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Dustin Rynders

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**BATTLING IMPLICIT BIAS IN THE IDEA TO ADVOCATE  
FOR AFRICAN AMERICAN STUDENTS WITH DISABILITIES**

*Dustin Rynders\**

**INTRODUCTION**

The disproportionate representation, discipline, and restrictive placement of African American students in special education is an urgent problem and a hotly contested issue. Currently, African American students are overrepresented in special education when compared to their white peers. African American students are also disciplined at higher rates than their white peers and put in more restrictive placement settings. Implicit bias is one of the contributing reasons for this disproportionality. This paper will explore how the systematic problems of implicit bias for African Americans in the juvenile justice and child welfare systems translate to implicit bias problems and disproportionality in the special education system. Additionally, this paper explores how the federal government attempts to combat this problem through the Individuals with Disabilities Education Act (hereinafter “IDEA”) and possible legal solutions lawyers can use in the courtroom and in their own practice to combat implicit bias.

## I. WHAT IS THE IDEA?

The IDEA is Congress's way of ensuring that all students with disabilities receive a free appropriate public education (hereinafter "FAPE")<sup>1</sup> in the least restrictive environment (hereinafter "LRE").<sup>2</sup>

## II. DEFINING IMPLICIT BIAS

Implicit bias attitudes are stereotypes that can impact our actions without our conscious recognition. Everyone has implicit biases because our brains organize information through cognitive shortcuts known as schemas. Schemas are necessary for day-to-day functioning but can result in unjust outcomes when applied inaccurately. Implicit bias can be associated with race, gender, disability status, age and other characteristics. Implicit bias can interact with other psychological phenomena like racial anxiety, stereotype threat, and misuse of stereotypes. Implicit bias is independent of explicit bias but can interact with other types of bias.<sup>3</sup>

Implicit biases are more likely to impact behavior when a decision-maker has:

- a high level of discretion;
- a high cognitive load, meaning that there are many demands on the decision maker's cognitive energy;
- a need to make quick decisions; and
- a low likelihood that his or her decisions will be reviewed.<sup>4</sup>

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<sup>1</sup> THE ARC OF TEXAS & DISABILITY RIGHTS TEXAS, IDEA MANUAL 2016: A GUIDE FOR PARENTS AND STUDENTS ABOUT SPECIAL EDUCATION SERVICES IN TEXAS 6 (2016), [https://www.thearcoftexas.org/wp-content/uploads/2016/10/IDEA-Manual-2016\\_with\\_CoverREV.pdf](https://www.thearcoftexas.org/wp-content/uploads/2016/10/IDEA-Manual-2016_with_CoverREV.pdf).

<sup>2</sup> Nicole M. Oelrich, *A New "IDEA:" Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 14 (2012).

<sup>3</sup> See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); AMERICAN VALUES INSTITUTE, TRANSFORMING PERCEPTION: BLACK MEN AND BOYS (2013), <https://www.issuelab.org/resources/14809/14809.pdf>.

<sup>4</sup> See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

In the education system, decision-makers often function under the above situations. Advocates should also be wary of their own implicit biases, as research suggests no group is immune to implicit biases.<sup>5</sup>

Harvard University's Project Implicit offers free assessments to help individuals identify implicit biases.<sup>6</sup> These assessments test a variety of bias including age bias, racial bias, and ability bias.<sup>7</sup>

### III. THE ROLE OF IMPLICIT BIAS IN OTHER CHILD SERVING SYSTEMS

Although implicit bias research across systems reflects that attitudes and biases influence decision makers under the conditions outlined above, implicit bias research is most developed in the area of juvenile justice and criminal justice.<sup>8</sup>

The latest statistics from the Office of Juvenile Justice and Delinquency Prevention show that racial disparities are worsening. In 2003, black youth were 3.7 times more likely to be incarcerated than white youth; in 2013, the number grew to 4.3. In 2015, black youth were 5 times more likely to be incarcerated than white youth.<sup>9</sup> The racial disparity in arrests and detention show that black youth are 269 percent more likely than white youth to be arrested for staying out late.

There is no consensus on why the racial disparity is growing in juvenile justice. One theory is that alternatives to incarceration are more available to white youth. Other theories consider the bias judges and other decision-makers may hold against certain families—those which are single-parent, seemingly dysfunctional, have mental health problems—and the effect that bias has upon a child's placement decision.

A study of 233 narrative reports written by probation officers revealed differences in the way that probation officers described black

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<sup>5</sup> *Id.*

<sup>6</sup> See PROJECT IMPLICIT, [HTTPS://IMPLICIT.HARVARD.EDU/IMPLICIT/](https://implicit.harvard.edu/implicit/) (LAST VISITED MAR. 2, 2019).

<sup>7</sup> *Id.*

<sup>8</sup> See Eli Hager, *Our Prisons in Black and White*, MARSHALL PROJECT (Nov. 18, 2015), [http://youthlaw.org/wp-content/uploads/2015/11/Our-Prisons-in-Black-and-White\\_-\\_The-Marshall-Project.pdf](http://youthlaw.org/wp-content/uploads/2015/11/Our-Prisons-in-Black-and-White_-_The-Marshall-Project.pdf).

<sup>9</sup> THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (Sept. 2017), [www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf](http://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf).

and white youths.<sup>10</sup> The reports referred more to negative personality traits for black youths and more to negative environmental influences for white youths.<sup>11</sup> Black youths were also judged to have a higher risk of reoffending.<sup>12</sup> Research on implicit bias in public defender decision-making shows that implicit biases can: (1) affect evaluation of ambiguous evidence, (2) influence how attorneys interpret a client's ambiguous behaviors and facial expressions, (3) negatively influence attorneys' behaviors, and (4) cause attorneys to treat stereotyped individuals in stereotype-consistent ways.

Research shows that implicit bias impacts decisions made throughout the child welfare process.<sup>13</sup> Starting with the point of referral, various decisions are made that determine the outcome of a child welfare proceeding. Most decision-makers believe their evaluations to be based on an objective review of the facts, but research calls into question this objectivity. At the point of referral, black families are overreported for suspected maltreatment. During substantiation of abuse or neglect, caseworkers are more likely to substantiate abuse and remove a child in cases involving neglect (disproportionately involving black families) than those of physical/sexual violence (disproportionately involving white families). The research also shows that families of color are no more likely to mistreat their children than white families; the racial disparity in the child welfare systems shows the effect of implicit bias.<sup>14</sup>

#### IV. WHAT WE KNOW OF IMPLICIT BIAS IN EDUCATION

There is less research on implicit bias in education, but emerging research reflects the problems that exist. Teachers have significantly lower expectations for black students.<sup>15</sup> Schools with larger populations of black students have higher discipline rates and

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<sup>10</sup> George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See JINA LEE ET AL., IMPLICIT BIAS IN THE CHILD WELFARE, EDUCATION AND MENTAL HEALTH SYSTEMS (July 2015), [http://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review\\_061915.pdf](http://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf).

<sup>14</sup> *See id.*

<sup>15</sup> See, e.g., Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617, 618 (2015); Seth Gershenson et al., *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. EDUC. REV. 209 (2016).

lower special education identification rates.<sup>16</sup> Black students are more likely to be misdiagnosed than white students.<sup>17</sup> Black students are more likely to be educated in restrictive environments.<sup>18</sup> Racial disparities in exclusionary discipline are greater for discretionary, subjective offenses, rather than mandatory, objective offenses.<sup>19</sup>

A 2015 study found that the symptomology of autism may predispose individuals to activate negative implicit biases, particularly individuals who are not familiar with autism and hold negative stereotypes. These biases may be conflated if the student is part of a racial minority group.<sup>20</sup> For example, if a person holds an implicit bias against people of color, and if the same person holds an implicit bias against people with disabilities, then the two forms of bias can compound upon each other if the person meets a person of color with a disability.<sup>21</sup> The conflation of different implicit biases can cause there to be overall higher rates of implicit biases in special education.<sup>22</sup> It can also cause a person to associate the perceived traits of one group (people of color) with the perceived traits of another group (people with disabilities).<sup>23</sup>

The author believes it is likely that implicit bias in special education services can impact the way different communities view special education services. For example, the fact that African American students are disproportionately placed in restrictive settings may contribute to an impression among some African American

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<sup>16</sup> David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 196 (2015).

<sup>17</sup> David S. Mandell et al., *Disparities in Diagnoses Received Prior to a Diagnosis of Autism Spectrum Disorder*, 37 J. AUTISM & DEVELOPMENTAL DISORDERS 1795, 1799 (2007).

<sup>18</sup> Russell J. Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 EXCEPTIONAL CHILD. 411, 413 (2006); see also NAT'L COUNCIL ON DISABILITY, *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES* (2015), [https://www.ncd.gov/sites/default/files/Documents/NCD\\_School-to-PrisonReport\\_508-PDF.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf).

<sup>19</sup> See, e.g., Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002); Kimberly Booker & Angela Mitchell, *Patterns in Recidivism and Discretionary Placement in Disciplinary Alternative Education: The Impact of Gender, Ethnicity, Age and Special Education Status*, 34 EDUC. & TREATMENT CHILD. 193, 195 (2011).

<sup>20</sup> Ashley Yull, *The Impact of Race and Socioeconomic Status on Access to Accommodations in Postsecondary Education*, 23 J. GENDER, SOC. POL'Y & L. 353 (2015).

<sup>21</sup> See Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 192 (2012).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

people that special education is an undesired service that is meant to segregate and lower expectations for students, instead of a robust set of rights and services. Unfortunately, there is a shameful history of special education being misused with some African American students, so this perception is not without merit. After desegregation, African American students were frequently put in special education in order to keep them segregated from white students.<sup>24</sup>

## V. IMPLICIT BIAS IN SPECIAL EDUCATION REFERRALS<sup>25</sup>

Implicit bias towards students of color and students with disabilities can cause there to be implicit bias in the special education referral process.<sup>26</sup> In order to be referred to special education, a referral must be made by either a school staff member or a parent.<sup>27</sup>

Referrals by school staff members may be subject to implicit bias that these educators have against students of color and/or students with disabilities. The educators may not even be aware that they hold biases against students of color or students with disabilities, but these biases become evident in the referral process. For example, a white teacher may have two students—one white and one black—that rock in their chairs during class. If the teacher holds an implicit bias against students of color, the teacher may refer the black student to special education for behavioral issues, but only think that the white student is acting normally for his age.

In fact, studies have found that white teachers have referred and “placed disproportionately high numbers of their minority students into special education.”<sup>28</sup> Eighty percent of these referred students

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<sup>24</sup> Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072 (2005).

<sup>25</sup> Even though African American students are the focus of this paper, it is important to note that English Language Learners (hereinafter “ELLs”) are generally underidentified and under referred for special education services. Texas set an arbitrary 8.5 percent cap on the number of children in each school that could be placed in special education. This cap as well as the idea that ELLs do not need extra services outside of ESL contribute to the ongoing underrepresentation of ELL students in special education. Brian M. Rosenthal, *Denied: Texas Schools Shut Non-English Speakers Out of Special Ed*, HOUSTON CHRON. (Dec. 10, 2016), <https://www.houstonchronicle.com/denied/4/>.

<sup>26</sup> Redfield & Kraft, *supra* note 21, at 189.

<sup>27</sup> 34 C.F.R. § 300.301(b) (2018).

<sup>28</sup> Oelrich, *supra* note 2, at 25.

were referred by predominately white teachers, and they are later classified as emotionally disturbed.<sup>29</sup>

It is likely that there are higher rates of referral for students of color to special education because the majority of the teaching force is white.<sup>30</sup> For the 2015-2016 school year, 80.1 percent of public school teachers were white, non-Hispanic<sup>31</sup> whereas only 6.7 percent of public school teachers were black, non-Hispanic.<sup>32</sup> This is not representative of the nation as a whole where 16 percent of students are black, non-Hispanic, and 50 percent of students are white, non-Hispanic.<sup>33</sup>

Once the referral takes place, procedural safeguards mandated by the IDEA occur, but problems can still occur if a referral is based on implicit bias.<sup>34</sup> Mistakes in the referral and evaluation process of students of color can be especially hazardous because of reification, which is “a mental tendency for the label for a group to become the label for the individual and for that label to become fixed.”<sup>35</sup> Once a label has been placed upon a person it can cause her to think of herself as only as a member of that specific group.<sup>36</sup> Any other characteristics or traits that she associates with herself will become overshadowed by the label affixed to her.<sup>37</sup> When this concept is applied to special education, if the initial referral was based on implicit bias, it can be hard for the educator to think of a child with disabilities as an individual apart from her disability and label of special education.<sup>38</sup>

The reason why there is not much research done in the field of implicit bias in special education is because typically biases are self-reported and “self-reporting is not an accurate reflection of actual bias.”<sup>39</sup> This is especially true for implicit bias against people with

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<sup>29</sup> *Id.* at 25-26.

<sup>30</sup> *Indicator 8: Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/raceindicators/indicator\\_rbd.asp](https://nces.ed.gov/programs/raceindicators/indicator_rbd.asp) (last updated July 2017); *Table 209.10. Number and Percentage Distribution of Teachers in Public and Private Elementary and Secondary Schools, by Selected Teacher Characteristics: Selected Years, 1987-88 Through 2015-16*, NAT'L CTR FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d17/table s/dt17\\_209.10.asp?current=yes](https://nces.ed.gov/programs/digest/d17/table s/dt17_209.10.asp?current=yes) (last visited Mar. 2, 2019).

<sup>31</sup> *Table 209.10.*, *supra* note 30.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Redfield & Kraft, *supra* note 21, at 197-98.

<sup>35</sup> *Id.* at 193.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 190.

disabilities because it is one of the least self-reported categories of bias.<sup>40</sup> However, if a person wanted to accurately find the correlation between implicit bias and special education referrals, they would need to use an impartial instrument to measure implicit bias. Since self-reporting of bias has been found to be inaccurate, an Implicit Association Test would be recommended to measure an educator or a layperson's level of implicit bias.<sup>41</sup> An Implicit Association Test is an online tool that measures a person's level of bias against a category of people by measuring how quickly people associate negative words with people of that category.<sup>42</sup> Implicit Association Tests can be found on Harvard's Project Implicit website.<sup>43</sup>

## VI. IMPLICIT BIAS IN SPECIAL EDUCATION PLACEMENT

Even though African American students are proportionately represented in special education as a whole,<sup>44</sup> African American students are only disproportionately represented in the more subjective categories of disabilities. The IDEA's disability categories are divided into high-incidence and low-incidence categories.<sup>45</sup> Low-incidence categories are observable outside of school and consist of disabilities such as "hearing impairments, visual impairments, orthopedic impairments, autism, traumatic brain injury, and other health impairments."<sup>46</sup> The high-incidence categories of disability are more subjective and consist of severe emotional disturbance, specific learning disability, and intellectual disabilities.<sup>47</sup> African Americans are not disproportionately represented in low-incidence categories of disabilities; they are only disproportionately represented in the high-incidence categories that become prevalent during school.<sup>48</sup> Fifty-seven percent of African American students are diagnosed with high-

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<sup>40</sup> *Id.* at 195.

<sup>41</sup> JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS 2* (2009), <https://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> PROJECT IMPLICIT, *supra* note 7.

<sup>44</sup> *Indicator 6: Elementary and Secondary Enrollment*, NAT'L CTR FOR EDUC. STATISTICS, [https://nces.ed.gov/programs/raceindicators/indicator\\_rbb.asp](https://nces.ed.gov/programs/raceindicators/indicator_rbb.asp) (last updated July 2017); *Indicator 8*, *supra* note 30.

<sup>45</sup> Garda, *supra* note 24, at 1078; Oelrich, *supra* note 2, at 28.

<sup>46</sup> Garda, *supra* note 24, at 1078.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

incidence categories compared to 46 percent of white students.<sup>49</sup> This disproportionality between the rates of African American students categorized with objective versus subjective disabilities shows the role that implicit bias can play in referring students of color to special education.

Additionally, African American students are more than twice as likely as all other ethnic groups to be identified as having emotional disturbance.<sup>50</sup> It is estimated that African American students are between 2.24 and 2.36 times more likely to be classified as having emotional disturbance.<sup>51</sup> This is extremely problematic because it means that African American students who are incorrectly categorized as having emotional disturbance are put in a more restrictive environment than necessary.<sup>52</sup> Seventy-one percent of African American students are placed in the most highly restrictive setting in a public school (a separate, self-contained class) compared to only 61 percent of all other children with emotional disturbance.<sup>53</sup>

Miscategorized students also could be missing out on treatment that they need to address the different appropriate diagnosis. African American students are highly underrepresented when it comes to Autism.<sup>54</sup> In a comparative study of all 50 states, it was found that African Americans with Autism were under identified in 40 states. One of the reasons behind this is because a diagnosis of Autism comes with many more rights and services that are expensive when compared to other disability classifications. Additionally, some states require multiple individualized education plan considerations for students with Autism.<sup>55</sup> This makes it harder to diagnose students with Autism and keeps out students who need these services.

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<sup>49</sup> U.S. DEP'T OF EDUC., NUMBER AND PERCENT OF CHILDREN IN RACE/ETHNICITY CATEGORY AGES 6 THROUGH 21 WITH DISABILITIES SERVED UNDER IDEA, PART B, BY DISABILITY CATEGORY AND STATE (2016-2017), <https://www2.ed.gov/programs/osepidea/618-data/static-tables/index.html>.

<sup>50</sup> Oelrich, *supra* note 2, at 10.

<sup>51</sup> *Id.* at 22.

<sup>52</sup> *Id.* at 23.

<sup>53</sup> *Id.* at 24.

<sup>54</sup> Traci Pedersen, *Study: Minority Kids Underrepresented in Autism Diagnoses*, PSYCHCENTRAL (May 5, 2018), <https://psychcentral.com/news/2018/05/05/study-minority-kids-underrepresented-in-autism-diagnoses/135149.html>.

<sup>55</sup> *See e.g.*, 19 TEX. ADMIN. CODE § 89.1055 (2018).

## VII. IMPLICIT BIAS IN DISCIPLINE

In the juvenile justice system, African American students' suspension rates are more than double their representation rates in public schools in the United States.<sup>56</sup> African American males make up 8 percent of public school students, but they make up 25 percent of out of school suspensions.<sup>57</sup> African American females make up 8 percent of public school students, but they make up 14 percent of out of school suspensions.<sup>58</sup>

In Texas, a statewide longitudinal study was conducted that examined millions of school and juvenile justice records and controlled for more than 80 variables.<sup>59</sup> The study found that "African-American students and those with particular educational disabilities were disproportionately likely to be removed from the classroom for disciplinary reasons."<sup>60</sup> Eighty-three percent of male African American students had at least one discretionary violation; whereas, only 59 percent of white male students had a discretionary violation.<sup>61</sup> Similarly, 70 percent of female African American students had a discretionary violation, but only 37 percent of white female students had a discretionary violation.<sup>62</sup> Additionally, African American students were 31 percent more likely of being punished for a discretionary action.<sup>63</sup> This shows a huge discrepancy in how teachers and school staff discipline black students when compared to white students.

There were also higher rates of suspension and expulsion for special education students. During the study, nearly 75 percent of the special education students were suspended or expelled at least once.<sup>64</sup>

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<sup>56</sup> U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, 2015-16 CIVIL RIGHTS DATA COLLECTION SCHOOL CLIMATE AND SAFETY: DATA HIGHLIGHTS ON SCHOOL CLIMATE AND SAFETY IN OUR NATION'S PUBLIC SCHOOLS 1, 13 (2018), <https://www2.ed.gov/about/offices/list/oer/docs/school-climate-and-safety.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Student's Success and Juvenile Justice Involvement*, COUNCIL ST. GOV'TS JUST. CTR. & PUB. POL'Y RES. INST., at ix (July 2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf).

<sup>60</sup> *Id.* at x.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at xi.

Consequently, these students were more likely to be held back or drop out.<sup>65</sup>

Schools should create viable options for students other than suspension. Suspended students are the most likely to engage in activities that are not conducive to learning when suspended from school. Alternatives to out of school suspension could include in-school suspension—utilizing teaching staff for continued instruction, creating a “cool off” area in the classroom for students who need time to calm down or to compose themselves, and utilizing the school counselor as needed.

## VIII. HOW DOES IDEA ADDRESS DISPROPORTIONALITIES

### A. Protections for Individual Students

Each state must have “policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities.”<sup>66</sup> These policies should also address disproportionate placement (including disciplinary placement). While many special education advocates and attorneys are rarely contacted by parents who do not want special education services, there are many cases where a dispute over an eligibility category may make these provisions relevant. For example, a school insists on an eligibility of emotional disturbance for an African American student, whose outside evaluators believe to instead be on the autism spectrum.

In order to help reduce implicit bias and misclassification, tests and other materials used to assess the child must be: 1) “selected and administered so as not to be discriminatory on a racial or cultural basis;” and 2) “provided and administered in the child’s native language or other mode of communication and in a form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.”<sup>67</sup> “[A]ll evaluations and assessments of a child be conducted in the native language of the child, in accordance with the definition of native language in § 303.25.”<sup>68</sup>

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<sup>65</sup> *See id.*

<sup>66</sup> 34 C.F.R. § 300.173 (2018).

<sup>67</sup> *Id.* § 300.304(c)(1).

<sup>68</sup> *Id.* § 303.321(a)(5).

## IX. SYSTEMIC PROTECTIONS FOR SCHOOLS WITH SIGNIFICANT DISPROPORTIONALITY

Concerned that some racial and ethnic groups were overrepresented in special education, Congress in the 2004 reauthorization of the IDEA required that school districts identified with “significant disproportionality” based on race and ethnicity must spend 15 percent of their IDEA funds to provide early intervening services to those not yet identified.<sup>69</sup>

In 2013, the Government Accountability Office (hereinafter “GAO”) issued a report on how states determine whether districts have significant disproportionality in special education programs.<sup>70</sup> The focus was again on looking at overidentification. GAO found that the state standards varied widely. For example, the report compared

in Nebraska, . . . racial and ethnic groups must be identified for special education at a rate three times higher than for other groups for 2 consecutive years. In contrast, racial and ethnic groups in Louisiana districts must be identified for special education at twice the rate of other students in any year.<sup>71</sup>

On December 12, 2016, the U.S. Department of Education Office of Special Education Programs (hereinafter “OSEP”) released a final rule on disproportionality called the Equity in IDEA. That rule determined that all states must use a risk ratio to determine disproportionality though states were still allowed to determine what rate of disproportionality would be considered “significant.” The states were originally given until July 1, 2018, to comply with the Equity in IDEA regulations; however, in July of 2018, the Department of Education released a report allowing the states to have until July 1, 2020, to comply with the regulations.<sup>72</sup> The Department of Education was worried that a risk ratio would establish a racial quota.<sup>73</sup>

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<sup>69</sup> *Id.* § 300.646(b)-(c).

<sup>70</sup> U.S. GOVERNMENT ACCOUNTING OFFICE, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION, GAO-13-137 (2013), <https://www.gao.gov/assets/660/652437.pdf>.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 31,306 (July 3, 2018) (to be codified at 34 C.F.R. pt. 300).

<sup>73</sup> *Id.*

In its report, the Department of Education stated that it believed that “disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities” needs to be studied further.<sup>74</sup> There are two conflicting fields of thought when it comes to African American students in special education. One field believes that African American students are overidentified in special education; while the other believes that African American students are underidentified. The Department of Education takes the position that it needs to further study the issue to determine if African American students are over or underrepresented in special education.<sup>75</sup> Furthermore, it contends that if there is an over or underrepresentation it could not be due to bias or discrimination.<sup>76</sup> The Department of Education believes that environmental factors affecting the African American community, such as poverty, could cause African American students to need more help in school, thus making them eligible for special education services under the IDEA.<sup>77</sup>

The Department of Education received many comments regarding the harm that could occur from a two-year delay in states complying with the significant disproportionality regulations.<sup>78</sup> The Council of Parent Attorneys and Advocates (hereinafter “COPAA”) filed a lawsuit against the Department of Education over its delaying the national deadline for state educational agencies (hereinafter “SEAs”) and local educational agencies (hereinafter “LEAs”) compliance with a disproportionality risk ratio.<sup>79</sup> The lawsuit was specifically filed against the Department of Education for its “abdicating its responsibility to protect the civil rights of students.”<sup>80</sup> COPAA alleges that the Department’s delay interferes with its obligation under IDEA “to ensure children with disabilities get the education services they need in the most appropriate setting without regard to their race.”<sup>81</sup> On March 2, 2019, the District Court for the

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; Denise Marshall, *COPAA Challenges Secretary DeVos’s Decision to Delay Implementation of Equity in IDEA Regulation*, COPAA (July 12, 2018), <https://www.copaa.org/news/408919/copaa-challenges-secretary-devos-decision-to-delay-implementation-of-equity-in-idea-regulation.htm>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

District of Columbia released a decision finding that the delay violated the Administrative Procedures Act by failing to provide a reasoned explanation for delaying the 2016 Regulations and failing to consider the “costs of delay.”<sup>82</sup> The decision vacated the delay regulation, requiring the disproportionality rule to be implemented immediately.

Even before the delay rule was vacated, several states had decided to move forward with a risk ratio. The Texas Education Agency (hereinafter “TEA”) has agreed to comply with the original Department of Education’s deadline for the disproportionality risk ratio.<sup>83</sup> The TEA took the advice from Disability Rights Texas’s comment on its manual used for state monitoring.<sup>84</sup> Other states have also agreed to implement the disproportionality risk ratio for the 2018-2019 school year. For example, South Dakota,<sup>85</sup> Michigan,<sup>86</sup> and Illinois<sup>87</sup> are already using risk ratios to calculate rates of disproportionality in their school districts.

## X. ADDRESSING IMPLICIT BIAS

Research does suggest some promising strategies for addressing implicit bias. Those strategies include:

- Recognizing individual bias and being motivated to be fair;<sup>88</sup>
- Interacting with individuals from different cultures;<sup>89</sup>
- Focusing decision-makers on the student as an individual;
- Increasing cultural understanding;

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<sup>82</sup> COPAA v. DeVos, No. 18-cv-1636 (D.D.C. Mar. 2, 2019).

<sup>83</sup> 43 Tex. Reg. 4970 (July 27, 2018).

<sup>84</sup> *Id.*

<sup>85</sup> *Significant Disproportionality*, S.D. DEP’T OF EDUC., <https://doe.sd.gov/sped/Disproportionality.aspx> (last visited Mar. 2, 2019).

<sup>86</sup> MICH. DEP’T OF EDUC., 2017 SIGNIFICANT DISPROPORTIONALITY LIST (2017), [https://www.michigan.gov/documents/mde/2017\\_Significant\\_Disproportionality\\_637989\\_7.pdf](https://www.michigan.gov/documents/mde/2017_Significant_Disproportionality_637989_7.pdf).

<sup>87</sup> *IDEA Part B State Performance Plan: Indicators 9-10 Frequently Asked Questions 1, 2*, ILL. ST. BOARD EDUC. (May 4, 2018), <https://www.isbe.net/Documents/State-Performance-Plan-Indicators-9-10-FAQ.pdf>.

<sup>88</sup> KANG, *supra* note 41, at 5.

<sup>89</sup> *Id.*

- Establishing systems to ensure the review of discretionary decisions;
- Committing decision-making teams to criteria before they evaluate individual facts;<sup>90</sup>
- Individualizing students for decision-makers;<sup>91</sup>
- Focusing on students' individual strengths and growth potential.

These strategies are important to keep in mind in individual education plan meeting advocacy, and while crafting relief or settlement agreements that deal with situations that may have been caused by implicit bias.

**XI. UNDERSTANDING CULTURAL HUMILITY AND CROSS-CULTURAL LAWYERING TO SERVE STUDENTS AND FAMILIES FROM CULTURES DIFFERENT THAN YOUR OWN**

While seeking to write on educational needs and advocacy for African American students, the author believes it is important for advocates to maintain cultural humility, even as they strive to learn more about the needs of students of different cultures. No advocate or educator will be able to develop cultural competence to sufficiently understand the myriad of cultural perspectives in contemporary society, but we can acknowledge that with humility. The author works for an agency, Disability Rights Texas, which has adopted cultural humility as an outlook to guide our work. Cultural humility as a concept came from the healthcare profession, where some professionals came to believe that with the increasing diversity in the United States combined with an added cultural awareness, cultural competence was not serving their needs.<sup>92</sup>

Cultural humility is a term coined by Melanie Tervalon and Jann Murray-Garcia in 1998 to describe a way of infiltrating multiculturalism into their work as healthcare professionals.

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<sup>90</sup> See, e.g., Patricia G. Devine et al., *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012); Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXP. PSYCHOL. GEN. 1765 (2014).

<sup>91</sup> Sophie Lebrecht et al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 PLOS ONE e4215 (2009), <http://journals.plos.org/plosone/article/asset?id=10.1371%2Fjournal.pone.0004215.PDF>; Devine et al., *supra* note 89.

<sup>92</sup> JOSÉ B. ASHFORD & CRAIG WINSTON LECROY, *HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT: A MULTIDIMENSIONAL PERSPECTIVE* (4th ed. 2008).

Replacing the idea of cultural competency, cultural humility was based on the idea of focusing on self-reflection and lifelong learning. Since that time, agencies of different types have adopted the approach of cultural humility. From this lens, the author fully acknowledges that we can review research on the African American learner, but it does not mean that we should not approach each African American child and family with humility and let them remain the expert on their experience and need.

Cross-cultural lawyering is another way to better relate to clients, and it works closely with cultural humility. The authors of this approach created five key facets to cross-cultural lawyering: degrees of separation and connection, rings in motion, parallel universes, red flags and remedies, and the camel's back.<sup>93</sup> This approach begins with the first facet, called Habit 1, which focuses on identifying similarities and differences between the lawyer and the client.<sup>94</sup> By identifying similarities and differences, it can give the lawyer a greater understanding of common ground between herself and the client.<sup>95</sup> Habit 1 also causes the lawyer to analyze any differences between herself and the client and ways to compensate for these differences.<sup>96</sup> Habit 2 extends upon Habit 1 by extending the analysis of similarities and differences to all four parties: lawyer, client, legal decision makers (judge and jury), and opposing counsel.<sup>97</sup> Habit 3, parallel universes, causes the lawyer to focus upon alternative explanations for her client's behavior.<sup>98</sup> Habit 3 discourages lawyers from making assumptions about their clients.<sup>99</sup> For example, if a client misses a meeting, the lawyer should not assume that the client did not care about her case.<sup>100</sup> The lawyer should consider the parallel universes that maybe the client missed her bus, her child became suddenly sick, or she overslept.<sup>101</sup>

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<sup>93</sup> SUSAN BRYANT & JEAN KOH PETERS, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW 47-63 (Kimberly Holt Barret & William H. George eds., 2005).

<sup>94</sup> *Id.* at 47.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 48.

<sup>97</sup> *Id.* at 49.

<sup>98</sup> *Id.* at 52.

<sup>99</sup> *Id.* at 53.

<sup>100</sup> *See id.* at 52.

<sup>101</sup> *See id.*

Furthermore, Habit 4 is the most important habit for special education because it addresses issues that many special education and disability lawyers encounter on a frequent basis. Habit 4 focuses on recognizing the red flags of when a client or the lawyer is beginning to lose interest or is not understanding the conversation. Red flags that a client is losing interest or not listening include:

- [t]he client appears bored, disengaged, or even actively uncomfortable;
- the client has not spoken for many minutes, and the lawyer is dominating the conversation;
- the lawyer has not taken any notes for many minutes;
- the client is using the lawyer’s terminology instead of using the client’s words;
- the lawyer is judging the client negatively;
- the client appears angry; or the lawyer is distracted and bored.<sup>102</sup>

While interviewing a client or informing a client of possible solutions, a lawyer should use active listening techniques by asking the client questions about what was just said.<sup>103</sup> The lawyer should phrase questions using different language than originally used to explain the foundational concept so that the client is not simply repeating the lawyer’s own language without fully understanding it.<sup>104</sup> If a lawyer suspects that a client is not understanding a concept, the lawyer should try using more colloquial language and give real-life examples of the concept.<sup>105</sup>

When meeting with a client, if a client is uncomfortable answering certain questions, try asking the question in an indirect way instead of a direct way. For example, instead of asking “Did you yell at her?” try asking “Was anyone yelling?”<sup>106</sup> Asking clients questions that could spur a narrative is also extremely useful if a client is hesitant to talk.<sup>107</sup> An example of a narrative question is “What happened that day?” and “How were you feeling?”

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<sup>102</sup> *Id.* at 58.

<sup>103</sup> *Id.* at 54.

<sup>104</sup> *Id.* at 55.

<sup>105</sup> *See id.* at 56.

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 55.

If none of the above approaches work for assisting the conversation Susan Bryant and Jean Koh Peters, the authors of the concept, suggest:

- turning the conversation back to the client’s stated priority;
- seeking greater detail about the client’s priority;
- giving the client a chance to explain in greater depth her concerns;
- asking for examples of critical encounters in the client’s life that illustrate the problem area;
- exploring one example in some depth;
- asking the client to describe in some detail what a solution would look like; and
- using the clients’ words.<sup>108</sup>

The final habit, Habit 5, involves preventing negative factors that could influence an attorney-client relationship.<sup>109</sup> The best way to prevent negative influences from impeding on an attorney-client relationship is by the attorney knowing himself well and knowing his biases.<sup>110</sup> Since people are prone to use implicit and explicit bias when they are in high-stress situations, attorneys should try their best to minimize stress by practicing self-care and budgeting enough time to adequately meet the client’s needs.<sup>111</sup> Even though lawyers are frequently faced with stressors that they cannot control, they should try their best to minimize stressors over which they have control.<sup>112</sup>

## **XII. OBTAINING AND ANALYZING DATA TO RAISE IMPLICIT BIAS**

Because states are required to measure data related to disproportionality, attorneys should be able to find annual disproportionality data in a state’s monitoring reports. The Center for Civil Rights and Remedies at The University of California at Los Angeles also compiles national data and keeps track of sources of available state-by-state data.<sup>113</sup>

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<sup>108</sup> *Id.* at 58-59.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 57.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *Nationwide Suspension Rates at U.S. Schools (2011-12)*, CTR. FOR C.R. REMEDIES, [www.schooldisciplinedata.org](http://www.schooldisciplinedata.org) (last visited Mar. 2, 2019).

### XIII. RAISING COMPLAINTS THAT ADDRESS RACIAL DISCRIMINATION

Individual due process cases and state complaints are an appropriate place to raise concerns that identification, discipline, or placement decisions may have been inappropriately influenced by racial bias and discrimination.

The Department of Education Office of Civil Rights (hereinafter “OCR”) complaints, often used by special education advocates and attorneys to enforce Section 504 can also be used to enforce Title VI of the Civil Rights Act of 1964.

In *NAACP v. Bryan ISD*, Texas Appleseed, NAACP Legal Defense Fund and the National Center for Youth Law filed a systemic complaint with OCR on a school to prison pipeline case alleging violations of Title VI of the Civil Rights Act of 1964.<sup>114</sup> The complaint was based on data showing that while African American students comprise less than 25 percent of the students in Bryan public schools, they received more than half of all Class C tickets issued over the last three school years.<sup>115</sup> A Class C ticket is the lowest level misdemeanor in Texas. African American students are four times more likely to receive a ticket for “Disruption of Class” or “Disorderly Conduct-Language” (profanity) compared to other students.<sup>116</sup>

The Department of Justice (hereinafter “DOJ”) Educational Opportunities Section also has jurisdiction over disability discrimination under the Americans with Disabilities Act as well as race, national origin, sex and religious discrimination. The section also has jurisdiction over the Equal Educational Opportunities Act of 1974. As an example of a complaint to the DOJ raising disability and racial discrimination together, Disability Rights Texas, Texas Appleseed and the National Center for Youth Law filed a complaint against Dallas County’s truancy court and the four school districts that referred students to those courts.<sup>117</sup> The DOJ announced a formal investigation

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<sup>114</sup> Damon T. Hewitt et al., O.C.R. Complaint, *The Bryan Independent School District Ticketing Practices Violates Title VI of the Civil Rights Act of 1964 and Its Implementing Regulations*, NAT’L CTR. FOR YOUTH L. (Feb. 20, 2013), [https://youthlaw.org/wp-content/uploads/2014/11/Bryan\\_ISD\\_OCR\\_Complaint\\_FINAL.pdf](https://youthlaw.org/wp-content/uploads/2014/11/Bryan_ISD_OCR_Complaint_FINAL.pdf)

<sup>115</sup> *Id.* at 1.

<sup>116</sup> *Id.*

<sup>117</sup> Michael Harris et al., DOJ Complaint, NAT’L CTR. FOR YOUTH L. (June 12, 2013), [https://youthlaw.org/wp-content/uploads/2015/01/Final\\_DOJ\\_Complaint\\_061113\\_846\\_MV\\_.pdf](https://youthlaw.org/wp-content/uploads/2015/01/Final_DOJ_Complaint_061113_846_MV_.pdf)

of that complaint, which included an allegation of ADA and national origin discrimination.<sup>118</sup>

In *East County Branch of the NAACP v. Antioch Unified School District*,<sup>119</sup> the National Center for Youth Law represented the local NAACP in a suit based on a district's failure to identify, evaluate and provide special education services and supports to African American students with disabilities, and the exclusion of African American students through excessive suspension and expulsion, and other forms of exclusionary discipline that unnecessarily denied students access to classroom instruction.<sup>120</sup>

## CONCLUSION

Unfortunately, special education identification, discipline, services, and placement are too often influenced by race. Educators and advocates must understand the role that implicit bias plays in producing these disproportionalities and find ways to incorporate promising practices from research to prevent racially-biased decision making. Special education attorneys should not shy away from opportunities to raise racial and national origin discrimination in cases when appropriate and look for opportunities to partner with racial justice organizations. In this work, attorneys must commit ourselves to learning more about the needs of African American learners and other cultural minorities, while understanding that we must remain humble about the limitations of what we can understand. We must all commit ourselves to self-reflection, cultural learning, and advocacy to achieve educational equity.

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<sup>118</sup> See *Dallas County Truancy Court*, NAT'L CTR. FOR YOUTH L., <https://youthlaw.org/case/dallas-county-truancy-court/> (last visited Mar. 2, 2019).

<sup>119</sup> No. C16-01297 (Super. Ct. Cal. July 6, 2016).

<sup>120</sup> See *Antioch Unified School District Settlement*, NAT'L CTR. FOR YOUTH L., <https://youthlaw.org/case/antioch-unified-school-district-civil-rights-complaint/> (last visited Mar. 2, 2019).