Historical and Legal Overview of Special Education Overrepresentation: Access and Equity Denied

DONNA Y. FORD
Vanderbilt University
CHARLES J. RUSSO
University of Dayton

ABSTRACT
The history of the denial of equal education opportunities to Black children is a long one, whether through racial segregation or overrepresentation in special education. No other group is as overreferred, overidentified, and overrepresented in special education as Black students, specifically Black males. The authors present an historical and legal overview of special education and critique in the 2015 report by Morgan, Farkas, Hillemeier, Mattison, Maczuga, Li, and Cook. Based on their analysis of limited criteria rather than comprehensive criteria, Morgan and colleagues claim that Blacks were not overrepresented in special education and that more should have been identified. This study created a swelter of discussion and debates that are not new but that the authors find to be biased, polemic, and deficit-oriented assertions. The potential impact of Morgan et al.’s work (arguments, findings, and conclusions) must be interrogated rather than discounted.

Sadly, the history of the denial of equal education opportunities to Black children is a long one, whether through racial segregation or being overrepresented in special education in American public education. As documented below, no other group of children is as overreferred, overidentified, and overrepresented in special education as Black students, specifically Black males. Federal reports, national studies, state reports, and other district-wide studies, discussed below, consistently present data attesting to this sad state of affairs.

The Annual Reports to Congress have revealed the pervasive and persistent magnitude of overrepresentation in specific special education placement areas, such as emotional and behavioral disorders, intellectual disabilities, developmental delay, and attention deficit hyperactivity disorder (ADHD). These high-incidence areas are subjective and based on tests. This is problematic in light of language in the Individuals with Disabilities Education Act (IDEA) addressed below, which provides guidance for educators to ensure that they are not being culturally biased and stigmatizing in measures, policies, and procedures.

According to the 37th Annual Report to Congress,

... Black students are over two times likely to be at risk for having both intellectual disabilities and emotional disturbance than other students, almost two times more likely to have developmental delay, and 1.5 times more likely to have a specific learning disability. (U.S. Department of Education, 2013, exhibit 26, p. 42; also see http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf)
In addition to overrepresentation, Blacks are often placed in the most restrictive settings, meaning not educated with students without disabilities. De facto segregation remains evident whether in separate schools, residential facilities, hospital/homebound environments, and correctional facilities (U.S. Department of Education, 2013; also see http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf).

The extensive and persistent overrepresentation of Black students, mostly Black males, is undeniable. Decades of indisputable reports reveal such imbalances. Chinn and Hughes (1987) paved the way for schools to set equity goals, but little progress is evident.

In 1968, the U.S. Department of Education’s Office of Civil Rights (OCR) began conducting a biennial survey of elementary and secondary schools in the United States . . . . One focus of the data in these surveys has been placement in special education programs disaggregated by various student characteristics (e.g., sex, race/ethnicity, receipt of free/reduced price lunch, language proficiency). The patterns of disproportionality have remained relatively stable at the national level for the past 40 years. (Hosp (n.d.); http://www.rtinetwork.org/learn/diversity/disproportionaterpresentation)

Arguably, the most successful federal education statute is the IDEA (2004). Yet, even though some of the motivation behind the IDEA was undoubtedly to remedy inequities faced by students of color, in light of Mills v. Board of Education of the District of Columbia (1972), discussed below, it was not until 30 years after the law’s initial enactment that Congress modified the statute in an attempt to take greater steps to remedy the situation. In its 2004 reauthorization of the IDEA, effective in 2005, Congress directed state officials to develop policies and procedures to prevent the overidentification or disproportionate representation of students by race and ethnicity. At the same time, this part of the IDEA requires school officials to record the number of children from minority groups who are in special education classes and to provide early intervention services for students in groups deemed to be overrepresented.

Our focus on the overrepresentation of Black students in special education placements is long overdue. Moreover, there is a sense of urgency to take another look and critique the IDEA prompted by the flawed work of Morgan et al. (2015) who boldly and erroneously claimed that Blacks were not overrepresented in special education and that more should have been identified, based on the limited criteria they analyzed rather than comprehensive criteria. This study created a swelter of discussion and debates similar to those by Herrnstein and Murray (1994) and rebuked by Gould (1996). Biased, polemic, deficit-oriented assertions and data riddled this “scholarship” and those supporting the arguments, findings, and conclusions. The potential impact of Morgan et al.’s work must not be discounted, hence this special issue.

Ford and Toldson (2015) listed numerous flaws in Morgan et al.’s (2015) literature review, methodology, sampling, analyses, and interpretations (see http://diverseeducation.com/article/76088/). While space limitations prohibit us from sharing all of those shortcomings, others in this special issue have addressed them in detail. One of the many egregious aspects of their study was the homogenization of students of color who come from different racial and ethnic backgrounds; the study is an inconsistent discussion, treatment, and disaggregation of the selective data subgroups by race and ethnicity, income, gender, and language. That is, the experiences of Blacks, Hispanics, Native Americans, and Asians differ based on income, language, family status, school experiences, and expectations, as noted, for example, by Ogbu (1990), but group differences and heterogeneity were not addressed in the literature and thus ignored in the data and subsequent misinterpretations. When teasing out different student and group outcomes in general and by race in particular, it is necessary to do so with a critical lens—one that contextualizes the unique and specific nuances and experiences of each group. This includes disaggregating data to understand the representation of Black males compared to Black females, including along income lines (those on free and reduced lunch vs. paying full price). This was not considered by Morgan et al., calling into further question the generalizability and utility of their study.

Against this background, then, the purpose of this article is to present a historical and legal overview of special education and the overrepresentation of racially different students. In so doing, the

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article reviews decades of federal and national reports/studies along with litigation and legislation on providing special education for students who are Black. The article ends with recommendations to decrease the misidentification and misplacement of Black students in special education, particularly in high-incidence categories.

A Brief Overview of the IDEA

It is worth keeping in mind that Brown v. Board of Education (1954) is the most important case on schooling in the history of the U.S. Supreme Court, arguably its most significant judgment ever. In Brown, the Court unanimously put an end to de jure (as a matter of law) racial segregation in public schools even as the nation continues to struggle with de facto (as a matter of fact) segregation based on such matters as housing and institutional racism. At the same time, the Court opened the door to equal educational opportunities for other groups that had long been marginalized and/or underserved, most notably students from poor families, students who needed help in achieving English proficiency, females, and students with disabilities.

While it may be that the United States would eventually have addressed the needs of these groups, there can be no doubt that Brown (1954) served as the impetus. For instance, Congress addressed the needs of poor students as it did in the 1965 Elementary and Secondary Education Act (ESEA), later re-codified as the No Child Left Behind Act, and now identified as the Every Student Succeeds Act (https://www.whitehouse.gov/the-press-office/2015/12/10/white-house-report-every-student-succeeds-act). Seven years later, Title IX of the 1972 amendments to the ESEA ensured equal opportunities for women in intercollegiate sports; the reach of Title IX has since expanded to provide protection from sexual harassment in schools and in the workplace.

Most importantly, for the purposes of this article, the 1975 enactment of the Education for All Handicapped Children Act (EAHCA), now the IDEA, addressed the needs of students with disabilities. Insofar as the focus of this article is on the inequalities that children of color with disabilities face despite the best intentions of the IDEA, the remainder of this section examines its legal history and content.

Prehistory

As might have been expected, protecting the rights of students with disabilities was the product of years of legal maneuvering. The 12% of children who were served in 1948 grew to 21% in 1968 and to 38% in 1968 (Ballard, Ramirez, & Weintraub, 1982, p. 2). Still, two federal trial court cases provided the greatest push toward the enactment of the EAHCA.

Pennsylvania Association for Retarded Children v. Pennsylvania (PARC, 1971, 1972) was a consent decree, signifying that it was the result of a judicially approved settlement between the parties rather than a judgment on the merits of the underlying claims addressing the rights of students with disabilities. In PARC, a federal trial court created many of the principles that were ultimately included in the IDEA.

The parties in PARC agreed that students who were either “mentally retarded” (now called intellectually disabled) or were thought to have been so could not have been denied admission to public schools or their placements changed without receiving procedural due process. Now more commonly referred to as “inclusion” rather than mainstreaming, the court also pointed out that it was preferable for school officials to place children with disabilities in regular classrooms rather than having them segregated in more restrictive settings. The first federal case addressing the educational needs of children with disabilities, in PARC, the parties agreed that all students, including those with disabilities, can learn in schools and that they are entitled to programs designed to meet their individualized learning needs.

Mills v. Board of Education of the District of Columbia (Mills, 1972) concerned the needs of seven named exceptional children who filed suit on behalf of perhaps as many as 18,000 students with disabilities who were not receiving programs of specialized education. Most of the children, who were students of color, would today have been classified as having behavioral problems, intellectual disabilities, emotional disorders, and/or ADHD—language not used at that time.
In a decision on the merits, indicating that a trial occurred, the federal district court in Washington, DC, rejected the claim of school officials that the school board lacked the resources to provide educational opportunities for all of its students. Instead, the court directed officials to spend its funds equitably to provide educational opportunities consistent with the individualized needs and abilities of all students, explaining that inequities could not weigh more heavily on those with disabilities. In line with PARC, the court directed officials to provide students and their parents with due process before they could be excluded from school for disciplinary reasons, have their placements changed, and/or have the services they received discontinued. In creating these safeguards, the court foreshadowed what became part of the due process protections included in the IDEA.

**Overview of the IDEA**

To be eligible to receive services under the IDEA, children/students with disabilities must meet four eligibility requirements. First, students must be between the ages of 3 and 21 years (20 U.S.C.A. § 1412(a)(1)(A)). Even so, local boards are not obligated to offer special education services to individuals between the ages of 18 and 21 years who are incarcerated in adult facilities but only if they had not previously been identified as qualified to receive services under the IDEA when they were incarcerated (20 U.S.C. § 1412(a)(1)(B)(ii)) or those who graduated from high school with regular diplomas (34 C.F.R. § 300.102(a)(2)(B)). Subject to state laws that may offer greater protection, courts interpret the IDEA as obligating educational officials to treat students as being 21 years until the end of the academic years in which they reach the statutory age limit.

Second, children/students must have specifically identified disabilities. More specifically, according to the IDEA, the term, *child with a disability*, means 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. . . . (20 U.S.C.A. § 1401(3)(A)(I))

Third, students must be in need of special education (20 U.S.C.A. § 1401(3)(A)(ii)). In other words, children must need a “free appropriate public education” (20 U.S.C.A. § 1401(9)) in the least restrictive environments where their education is directed by the contents of their Individualized Education Programs (IEPs) (20 U.S.C.A. §§ 1410(14), 1414(d)(1)(A)). In evaluating whether students need special education services, the IDEA mandates that educational officials select and administer testing and evaluation materials that are neither racially nor culturally biased (20 U.S.C.A. §§ 1412(a)(6)(B), 1414(b)(3)(A)(i)). Moreover, students whose primary language or other mode of communication is not English must be assessed in their native languages or other modes of communication (20 U.S.C.A. §§ 1412(a)(6)(B), 1414(b)(3)(A)(ii)). Further, students must be subjected to multidisciplinary evaluation procedures with the result that no single test can be the sole factor in determining eligibility or placements (20 U.S.C.A. § 1414(b)(2)(B)).

Fourth, children must be offered related services (20 U.S.C.A. § 1401(3)(A)(ii)) such as “developmental, corrective, and other supportive services (20 U.S.C. § 1401(26)(A)).” As such, children are not required to need related services to qualify under the IDEA.

A noteworthy feature of the IDEA is the extensive due process protections safeguarding the rights of children (20 U.S.C.A. § 1415) and their parents, a term broadly interpreted to include “natural, adoptive, or foster parents, guardians, and individuals acting in the place of natural or adoptive parents (including grandparents, stepparents, or other relatives) with whom children live, or individuals who are legally responsible for a child’s welfare” (20 U.S.C.A. § 1401 (21).)

The IDEA’s due process rights include parental notification in a language understandable to the general public and, if necessary, translated to parents’ native languages or primary modes of communication. Oral notification may be appropriate if written notice is not feasible (34 C.F.R.
§ 300.503(c) before agreeing to initial evaluations (20 U.S.C.A. § 1414(a)(1)(D)(i)(I)) and/or placements of their children (20 U.S.C.A. § 1414(a)(1)(D)(I)), and the right to participate in creating the IEPs governing the education of their children (20 U.S.C.A. § 1414(d)(1)(B)(ii)). Given this historical overview of relevant legal cases, we turn our attention to implications tied to overrepresentation.

THE IDEA AND DISPROPORTIONATE REPRESENTATION

As of 2005, when identifying children in need of special education services, the IDEA has directed state officials to devise “policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities (20 U.S.C.A. §§ 1412(a)(24)).” This part of the law directs educators to record the number of students from minority groups who are in special education classes and to provide early intervention services for children in groups deemed to be overrepresented. The Office for Civil Rights collects such data for 99% of schools, which can be found at the national, state, district, and school building levels (http://ocrdata.ed.gov).

To date, only one recorded case has addressed the IDEA’s overrepresentation provision. In a long-running dispute from Pennsylvania, the Third Circuit affirmed the rejection of allegations from a class of African American parents that their school board practiced systematic and intentional racial segregation against their children with learning disabilities (20 U.S.C.A. §§ 1412(a)(24)).” This part of the law directs educators to record the number of students from minority groups who are in special education classes and to provide early intervention services for children in groups deemed to be overrepresented. The Office for Civil Rights collects such data for 99% of schools, which can be found at the national, state, district, and school building levels (http://ocrdata.ed.gov).

The outcome in Blunt represents something of a setback for those who would like to eliminate the overrepresentation of students of color in special education placements. Even so, readers are cautioned to read too much into the case one way or the other. More specifically, in an adversarial proceeding that was largely based on the pleadings, the class submitted charges that a federal trial court rejected. On appeal, the Third Circuit affirmed that the class and its lawyers failed to provide evidentiary materials necessary to advance their case or to meet statutory deadlines.

Blunt was decided as it was at least, in part, because the plaintiffs failed to comply with the appropriate statute of limitations within which to file their claim. The court did not address the merits of the claim advanced by the class. Readily conceding that the Supreme Court’s refusal to hear an appeal is of no precedential value, insofar as all three levels of the federal judiciary rejected the claim, it may be that the plaintiffs will have to build a stronger case. This is not a rejection of the argument that Blacks and some other students of color are overrepresented in special education and being served inadequately. However, it does appear that the plaintiffs failed to make their case.

SUMMARY AND RECOMMENDATIONS

The contributions of litigation and legislation to the development of special education and its subsequent implementation notwithstanding, little has changed regarding Black students’ overrepresentation in special education overall and especially in high-incidence areas (Russo & Talbert-Johnson, 1997 and authors of this special issue). If anything, despite the promise of the IDEA, progress toward making more equitable placements for Black students has been slow and/or nonexistent.

The field has a long way to go in terms of providing equitable placements for Black students in special education and is made more difficult due to counterproductive and regressive studies such as that presented by Morgan et al. (2015). While recognizing that the IDEA is long overdue for needed reauthorization, we offer the following recommendations for its implementation as the statute now stands. We do not offer suggestions on how the statute might be improved. Rather, we offer the following recommendations for practice to move education forward and effect change:

1. Set quantifiable equity goals: Law and policy makers along with educational leaders should
determine numerical equity goals such as those used in employment discrimination, older special education cases (Chinn & Hughes, 1987) and a recent discrimination case (Chinn & Hughes, 1987; Ford, 2013, 2014; Ford & Russo, 2015; Russo & Ford, 2015) that sets minimum and maximum representation. This is not a racial quota, but rather a 10–20% allowance for school officials to use as a guide in deciding when representation is beyond statistical chance and discrimination may be operating. Just as national- and state-level policies should involve a variety of professions, so, too, should local educational leaders put together teams to develop and review their plans. Teams should include building- and district-level administrators, a board member, a board’s attorney, parents, community leaders, and others who are interested in the welfare of children.

2. Disaggregate data by race, gender, and income: Students of color are heterogeneous, and special education data must be examined with this in mind. Between-and within-group analyses and interpretations are critical to develop strategies that decrease and eliminate overrepresentation. For example, while Black students are overrepresented in special education and most of them are Black males, it is important to try to understand why this is so and whether it is equitable. Similarly, Black and Hispanic students have different experiences in special education, along with different representation issues. Each group’s data must be examined, with educators tailoring strategies for prevention and intervention—for support and change to provide all children with free appropriate public education in the least restrictive environments.

3. Adopt culturally responsive instruments: Ongoing studies and discussions support or oppose the efficacy of tests and instruments (e.g., checklists) normed on White students and are otherwise described as colorblind. Yet, educators must be diligent about selecting all evaluation or assessment tools with bias and fairness as essential considerations. There is no such thing as a bias-free test or instrument (Ford & Helms, 2012). Consequently, tests found to be less biased toward Black students are invaluable and can go far in decreasing their overrepresentation in high-incidence special education areas/categories. Moreover, educational leaders must adopt sound testing and assessment practices such as those advocated by the American Psychological Association (see http://www.apa.org/science/programs/testing/).

4. Adopt culturally responsive policies and procedures: As discussed above, educators must be mindful of the IDEA’s bias-free testing requirements. This means that educators ought to be deliberate and intentional about evaluating policies and procedures to weed out those that contribute to overrepresentation. This includes studying referral rates and patterns by teacher demographics and reasons for referrals. Administrators must thus ask such questions as why teachers are making such referrals and what patterns can be found by teachers, other educators, and families. Further, educators must not violate Civil Rights laws, which are monitored and enforced by the Office for Civil Rights and Department of Justice (Civil Rights Act of 1964).

5. Educate families: Given the extensive presence of Black students in special education and the requirement of family input, it is essential to ensure that families know about special education categories, associated needs, and their rights as decision makers. More informed families can support their children and make appropriate decisions, which may include refusing special education identification and placement. This can be accomplished not only by posting material on district website, an activity of dubious value in some poorer communities, but by offering parent workshops and information sessions regularly to explain the many complexities of the IDEA.

6. Train educators to be culturally responsive: Overall, the majority of educators are White—in particular, White females. Too few universities have coursework designed to prepare teachers to be culturally competent or to work
with students of color, especially if students live in inner-city communities that are different from the realities teachers may have experienced. Still, there is work indicating that when such preparation is evident, educators are less biased in their views of Black and other students of color. In other words, culturally competent educators are more likely to see strengths in their students. This can decrease special education (over) referrals. Accordingly, educational leaders should offer regular, annual professional development sessions with teachers and other staff to explain the importance of being culturally responsive.

7. Develop policies ensuring that committees of decision makers are racially heterogeneous: The very racially heterogeneous nation and student population begs for decision makers to be racially diverse to the extent that this is possible. When districts lack diversity, this would entail hiring consultants in and outside of the community. When committees comprise people of color, this adds a much needed cultural lens and associated advocacy for students of color. Such members are able to reframe questions, challenge biases and stereotypes, and advocate for referred students. Cultural brokers support committee members and hold them accountable.

8. Review policies regularly: Policies should be reviewed regularly, at least every two years, to ensure that they are up-to-date with changes in state and local laws, as well as developments in special education assessment and related areas. More specifically, insofar as the IDEA is a federal law, boards should conduct internal audits to ensure that their policies are meeting what is expected of in serving children of color with disabilities. Moreover, states should be especially careful to meet their federal obligations because painfully few states do more than the minimum required under the IDEA, with West Virginia law explicating dictating that, “no state rule, policy or standard under this article or any county board rule, policy or standard governing special education may exceed the requirements of federal law or regulation” (West Virginia Code Ann. § 18–20–5(3)).

CONCLUSION

To date, the nation has yet to meet the promise of Brown (1954) and its progeny by providing equal and/or equitable educational opportunities for all children. If we are ever to achieve this seemingly elusive goal, then educational leaders, working with law and policy makers, as well as racially diverse and culturally responsive professionals, must further review the IDEA to devise ways to end the unacceptable practice whereby African American students, and males in particular, are overrepresented in special education placements.

It is an unfortunate reality that what we have written here mirrors what we and others have bemoaned for decades. It is past time for educators and other professionals to be more assertive at taking on attitudes, measures, policies, and procedures that fail to effect progress. It is essential that scholars refute studies, such as those by Morgan et al. (2015), that discount and contradict decades of data and hundreds of reports that make it clear—Black students are egregiously overrepresented in special education—the magnitude is inequitable and contributes to the miseducation of students. Deficit thinking and discrimination are major contributing factors, along with testing issues. Thousands of Black students have been misidentified and placed in special education when such services are not needed. Their potential has been denied. They have lost in a number of ways . . . and so has our nation.

REFERENCES


ABOUT THE AUTHORS

DONNA Y. FORD, Ph.D., Professor of Special Education and of Teaching and Learning in the Peabody College of Education at Vanderbilt University, publishes and consults in gifted education and urban education. She has written several books and numerous articles.

CHARLES J. RUSSO, J.D., Ed.D., the Joseph Panzer Chair in Education in the School of Education and Health Services, Director of its Ph.D. Program, and Adjunct Professor in the School of Law at the University of Dayton, writes and speaks extensively on issues in Education Law.