exclusion of a particular classification is appropriate; once it is determined that a student no longer needs that classification, that classification loses on the rational basis test and therefore loses on Equal Protection analysis. *Id.* at 513. The court found that children, once placed in a low-ability track, had little chance of moving out of that track;

Children in poor, minority communities in the United States often are not exposed to the mainstream knowledge that is on standardized tests.[138] Dr. Payne, an expert on poverty, explains that the language of business and school is called the "formal register" of English.[139] However, students in poverty, particularly minorities, speak in a casual register, which is largely dependent on nonverbal assists.[140] The best way to learn a language is to have constant interaction with and immersion in that language.[141] Thus, it is necessary for teachers to teach students directly the formal register in English.[142] However, schools rarely employ techniques to address the cultural and linguistic challenges many students face and instead force them to complete all their school work and tests in a formal register with which they are not familiar.[143] Significantly, special education evaluations are typically conducted in the formal register, which leads to misidentification and minority overrepresentation in these programs.[144]

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therefore, the districts were found to be unjustly discriminating against minority students. *Id.* at 512. The court reasoned, "[i]n theory, since tracking is supposed to be kept flexible, relatively few students should actually ever be locked into a single track or curriculum. Yet, in violation of one of its principal tenets, the track system is not flexible at all." *Id.*

138 *See* Harry, *supra* note 104, at 76-77. Harry explains that children in such communities typically "go no further than several blocks from their own homes and come into contact with adults from other communities only in school, which oftentimes presents them with negative experiences that they would rather avoid than learn from." *Id.*; *see also* Glennon, *supra* note 83, at 1258 (in short, standardized tests only measure "acquired knowledge" and "reflect cultural judgments about what knowledge children should have").

139 Payne, *supra* note 91, at 27. Every language has five registers: (1) frozen, which is language that is always the same, like prayers; (2) formal, which has complete sentences and specific word choice; (3) consultative, which is formal register used in conversation; (4) casual, which is general and dependent upon non-verbal assistance; and, (5) intimate, which is "between lovers or twins." *Id.* Payne explains that the formal register is used on standardized tests and one is expected to be able to communicate using formal language to get a well-paying job. *Id.* at 28.

140 *Id.* Payne writes:

> When student conversations in the casual register are observed, much of the meaning comes not from the word choices, but from the non-verbal assists. To be asked to communicate in writing without the non-verbal assists is an overwhelming and formidable task, which most of them try to avoid. It has very little meaning for them.

Id.

141 *Id.* at 29. However, Payne argues that one must have some need and desire to learn that language. "[W]ould you learn to use sign language well if there were no significant relationship that called for that usage?" *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

Hobson directly recognized this disparity.[145] The remedy in *Hobson* focused on decreasing the amount of overcrowding of African Americans in inner city schools.[146] It also abolished the track system, but required an educational plan to "include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunities to all schoolchildren."[147] However, *Hobson*'s remedy may be difficult to implement today because African Americans face linguistic, cultural, and social barriers and disadvantages before they even enter school.[148]

Early intervention helps to close the gap between socially disadvantaged children and their mainstream peers.[149] Programs such as Head Start, a federally funded preschool program for at-risk children, promote early intervention.[150] In recommending changes to the IDEA, the Presidential Commission stressed the important role that early identification and early intervention programs play in preventing some students from having to enter into special education programs when

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145 Hobson v. Hansen, 269 F. Supp. 401, 514 (D.D.C. 1967) (concluding that the students were "in reality being classified according to their socio-economic or racial status, or – more precisely – according to environmental and psychological factors which have nothing to do with innate ability."). *See supra* notes 113-14 and accompanying text.

146 *Hobson,* 269 F. Supp. at 515.

147 *Id.*

148 *See also* Hobson v. Hansen: *Judicial Supervision of the Color-Blind School Board*, *supra* note 110, at 1515-16. The author suggests that the court focused too much on racial disparity and should have focused more on economic differences affecting outcomes on standardized tests, explaining:

> Aspirations and family background need not always correlate with race; economic class is probably a more reliable indicator. If this is so, Negroes attending a middle-class Negro school suffer no educational detriment from de facto segregation; furthermore, integration of poor Negroes and poor whites would produce little or no educational benefit.

Id. (footnotes omitted).

149 Jack M. Fletcher et al., *Classification of Learning Disabilities: An Evidence-Based Evaluation*, *in* IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE 225 (Renee Bradley et al. eds., 2002). Children from economically advantaged backgrounds typically have vocabularies two times larger than their economically disadvantaged peers. *Id.* at 224. Reasons for this discrepancy include "print exposure, parental literacy levels, and reading to the child." *Id.*; *see also* Brooks-Gunn & Markman, *supra* note 103, at 15 (for instance, when parenting is taken into consideration, "a 12 to 15 point gap between black and white children is reduced by 3 to 9 points").

150 *See generally* Brooks-Gunn & Markman, *supra* note 103, at 151 (discussing programs that encourage increased parental involvement in children's' education increases academic improvement).

they grew older.[151] The 2004 IDEA amendments stressed the importance of early identification and early intervention programs.[152] By requiring states to adopt early intervention programs to provide assistance to infants and toddlers with disabilities, the IDEA may succeed in preventing some infants and toddlers from being identified with a disability when they reach school-age.[153]

However, the Act allows schools to use their funds to address the needs of at-risk infants and toddlers in addition to those already identified with disabilities; it does not require them to provide intervention programs to these students.[154] The IDEA could protect some children at an early age from failing in the regular classroom and also from being identified as having a disability, but it does not.[155] Moreover, the Act does not mandate that intervention programs be provided to school-age students.[156] Providing intervention programs to these students could prevent them from later school failure or dropout.[157]

B. Neutrality in Evaluation Procedures

A second provision aimed at decreasing the racial disproportion in special education requires that states ensure their evaluation techniques are racially and culturally neutral.[158] In *Larry P. v. Riles*,[159] the court's equal protection analysis centered on whether the plaintiffs could show that I.Q. tests were the primary reason why schools placed students in EMR classes; if they could do so, the burden shifted to the defendants to show a rational basis for using the tests without any other method.[160]

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151 *See supra* note 124 and accompanying text; *see also* Garda, *supra* note 80, at 1098 (arguing that, once they employ intervention strategies, schools "will be able to differentiate between children that have different learning styles and children that have disabilities").

152 *See supra* Part II.D.2.

153 *See supra* note 124 and accompanying text.

154 Pub. L. No. 108-446 § 101 (2004) (requiring states to implement services only if their states have minority over or under representation in their special education programs).

155 Garda, *supra* note 80, at 1099.

156 *See supra* Part II.D.2.

157 *See supra* note 82 and accompanying text (citing that lack of stimulation and failing school grades contributed to several students' decision to drop out of high school).

158 20 U.S.C. §§ 1414(b)(3)(A)(i)-(iii); *see supra* note 123 for the text of the IDEA provision.

159 Larry P. v. Riles, 343 F. Supp. 1306 (N. D. Cal. 1972). The school districts issued standardized I.Q. tests to its students in order to determine whether they should be placed in Educable Mentally Retarded ("EMR") classes. *Id.* at 1307. As in *Hobson*, the students claimed that the tests administered were racially and culturally biased and therefore racially discriminatory against African Americans. *Id.* at 1308.

160 *Id.* at 1311.

While *Hobson* focused on the inability of the students to move within their set tracks, the court in *Larry P.* focused on the limited evaluation procedures provided by the school district in determining whether a student needs special education services.[161] Unlike *Hobson*, the court determined in *Larry P.* that the school had provided enough procedural safeguards in evaluating its students for EMR placement.[162]

Unlike *Hobson* and *Larry P.*, the court came to a different conclusion in *PASE*.[163] The judge in *PASE* refused to rule that the assessment techniques used by the school violated the Equal Protection Clause.[164] Because of the 2004 IDEA amendments, the holding of *PASE* is questionable.[165] The 2004 Amendments specifically address the need for cultural and racial neutrality in conducting assessments for IDEA eligibility.[166] In addition to maintaining neutrality in the evaluation procedures used, the IDEA also mandates that the school "use a variety of assessment tools and strategies to gather relevant functional, developmental information" and "not use any single measure or

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[161] *Id.* The school, in evaluating its students, conducted not only I.Q. tests, but conducted psychological examinations which looked to factors such as developmental history and cultural background. *Id.* It also included a home visit, and the examiner estimated the student's adaptive behavior. *Id.* These were conducted with parental consent. *Id.* Moreover, a student will not be placed in an EMR class "unless other evidence 'substantiates' the I.Q. test scores." *Id.* at 1312.

[162] *Id.* at 1315. However, the court did express its concern that the school district may need to reevaluate its procedures and offered alternatives. *Id.* at 1313-14. For instance, some school districts relied heavily on teacher assessment and achievement test results, banning I.Q. tests. *Id.* at 1313. The court also suggested altering the I.Q. tests to favor the culture of the student. *Id.* at 1314.

[163] PASE v. Hannon, 506 F. Supp. 831, 883 (N.D. Ill. 1980).

[164] *Id.* at 882. The Judge criticized *Larry P.* because the Judge did not examine the test questions and the exams individually to determine whether or not they were discriminatory. *Id.* In *Larry P.*, the judge relied heavily on expert testimony and took as undisputed fact that the tests were culturally biased. *Id.* In *PASE,* however, the Judge discredited the expert testimony, which explained cultural differences that may influence African American perception of the world and results on the tests. *Id.* at 873-74. For example, African American culture emphasizes extended family, while mainstream culture puts more emphasis on the nuclear family. *Id.* at 873. Thus, questions that test a student's perception about family life may be different depending on what race the student is. *Id.* However, the Judge in *PASE* was not convinced that differences made substantial impacts on the actual tests at issue. *Id.* at 874. He explains:

> Dr. Williams did not explain how he relates the other characteristics of black culture to performance on the tests. It is not clear, for instance, how the extended family as opposed to the nuclear family would pertain to performance on the tests. . . Dr. Williams' description of black culture has not been connected to the specific issue in this case.

Id. at 873.

[165] *See supra* Part II.D.2.

[166] *See supra* Part II.D.2; notes 123-24 and accompanying text.

assessment as the sole criterion."[167] The Department of Education provides further guidance to evaluation procedures.[168] Specifically, the tests administered must be "tailored to assess specific areas of educational need and not merely those that are designed to provide a single general *intelligence quotient*."[169]

Thus, it is clear that Congress adopted the policy in Georgia's *NAACP* case that schools should use a variety of assessment evaluations when determining whether a student is eligible for services under the IDEA.[170] Additionally, by expressly prohibiting generalized standardized tests in evaluation procedures, cases like *PASE,* where standardized testing is upheld, may be questioned.[171] Furthermore, eliminating the use of these tests will help to ensure that students are adequately assessed based on their disability and not based on whether they have learned the material.[172] In conclusion, schools should expect to be held to the neutrality standard when conducting their assessments because the *PASE* decision may not be good law in the future. Though the Judge in *PASE* decided that only a few of the questions on the standardized tests were discriminatory, he did not conclude that the

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167 20 U.S.C. § 1414(b)(2) (2004).

168 *See* 34 C.F.R. §§ 300.530-300.536 (2006). For example, states must provide techniques that measure whether a student has a disability and not the level of mastery of the English language. 34 C.F.R. § 300.532(a)(2). Although this paragraph is meant for students with limited English proficiency, such as immigrants, this may apply to African American students as well because of the language barriers explained *supra* Part III.D.1.c; *see also infra* Part V (arguing that programs should be developed to prevent gaps in language development).

169 34 C.F.R. § 300.532(d) (emphasis added).

170 *See supra* note 123.

171 *PASE* based its decision on the determination that the standardized tests already being used to evaluate disability were not culturally biased. PASE v. Hannon, 506 F. Supp. 831, 883 (N.D. Ill. 1980). However, under the new IDEA, courts will no longer need to evaluate these generalized tests subjectively to determine whether they impose enough cultural bias to affect the outcomes of the test takers because they are prohibited by 34 C.F.R. § 300.532(d). Indeed, *Hobson* has been criticized because it can be argued that the Judge placed too much of his own educational assessments which he had no expertise to determine. *See supra* note 113 and accompanying text.

172 *See, e.g.*, President's Commission, *supra* note 43 (recommending that IQ tests be declared unnecessary in evaluating students). The Commission posits that eliminating these tests would help to "shift the emphasis in special education away from the current focus, which is on determining whether students are eligible for services, towards providing students the interventions they need to successfully learn." *Id.* at 5. Additionally, as *PASE* recognized, some students may be misdiagnosed as being learning deficient as a result of their test scores when, in reality, these students may have either another disability, such as dyslexia, or no disability at all, which prevents them from performing well. *PASE v. Hannon,* 506 F. Supp. at 834.

tests as a whole violated equal protection.[173] Schools may expect courts to take a step back from the principles outlined in *PASE* and return to *Hobson*-like analysis to determine that tests affecting minorities violate the Equal Protection Clause.

IV. CONTRIBUTION

Standardized testing cases—such as *Hobson, Larry P., PASE*, and *NAACP*—illustrate that there is an inherent difficulty in assessing children for disabilities using standardized testing techniques, which is directly related to the overrepresentation of minorities in special education.[174] Congress has taken a first step in helping to change this system by requiring more race-neutral assessment and evaluation procedures through the 2004 IDEA amendments.[175] Additionally, the IDEA attempts to address the racial disproportion by mandating that schools adopt early intervention services for students with disabilities to help better prepare them for school.[176] However, the Act fails to address students who do not have a disability early in their childhood, but who are at-risk for being identified for special education later in their academic careers.[177] This Part first argues that the IDEA should mandate that states employ early identification and intervention programs for students at risk of being identified with disabilities.[178] Finally, it suggests guidelines to help schools comply with the new IDEA and the regulations.[179]

A. The IDEA Should Mandate that Schools Provide Intervention Strategies for Students At-Risk of Special Education Evaluation

1. Proposed Amendment to the IDEA

§ 1401. Definitions:

(3) At-Risk

The term "at-risk" means any student who faces hardships that contribute to low academic performance, such as

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173 *Id.* at 834.

174 In *Larry P.*, for instance, the court recognized this difficulty by proposing that the school district use alternate methods, even eliminating the use of the I.Q. test altogether. Larry P. v. Riles, 495 F. Supp. 926, 960 (N.D. Cal. 1979).

175 20 U.S.C. § 1414(b)(3) (2004). *See supra* note 123 for the full text of these provisions.

176 20 U.S.C. § 1413(f)(1) (2004). *See supra* note 124 for the full text of this provision.

177 For instance, these students might include those with socioeconomic status, who attend schools with low funding, who face language barriers, and who take standardized test evaluations. *See supra* Part II.D.1 (discussing these factors).

178 *See infra* Part IV.A.

179 *See infra* Part IV.B.

> *socioeconomic status, difficulty in mastering Standard American English, lack of family support, or other factors, but who is not yet eligible for special education services under this Chapter.*
>
> § 1413 Local educational agency eligibility.
>
> (f) Early intervening services.
>
> (1) In general
>
> A local educational agency may not use more than 15 percent of the amount such agency receives under this subchapter for any fiscal year, less any amount reduced by the agency pursuant to subsection (a)(2)(C) of this section, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services *and general education intervention programs*, which *must* include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who *are at risk of being so identified in the future and* who need additional academic and behavioral support to succeed in a general education environment.

2. Commentary

The IDEA was intended to ensure that students with *disabilities* are provided an education.[180] It was not intended to provide remedial educational services to students who simply performed below average in school and were not taught properly in schools. However, students who are being provided inadequate education in the general education system consistently perform low on standardized tests and are incorrectly identified as having learning disabilities.[181] In 1999-2000, national expenditures for special education services reached an estimated $50 billion.[182] The cost of special education is only expected to increase.[183] As an added burden on schools, special education teachers

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180 *See supra* note 40 and accompanying text.

181 *See supra* Part II.D.

182 PRESIDENT'S COMMISSION, *supra* note 43, at 30.

183 Palmaffy, *supra* note 39, at 2.

have enormous case loads and must fill out large amounts of paperwork, which cuts into the time spent with their special education students. With such burdens being placed on schools that are directly related to their special education programs, it becomes necessary for schools to examine whether they are actually providing adequate special education services or simply weeding out students who may not have a learning disability but do not perform as well in school.[184]

The IDEA provides children who need special services with safeguards to ensure that they are given an individualized and appropriate education.[185] Nonetheless, a student's education is inappropriate if she is misidentified as having a disability when in reality she has difficulty reading or understanding the evaluating language. Moreover, when students such as those found in the *Hobson* decision are systematically placed in low tracks and restrained from moving out of that track, the education is hardly "individualized" but is rather applied to a large group of students. Misidentification of special education needs is discriminatory.[186]

Intervention programs work to prevent many students from even entering a special education classroom.[187] The IDEA now only provides for *early* intervention programs, focusing on identifying students for disabilities when they are toddlers or pre-schoolers.[188] However, the current IDEA neglects students, such as the Freedom Writers, who, instead of being identified as disabled at an early age, were identified as needing special education only when their schools no longer could or wanted to handle their behavior problems.[189]

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184 *See* Heubert, *supra* note 64 (arguing that many students perform poorly on standardized tests because they were never taught the material on which they were being tested).

185 Rothstein, *supra* note 61, at 39.

186 *See, e.g.*, Hobson v. Hanson, 269 F. Supp. 401, 429-42 (D.D.C. 1967); *see also* Garda, *supra* note 80, at 1074 (arguing that "[r]eclaiming special education from over represented African-Americans and instructional casualties and placing it back in the hands of the genuinely disabled cannot occur until special education relinquishes its exclusive grip on individualized instruction.").

187 *See supra* note 130. The federally funded preschool program, Head Start, is an effective tool to helping economically disadvantaged students become more prepared on entering school. In 2002, the Presidential Commission found that early intervention programs for toddlers and infants with disabilities were cost effective but rarely implemented by states. PRESIDENT'S COMMISSION, *supra* note 43, at 18.

188 *See supra* notes 123-24 and accompanying text.

189 *See supra* Part II.D.1.c.

Furthermore, although programs like Head Start provide an excellent avenue for disadvantaged students to be better prepared for school, more needs to be done to account for the language difficulties that African Americans face. Many students are placed in special education simply because they cannot read.[190] The IDEA should require schools to provide intervention programs for students beyond the pre-school age to address directly the language difficulties that many students face, particularly African Americans.[191] For example, reading programs and tutoring facilities would help to decrease this unacceptable percentage of students in special education and increase overall student performance.[192]

The IDEA should reflect a policy that attempts to reverse this ever-increasing failure to provide students with quality education. By amending the IDEA to require schools to provide students at risk of being identified as needing special education, ultimately, fewer students will be identified as needing special education. This reduces the enormous costs of special education and will decrease the paperwork special educators must complete. The ultimate result will be that children with and without disabilities will be provided an education appropriate to their needs.

B. Race-Neutral Evaluation Procedures

In order to comply with the IDEA and its regulations, schools should ensure that they are utilizing the most racially-neutral and culturally-neutral assessment techniques possible.[193] A suggested approach to help eliminate the inherent racial bias in standardized testing is to evaluate students using "psychometric tests that involve achievement and cognitive performance."[194] These tests stress the importance of adaptive behavior and cognitive processes instead of mere mainstreamed intelligence.[195] This may reduce, but not eliminate the language barrier that still exists for African Americans. However, for students that speak a language other than English, school remedies are already in place and

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190 *See supra* note 103 and accompanying text.

191 *See supra* Part II.D.1.c.

192 *See supra* notes 79-82 (explaining the social stigma students faced as being labeled needing special education and the resulting low expectation of those students by teachers and the students themselves).

193 *See supra* Part II.C (discussing the IDEA and CFR regulations and their requirements for evaluating students).

194 Fletcher et al., *supra* note 149, at 234. The authors suggest that relying on these tests would eliminate the need for standardized I.Q. tests. *Id.*

195 *Id.* at 234.

implemented to assist these students in becoming English literate.[196] Very little assistance exists for African American students who speak Black English Vernacular.[197] Eliminating the inherent racial bias found in standardized testing will do little to improve the standard English language skills of the minorities prevalent throughout the education system. Therefore, it is imperative that schools provide students with assistance and tutoring in learning Standard American English.

V. CONCLUSION

Children in America deserve to have an education that will enable them to thrive in our increasingly educated society, and the quality of this education should not depend on economic status or race. Special education misidentification effectively keeps students from learning to their best potential. Clearly, Congress hoped to begin to solve this major problem in 2004 when it reenacted the IDEA, but it did not do enough.[198] The IDEA should require schools to have in place early intervention programs that not only serve to help children with disabilities, but provide those programs to students at risk of being identified in the future as well. An amendment to the IDEA mandating that schools provide intervention services to *all* children, and not just infants and toddlers, who are identified with a disability or who are at-risk of being so labeled, will prevent many students from being misidentified and forgotten when they are older. Additionally, schools should take seriously the mandate that they use racially-neutral and culturally-neutral disability assessment techniques and strive to eliminate the use of standardized tests in disability identification, because these tests contribute to the racial disproportion in special education.[199] *Brown v. Board of Education* promised that minority students would be provided with equal educational opportunities, but the special education system has failed many minority students. Providing early intervention programs will not only save money for later special educational services,

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196 *See generally* Memorandum from Michael L. Williams, *supra* note 105 (listing transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language programs as many of the programs school districts may use in assisting their non-English speaking students); *see also* Alfredo J. Artiles et al., *supra* note 104, at 117 (finding that students who are classified as limited English proficient are overrepresented in special education in later grades).

197 *See, e.g.*, Carol McDonald Connor & Holly K. Craig, *supra* note 91 (discussing African American English and its effects on preschool children's reading readiness).

198 *See supra* Part II.D.2. The President's Commission also expressed the urgent need to tackle and solve the problem. PRESIDENT'S COMMISSION, *supra* note 43, at 26.

199 *See supra* notes 114-15 and accompanying text.

it will increase students' self-esteem and help them to have high expectations for themselves and their futures. The educational success of people like Principal Albano and the Freedom Writers should not be newsworthy material, but the norm.

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