THE DISPROPORTIONALITY PROBLEM: THE OVERREPRESENTATION OF BLACK STUDENTS IN SPECIAL EDUCATION AND RECOMMENDATIONS FOR REFORM

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I. INTRODUCTION AND BACKGROUND

A. ELIGIBILITY FOR SPECIAL EDUCATION SERVICES UNDER THE IDEA

As recently as 33 years ago, more than a million disabled students were denied access to the nation’s public schools on the basis of their disabilities.  

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It was not until the mid-1970s with the Supreme Court’s landmark decision in *Mills v. Board of Education*[^3] and the passage of the Education for All Handicapped Children Act[^4] (“EAHCA”) in (later renamed the Individuals with Disabilities Education Act (“IDEA”))[^5] that states were required to provide all disabled students with a “free [and] appropriate public education.”[^6] Today, as many as 11 percent of students enrolled in public school receive special education services.[^7]

In order to be eligible for special education services, a student must first meet the criteria for at least one of the thirteen qualifying diagnoses recognized by the IDEA, such as blindness, hearing impairment, speech and/or language impairment, mental retardation (“MR”), serious emotional disturbance (“SED”), or learning disability (“LD”).[^8] Second, it must be shown that special education services are required for the student to receive an appropriate education.[^9] Although it is common for students to receive multiple diagnostic labels, they are classified according to their “primary” disability for statistical purposes.[^10] Once the disability diagnosis and need for services are established, an individualized educational program (IEP) is constructed to meet the student’s needs and track her progress toward achieving her goals.[^11] The most common primary disability is LD, accounting for more than half of students served by the IDEA in grades K-12. MR and SED are the primary diagnoses of approximately 11 percent and 8 percent of students eligible for special education services.

[^8]: The complete list of recognized diagnoses is: blindness, hearing impairment, speech and/or language impairment, mental retardation, serious emotional disturbance, learning disability, autism, deafness, multiple disabilities, orthopedic impairment, other health impairment, traumatic brain injury, and visual impairment. IDEA, 20 U.S.C. § 1401(3).
[^9]: See id. § 1412(a)(5).
[^11]: Id.
respectively. Thus, these three diagnoses are frequently termed the “high incidence” categories, as they describe nearly three-quarters of the special education population.

Contrary to what one might expect, the special education classification process is far from uniform. The IDEA does not provide set criteria for assessing any of the thirteen recognized diagnoses, nor does it provide particularly clear definitions of any of the diagnoses, instead leaving to the states the discretion of setting their own diagnostic criteria for each diagnosis, and even whether to adopt the federally recognized categories at all. As a result, there exists a great deal of variation across states and even school districts - so much so that a student classified as disabled in one state or school district could very well be assessed as non-disabled in another.

This extreme variation in classification is most pronounced in the class of diagnoses referred to in the literature as belonging to the “social model.” Whereas the so-called “medical model” diagnoses (e.g., blindness, deafness) are typified by clearly identified and standardized diagnostic criteria and are made by a student’s physician, typically at an early age, social model diagnoses - of which MR, LD, and SED are perhaps the most prominent examples - are defined by less readily measured and more context-dependent criteria, such as behavior, intelligence, social skills, and communication abilities. These diagnoses are typically made during the school-age years and are most often the result of referral by a teacher rather than a medical professional. Often termed the “judgmental disability categories,” the social model diagnoses are inherently much more subjective in nature, as they rely on (1) the opinions and judgments of individuals tasked with referral, and (2) the state or school district’s necessarily arbitrary decision of where to draw the line between “normal” and “disabled.” Indicators most often considered in this category of diagnoses include standardized test scores, IQ, and classroom observation.

12 Id. at 44.
13 Id.
14 See IDEA, 20 U.S.C. 1401(c)(3); see also Donna L. Terman et al., Special Education for Students with Disabilities: Analysis and Recommendations, 6 THE FUTURE OF CHILDREN 4, 5-6 (1996).
16 See Reschly, supra note 10, at 42.
17 Id.
18 Id.
20 See Reschly, supra note 10, at 42; Terman et al., supra note 14, at 17-19.
21 See Reschly, supra note 10, at 42-46.
Thus, diagnosis of social model disabilities—especially the high-incidence categories of MR, LD, and SED—is widely noted to be unreliable, with many students receiving diagnoses in some school districts but not others, and assessors demonstrating significant difficulty in differentiating among these three categories due to the overlapping characteristics among students who suffer from them.\(^22\)

Despite wide agreement by scholars and scientists that most of the recognized diagnoses are distributed on a continuum, eligibility under the IDEA is determined on a dichotomous basis, using arbitrarily-determined “cutoff points”: either a student is or is not disabled and thus is or is not eligible for services.\(^23\) Indeed, the decision of whether or not a student is placed in a special education program may often be determined by a single point on an IQ or other standardized test.\(^24\)

\[\text{B. THE DISPROPORTIONALITY PROBLEM}\]

Disproportionate representation of ethnic and racial minority students in special education has long been a source of concern for educators and policymakers. It was first reported in 1968 by educational researcher Lloyd Dunn, who observed that 60 to 80 percent of the “educable mentally retarded . . . are children from low-status backgrounds - including Afro-Americans . . . and children from other nonmiddle class environments.”\(^25\) Since then, inquiries into the so-called disproportionality problem have proliferated, including several studies commissioned by the federal government examining its causes and seeking solutions, but with little success.\(^26\)

Despite these efforts, 40 years later the problem of disproportionality continues to plague the public education system. While African-American students make up just under 15 percent of the K-12 school population, they account for more than 20 percent of the special education population.\(^27\) The disability categories in which this overrepresentation

\(^{22}\) See id. at 46; see also Terman et al., supra note 14, at 17-19.

\(^{23}\) Reschly, supra note 10, at 43-45.

\(^{24}\) Id. at 45.

\(^{25}\) See Lloyd M. Dunn, Special Education for the Mildly Retarded - Is Much of It Justifiable?, 35 EXCEPTIONAL CHILDREN 5, 6 (1968); see also MacMillan & Reschly, supra note 15, at 15.

\(^{26}\) The two most prominent and frequently cited studies are PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY (Kirby A. Heller, et al. eds.,1982), and Donovan & Cross, supra note 7.

\(^{27}\) See Wanda J. Blanchett, Disproportionate Representation of African-American Students in Special Education: Acknowledging the Role of White Privilege and Racism, 35 EDUC. RESEARCHER 24, 24 (2006); Donovan & Cross, supra note 7, at 1-3. While disproportionate placement also occurs on the basis of sex (male students account for far more than half of students in special education), as well as in other racial and ethnic groups, such as Latinos and Native Americans, and among students
occurs most significantly are the high-incidence categories of MR, SED, and LD, with black students being between 2.5 and three times more likely to be identified as MR, nearly 1.5 times more likely to be diagnosed as LD, and between 1.5 and two times as likely to be labeled SED than their white counterparts. Similarly, African-American students are underrepresented in gifted programs, making up far less than 14 percent of that population in public schools.

The phenomenon of black students’ overrepresentation in special education programs demands particular attention in light of the widely documented “achievement gap” that persists between white and black students, a problem that has gained growing attention in recent years largely due to the No Child Left Behind Act, which requires the disaggregation of testing data on the basis of racial group. According to the most recent Nation’s Report Card, which estimates high-school seniors’ proficiency in math and reading on the basis of standardized testing, 43 percent of white students were “proficient” or better in reading, compared with just 16 percent of black students, reflecting little or no progress toward reducing this achievement gap since 1992, the first year for which comparable data are available. A similar gap exists in the area of math, with 29 percent of white students receiving scores of “proficient” or better, compared with 6 percent of black students. As the disproportionate placement of blacks in special education programs - as well as the factors causing this phenomenon - ought thus to be studied as likely contributors to black students’ comparatively lower levels of academic achievement.

II. THE NATURE OF THE PROBLEM

A. POSSIBLE CAUSES OF DISPROPORTIONALITY

The provision of high-quality, individualized special education services to students who require them is critical to the educational outcomes of disabled students, and as noted briefly above, it is the result of a hard-fought, decades-long battle waged by advocates and policymakers. For this

who speak English as a second language, this paper focuses on the problem of disproportionality among African-American students. See, e.g., Blanchett, supra.

28 See Donovan & Cross, supra note 7, at 1-3; Blanchett, supra note 27; Beth A. Ferri & David J. Connor, In the Shadow of Brown: Special Education and Overrepresentation of Students of Color, 26 REMEDIAL & SPECIAL EDUC. 93, 94 (2005).

29 See Donovan & Cross, supra note 7.


32 Due to modifications in the math tests used to collect this data, comparisons cannot as readily be made to evaluate progress toward shrinking the achievement gap with respect to math. See id. at 15, 17.
reason, this paper does not seek to cast act of referring a student to special education as a negative action per se. Nor does it seek to suggest that the mere fact of African-American students’ disproportionate representation in special education programs is not in and of itself conclusive evidence of a problem. As the goal of special education is - and ought to be - the accurate identification of students with disabilities and the provision of the services they need, it would be as much a cause for concern were fewer black students to be identified for special education services than who actually require them. Thus, it is critical to examine why disproportionality occurs.³³

Numerous potential explanations have been posited to explain the disproportionality phenomenon, including biological and environmental factors, the assessment and referral process, and the cultural mismatch between black students and teachers.

I. Biological and Environmental Factors

Some researchers suggest that there may be a genuinely higher incidence of special needs among minority groups, pointing to the fact that African-American children are more likely to be poor³⁴ and are thus more likely to be subject to the biological and environmental risk factors that threaten early childhood cognitive and emotional development, such as low birthweight, poor nutrition, poor or no healthcare, less stimulating and less stable home environments, and prenatal exposure to alcohol and tobacco, among others.³⁵ Some scholars even question whether race plays any role at all in the disproportionality phenomenon, arguing instead that as race functions as a sort of proxy for socioeconomic status, black students’ higher rates of referral to special education may be explained by their economic disadvantage and the corresponding risk factors enumerated above. However, a significant body of research exists in support of the theory that race does in fact play an independent role in the disproportionality problem.³⁶

³³ See, e.g., Donovan & Cross, supra note 7, at 3-4.
³⁵ See Donovan & Cross, supra note 7, at 4.
³⁶ See, e.g., MacMillan & Reschly, supra note 15, at 20 (arguing that “social class, and not ethnicity, would explain more variance in the rates of detection” for MR, SED, and LD). But see Terman et al., supra note 14, at 9-10 (reporting that only half of the correlation between race and disability diagnosis could be explained by SES); see also Ferri and Connor, supra note 28, at 95 (highlighting recent research showing higher incidence of disproportionality in Southern states, “suggesting a connection to a longer legacy of racial segregation”).
Additionally, educational disadvantage has been cited as a likely contributor to the disproportionality problem. Proponents of this hypothesis often describe a pattern of providing poor and minority students with inferior educational opportunities, which then increases the likelihood of their needing compensatory special education services in the future, as the “wait-to-fail model” of education. It is well documented that schools with a high concentration of poor and minority students typically have insufficient funding and lower per-pupil expenditures; they employ less qualified, less experienced teachers who frequently have lower expectations for their students, who are less able to control their classrooms effectively, and who exhibit lower levels of responsibility for student outcomes; they offer less rigorous curricula with fewer advanced courses and less of an emphasis on critical thinking; and they provide less support on the whole for academic achievement. As a result, black students are less likely to receive the educational supports that would put them on a “path to success,” potentially making their referral to special education more likely.

2. Bias in Assessment and Referral

Much of the research suggests that a flawed assessment and referral process contributes to the overrepresentation of black students in special education. As discussed above, federal law offers little guidance in the process of assessment and referral for special education services, leaving states and localities to develop their own diagnostic criteria and “cut-off points,” and resulting in wide variations across (and even within) states with respect to how students are assessed for the social model disabilities, as well as the rates at which students are identified as having these disabilities. This variation occurs most notably in the high-incidence disability categories, where reliability in identification is lowest. Further compounding the problem, these diagnoses are perhaps the least conducive to a dichotomous assessment model, especially in the milder cases, where no clear “line of demarcation” separates students with mild disabilities from those without disabilities.

37 See Terman et al., supra note 14, at 6.
38 See Donovan & Cross, supra note 7, at 4-5; Blanchett, supra note 27, at 25-26. See generally John B. Diamond et al., Teachers’ Expectations and Sense of Responsibility for Student Learning: The Importance of Race, Class, and Organizational Habits, 35 ANTHROPOLOGY & EDUC. Q. 75 (2004) (finding lower teacher expectations and lower levels of teacher accountability for student outcomes in majority-minority and majority-poor schools).
39 Donovan & Cross, supra note 7, at 5; see also Blanchett, supra note 27, at 25.
40 See Donovan & Cross, supra note 7, at 2-3; see also MacMillan & Reschly, supra note 15, at 18; Reschly, supra note 10, at 42-46; Terman et al., supra note 14, at 8.
41 See supra text accompanying note 40.
42 Terman et al., supra note 14, at 8; see also MacMillan & Reschly, supra note 15, at 18; Reschly, supra note 10, at 42-46.
Additionally, the use of high-stakes testing for referral purposes may further exacerbate the disproportionality problem. A wealth of evidence demonstrates testing bias among minority and underprivileged students, explained as depressed scores on standardized tests due to a reduced familiarity with test-taking procedures, among the many other concomitant results of educational disadvantage. Nonetheless, standardized tests remain the tool most frequently used for assessing whether students have MR and LD, likely causing many black students to be inappropriately identified as needing special education services on the basis of poor test scores that fail to accurately assess their actual abilities.\footnote{43 Terman et al., supra note 14, at 8; see also MacMillan & Reschly, supra note 15, at 18; Reschly, supra note 10, at 42-46.}

Furthermore, the paradigm that has prevailed from the outset in the realm of special education has been the so-called “fixed trait model,” wherein a disability (or a gift) is viewed as the result of traits internal to the child and context is largely ignored.\footnote{44 See supra text accompanying note 43.} This model dovetails with similarly prevailing perceptions of intelligence as innate and fixed, and thus a characteristic on the basis of which students can and should be sorted into tracks.\footnote{45 See generally Jeannie Oakes et al., Detracking: The Social Construction of Ability, Cultural Politics, and Resistance to Reform, 98 TEACHERS COLL. REC. 482 (discussing the harmful effects of ability tracking and arguing for its abolition in the school system).} These approaches to diagnosis have been the subject of increasing criticism in the last decade as recent research has demonstrated the significant role of social context in achievement and behavior, and as the view of intelligence as a fluid social construct has gained in popularity, thus casting doubt on the appropriateness of ability tracking in schools and leading educators to take context into account more in evaluating students’ learning and behavioral problems.\footnote{46 See id.}

3. Lack of Cultural Responsiveness

As noted above, the high-incidence diagnoses are inherently subjective, nearly always resulting from teacher referrals made on the basis of classroom observation of students’ behaviors and traits.\footnote{47 Reschly, supra note 10, at 40; Terman et al., supra note 14 at 4,7; see also IDEA, supra note 5; supra pp. 2-3.} As a result, possible bias or prejudice on the part of teachers is often raised as a potential contributing factor in the disproportionality problem. The data are mixed at best as to what proportion of teachers hold such biases and as to whether their referral decisions are the result of explicit racial discrimination.\footnote{48 Donovan & Cross, supra note 7, at 5 (finding no conclusive evidence of teacher bias); Reschly, supra note 10, at 47; see also MacMillan & Reschly, supra note 15,}
Perhaps a more likely explanation than overt racial prejudice on the part of teachers and assessors is the more subtle role of system-wide cultural bias. Numerous scholars have argued that a majority of teachers in the public schools are ill-prepared to meet the needs of ethnically and culturally diverse students. Shealey et al. note that more than 38,000 African-American teachers and administrators were displaced in the wake of Brown v. Board of Education, unable to find jobs in the newly desegregated schools. Forty years later there remains a massive shortage of black educators in the public schools. It is estimated that whereas as many as 40 percent of public school students belong to an ethnic or racial minority, upwards of ninety percent of teachers of grades K-12 are of white, European descent. As a result, it is widely theorized that, by and large, teachers fail to provide “culturally-responsive teaching” to their African-American students, resulting in what is often termed a “cultural mismatch” between students and their educational environments. Many scholars suggest that

at 16 (suggesting that overrepresentation occurs not at the teacher referral stage but at the assessment stage, when psychological evaluations are conducted).


51 See Shealey, supra note 49, at 119.

52 Ferri and Connor, supra note 28, at 94.

53 Shealey and colleagues describe culturally responsive teaching as the instruction provided by “teachers [who] recognize and value the cultural contributions of their students and use their knowledge of children’s cultures to inform their pedagogical practices and employ that knowledge in designing their instructional strategies.” Shealey et al., supra note 49, at 117.

54 See Blanchett, supra note 27, at 26-27; see also Shealey et al., supra note 49, at 116-120; Cartledge, supra note 49. See generally JEAN ANYON, Ghetto Schooling: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM (1997) (discussing the cultural mismatch between white educators and black students and its adverse consequences for student outcomes); AMANDA E. LEWIS, RACE IN THE SCHOOLYARD: NEGOTIATING THE COLOR LINE IN CLASSROOMS AND COMMUNITIES (2003) (discussing the role of social, cultural, symbolic, and economic capital in the educational context and its negative impact on black students’ academic achievement). Scholars such as Patton, Artiles, and Blanchett take this argument further, suggesting that the cultural mismatch is also largely the result of the culturally inappropriate curricula offered in public schools. Strongly influenced by critical race theory, they attribute the insufficient relevance of such curricula
this cultural mismatch hampers student learning, potentially exacerbating the educational disadvantage discussed above and causing more African-American students to be identified as needing special education services.55

A second and equally significant result of this cultural mismatch may be that teachers are similarly ill-prepared not just to meet the needs of African-American students, but also to understand their students. Teachers with little exposure to cultures other than their own may view “whiteness” and the behaviors, skills, and communication style that are associated with it as the norm, and conversely they may view behaviors and traits that do not conform to that model as deviant or otherwise departing from the norm.56 Accordingly, they may place greater value on the behaviors and skills more often exhibited by white students.57 Artiles refers to this differential valuation phenomenon as the “deficit view” of minorities, arguing that teachers - and members of a racial majority generally - tend to view difference as a mark of inferiority and in need of correction or improvement.58 In the context of special education referral, this may result in teachers viewing their white students as successful and high-achieving in contrast to their African-American students, whom they may be more likely to perceive as less successful and in need of special services.59

A third result stemming from the cultural mismatch between white educators and black students is the higher frequency with which black students receive disciplinary sanctions as compared with white students. The discrepancy in disciplinary rates is of significance in the special education context as the diagnosis of serious emotional disturbance is usually triggered by disciplinary actions such as assignment of detention, repeated removal from the classroom, and suspension from school.60 As African-American students, especially males, tend to be disciplined more often than whites, they may be at greater risk for referral to special

in the lives of African-American students to the phenomenon of “master-scripting,” whereby the dominant (white) class plays the role of “knowledge production” and determines how historical events and current topics are to be portrayed and presented for educational purposes, in the process distorting or revising them to serve the interests of the dominant class and place African-Americans in a disvalued position. See Alfredo J. Artiles, The Dilemma of Difference: Enriching the Disproportionality Discourse with Theory and Context, 32 J. SPECIAL EDUC. 32 (1998); Blanchett, supra note 27; James M. Patton, The Disproportionate Representation of African Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions, 32 J. SPECIAL EDUC. 25 (1998).

55 See supra text accompanying notes 45-60.
56 See Blanchett, supra note 27, at 27; Cartledge, supra note 49; Shealey et al., supra note 49.
57 See Blanchett, supra note 27, at 27. See generally LEWIS, supra note 54.
58 See Artiles, supra note 54, at 32-34.
59 See supra text accompanying note 54.
60 Terman et al., supra note 14, at 10.
education on the basis of an SED diagnosis. Similar to the impact of cultural bias on teachers’ perceptions of academic success, this trend may also be due to the cultural mismatch between African-American students and their school environments, in that white teachers may view behaviors typically associated with “whiteness” as those meriting reinforcement, and behaviors that deviate from the white ideal or norm (i.e., those exhibited by black students) as requiring disciplinary action.

B. THE RISKS OF ERRONEOUS PLACEMENT

While much of the literature suggests that special education services contribute strongly to positive outcomes for students appropriately identified as having disabilities and requiring additional services, there is an equally substantial body of literature documenting the risks of “false positives,” or the inappropriate placement of students in special education. Perhaps foremost among these is the stigma that accompanies the disability label, signifying lesser ability or even value. This stigma effect has been linked to negative social outcomes, such as teasing and other differential treatment by fellow students, as well as to lowered self-esteem and expectations on the part of the identified student that outlast completion of school.

Additional risks stem from placement in a special education track. Special education programs - especially those in schools with a high-concentration of black students - have been shown to be insufficiently funded, forcing them to offer lower-quality instruction provided by less qualified, less experienced teachers who have lower expectations for their students and exhibit less accountability for student outcomes; they typically provide less rigorous and demanding curricula, presented at a substantially reduced pace as compared with the general track; they frequently lump all students diagnosed with the high-incidence disabilities into the same classroom, offering the same set of services and interventions irrespective of the students’ highly disparate needs; and they provide students with fewer opportunities to interact with and be exposed to the often more sophisticated

61 Disciplinary rates for black students may be as high as twelve times those for whites. See e.g., Cartledge, supra note 49.
62 Some of the strongest evidence supporting the theory of cultural mismatch derives from studies of African-American students enrolled in majority-white schools in wealthier and suburban school districts. For instance, Cartledge reports that disciplinary rates of black students are significantly higher in suburban (majority-white) districts as compared with urban (more diverse) districts. See Cartledge, supra note 49.
63 See, e.g., Donovan & Cross, supra note 7; Reschly, supra note 10; Terman et al., supra note 14.
64 See, e.g., Donovan & Cross, supra note 7, at 2-3.
65 See id. at 2.
66 See id.
and advanced verbal abilities and social/relational skills of their non-disabled peers.\textsuperscript{67}

As a result, it is unsurprising that African-American students placed in special education programs are documented to have poorer post-school outcomes than their general education counterparts. Specifically, they are more likely to drop out of school, and if they do complete the twelfth grade they typically receive a certificate of attendance or completion rather than a high school diploma, resulting in reduced employment and earning potential in the future.\textsuperscript{68} Additional negative effects of special education placement include a greater likelihood of falling into poverty and relying on government benefits programs later in life, higher teen birth rates, and an increased chance of being convicted of a felony.\textsuperscript{69} In light of the already worrisome (and by many accounts widening) gap between whites and blacks in several of these dimensions - family income,\textsuperscript{70} teen birth rates,\textsuperscript{71} and extreme overrepresentation in the

\textsuperscript{67} See Blanchett, supra note 27, at 26; Shealey et al., supra note 47, at 116. See also Donovan & Cross, supra note 7, at 2-3; Cartledge, supra note 49. See generally Ferri & Connor, supra note 28. For a discussion of the treatment of MR, SED, and LD students receiving the homogeneous treatment despite their differing needs, see Reschly, supra note 10, at 46-47. Shealey et al., Green et al., and researchers at the Harvard Civil Rights Project note that special education students in school settings with a high concentration of African-American students are placed in comparatively more restrictive settings. See Tonika Duren Green et al., From Old Schools to Tomorrow’s Schools: Psychoeducational Assessment of African American Students, 26 REMEDIAL & SPECIAL EDUC. 82, 85 (2005); Shealey et al., supra note 49, at 116; see also Harvard Studies Find Inappropriate Special Education Placements Continue to Segregate and Limit Educational Opportunities for Minority Students Nationwide, Harvard Graduate School of Education, Mar. 2, 2001, available at http://www.gse.harvard.edu/news_events/features/2001/speced03022001.html [hereinafter Harvard Studies].

\textsuperscript{68} See Blanchett, supra note 27, at 25; see also Donovan & Cross, supra note 7; Ferri & Connor, supra note 28, at 95; Patton, supra note 54, at 25; Harvard Studies, supra note 65; Cartledge, supra note 49.

\textsuperscript{69} See supra text accompanying note 68.

\textsuperscript{70} As mentioned supra note 32, the 2005 Census reported that Black households had the lowest median income in 2004 ($30,134) among race groups. In contrast, the median income for non-Hispanic white households was $48,977. 2005 CENSUS, supra note 34. Additionally, a 2008 study by the Pew Charitable Trusts reports that only one in three African-Americans born into middle-class families grew up to have higher incomes than their parents, compared with more than two-thirds of whites born into the middle class. The study further reports that African-Americans born in the late 1970s were more likely to slip out of the middle class into poverty than their white counterparts, with more than forty-five percent born into families earning the median annual income now falling in the bottom quintile of the nation’s earners. Julia B. Isaacs, Economic Mobility of Black and White Families, in JULIA B. ISAACS ET AL., GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 71 (2008), available at http://www.brookings.edu/reports/2008/-/-/media/Files/rc
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prison population, to name just a few - examining the role of erroneous referral to special education programs as a contributing factor to these already harrowing trends is imperative.

III. PRESERVING EDUCATIONAL INEQUITY: BROWN UNFULFILLED

A. RESISTANCE TO DESEGREGATION POST-BROWN

Many factors impeded the fulfillment of the promise of Brown v. Board of Education, among them political opposition to inter-district busing, a lack of consistent, meaningful judicial oversight, and resistance by white educators and parents. Additionally, schools developed creative tactics as they sought to subvert the effects of desegregation decrees and to curb the phenomenon of “White flight.” Among these were pupil placement laws directing school districts to assign students to schools based on criteria such as “student preparation and aptitude, and the ‘morals,’ conduct, health and personal standards of the pupil”; segregation on the basis of gender, to quell white parents’ fears of potential miscegenation; and ability tracking, through which students were sorted into groups on the basis of perceived natural aptitude and educated in separate classrooms.

An additional means by which schools sought to fight the effects of desegregation was the referral of large numbers of African-American students to special education classes. To justify the exclusion of black students from the general education classroom, educators highlighted what they described as significant differences in the academic ability and potential of white students and black students, laying the foundation for

כתב המקור לא נדפס במלים אדומות נא_read_more_for_citations
what some scholars called the “cognitive merging of race and ability,” which continues to operate today.\textsuperscript{77}

Personal accounts by teachers at schools undergoing desegregation in the years immediately following the \textit{Brown} decision provide a vivid snapshot of the widely held perception of academic difference. Teachers and administrators reported “dreadful” scholastic differences between white and black students - the latter were depicted almost universally as “below-average” or “inferior” and to “have trouble following detailed instructions.”\textsuperscript{78} On this basis, teachers claimed that integration interfered with their ability to teach effectively, due to what they described as the “strain of managing differences in academic standards, cultural background, behavior patterns, [and] personality” and agreed that “retarded Negroes should be given special attention in classes for slow children, so that they would not burden the regular classes.”\textsuperscript{79}

Furthermore, differences in behavior and character were frequently noted, with black students described as prone to tardiness and absenteeism, “feelings of frustration and defensiveness,” and exhibiting a “poorly developed sense of responsibility, apparently due to neglect at home.”\textsuperscript{80} One teacher explained these perceived disparities as due to a “conflict between traditional standards for middle-class White children and lower standards, which Negroes in a segregated school and at home had been accustomed to.”\textsuperscript{81} Perhaps most telling of all, teachers who reported previous exposure to racially diverse environments recounted vastly different experiences with desegregation, marked by substantially fewer descriptions of academic and behavioral differences between white and black students, as well as far fewer complaints of difficulties managing integrated classrooms.\textsuperscript{82}

\textbf{B. Special Education as a Dumping Ground}

It was thus that special education classrooms became a sort of dumping ground for African-American students. By way of illustration, between 1955 and 1956, public schools in Washington, D.C., increased their special education enrollment by a factor of two, and 77 percent of special education students in 1956 were African-American.\textsuperscript{83} Excluding black students from the general education population under the guise of special education referral served two primary constituencies: it mollified white parents, who made known their preference to keep the quality of their children’s education from being diminished in any way, and it served the interests of

\textsuperscript{77} Ferri & Connor, \textit{supra} note 28, at 99.
\textsuperscript{78} \textit{Id.} at 97.
\textsuperscript{79} \textit{Id.} at 98.
\textsuperscript{80} \textit{Id.} at 98.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 96.
educators, whom scholars argue feared desegregation as threatening the public schooling system’s central principles of “conformity, standardization, and homogenization” - values which necessarily conflict with notions of diversity and human difference.\textsuperscript{84}

As a result, now more than 50 years since the landmark Supreme Court ruling, the notion of equal educational opportunity that many hoped \textit{Brown} would provide remains sadly elusive. In fact, many education scholars argue that African-American students are actually worse off today than they were before \textit{Brown}, maintaining that the quality of education afforded by black segregated schools was higher than that which most black students now receive in desegregated schools; that, relatedly, the instruction provided in black segregated schools was more culturally responsive to their needs; and that, due to ability tracking and referral to special education, classrooms today remain segregated to a large extent anyway.\textsuperscript{85} The pre- and post-\textit{Brown} disparity in the quality of education is especially pronounced for today’s African-American students in special education programs, where they are more likely to be placed in highly restrictive (i.e. segregated) settings, to have less qualified teachers who are less likely to be special education-certified, to be taught less rigorous curricula, to be held to lower expectations, to receive a diploma upon graduation, and so forth.\textsuperscript{86} Moreover, there are major shortages of special education teachers who are themselves culturally or ethnically diverse or who are experienced in providing culturally responsive instruction to their students, surpassing the already substantial extent to which general education teachers are ill-prepared to provide such instruction.\textsuperscript{87} Furthermore, insofar as persistent school segregation - whether in the form of over-referral of minority students to special education classes or otherwise - remains hidden, the fiction that educational equity for whites and blacks has been achieved (and moreover that racism has been overcome) is able to prevail. Derrick Bell makes this point in his satirical “dissenting opinion,” arguing that what the Court ought to have done in \textit{Brown} is to uphold rather than abolish the doctrine of “separate but equal” and to order its strict enforcement in the

\textsuperscript{84} \textit{Id.} at 97; see also Blanchett, \textit{supra} note 27, at 24; Oakes et al., \textit{supra} note 45, at 490-92; Patton, \textit{supra} note 54, at 28-29.

\textsuperscript{85} See Blanchett, \textit{supra} note 27, at 24, 27; see also Shealey et al., \textit{supra} note 49, at 113, 116-19.

\textsuperscript{86} See Shealey et al., \textit{supra} note 49, at 115-16; see also Donovan & Cross, \textit{supra} note 7, at 2-3; Blanchett, \textit{supra} note 27, at 26; Green et al., \textit{supra} note 67, at 85; Shealey et al., \textit{supra} note 49, at 116; Reschly, \textit{supra} note 10, at 46-47; Cartledge, \textit{supra} note 49; \textit{Harvard Studeies}, \textit{supra} note 67. \textit{See generally} Ferri & Connor, \textit{supra} note 28.

\textsuperscript{87} See Shealey et al., \textit{supra} note 49, at 116.
educational context, thereby ensuring the visibility (in lieu of enabling the veiling) of the inequality between white and black schools.88

IV. SUGGESTIONS FOR REFORM

Education scholars and policymakers have proposed numerous avenues for reform in the four decades since the disproportionality problem was first documented. This section of the paper will examine several potential types of reform and make recommendations based on their relative strengths, weaknesses, and likelihood of success in remedying the problem.

A. LEGAL AND LEGISLATIVE REMEDIES

The original intent of the IDEA (and in its initial form, as the EAHCA) was to ensure that all students have access to a “free and appropriate education” in the “least restrictive environment” possible - words which appear fundamentally at odds with the (largely) racial segregation that special education referral has enabled to persist.89 Additionally, numerous attempts have been made to revise and amend the IDEA in hopes of curbing the overrepresentation of minority students in special education classrooms. For instance, the 1997 amendments to the Act included the implementation of monitoring and enforcement measures to address “both the overrepresentation of minorities in identification for special education, and their placement in overly restrictive educational environments,” as well as the “revision of policies, procedures, and practices used in such identification and placement.”90 However, that the problem persists unabated demonstrates that despite the Act’s lofty aspirations, little has changed.91

Several attempts have also been made to remedy the problem in the courts, reaching their apogee in the 1970s, but with mixed success at best. In Hobson v. Hansen, Federal Appeals Court judge J. Skelley Wright found that the use of intelligence tests in ability tracking placement rose to the level of unconstitutional discrimination against African-American students and declared them impermissible for such purposes in the D.C. schools.92

88 Derrick Bell, Bell, J., Dissenting, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 185-87, 192, 196-98 (Jack Balkin ed., 2001).
89 See IDEA, supra note 5.
90Id.; see also Daniel Losen, New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement, in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 263-64 (2002).
91 See Donovan & Cross, supra note 7. For an in-depth explanation of the weaknesses in the current enforcement mechanisms and their role in hampering the achievement of the Act’s goals, See Losen, supra note 90, at 270-72 (arguing that perverse incentives and a lack of information hamstring the Office of Civil Rights’ effectiveness in enforcing the provisions of the IDEA).
However, despite what seemed to be a significant victory at the time, the practice of tracking continued to remain widespread in D.C. and throughout the nation.93

Similarly, in two California Supreme Court decisions around that time, plaintiffs successfully challenged what they argued were biased assessment and referral procedures.94 In Diana v. State Board of Education, the court declared that the school system’s use of standardized IQ tests administered in English as the basis for an MR diagnosis unconstitutionally discriminated against students for whom English was not their first language and invalidated the use of such tests for special education referral purposes.95 In Larry P. v. Riles, overrepresentation of racial minority students in special education programs was declared to be largely the result of widespread teacher bias, and the court declared the use of intelligence tests for black students for special education purposes to be impermissible.96

However, despite the excitement and optimism generated by these decisions, subsequent decisions in other states yielded far less favorable results, with many courts upholding the use of IQ tests for ability tracking and special education referral purposes despite their potentially discriminatory impact.97 Additionally, further weakening the impact of the early cases, the California Supreme Court later revisited its decision in Larry P. rescinding the decision’s overall holding and revising it to substantially limit its reach.98 In recent years, efforts atremedying the problem through litigation have receded significantly and the attention of advocates has shifted to other avenues of reform outside the courtroom.

93 See Green et al., supra note 67, at 84-85.
94 Diana v. Board of Education, No. C-70-37 RFP (N.D. Cal. June 18, 1973); Larry P. v. Riles, 343 F.Supp. 1306 (N.D. Cal. 1972), aff’d, 502 F.2d 963 (9th Cir. 1974), further proceedings, 495 F.Supp. 926 (N.D. Cal. 1979), aff’d in part, rev’d in part, 793 F.2d 696 (9th Cir. 1984); see also Shealey et al., supra note 49.
95 Diana, No. C-70-37 RFP.
98 The original Larry P. decision prohibited the use of IQ testing of African-American students for any special education purpose. Later, this prohibition was limited to the use of IQ tests for labeling students as MR. The California State Department of Education subsequently issued an advisory opinion recommending that the state’s public schools continue to follow the original decision, but a state of confusion remains today. Larry P., 343 F.Supp. at 1314-15; Green et al., supra note 67, at 85.
B. SYSTEM IMPROVEMENT

1. Prevention and Early Intervention

In light of the substantial body of research suggesting that the black students’ overrepresentation in special education may be in large part caused by educational disadvantage, a proposal advocated by a growing consensus of scholars is simply to improve the quality of general education in schools with a high concentration of African-American students to decrease the likelihood that they will be identified - whether appropriately or not - as needing special education services.\(^9\) To this end, several types of improvements would be desirable, foremost among them being substantial increases in funding to enable the provision of sufficient facilities and resources (e.g., up-to-date libraries, science labs, computer technology) as well as a greater selection of advanced course offerings, better-trained teachers, lower student-teacher ratios and class sizes, and so forth.\(^10\)

Furthermore, a heightened emphasis on early detection is also recommended, with the goal being to recognize potential problems before they reach the referral stage. The likelihood that a behavioral or learning problem will be detected early enough to be addressed before formal intervention is required could be increased in multiple ways, from training teachers in detection methods so that they can better spot early warning signs to annual school-wide screenings for behavioral and learning difficulties designed to identify problems before they reach a level of severity requiring formal services.\(^11\)

Another major potential tool for maximizing students’ academic achievement from an early age and reducing their likelihood of needing special education services later on is increased access to early childhood education. Providing education before kindergarten has been shown to dramatically increase students’ eventual academic success and offset many of the effects of economic disadvantage on achievement discussed above.\(^12\) While the goal of this paper is not to make the case for universal prekindergarten, the role of early childhood education as a contributing

\(^9\) See, e.g., Donovan & Cross, supra note 7.

\(^10\) See id.; Blanchett, supra note 27, at 25; Cartledge, supra note 49; Shealey et al., supra note 49.

\(^11\) Serna and colleagues describe one example of such an instrument, Systematic Screening for Behavior Disorders (SSBD), which is designed for use with pre-school and elementary school age children at risk for behavior disorders. See Loretta A. Serna et al., Intervention Versus Affirmation: Proposed Solutions to the Problem of Disproportionate Minority Representation in Special Education, 32 J. OF SPECIAL EDUC. 1, 48 (1998); see also Donovan & Cross, supra note 7; Green et al., supra note 67, at 87.

\(^12\) See supra text accompanying note 101. For a discussion of some of the obstacles faced by universal pre-K advocates, See James E. Ryan, A Constitutional Right to Preschool?, 94 Cal. L. Rev. 49 (2006).
factor in improving students’ later academic success and reducing their future need for referral to special education cannot go unmentioned. While far from ideal or uniformly of the highest quality, programs designed to provide early education to disadvantaged and at-risk children, such as HeadStart, may be the best option for increasing access to pre-K education unless and until such access becomes universal.\footnote{See, e.g., Donovan & Cross, \textit{supra} note 7.}

Finally, an often overlooked but incredibly valuable resource for preventing referrals to special education and improving students’ overall academic outcomes lies not within the school but at home, with parents. More involved, more aware parents can play a critical role in ensuring the appropriate educational placement of their child. The more that parents are a part of the education process, the more they are able to communicate with the child’s educators about his or her abilities and needs, thus avoiding unnecessary referral for special education and enabling the school to tailor the child’s education to his or her individual needs and help him or her to excel in the school environment. Fostering teacher-parent relationships also increases the opportunities for teachers to receive feedback about the effectiveness and appropriateness of their instruction methods for each student, further bolstering the information provided by in-school evaluations of teachers’ instructional methods.\footnote{See \textit{infra} p. 26 for a discussion of the utility of such evaluations.} Finally, greater parent involvement may increase accountability on the part of the student as well as on the part of the teacher and school, by demanding an appropriate education for the child and expressing concerns if it is not provided. More involved parents are more likely to provide homework help, make sure assignments are turned in, require and ensure attendance, provide incentives for academic success and consequences for failure, set high expectations for students and decrease their chances of dropping out, and so on.\footnote{See Donovan & Cross, \textit{supra} note 7; Blanchett, \textit{supra} note 27; Cartledge, \textit{supra} note 49.}

\textbf{2. Culturally Responsive Instruction}

Very much related to the more general recommendation to improve the quality of majority-black schools is the call for providing more culturally responsive instruction in those schools.\footnote{See \textit{supra} text accompanying notes 45-60.} Part and parcel of improving the quality of education provided to black students is ensuring that their teachers, their curriculum, and their overall school environment meet their needs and allow them to thrive, thereby minimizing the cultural mismatch
that is characteristic of many schools today, and further increasing these students’ chance at academic success.\textsuperscript{107}

Improved cultural responsiveness in schools may be achieved in multiple ways. First, the number of African-American educators - teachers and administrators - in both general education and special education programs must be increased.\textsuperscript{108} Second, more rigorous professional development geared toward culturally responsive instruction techniques (at both the “pre-service” and “in-service” stages\textsuperscript{109}) would benefit educators of all cultural backgrounds by increasing their preparedness to teach and to understand their students.\textsuperscript{110} This would likely have the simultaneous and equally crucial benefit of reducing the potential for cultural bias in teachers’ assessments of their black students.\textsuperscript{111}

As well as a useful tool for early detection of learning and behavioral difficulties, regular screenings can also serve as a check on instructional and environmental appropriateness by highlighting problems before they adversely affect student outcomes.\textsuperscript{112} Recent studies emphasize the critical importance of taking educational context, including cultural responsiveness, into account in assessing students for learning and behavioral problems.\textsuperscript{113} Thus, frequent screenings to evaluate instructional effectiveness - especially in combination with increased parental involvement - may assist in bringing problems to educators’ attention early on and enable teachers to alter their instructional methods in time to improve students’ classroom experience before academic outcomes are hampered.\textsuperscript{114}

\textsuperscript{107} See Donovan & Cross, supra note 7, at 7-11; Cartledge, supra note 49; Blanchett, supra note 26, at 25-26; Patton, supra note 54; Shealey et al., supra note 49.
\textsuperscript{108} See Shealey et al., supra note 49, at 116.
\textsuperscript{109} Pre-service training refers to the schooling, certification, and training provided to teachers before they enter the classroom. In-service training refers to the professional development and continuing education programs they receive after beginning their teaching careers. See North Central Regional Educational Laboratory, Learning Point Associates, Critical Issue: Educating Teachers for Diversity (2007), available at http://www.ncrel.org/sdrs/areas/issues/educatrs/presrvce/pe300.htm.
\textsuperscript{110} For examples of existing pre-service diversity preparation programs that have been hailed as among the most effective, see id. Zeichner lays out 16 elements for effectively preparing teachers to meet the needs of a diverse student body, such as examining teachers’ own views on race and ethnicity, exploring the effects of prejudice and how to deal with them in the classroom, and instruction about the roles of privilege and structural inequity in education. KENNETH M. ZEICHNER, NAT’L CTR. FOR RESEARCH ON TEACHER LEARNING, EDUCATING TEACHERS FOR CULTURAL DIVERSITY 24 (1993).
\textsuperscript{111} See supra text accompanying notes 45-60.
\textsuperscript{112} See Green et al., supra note 67, at 87.
\textsuperscript{113} See id.; See also Donovan & Cross, supra note 7, at 170-72.
\textsuperscript{114} See Donovan & Cross, supra note 7, at 170-88.
Furthermore, studying the teaching methods that have historically been most effective and incorporating them into the preparation that today’s teachers receive in their coursework and professional development is likely to substantially increase teachers’ ability to meet the needs of and to understand black students. Looking to pre-Brown teaching methods, Shealey and colleagues note five principles shared by the most effective teachers of African-American students: a commitment to community and public activism, high expectations, genuine caring or “other mothering,” close relationships with the black community, and a nuanced understanding of their students’ communication and learning styles.\footnote{Shealey et al., supra note 49, at 118-19.}

3. Pre-Referral Intervention

Far too often, students identified as needing special education services are removed from the general education population immediately or very soon after being labeled with a disability diagnosis, before any other intervention methods are even attempted.\footnote{See, e.g., Reschly, supra note 10, at 51.} However, exclusion from the general education classroom ought hardly to be the first step in addressing students identified as having behavior or learning difficulties - rather, it ought to be the last resort. To this end, education psychologists recommend that students be “mainstreamed” whenever possible, and that other, less severe methods of intervention be attempted before a student is taken out of the general education classroom altogether.\footnote{See id., at 51-52; see also George Ansalone, Getting Our Schools on Track: Is Detracking Really the Answer?, in RADICAL PEDAGOGY (2004).}

Suggested interventions include the use of a behavioral aide, small-group tutoring either during or after school, additional tutoring support at home, and temporary or partial-day placement in a separate classroom either for some or all subject areas, among many others.\footnote{See Reschly, supra note 10, at 51.} These less intensive techniques not only allow students to remain in the general classroom, where the vast majority of disabled students are shown to benefit a great deal from exposure to and socialization with their non-disabled peers, as well as from the higher expectations of teachers and the comparatively more rigorous curriculum;\footnote{See supra text accompanying notes 61-65.} but in many cases, as these less severe intervention methods are less expensive than full removal to special education, if they are effective at addressing the student’s difficulties, they can help schools to conserve scarce special education resources.\footnote{See Reschly, supra note 10, at 51.}
4. Changes in the Assessment and Classification Process

Educational psychologists also offer strong critiques of and corresponding suggestions for improvement to the current assessment and classification process. As discussed above, the current classification system is typological, in that it relies on grouping students into one (or more) of 13 recognized disability categories on a dichotomous basis (i.e. disabled/non-disabled, or mentally retarded/non-mentally retarded).\textsuperscript{121} Furthermore, the current system is etiological, which is to say it emphasizes attributes internal to the individual and largely ignores context.\textsuperscript{122}

Revising this system to operate on a continuum basis rather than the current dichotomy model, it is argued, would better reflect the actual distribution of ability.\textsuperscript{123} Similarly, replacing the typological approach with a dimensional one would further improve the extent to which the classification system mirrors reality, by examining students’ abilities in various areas of learning and behavior (e.g., reading, social conduct, etc.).\textsuperscript{124} Finally, supplanting the current approach of focusing on what are viewed as internal traits with one that considers skills and abilities in context would further improve the effectiveness of the classification process.\textsuperscript{125} Honing in on students’ actual abilities and needs rather than oversimplifying them in an attempt to fit them into standardized but inappropriate molds - a model that often results not only in frequent mischaracterization of students’ abilities but also in the provision of wholly inappropriate intervention methods\textsuperscript{126} - would make schools better able to tailor intervention methods to students’ genuine needs and provide the educational supports required for academic success.

Moreover, Reschly points out that modifying the process in this way would also likely reduce costs, as it is nearly always cheaper to provide the specific services required in an a la carte fashion than to provide nearly all students labeled as disabled with a one-size-fits-all intervention regimen that often wastes schools’ precious dollars by including unnecessary or even inappropriate services.\textsuperscript{127} This is especially the case for students inappropriately referred to special education programs, who could be well served (or even better-served) by the general education track with slight modifications or supplementary services.\textsuperscript{128}

\textsuperscript{121} See id. at 49.
\textsuperscript{122} See id.
\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} See id. at 49-50.
\textsuperscript{126} See supra text accompanying notes 61-65.
\textsuperscript{127} See Reschly, supra note 10, at 45, 51.
\textsuperscript{128} See id.
An additional and very much related reform that is widely proposed is the wholesale abandonment of standardized tests for special education referral purposes. This modification to current assessment methods serves as the logical corollary to the above-recommended shift from the typological-dichotomy paradigm to the multi-dimensional continuum approach. More nuanced, individualized review of each student’s needs and abilities in lieu of heavy reliance on test scores and arbitrary cut-off points would curb the effect of testing bias and thus reduce the frequency of inappropriate referrals on the basis of depressed test scores. Further, requiring the involvement of more school personnel than just a single referring teacher or assessor before a student can be officially referred to special education would provide an important check within the referral process, as it would serve to reduce the risk of erroneous referrals resulting from a single teacher’s cultural biases as well as to offset the risk of error inherent in subjective evaluations more generally.

5. Recommendations in Action: Maryland Pilot Study

A pilot study of a new special education referral process, tested in public middle schools in southern Maryland, provides an illustration of several of the previously discussed recommendations in action. The innovative process incorporated proposed reforms such as a shift away from referral on the basis of high-stakes testing and toward more individualized review of abilities and problems by multiple educators, a policy of avoiding referral whenever possible, increased attention to educational context instead of exclusive examination of “within-child” problems, and requirements that instructional techniques be adjusted and other pre-referral intervention methods attempted first.

With the goal of reducing inappropriate referral of black students to special education programs, Conahan and colleagues put in place a multi-step referral procedure that required teachers to try and document their attempts at implementing certain alternative teaching methods and behavior management techniques. The process also mandated

129 See id. at 46, 49-50; see also Blanchett, supra note 27; Shealey et al., supra note 49; Terman et al., supra note 14.
130 See supra text accompanying note 129.
132 The referral process was designed as follows: teachers were required to fill out an Academic Intervention Checklist for each student being considered for placement in special education, including work samples and examples of classroom activities and behaviors, followed by completion of a Behavior Intervention Checklist on which teachers recorded their efforts at using alternative behavior management techniques. An Intervention Team reviewed the checklists and work samples submitted, observed the student in question, and then either sent the student back to the general
involvement by multiple decision-makers before an official special education referral could be made for any student. The study reported extremely positive results: there were far fewer reports of erroneous or unnecessary referrals as well as a staggering decrease of 68 percent in the overall rate of special education referral for black students.

C. CHANGES IN HOW WE VIEW DIFFERENCE

1. Abandon the “Deficit” Model

Some scholars argue that the prevailing paradigm of special education is founded in the “functionalist” tradition, in that it starts from the premise that there exists some norm or objective interpretation of social reality (the normal student) and that deviations from that norm constitute a deficit or pathology (disability) in need of corrective measures (special education). This approach to understanding and acting upon the perception of human difference has also been termed the “deficit model,” highlighting the instinct, exhibited especially by members of the dominant class, to equate difference with abnormality or failure.

The current approach to special education, wherein perceived differences in ability and behavior trigger a disability label and typically lead to subsequent exclusion from the general education population, serves to reinforce this view. Moreover, by supporting this approach, which tacitly rewards homogeneity over diversity, educators and school officials serve to perpetuate the overrepresentation of black students in special education and, in doing so, to further reinforce the existence of “presumed intellectual hierarchies among racial and ethnic groups.” To combat what has thus devolved into a harmful vicious cycle, the concepts of ability and race must first be disentangled. Perhaps the best way to accomplish this

education classroom with specific recommendations for intervention or elected to send the student to the IEP team with an initial referral for special education. See id. Michel Foucault is widely considered the father of “new functionalism.” His theories have been applied in the context of education by critical race theorists such as Patton. See Patton, supra note 54, at 26. See Artiles, supra note 54, at 32-33. See id. See supra text accompanying note 84. See Ferri & Connor, supra note 28, at 94; see also Artiles, supra note 54. See generally Patton, supra note 54.
goal is through improved and expanded preservice diversity preparation programs for teachers.\textsuperscript{140}

2. Detracking Schools

On a broader note, replacing the prevailing model with one that emphasizes the benefits of and accordingly seeks to embrace human diversity - not simply racial or ethnic diversity, but also diversity of learning styles, communication styles, behavioral patterns, and ability levels - would attack the problem at its core. A shift of this nature would dovetail with the recommendations made above for reforming the assessment and classification process.\textsuperscript{141} By shifting the focus away from identifying specific, internal trait-based differences and determining whether they rise to the level of an official disability label as defined by an arbitrary cutoff point, and instead to a more holistic process that both recognizes and values the uniqueness of each student and seeks to identify and then meet each individual student’s needs, all students would be far better and more equitably served.

To this end, calls to “detrack” schools have been made since the early 1980s. At the forefront of the detracking movement, which has never been confined to the special education context, Jeannie Oakes has long advocated a wholesale change in how educators view the concept of intelligence, arguing for its treatment as a fluid social construct rather than an immutable, innate trait.\textsuperscript{142} On this basis, advocates of detracking seek to debunk as a myth the conventional wisdom supporting its use in schools - namely, that students differ on the basis of natural ability and must be sorted accordingly in order to be educated most effectively.\textsuperscript{143}

With the backing of a growing number of state and local officeholders, courts, and educational and child advocacy organizations\textsuperscript{144} as well as an increasing body of research, Oakes and her progeny maintain that the use of ability tracking in schools is especially harmful to students of non-white backgrounds.\textsuperscript{145} In schools employing tracking

\textsuperscript{140} See Ferri & Connor, \textit{supra} note 28; see also Blanchett, \textit{supra} note 27, at 27.

\textsuperscript{141} See \textit{supra} text accompanying notes 119-28.

\textsuperscript{142} See \textbf{generally} Jeannie Oakes, Distribution of Knowledge, in \textit{KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY} (1985).

\textsuperscript{143} For a thorough overview of the practice of ability tracking from its origins in the early 20th century through the late 1960s, See Hobson, 269 F.Supp. 401. For a detailed history of the detracking movement, see Ansalone, \textit{supra} note 117.

\textsuperscript{144} A number of prominent organizations now oppose ability tracking, including the National Governor’s Association, the College Board, the National Education Association, the National Council of Teachers of English, and the Carnegie Council for Adolescent Development. The California Department of Education and the State of Alabama also openly oppose tracking. See Mid-Atlantic Equity Consortium, http://www.maec.org [hereinafter MAEC] (last visited May 26, 2008).

\textsuperscript{145} See \textit{id}.
systems, black students are severely overrepresented in the lower tracks where - similar to the difference in the quality and nature of the education provided in special education tracks as compared with general education programs\textsuperscript{146} - they typically receive less rigorous curricula, have lower expectations set for them, are faced with the stigma associated with placement in a lower track, and are segregated from and thus deprived of exposure to and socialization with their peers of perceived greater ability, resulting in reduced motivation and self-esteem, lower expectations held by the students themselves, and worse post-school outcomes.\textsuperscript{147} In short, detracking advocates argue, the use of ability tracking in schools perpetuates educational inequity, with students of color as the primary victims.\textsuperscript{148} Furthermore, were intelligence and ability treated as the movement’s proponents suggest, as a fluid social construct, tracking would lose its central justification and accordingly its privileged place at the center of most school systems.\textsuperscript{149}

The most common argument advanced by proponents of tracking relies on the assumption that educating students of varied ability levels - or, in the special education context, disabled and non-disabled - in the same classroom will result in academic mediocrity by stunting the growth of the higher achievers and simultaneously failing to meet the needs of the lower-achieving students.\textsuperscript{150}

While some research does support the benefits of tracking, primarily in the area of math,\textsuperscript{151} recent studies and detracking pilot programs suggest that these concerns are unfounded, demonstrating instead that inclusion is extremely beneficial for many lower-achieving and disabled students, and that it causes no harm to their higher-achieving counterparts.\textsuperscript{152} One such example is provided by the New York City schools’ decision in 1994 to require all ninth grade students to take college-prep level math and science courses.\textsuperscript{153} While not all students passed the courses, thousands of additional students did attain passing marks, demonstrating that far more students were able to complete the more challenging coursework than previously assumed.\textsuperscript{154} As higher-level courses are widely understood to function as the gateway to college admission, allowing all students the opportunity to take - and succeed in - such coursework would increase the educational opportunities provided to many students who would otherwise be deprived

\textsuperscript{146} See supra text accompanying notes 61-70.
\textsuperscript{147} See id.
\textsuperscript{148} See Oakes et al., supra note 45; see also Ansalone, supra note 117.
\textsuperscript{149} See supra text accompanying note 148; see also Oakes, supra note 142.
\textsuperscript{150} See supra text accompanying note 149.
\textsuperscript{151} See Ansalone, supra note 117, at 4.
\textsuperscript{152} See id.
\textsuperscript{153} See MAEC, supra note 144.
\textsuperscript{154} See id.
thereof due to their placement in lower tracks. Accordingly, it would provide students with greater academic stimulation in lieu of the low expectations and lower quality of education characteristic of lower-track classrooms, thus substantially improving students’ likelihood of achieving post-school success.

In light of the growing body of research supporting the benefits of detracking in schools, alternative methods of educating students of diverse ability levels, cultural backgrounds, learning styles, and behavioral manners, have emerged with great success. In addition to New York City’s approach discussed above, innovative schools across the country have begun offering “double doses” of core classes for students needing additional instruction to prevent them from falling behind; providing supplementary tutoring sessions on a group or individual basis either during or after school; implementing “within-class” grouping wherein a lesson is taught to the class as a whole and then students are divided into small groups based on their mastery of the material for a portion of the class time; and providing teachers with more rigorous training and development of methods for meeting the needs of a mixed ability-level classroom, as well as in effective classroom and behavioral management techniques.

Clearly, the central tenet of the detracking movement applies with equal force in the area of special education, supporting the rejection of the rigid, two-track system (disabled vs. non-disabled) in favor of an approach that provides an equal education to all students by default, supplemented with additional services and modifications on an as-needed, individual basis. Abolishing the separate special education track would vitiate much of the disproportionality problem, in that students would no longer simply be referred to a separate track but rather be identified as needing certain services to supplement the education provided to all. Furthermore, the benefits of such a shift would extend far beyond the disproportionality problem by improving the quality of education provided to all minority and disadvantaged students, by reducing the negative effects of receiving special education services (e.g., stigma, lower expectations), and by increasing these students’ chances at achieving positive post-school outcomes. To this end, it would ultimately serve to weaken the perceived link between membership in a racial or ethnic minority group and lower academic ability by attacking the self-fulfilling prophecy that is perpetuated by the current system.

155 See Oakes et al., supra note 45; Ansalone, supra note 117; see also Oakes, supra note 142.
156 See supra text accompanying note 155.
157 See MAEC, supra note 145.
V. CONCLUSION

Despite more than four decades of awareness by educators and policymakers and as many years’ worth of efforts to remedy it, the phenomenon of black students’ overrepresentation in special education persists today, rendering illusory the promise of equal educational opportunity and quietly preserving the segregation that Brown purported to eliminate in the public schools. Many types of reforms appear promising as tools for combating this problem. First, the special education system must be reformed by strengthening prevention and early intervention - especially through increasing funding in majority-black schools, by placing greater emphasis on culturally responsive instruction, by modifying its assessment and referral approaches to better mirror the way in which ability occurs among students and take context into account, and by ceasing to rely on exclusion as the first response. Second, there must be a shift in how the school system treats human difference, by abandoning the deficit model and abolishing the rigid disability tracking system. These recommended reforms, if implemented in combination, should go a long way toward solving not just the disproportionality problem, but also the much larger problem of continued educational inequity.

Opposition by white parents, educators, and political conservatives is to be expected, especially to the more drastic of these proposed reforms (e.g., detracking), given the sensitive nature of the issue of race in this nation, the undeniable connection between education and power, and the inherent desire for the dominant class to preserve the status quo. However, as the body of research continues to grow, providing support for the effectiveness of these recommendations and debunking the myths underlying the justifications for opposition to such reform (e.g., the perception that detracking will result in academic mediocrity), and as many of the reforms promise the added benefit of improved cost-effectiveness, there may well be cause for optimism yet.

158 See Artiles, supra note 54; Blanchett, supra note 27; Patton, supra note 54.