Disabling Language: The Overrepresentation of Emergent Bilingual Students in Special Education in New York and Arizona

Emma Curran Donnelly Hulse

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

DISABLING LANGUAGE:
THE OVERREPRESENTATION OF EMERGENT BILINGUAL STUDENTS IN SPECIAL EDUCATION IN NEW YORK AND ARIZONA

Emma Curran Donnelly Hulse[*]

INTRODUCTION

At the age of four, Luz seemed poised for academic success. The firstborn daughter of two Mexican immigrants, Luz was a spunky, assertive child who spoke in Spanish without hesitation. Both of her parents were deeply invested in her education. Her mother, Alicia, attended weekly classes on how to design at-home learning experiences for her children and received support from a trained facilitator through home visits. Luz regularly read with her mother and her father when he was home from his restaurant job. The spring before she entered kindergarten, she won a coveted spot at a high-achieving neighborhood school that had just opened in a new state-of-the-art building. The facilitator assured Alicia that Luz was well prepared for kindergarten and would thrive at her new school.

But by the middle of first grade, Luz's progress had ground to a halt. She was not advancing in reading or writing, and teachers reported that she was not engaged in classroom activities or discussions. At home, she refused to do homework or read in Spanish with her mother. Alicia reluctantly agreed to a special education evaluation to determine if Luz had a speech or language impairment (SLI). At the Individualized Education Plan (IEP)[1] meeting, both Luz's teacher and the school principal insisted that she required special education services and pressured Alicia to accept a placement in a self-contained classroom.[2] However, the psychologist who had conducted the evaluation had

---

1. The Individualized Education Plan is a written document that details the student's academic needs; lays out annual goals; and identifies special education, related services, and other accommodations needed to support the student to reach those goals. *See* 20 U.S.C. § 1414(d)(1)(A). The IEP is developed by a team including educators, administrators, the parent, and the student. *See id.* § 1414(d)(1)(B).

2. Self-contained classes exclusively serve students with disabilities. In New York State, self-contained classes are limited to 15 students and staffed by one teacher and at least one supplementary school personnel. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(h)(4) (2016).

come to a very different conclusion: Luz was simply navigating the difficult process of acquiring academic English.

Parents and students like Alicia and Luz are not unique in the New York City school system. Mothers, fathers, grandparents, and guardians share a fierce commitment to their children and a willingness to fight to ensure they receive the education they deserve. But many of them face a system that lacks the institutional knowledge and resources to support their children's emergent bilingualism.[3]

The overrepresentation of emergent bilingual and Latinx students in special education is a civil rights issue, implicating two intersecting but distinct legal regimes: the federal Individuals with Disabilities Education Act (IDEA) and state laws regarding English Language Learners (ELLs). First passed in 1975, the IDEA guarantees children with disabilities a right to a free and appropriate public education in the least restrictive environment.[4] To qualify for services, an evaluator must find that a student has a disability encompassed in one of 13 categories and that this disability adversely affects their educational progress.[5]

While Supreme Court precedent[6] and the federal Equal Education Opportunity Act (EEOA)[7] require states to educate English learners, state law differs considerably on the rights of emergent bilingual students and the programmatic offerings available to them. The two states highlighted in this study — Arizona and New York — have divergent approaches to educating students learning English. Arizona has a uniform policy of Sheltered English Immersion (SEI), which places all students classified as English Learners in segregated

---

3. A brief note on language: the legal term for a student whose home language is not English and who needs support to acquire academic English is "English Language Learner" (ELL) or "Limited English Proficient" (LEP). The U.S. Department of Education's Office for Civil Rights (OCR) reports data using the latter term. However, Ofelia Garcia and other scholars have observed that these terms not only center the goal of English language acquisition at the expense of bilingualism but also contribute to deficit discourses about immigrant students and their families. As a result, this Article uses "emergent bilingual" in place of ELL or LEP, including when referring to data or research that uses this terminology. *See* Ofelia Garcia, *Emergent Bilinguals and TESOL: What's in a Name?*, 43 TESOL Q. 322, 322 (2009).

4. *See* 20 U.S.C. § 1412.

5. *See* 34 C.F.R. § 300.8.

6. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) (finding public schools must offer non-English speakers instructional training to learn English in school districts that receive federal funding).

7. 20 U.S.C. § 1703(f) ("No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by — (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.").

classrooms for four hours a day with all instruction focused on English acquisition.[8] In contrast, New York law grants parents the right to select bilingual education for their children, the legacy of a legal battle waged by the Puerto Rican community in the 1970s that led to the so-called ASPIRA Consent Decree.[9] In recent years, accountability systems, which alternately reward schools when their students rapidly acquire English and penalize them when students fail to make adequate progress on state tests, have led to a precipitous drop in the number of bilingual programs. As a result, restrictive language policies guide both states' approaches to educating emergent bilingual students: in Arizona, an explicit policy, and in New York, an implicit one.

This Article explores how these restrictive language policies contribute to the overrepresentation of emergent bilingual students in special education. It further argues that in this legal and political context, the lack of adequate resources for educating emergent bilingual students limits educators' options when students require remediation. Because of the power of educator discretion in the special education identification process, deficit discourses about children, families, and bilingualism may lead teachers and evaluators to interpret a student's slow progress as resulting from an innate disability rather than conditions in the classroom. While race is rarely openly referenced in special education assessments, decisions are made in the context of highly contested debates over language, assimilation, and identity that are fraught with racialized meaning.

Indeed, outcomes in New York and Arizona are remarkably similar. This Article tests its hypothesis through an original analysis of data from the U.S. Department of Education's Office for Civil Rights (OCR).[10] While this data is publicly available online, it is underutilized by researchers and advocates. The analysis applies the statistical methodologies recommended by the IDEA Data Center in the federal Department of Education (DOE)[11] to show that emergent bilingual students are overrepresented in multiple high-incidence categories in

---

8. *See* Patricia Gándara & Gary Orfield, *Why Arizona Matters: The Historical, Legal, and Political Contexts of Arizona's Instructional Policies and U.S. Linguistic Hegemony*, 11 LANGUAGE POL'Y 7, 12 (2012).

9. *See* Aspira of N.Y., Inc. v. Bd. of Educ., 423 F. Supp. 647, 648 (S.D.N.Y. 1976).

10. *See Civil Rights Data Collection: Detailed Data Tables*, OFF. FOR C.R., U.S. DEP'T EDUCATION, https://ocrdata.ed.gov/flex/Reports.aspx?type=school [https://perma.cc/KCP5-27UW] (last visited Jan. 10, 2021).

11. *See infra* Section III.B.

both Arizona and New York, particularly in the SLI category.[12] In New York, for example, Latinx students are twice as likely to be identified as SLI.[13] In both states, Black and Latinx students are overrepresented in the Specific Learning Disability (SLD) and Intellectual Disability (ID) categories, while in Arizona, American Indian students are overrepresented in SLD and ID.[14] The OCR data also show that state thresholds for determining overrepresentation mask widespread disproportionate representation.[15] However, there is variation across school districts, suggesting that overrepresentation is not inevitable and can be addressed.

The extent of the overrepresentation of emergent bilingual students and Latinx students in special education requires immediate action. While legislators have taken steps to address disproportionality in special education and new regulations recently went into effect to standardize the methodology for identifying districts with overrepresentation, these changes are not sufficient to ensure transparency or accountability. Moreover, public enforcement has overly relied on procedural compliance, failing to address the underlying conditions that drive overrepresentation. As a result, stronger federal standards and enforcement, along with a renewed investment in transforming classroom practice, are needed to ensure that emergent bilingual students and students in special education receive an appropriate education.

This Article makes three unique contributions to legal scholarship on special education. First, the legal literature on emergent bilingual students and special education is extremely limited and does not discuss disproportionate representation.[16] This Article addresses this gap by braiding original data analysis together with interdisciplinary research on emergent bilingual students, restrictive language policies, and overrepresentation. Second, this is the first article to use the OCR data to study disproportionality: previous studies relied on data obtained through state governments, and as such the states in question

---

12. These categories are described as "high incidence" or "judgmental" because they comprise more than 82% of all students in special education, but both their definitions and diagnostic practices vary widely, allowing great latitude to educators and evaluators to make subjective decisions. *See* Amanda L. Sullivan, *Disproportionality in Special Education Identification of English Language Learners*, 77 EXCEPTIONAL CHILD. 317, 318 (2011).

13. *See infra* Table 8.

14. *See infra* Tables 8, 9.

15. *See infra* Section III.C.iii.

16. *See, e.g.*, Claire Raj, *The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity*, 87 TEMP. L. REV. 283, 310 (2015).

were not explicitly named. This Article's findings demonstrate the vital importance of publicly available data, but they also identify some problems with the OCR data set that undermine its intended purpose of promoting transparency and accountability. Third, this Article demonstrates that even seemingly divergent language policies — in this case, a bilingual education ban in one state and explicit protections for emergent bilingual students in another — can produce similar patterns of overrepresentation. Ultimately, classroom practice matters and enforcement efforts must move beyond procedural compliance to incubate culturally responsive pedagogy.

While this Article includes data on American Indian, Black, and white students, readers might note that its analysis of racial data tends to focus on Latinx students. This is in part because Spanish-speaking students represent the majority of emergent bilingual students in New York and Arizona, and in part because this Article aims to address a gap in the literature: most studies of overrepresentation do not center on Latinx students. But while Spanish-speakers represent 75.6%[17] and 63.3%[18] of emergent bilingual students in Arizona and New York, respectively, emergent bilingual students are not exclusively Latinx. In New York in particular, the immigrant community is large and diverse. Statewide, 9.2% of emergent bilingual students speak Chinese, 4.3% speak Arabic, 2.7% speak Bengali, and 1.6% speak Russian.[19] There are also significant communities of Black migrants from Haiti and West Africa.[20] The Latinx label may mask intragroup distinctions, such as indigenous or Afro-Latinx identities, that may be tied to increased referral and special education placement. For example, one hypothesis might be that even if Latinx students are underrepresented in the emotional disturbance category (ED), Afro-Latinx students might be overrepresented in ED because they are perceived as Black rather than Latinx, and Black students have historically been disproportionately

17. Julie Sugarman & Courtney Geary, *English Learners in Arizona: Demographics, Outcomes, and State Accountability Policies*, MIGRATION POL'Y INST. 3 (Aug. 2018), https://www.migrationpolicy.org/sites/default/files/publications/EL-factsheet2018-SelectStates_FinalWeb.pdf [https://perma.cc/JEC7-H6AA].

18. *Id.*

19. *Id.*

20. *See* N.Y.C. DEP'T OF EDUC., 2018–2019 ENGLISH LANGUAGE LEARNER DEMOGRAPHIC REPORT 17–18, https://infohub.nyced.org/docs/default-source/default-document-library/ell-demographic-report.pdf [https://perma.cc/NM64-LP54] (last visited Oct. 23, 2020).

represented in ED.[21] Similarly, emergent bilingual students overall might not be overrepresented in ED, but perhaps Black immigrants are. But the OCR data does not allow for fine-grained analysis because it does not cross racial data with language proficiency. One of the recommendations this Article offers is that OCR should make this data available to allow for deeper analysis of how race and language intersect in the special education system. For the moment, however, the data limits research to separate analyses of emergent bilingual students and students of color.

This Article proceeds in four Parts. Part I provides an introduction to the disproportionate representation of students of color and emergent bilingual students in special education, and explains why it is a critical problem in special education law and policy. Part II explores how the policy context, particularly restrictive language policies, and the power of educator discretion in the special education evaluation process drive overrepresentation. Part III explains the methodology underlying the data analysis, explains key findings, and discusses their implications. Part IV discusses the limitations of current enforcement efforts and the need to move beyond procedural compliance to address classroom practice, closing with policy recommendations to improve transparency and strengthen federal enforcement.

I. DISPROPORTIONALITY AND ITS CONSEQUENCES

The critique of disproportionate representation of students in special education starts from the assumption that if all students were correctly identified and placed, the demographics of special education would correspond to the general student population. [22] Disproportionality can manifest as either overrepresentation or underrepresentation: both patterns indicate that students may not be receiving an appropriate education that meets their unique needs as required by federal law.[23] Overrepresentation suggests that students

---

21. *See* Daniel J. Losen & Gary Orfield, *Introduction*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION, at xv–xxi (2002) (citing a study that found Black children were overrepresented in the area of ED since the 1970s).

22. *See* J.S. Valenzuela et al., *Examining Educational Equity: Revisiting the Disproportionate Representation of Minority Students in Special Education*, 72 EXCEPTIONAL CHILD. 425, 426 (2006) ("Disproportionate representation of minority students in special education programs refers to either a higher or lower percentage of students from a particular ethnic group in special education than is found in the general student population and has been well documented as both a historical and continuing concern.").

23. *See* Losen & Orfield, *supra* note 21, at xxi.

are incorrectly referred, evaluated, and placed in special education.[24] Inversely, underrepresentation suggests that classroom teachers are not identifying students who need support.[25] While this Article primarily focuses on the former, both overrepresentation and underrepresentation are equally serious problems.

Overrepresentation predates the creation of the modern special education system and reflects historical patterns of the placement of Black and Latinx students in restrictive classrooms. In response to the school desegregation movement, school districts effectively re-segregated schools by tracking students of color.[26] The problem first came to policymakers' and academics' attention in 1968 when Lloyd Dunn argued, in an essay in *Exceptional Children*, that between 60% to 80% of students in "mild mental retardation classes" were either low-income or students of color.[27] In California, a series of lawsuits in the early 1970s revealed that schools were disproportionately identifying Chicanx, Black, and American Indian students as intellectually disabled and placing them in self-contained classrooms.[28] In one particularly egregious case, Monterey County schools administered IQ tests in English to children from monolingual Spanish-speaking households and identified the students as intellectually disabled based on their results.[29] Moreover, the tests were normed on all-white, English-speaking standardization groups.[30]

---

24. *See* Julie Bollmer et al., *Using the Risk Ratio to Assess Racial/Ethnic Disproportionality in Special Education at the School-District Level*, 41 J. SPECIAL EDUC. 186, 186 (2007) [hereinafter Bollmer et al., *Using the Risk Ratio*].

25. *See id.*

26. *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 985 (9th Cir. 1984) (affirming a lower court finding that the use of unvalidated IQ tests to place students in "Educable Mentally Retarded" classes had a discriminatory impact on Black students); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1460, 1460–61 (S.D.N.Y. 1985) (reasoning that Yonkers's practice of placing self-contained special education classrooms comprised primarily of students of color in predominantly white schools was discriminatory despite its "facially 'integrative' consequences"); Horson v. Hansen, 269 F. Supp. 401, 443 (D.D.C. 1967) (holding that an "ability grouping" system implemented in Washington, D.C., schools in the aftermath of *Bolling v. Sharpe* represented a "denial of equal educational opportunity" and hence equal protection); *see also* Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 518 (1999).

27. *See* Lloyd M. Dunn, *Special Education for the Mildly Retarded — Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 6 (1968).

28. *See* RICHARD R. VALENCIA, CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY 126–47 (2008).

29. *See id.* at 126–30.

30. *See id.*

When the children were retested in Spanish, almost all scored at or above the state's cut score for placement in regular academic classes.[31]

Despite the best efforts of advocates, the problem has proved intractable. At the turn of the century, Black students were overrepresented in every disability category and almost every state.[32] They were almost three times as likely as white students to be labeled ID, and almost twice as likely to be classified as ED.[33] Black and American Indian students were also disproportionately represented in the SLD category.[34] While the percentage of Black and Latinx students classified as ID decreased by the end of the decade, the number of Latinx students labeled as SLD increased in the same period.[35]

Because the vast majority of special education research focuses on racial disproportionality, few studies have explored whether emergent bilingual students are appropriately represented in special education nationally. However, researchers have found that emergent bilingual students who either (1) have been in English as a second language (ESL) classes or (2) report a lack of English proficiency at the tenth-grade level are overrepresented in special education.[36] Another study found that while emergent bilingual students were underrepresented in the early grades, they were overrepresented by the third grade, suggesting that teachers wait until students achieve proficiency to refer them to special education.[37] Studies have also documented overrepresentation of emergent bilingual students in the "high incidence" categories of SLD, ED, ID, and SLI at the district level. In 2006, emergent bilingual students were overrepresented in the SLD category in half of Arizona districts and the SLI and ID categories in roughly a quarter of districts.[38] A study of urban districts in

---

31. *See id.*

32. *See* Losen & Orfield, *supra* note 21, at xv, xx.

33. *See id.*

34. *See id.*

35. *See* Dalun Zhang et al., *Minority Representation in Special Education: 5-Year Trends*, 23 J. CHILD & FAM. STUD. 118, 121, 125 (2014) (speculating that this increase could either be related to better identification and testing or increasing numbers of emergent bilingual students in schools across the country).

36. *See* Dara Shifrer, Chandra Muller & Rebecca Callahan, *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language*, 44 J. LEARNING DISABILITIES 246, 255 (2011).

37. *See* Jennifer F. Samson & Nonie K. Lesaux, *Language-Minority Learners in Special Education: Rates and Predictors of Identification for Services*, 42 J. LEARNING DISABILITIES 148, 159 (2009).

38. *See* Alfredo J. Artiles et al., *Shifting Landscapes of Professional Practices: English Learner Special Education Placement in English-Only States*, *in* FORBIDDEN

California found that while emergent bilingual students were underrepresented in the early grades, they were overrepresented in grades 6–12.[39] Interestingly, in both Arizona and California, the number of emergent bilingual students in special education continued to increase in the years following the passage of restrictive language policies, despite a fluctuation in the number of enrolled ELLs.[40] In fact, in California, students in English immersion programs were not only more likely to be placed in special education than their peers receiving different models of language support but also were more likely to be placed in the most restrictive settings.[41] Studies in New Mexico[42] and Texas also found evidence of overrepresentation of emergent bilingual students in special education.[43]

The overrepresentation of emergent bilingual students is troubling for four reasons. First, students who are struggling to master academic English may be incorrectly placed in special education. In their qualitative study, Beth Harry and Janette Klingner observed that IEP teams did not effectively address language and cultural issues when they classified emergent bilingual students as ID, including one case where a Haitian Creole speaker was classified while still at a beginning level of English proficiency.[44] This mistaken identification may result in a misalignment of services. For example, if a student is struggling to

---

LANGUAGE: ENGLISH LEARNERS AND RESTRICTIVE LANGUAGE POLICIES 107–08 (Patricia Gándara & Megan Hopkins eds., 2010) [hereinafter Artiles et al., *Shifting Landscapes*].

39. *See* Alfredo J. Artiles et al., *Within-Group Diversity in Minority Disproportionate Representation: English Language Learners in Urban School Districts*, 71 EXCEPTIONAL CHILD. 283, 295–96 (2005) [hereinafter Artiles et al., *Within-Group Diversity*].

40. *See* Artiles et al., *Shifting Landscapes*, *supra* note 38, at 106–08; *see also* Sullivan, *supra* note 12, at 327 (finding that prior to Proposition 203's passage in 2000, emergent bilingual students were underrepresented in special education overall and in the SLI category in particular, but by 2006 they were overrepresented statewide and were 30% more likely to be identified as SLI than their white peers).

41. *See* Artiles et al., *Within-Group Diversity*, *supra* note 39, at 294–95. Emergent bilingual students in English immersion programs were 32% more likely than their peers in modified immersion programs to be placed in segregated special education programs. *See id.* at 294.

42. Note that the authors do not explicitly identify New Mexico as the study's location, but the demographic description of the district closely parallels that of Albuquerque, New Mexico.

43. *See* Diana Linn & Lynn Hemmer, *English Language Learner Disproportionality in Special Education: Implications for the Scholar-Practitioner*, 1 J. EDUC. RSCH. & PRAC. 70, 75 (2011); Valenzuela et al., *supra* note 22, at 437.

44. *See* BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION?: UNDERSTANDING RACE & DISABILITY IN SCHOOLS 137–39 (2d ed. 2014).

learn English because her classroom teacher fails to provide effective "scaffolding" of language support in her lessons, pulling the child out for therapy related to, say, language processing is unlikely to correct the underlying issue. Schools may fall short of providing appropriate services, even where students are correctly identified as having special needs. In her ethnographic study of a bilingual charter school, Sara Kangas found that the school's system of placing students with disabilities in one "inclusive" classroom meant that emergent bilingual students received less than two hours of ESL services a week.[45] Those services were targeted at the classrooms where the majority of emergent bilingual students were placed, leaving no available staff to assist students with disabilities who needed help in learning English.[46]

Second, special education placement may limit access to instruction in students' home language and have long-term consequences for their bilingual development. Emergent bilingual students in special education settings are less likely to receive language support services and instruction in their home language than emergent bilingual students in general education.[47] In her study of the bilingual charter school, Kangas also found that students received no special education support during Spanish instruction, a problem compounded by the lack of consistent Spanish instruction in the special education classroom.[48] Teachers expressed doubt that their special education students were capable of becoming bilingual, and emphasized compliance with the requirements of each student's IEP over providing language services.[49]

---

45. *See* Sara E. N. Kangas, *"That's Where the Rubber Meets the Road": The Intersection of Special Education and Dual Language Education*, 119 Tchrs. Coll. Rec. 1, 15–17 (2017).

46. *See id.* at 17–20.

47. *See* Alfredo J. Artiles, Federico R. Waitoller & Rebecca Neal, *Grappling with the Intersection of Language and Ability Differences: Equity Issues for Chicano/Latino Students in Special Education*, *in* Chicano School Failure and Success: Past, Present, and Future 221 (Richard R. Valencia ed., 3d ed. 2011) [hereinafter Artiles et al., *Equity Issues*].

48. *See* Kangas, *supra* note 45, at 15–20.

49. *See id.* at 20–24. In her study of IDEA compliance in suburban districts, Catherine Kramarczuk Voulgarides describes a district administrator's outrage that schools are required to provide language services to emergent bilingual students considered to be "low functioning." *See* Catherine Kramarczuk Voulgarides, Does Compliance Matter in Special Education? IDEA and the Hidden Inequities of Practice 107–10 (2018). Voulgarides writes that the administrator said, "I don't understand why on earth you would pull out a self-contained kid for 2 hours to a non-special-education-trained ESL teacher" and claimed it was "contraindicative" to the needs of students with disabilities. *Id.* at 109. Embedded in these statements is a belief that some students are incapable of their bilingual abilities because of their disability, and that special education services are ultimately more valuable and important than services for emergent bilingual students.

Students who do not receive consistent instruction and support in their native language will, at a minimum, fail to develop academic language skills in both languages, and may struggle to maintain proficiency in their first language. The consequences of language loss for students' connections to culture, community, and family are immeasurable.

Third, placement in special education may result in increased segregation. Nationally, Latinx students are 28% more likely than their non-Latinx peers to be placed in a self-contained classroom, while one local study of a southwestern state found that 57% of emergent bilingual students were placed in separate classrooms compared with 38% of non-ELLs in the same disability category.[50] In a good faith effort to concentrate resources and streamline services, schools may also be placing emergent bilingual students with disabilities in a small subset of schools.[51] At the level of policy, placing emergent bilingual students in self-contained special education classrooms or isolated schools runs counter to federal language policy goals by preventing the integration of English learners.[52] The stigmatizing effect of the label imposed by special education and the subsequent separation from peers can have a detrimental effect on both students and their families.[53]

Fourth, the inequitable distribution of resources, wide variation in the quality of programming, and the stigmatizing effects of segregation lead to abysmal educational outcomes for special education students. Outcomes are particularly bleak for students of color. Latinx students aged 14 years and older with disabilities drop out of school at a rate of 43%, while the dropout rate for Black students with disabilities is 45%, more than 10% higher than the dropout rate for white students with disabilities.[54] Although students with disabilities generally tend to perform significantly lower than their peers on standardized assessments, white students even outperformed students of color within the same disability categories.[55] These outcomes are partly

---

50. *See* Artiles et al., *Equity Issues*, *supra* note 47, at 218, 221. While the locality where the referenced study took place is unnamed, it is likely Albuquerque, New Mexico.

51. *See* VOULGARIDES, *supra* note 49, at 109–10 (describing a district administrator's comment that they had placed "all ESL kids in one school" in order to streamline services).

52. *See* Gándara & Orfield, *supra* note 8, at 12–13.

53. *See* Sara Green et al., *Living Stigma: The Impact of Labeling, Stereotyping, Separation, Status Loss, and Discrimination in the Lives of Individuals with Disabilities and Their Families*, 75 SOCIO. INQUIRY 197, 205 (2005).

54. Artiles et al., *Equity Issues*, *supra* note 47, at 218.

55. *See id.* at 220.

explained by the legal structure of the special education system itself, which does not lead to the equitable distribution of resources. LaToya Baldwin Clark has shown that white parents leverage their cultural capital to secure preferable diagnoses and services for their children, decreasing the availability of resources for children whose parents struggle to navigate the school system. [56] Placement in special education, then, neither ensures that students will receive necessary services nor will derive significant benefit from the program. Instead, it has the potential to stigmatize and segregate students while posing yet another obstacle to their bilingual development. These concerns give urgency to the question of overrepresentation in special education.

II. RESTRICTIVE LANGUAGE POLICIES AND EDUCATOR DISCRETION DRIVE DISPROPORTIONALITY

While the IDEA requires that special education placement be determined by each child's unique needs and challenges, these decisions are not made in a vacuum. This Part explores two different but mutually reinforcing causes of overrepresentation: the legal and policy context and educator discretion. First, it explores how the federal government's failure to regulate the education of emergent bilingual students has allowed states wide latitude to shape their own language policies, even as Congress has strengthened federal protections for students with disabilities. Unlike students in special education, no federal funding attaches to emergent bilingual students, and courts have held the guarantee of meaningful educational opportunity for emergent bilingual students mandates only "adequate" results. Because of the decentralization of language policy, states have adopted widely divergent approaches to educating emergent bilingual students, a reality exemplified by Arizona and New York. However, even in New York, where emergent bilingual students have substantive rights, two decades of high-stakes testing have undermined bilingual education programs. As a result, educators do not have sufficient resources to serve emergent bilingual students, and language learners have minimal rights. The second major driver of overrepresentation is educator discretion. Without administrative oversight, educator discretion plays a decisive role in determining student placement in special education. Ethnographic research suggests that these decisions may be informed by deficit discourses about students of color in

---

56. *See* LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381, 423–31 (2018).

general and bilingual students in particular, contributing to the disproportionate representation of these students in the special education system.

A. Contextualizing the Classroom: The Rise and Fall of Federal Support for Bilingual Education

For a few years in the 1970s, the federal government used its twin powers of spending and enforcement to promote the expansion of meaningful educational opportunities for emergent bilingual students. But in the ensuing decades, these protections have been retracted, and now federal policy prioritizes English acquisition while granting extraordinary latitude to the states to determine their own language education policies. At the same time, divisive battles over bilingual education in both Arizona and New York have restricted the range of programs offered and resources available to educators, while infusing questions of language instruction with racialized meaning.

Federal support for bilingual education, like the IDEA, arose out of the shifting cultural landscape in the aftermath of the Civil Rights movement.[57] But unlike the IDEA, federal protections for emergent bilingual students were watered down and subsequently eliminated by the early 2000s. The Bilingual Education Act of 1968[58] was the first federal legislation to recognize that students learning English had special educational needs, establishing "a modest grant-in-aid program to support experimental demonstration projects."[59] Two years later, the new Office for Civil Rights in the Department of Health, Education, and Welfare issued a memo that concluded that Title VI of the Civil Rights Act protected emergent bilingual students, requiring districts where students were unable to participate in educational programs to take affirmative steps to rectify the deficiency.[60] The Supreme Court subsequently relied on this interpretation of Title VI in the landmark case *Lau v. Nichols*,[61] reasoning that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not

---

57. *See* Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1264–66 (1988) [hereinafter Moran, *The Politics of Discretion*].

58. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 701 (1968).

59. Moran, *The Politics of Discretion*, *supra* note 57, at 1263.

60. *See* Office for Civil Rights, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11549, 11595 (July 10, 1970); *see also* Moran, *The Politics of Discretion*, *supra* note 57, at 1266.

61. 414 U.S. 563 (1974).

understand English are effectively foreclosed from any meaningful education."[62] The following year, Congress codified the holding of *Lau* in Section 204 of the EEOA, providing

> [n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[63]

Although *Lau* did not specify a remedy for a few years following the passage of the EEOA, bilingual education was in the ascendancy. Congress increased appropriations and earmarked funds for transitional bilingual education programs recognizing the value of students' cultural heritage and providing for instruction in their home language.[64] But ideological conflict over the value of bilingual education and resistance from states eroded support for federal policy. Beginning in 1983, states were given greater latitude in choosing among instructional approaches, including granting state agencies greater discretion in bilingual-education policymaking and implementation.[65] In the 2002 reauthorization of the Elementary and Secondary Education Act, now popularly known as "No Child Left Behind" (NCLB), Title VII was eliminated, and along with it, any mention of bilingualism as a stated goal of federal policy.[66] Emergent bilingual students were renamed "English Language Learners," and accountability provisions mandated annual English assessments and attainment of "measurable achievement objectives," a requirement that carried with it the threat of losing federal funding.[67] NCLB also replaced the competitive grants process with a formula that grants aid to each state based on their enrollments of emergent bilingual students and other immigrant students, reducing the impact of federal funding while also removing any requirement that states prioritize bilingual programs.[68]

Retrenchment in federal legislation was paralleled by that in the courts. *Castañeda v. Pickard*[69] established a three-prong test that has

---

62. *Id.* at 566.

63. 20 U.S.C. § 1703(f).

64. *See* Moran, *The Politics of Discretion*, *supra* note 57, at 1278.

65. *See id.* at 1305.

66. *See* EUGENE E. GARCÍA, TEACHING AND LEARNING IN TWO LANGUAGES: BILINGUALISM AND SCHOOLING IN THE UNITED STATES 98 (2005).

67. *See id.*

68. *See id.*

69. 648 F.2d 989 (5th Cir. 1981).

been widely implemented in federal courts to assess whether state language education programs satisfy the requirements of the EEOA. Under that test, the state must (1) formulate a sound English language instruction educational plan, (2) implement that plan, and (3) achieve adequate results.[70] This test does not require that districts implement bilingual education — only that that their strategy has a basis in educational research and can demonstrate some results. A subsequent round of litigation out of Arizona further weakened the *Castañeda* test. In *Horne v. Flores*,[71] the Supreme Court reversed a district court order requiring Arizona to increase its funding to cover the cost of instruction for bilingual students, holding that "appropriate action" neither requires a particular level of funding nor "the equalization of results between native and nonnative speakers on tests administered in English."[72] In *Flores v. Huppenthal*,[73] the Ninth Circuit upheld Arizona's SEI program, reasoning that the plaintiffs had not identified an injury sufficient to justify a statewide injunction.[74]

The result is that states now have wide discretion to determine their own language policy and strategy for educating emergent bilingual students.[75] Delegation to the states has not resulted in more expansive rights for students, nor has it "mitigated ideological conflict over the role of English []or enhanced experimentation to resolve pedagogical uncertainty."[76] Rather, as demonstrated by the recent history of education policy in Arizona and New York, the decentralization of policy-making authority has opened the door for restrictive language approaches that narrow instructional offerings to a limited range of programs that fail to support bilingual development, reduce the resources available to educators, and create an implicit association between bilingualism and deficiency.

---

70. *See id.* at 1009–10.

71. 557 U.S. 433 (2009).

72. *Id.* at 467.

73. 789 F.3d 994 (9th Cir. 2015).

74. *See id.* at 1008.

75. *See* Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 169 (1999) [hereinafter Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*] (discussing divergent language policies in California and New York under the "new federalist" approach).

76. *Id.*

B. Arizona: The Nativist Campaign for English-Only Education

Arizona has a long history of segregation and discriminatory treatment of Chicanx students in school, a history compounded by the passage of Proposition 203 in 2000.[77] Backed by California millionaire Ron Unz — who also funded California's Proposition 227 — Proposition 203 was sold as the "English for the Children" initiative.[78] The campaign was carefully choreographed to avoid explicit racism. A local committee of three Chicanx educators chaired the campaign, and narratives of responsible governance were central to its success: bilingual education was described as a failed strategy while English-only education was painted as the most direct route to academic success.[79] However, the rhetoric surrounding the campaign played on a popular image of immigration as an invasion. Journalists and supporters described Proposition 203 as a war, with Unz "marshaling forces" fighting against bilingual education.[80] Bilingual education was depicted as a pathology, inflicting generational harm on children and trapping them in a cycle of poverty, as teachers were crushed by an "ever-increasing" tide of students and languages.[81] In contrast, English was portrayed as an essential element of economic opportunity and American identity.[82] In striking down bilingual education, Unz and other advocates positioned themselves as saving children from their language, culture, and community.

After the election, officials did not initially move aggressively to enforce the ban on bilingual education, instead giving local districts some latitude in offering a range of programs and allowing parents to waive participation in SEI.[83] However, Tom Horne, a former state legislator and school board member, ran for Superintendent of Public Instruction in 2002, building his campaign on the promise to fully

---

77. *See* Gándara & Orfield, *supra* note 8, at 12–13 (discussing the history of "Mexican Rooms" in Arizona and subsequent desegregation litigation).

78. *See* Wayne E. Wright, *The Political Spectacle of Arizona's Proposition 203*, 19 EDUC. POL'Y 662, 667 (2005).

79. *See id.* at 672–74.

80. *See* Eric Johnson, *Proposition 203: A Critical Metaphor Analysis*, 29 BILINGUAL RSCH. J. 69, 75 (2005).

81. *See id.*

82. *See id.* at 76 (citing to a statement in *Arizona Voter Information Pamphlet* that "English is the language of opportunity and economic advancement" and a quote in *The Arizona Republic* stating that a society that "stays together" requires a common language as examples of common metaphors deployed in the campaign for Proposition 203).

83. *See* Patricia Gándara et al., *Forbidden Language: A Brief History of U.S. Language Policy*, *in* FORBIDDEN LANGUAGE: ENGLISH LEARNERS AND RESTRICTIVE LANGUAGE POLICIES 29 (Patricia Gándara & Megan Hopkins eds., 2010).

enforce Proposition 203.[84] After his election, he appointed Margaret Garcia-Dugan, co-chair of the Proposition 203 campaign, as the Associate Superintendent of Academic Support.[85] Horne and Garcia-Dugan restricted parents' access to waivers and closed the last remaining door to bilingual education.[86] The SEI model was developed and implemented beginning in 2006.[87]

Proposition 203 was not the only example of how nativist narratives about education and assimilation impacted offerings for students of color. Following a student protest of a talk by Garcia-Dugan at Tucson High School, Horne took aim at Tucson Unified's Mexican American Studies program.[88] Created as a remedy in a desegregation suit brought by Black and Latinx students in Tucson, the program had a proven track record of improving high school graduation rates and achievement test pass rates.[89] But Horne, offended by the protest and the M.E.Ch.A[90] t-shirt of a faculty member, portrayed the program as "anti-American" by promoting segregation and racial hatred through "destructive ethnic chauvinism."[91] Horne lobbied the Arizona legislature to pass legislation banning programs that "[p]romote the overthrow of the United States government" or "[a]re designed primarily for pupils of a particular ethnic group," and the program was banned under his successor, John Huppenthal.[92] The District Court of Arizona found that Horne's language operated as derogatory code words for Chicanx students and demonstrated discriminatory intent, as did the fact that only programs for Chicanx students were targeted.[93] In both the contemporaneous history of Proposition 203 and the

---

84. *See* Wright, *supra* note 78, at 676–77.

85. *See id.* at 680.

86. *See id.* at 680–81.

87. *See* Patricia Gándara & Gary Orfield, *A Return to the "Mexican Room": The Segregation of Arizona's English Learners*, C.R. PROJECT/PROYECTO DE DERECHOS CIVILES   9   (2010), https://www.civilrightsproject.ucla.edu/research/k-12-education/language-minority-students/a-return-to-the-mexican-room-the-segregation-of-arizonas-english-learners-1/gandara-return-mexican-room-2010.pdf [https://perma.cc/U76E-VFG7].

88. *See* González v. Douglas, 269 F. Supp. 3d 948, 952 (D. Ariz. 2017).

89. *See id.* at 950–51.

90. M.E.Ch.A., or Movimiento Estudiantil Chicanx de Aztlán, is a national student organization born out of the Chicano Rights Movement. *See Our History*, M.E.CH.A: MOVIMIENTO   ESTUDIANTIL   CHICANX   DE   AZTLÁN, http://www.mechanationals.org/p/history.html [https://perma.cc/C9NH-RHJN] (last visited Oct. 20, 2020).

91. *See González*, 269 F. Supp. 3d. at 952–55 (citing the trial transcript).

92. *Id.* at 957 (citing ARIZ. REV. STAT. ANN. §15-112(A) (2011)).

93. *See id.* at 967–68.

campaign against the MAS program, discourses of race, assimilation, and identity profoundly shaped political decisions about how Latinx students should be educated.

Successive budget crises have also restricted students' access to an adequate education. In *Horne v. Flores*, the Supreme Court rejected the argument that the EEOA requires increasing funding for emergent bilingual students. But Arizona's school system is one of the most underfunded in the country: an *Education Week* report found that Arizona ranks 49th out of 49 reporting states and the District of Columbia in its per-pupil spending.[94] Following the financial crisis in 2008, Arizona cut $1.5 billion from its education budget.[95] The resulting budget shortfalls led directly to low teacher salaries and a successful teacher strike in spring 2018.[96] Caught between restrictive language policies and harsh budgetary realities, Arizona teachers have few resources to support their emergent bilingual students.

C. New York: The Collateral Consequences of Accountability

As a result of the Puerto Rican community's activism, emergent bilingual students in New York have greater legal rights than those in Arizona — the New York State Department of Education (NYSED) has a stated commitment to bilingual education.[97] However, shifts in the demographic and political landscape in the early 2000s and the rise of stringent accountability policies undermined bilingual education and contributed to a deficit discourse about emergent bilingual students.[98] In the 1970s, Puerto Rican communities inspired by the victories of the Civil Rights Movement moved to address inequities in

---

94. *See* Gándara & Orfield, *supra* note 8, at 13.

95. *See* Mike Elk, *Arizona Teachers Begin Strike as Wave of Education Walkouts Rolls West*, GUARDIAN (Apr. 26, 2018, 7:44 AM), https://www.theguardian.com/us-news/2018/apr/26/arizona-teachers-strike [https://perma.cc/89FW-WL9R] ("Since 2008 the state has cut $1.5 [billion] from the school budget and salaries for teachers rank as the lowest in the country; those for high school teachers are the second lowest.").

96. *See id.*

97. *See Blueprint for English Language Learner/Multilingual Learner Success*, OFF. BILINGUAL EDUC. & WORLD LANGUAGES, N.Y. ST. EDUC. DEP'T 3, http://www.nysed.gov/common/nysed/files/nys-blueprint-for-ell-success.pdf [https://perma.cc/B339-WVJG] (last visited Nov. 13, 2020).

98. *See* Luis O. Reyes, *The* Aspira *Consent Decree: A Thirtieth-Anniversary Retrospective of Bilingual Education in New York City*, 76 HARV. EDUC. REV. 369, 384–88 (2006) (noting the change in NYC mayorship left an unfinished record of ELL education reform while there was a record increase in students who immigrated and enrolled in NYC schools).

the City's school system.[99] Bilingual education became a central demand, tied to a struggle for identity in which language "was 'an important symbol of cultural continuity as well as political influence.'"[100] Activists did not see bilingual education as a limited avenue to language acquisition, but rather a bicultural model of education defined by respect for the culture of Puerto Rican communities "in direct opposition to the deficit models of education embedded in many compensatory programs of the 1960s."[101]

Puerto Rican advocates framed learning Spanish as a civil right. To vindicate this right, the Puerto Rican Legal Defense and Education Fund (PRLDEF) sued the New York City Board of Education (BOE) on behalf of ASPIRA of New York, a Puerto Rican community organization.[102] The BOE settled the suit in 1974 and entered into the ASPIRA Consent Decree, which established transitional bilingual education as a legal entitlement for emergent bilingual students in New York City.[103] The ASPIRA Consent Decree was inscribed in NYSED regulations requiring that schools offer bilingual education when 20 or more students in contiguous grades speak the same language.[104]

Not all members of the Puerto Rican community were satisfied with the Transitional Bilingual Education (TBE) model *Aspira* established, viewing it as an assimilationist model of education leading to a "deficit-based, remedial type of bilingual education."[105] The fact that *Aspira* represented a class of Spanish-speaking emergent bilingual students also shaped the perception of bilingual education as a Puerto Rican or Latinx issue, rather than a program that benefits all immigrant communities in New York.[106] However, the militancy of the Puerto Rican community succeeded in preserving bilingual education for

---

99. *See id.* at 373.

100. *Id.* (quoting J.P. FITZPATRICK, PUERTO RICAN AMERICANS: THE MEANING OF MIGRATION TO THE MAINLAND 7 (2d ed. 1987)).

101. *Id.*

102. *See* Aspira of New York, Inc. v. Bd. of Educ., 58 F.R.D. 62 (S.D.N.Y. 1973).

103. *See* Aspira of New York, Inc. v. Bd. of Educ., 423 F. Supp. 647, 649 (S.D.N.Y 1976).

104. *See Parent Bill of Rights for New York State's English Language Learners*, N.Y. ST. EDUC. DEP'T (Oct. 9, 2018), http://www.nysed.gov/bilingual-ed/parents-bill-rights-new-york-states-english-language-learnersmultilingual-learners-ell [https://perma.cc/WHW4-WJVH].

105. Reyes, *supra* note 98, at 372 (quoting Sandra Del Valle, *Bilingual Education for Puerto Ricans in New York City: From Hope to Compromise*, 68 HARV. EDUC. REV. 193, 204 (1998)).

106. *See id.* at 374.

almost three decades in the midst of New York's fiscal crisis and the face of resistance from school and union leadership.[107]

By the late 1990s, the system established by the ASPIRA Consent Decree was under attack. First, the Puerto Rican communities who had mobilized to create bilingual education were no longer united in support of the model.[108] As Latinx demographics in the City shifted, new immigrant communities in New York sometimes openly opposed bilingual education.[109] For example, a priest in Bushwick mobilized Dominican parents to challenge waivers that allowed students to remain in bilingual programs for longer than three years.[110] Bilingual education also became a target of Mayor Rudy Giuliani, who described it as a failed social experiment and attempted to enlist the support of Ron Unz, the millionaire behind California's Proposition 227 and Arizona's Proposition 203, to eliminate the ASPIRA Consent Decree.[111] As a result, the City replaced the ASPIRA Consent Decree's "opt-out" model for enrolling students in bilingual education with a new "opt-in" mechanism.[112] While Giuliani and Unz failed to end bilingual education, their assault undoubtedly shaped public perception of the success of bilingual programs.

Although Mayor Michael Bloomberg did not seek to eliminate bilingual programs, his administration's policies effectually undermined them. Under NCLB[113] and New York State regulation,[114] schools were required to meet Adequate Yearly Progress (AYP) goals on state tests, and schools that failed to make progress for two years or more were placed on school improvement lists and threatened with closure. The Bloomberg Administration also moved aggressively to transform the school system, using test scores to justify closing struggling schools.[115] Schools serving emergent bilingual students were

---

107. *See id.* (mapping New York City's Puerto Rican community's activism from the early 1960s to the mid-2000s).

108. *See id.* at 383.

109. *See* Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, *supra* note 75, at 179–80.

110. *See id.*

111. *See* Wright, *supra* note 78.

112. *See* Reyes, *supra* note 98, at 384.

113. No Child Left Behind Act of 2001, Pub. L. No. 107–110, § 1111(b)(2)(B), 115 Stat. 1446 (2002).

114. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2 (p)(2)(5)–(6) (2015).

115. For a helpful primer on New York City school closures' effectiveness in the context of one study, see Patrick Wall, *Bloomberg's Early School Closures Benefitted Future Students, New Study Finds*, CHALKBEAT (Nov. 19, 2015, 5:00 AM), https://ny.chalkbeat.org/2015/11/19/21098835/bloomberg-s-early-school-closures-bene fitted-future-students-new-study-finds [https://perma.cc/2RWE-C4U9]. *See also*

disproportionately represented on school improvement lists: 31% of schools were placed on New York's "Schools In Need of Improvement List" in 2014 for failing to meet AYP for their English learners.[116] A study of schools that eliminated their bilingual programs in the late 2000s found that administrators decided to end these programs because (1) of immense pressure to improve test scores and ensure quick acquisition of English, (2) of an ideological belief that bilingual programs were to blame for low test scores, and (3) new small schools created by the administration no longer had the concentrations of students needed to offer bilingual education as required by the ASPIRA Consent Decree.[117] As Kate Menken and Christian Solarza found, the number of students in bilingual education dropped dramatically during that period. During the 2002–2003 school year, 39.7% of emergent bilingual students were enrolled in bilingual education, and 53.4% were enrolled in ESL. [118] By 2010–2011, however, just 22.3% of emergent bilingual students were in bilingual education, while ESL expanded to accommodate 70.2% of English learners. [119] Menken and Solarza argue that while accountability regimes may not explicitly ban bilingual education, they create disincentives to foster bilingualism, essentially functioning as an implicit restrictive language education policy.[120]

Menken and Solarza also found that administrators under pressure sometimes blamed emergent bilingual students themselves, claiming that they did not "buy in" to the English language and therefore were unmotivated to learn English.[121] These educators attributed students' lack of interest to their attachment to the Dominican Republic and their neighborhoods.[122] According to this view, bilingualism was an obstacle to be overcome rather than an asset to be cultivated. Speaking Spanish was conflated with a refusal to assimilate and a rejection of American identity. One teacher's comment that she was working in a Dominican "ghetto" summoned up images of cultures of poverty,

---

Robert Bifulco & David J. Schwegman, *Who Benefits from Accountability-Driven School Closure? Evidence from New York City*, 39 J. POL'Y ANALYSIS & MGMT. 96, 99 (2019).

116. *See* Kate Menken & Cristian Solorza, *No Child Left Bilingual: Accountability and the Elimination of Bilingual Education Programs in New York City Schools*, 28 EDUC. POL'Y 96, 103 (2014).

117. *See id.* at 106.

118. *Id.* at 99.

119. *Id.*

120. *See id.* at 97.

121. *See id.* at 113.

122. *See id.* at 113–14.

echoing the Proposition 203 campaign's description of bilingual education as a "trap" or "pathology."[123]

Despite their distinct legal regimes, Arizona's and New York's policies towards emergent bilingual students have some important parallels. Both states have undermined the viability of bilingual programs and prioritized English acquisition over bilingual development. As a result, educators have fewer programmatic resources to leverage to support emerging multilingual students who are struggling. In both states, the debate over the education of Latinx students has become a pitched battle over language and identity, with assimilation and English acquisition pitted against maintenance of native languages and cultural heritage. And powerful deficit discourses about Latinx students shape educators' perceptions of students' innate language-learning abilities. This contentious context shapes the choices educators make when they evaluate and refer students for placement in special education.

D. Educator Discretion Under Restrictive Language Policies

While the political context shapes decisions in the classroom, the single most important factor driving the overrepresentation of emergent bilingual students in special education is educator discretion. In *Why Are So Many Minority Students in Special Education?*, Beth Harry and Janette K. Klingner argued placement in special education is not a scientific process, but rather the "result of social forces that intertwine to construct an identity of 'disability' for children whom the regular education system finds too difficult to serve." [124] They conducted a multi-year, multi-site ethnographic study of special education in a district in the South.[125] Some of the factors they identified as influencing the likelihood of referral to special education include the quality of instruction, socioeconomic status, and race.[126] But ultimately, they described how these decisions were shaped by each school's "culture of referral," reflecting the beliefs of teachers, administrators, and psychologists, as well as pressure from the school district. [127] Some strong teachers referred students at a high rate

---

123. *See id.* at 113.

124. HARRY & KLINGNER, *supra* note 44, at 13.

125. *See id.* at 24–27.

126. *See id.* at 103.

127. *See id.*; *see also* Sarah E. Redfield & Theresa Kraft, *What Color Is Special Education?*, 41 J.L. & EDUC. 129 (2012) (arguing that the legal framework that the Supreme Court case *Board of Education v. Rowley* established has contributed to

because they believed that special education was an effective intervention and that their students required remediation, while other weak teachers referred students without reflecting on how their instructional practices might have affected students' academic progress and classroom conduct.[128]

Once students were referred, Harry and Klingner found the decision to place them in special education was influenced by five factors. First, where school personnel felt that a child's "dysfunctional" family was the cause of their academic challenges, educators frequently struggled to disentangle their assessment of the child from their perception of the family.[129] Second, school personnel frequently did not consider the culture of the child's classroom, assuming that the problem was in the child, not the environment, and therefore ignoring evidence that the classroom was chaotic or the instruction ineffective.[130] Third, the teacher's assessment of the child and the IEP team's deference to that judgment exerted undue influence on the process.[131] Fourth, the psychologist's philosophies, including preferences for certain categorical placements or views of the most appropriate setting, shaped the outcome.[132] Lastly, schools felt immense pressure to improve their test scores, leading them to more aggressively refer, assess, and place students in special education, partly to tip the assessment system in their favor and partly to provide remediation for struggling students.[133] In the process, "low achievement came to be synonymous" with disability.[134]

In the context of placement decisions about emergent bilingual students, Harry and Klingner found that children's language needs and influence of their language proficiency on their academic performance were rarely discussed.[135] Bilingual assessors were generally not involved in the decision, and staff frequently expressed confusion about the appropriate process for referring and evaluating students, as well as when students should achieve proficiency in a second language.[136]

---

disproportionality by giving discretion to classroom teachers and IEP teams in placing students in special education, allowing implicit biases to influence these decisions).

128. *See* HARRY & KLINGNER, *supra* note 44, at 106–10.

129. *See id.* at 112.

130. *See id.*

131. *See id.* at 112–13.

132. *See id.* at 113–15.

133. *See id.* at 115–19.

134. *Id.* at 116.

135. *See id.* at 130.

136. *See id.* at 124–25.

The factors Harry and Klingner identified are compounded where restrictive language policies are implemented. In the aftermath of Proposition 227's passage in California, teachers responsible for educating emergent bilingual students expressed confusion about the interpretation of the law and worried they were not trained to work effectively with students learning English.[137] They also noted general resource scarcity, in particular the lack of Spanish language assessments. [138] The lack of Spanish assessments is especially concerning because emergent bilingual students should not be placed in special education unless a disability manifests itself both in their first language and in English.[139] It is likely that in the absence of sufficient training or resources, and a general lack of institutional knowledge about how best to serve emergent bilingual students, "general education systems . . . increasingly rely[] on special education as a way of coping with the unrealistic requirements of these restrictive language policies."[140] In both New York and Arizona, then, it is very possible that educators turn to special education in an effort to serve struggling emergent bilingual students.

Harry and Klingner did not find a clear link between teachers' racial biases and referrals to special education and were careful to acknowledge that in referring students to special education, teachers were most frequently motivated by a good faith belief in the necessity of remediation.[141] However, race still plays into the referral process in multiple ways, both in terms of the variable quality of instruction in schools serving students of color and schools' cultures of referral. For example, Harry and Klingner found that some of the highest rates of placement in special education were in white-majority schools comprised of students with high socioeconomic status where Black students were bussed in, suggesting that in this context, educators

---

137. *See* Tracy Gershwin Mueller et al., *The Individuals with Disabilities Education Act and California's Proposition 227: Implications for English Language Learners with Special Needs*, 28 BILINGUAL RSCH. J. 231, 236 (2004).

138. *See id.* at 241–42.

139. *See, e.g.*, Kathryn Kohnert, *Bilingual Children with Primary Language Impairment: Issues, Evidence, and Implications for Clinical Actions*, 43 J. COMMC'N DISORDERS 456, 457 (2010); Johanne Paradis, *The Development of English as a Second Language with and Without Specific Language Impairment: Clinical Implications*, 59 J. SPEECH LANGUAGE & HEARING RSCH. 171, 177 (2016).

140. Artiles et al., *Shifting Landscapes*, *supra* note 38, at 114.

141. *See* HARRY & KLINGNER, *supra* note 44, at 106–07.

might have been more likely to refer students because of discrepancies in preparation between white students and students of color.[142]

According to Harry and Klingner, the most marked influence of racial ideologies was reflected in educators' assumptions about students' families. Their study describes the case of two young Black students who were classified as ED.[143] In both cases, educators' perceptions reflected stereotypical ideas about families of color.[144] They regarded these families as dysfunctional and assumed that caretakers were either using drugs or involved with the criminal justice system.[145] In fact, one child's single mother maintained a library of 100 children's books and regularly read with her children, while the second child lived with her grandparents and was supported by a tight-knit extended family. In their ignorance of children's home lives, educators conflated their stereotypes about families of color with their perceptions of the children, assuming that students' difficulties in the classroom reflected an innate deficit.[146]

The connection between deficit discourses about families and communities and overrepresentation of students of color in special education was also highlighted in a study of racial disproportionality in two suburban New York school districts.[147] Both were white-majority districts undergoing processes of demographic shift, in particular the growth of Latinx communities.[148] Not only did researchers find that districts had inadequate institutional safeguards to prevent referrals and provide teachers with assistance in supporting struggling students, but they also found that deficit thinking reflecting race and class

---

142. *See id.* at 187. This pattern could also be explained as an attempt to re-segregate schools. *See generally* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1460 (S.D.N.Y. 1985) (finding that Yonkers's practice of placing self-contained special education classrooms comprised primarily of students of color in predominantly white schools was discriminatory despite its "facially 'integrative' consequences").

143. *See* HARRY & KLINGNER, *supra* note 44, at 87–93.

144. *See id.* at 89, 91.

145. *See id.*

146. *See id.* at 87–93.

147. *See* Roey Ahram, Edward Fergus & Pedro Noguera, *Addressing Racial/Ethnic Disproportionality in Special Education: Case Studies of Suburban School Districts*, 113 TCHRS. COLL. REC. 2233 (2011); *see also* Edward Fergus, *Social Reproduction Ideologies: Teacher Beliefs About Race and Culture*, *in* DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 117, 124–26 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) (finding that teachers in school districts with high rates of overrepresentation were less likely to express deficit orientation in relation to their students when they were more pedagogically confident and expressed a sense of responsibility to learn about their students' cultures and communities).

148. *See* Ahram et al., *supra* note 147, at 2242–44.

stereotypes served as a driving force behind the decision to refer.[149] While teachers couched their explanations in terms of class and culture, their perceptions reflected racial stereotypes. Causal explanations proposed by educators for the large numbers of students of color in special education included "[t]hey bring ghetto to the school," and "[t]hey don't speak English."[150]

The intent in highlighting this research is not to characterize all teachers as racists but rather to demonstrate how the political context shapes the classroom. Teachers who seek to ensure that all of their students progress academically are limited by the lack of adequate resources to serve emergent bilingual students. Without an equivalent system of legal rights and resources for emergent bilingual students, special education becomes the best mechanism to provide students with support. And in the process of evaluating and identifying students, confusion about language acquisition, the lack of bilingual assessment, and powerful implicit biases about bilingualism and cultural and linguistic deficits in communities all bear on the decision to place students in special education. While further qualitative research is necessary to test these hypotheses in the specific context of emergent bilingual students in New York and Arizona, it seems likely that this confluence of factors may lead to the overrepresentation of emergent bilingual students and Latinx students in special education. In fact, publicly available data indicate that these students are significantly overrepresented in the high-incidence categories in both states.

III. Patterns of Overrepresentation in New York and Arizona

This Part describes this Article's analysis of OCR data and discusses key findings. Section III.A discusses the strengths and limitations of the OCR data set. Section III.B lays out the methodology used to analyze the data. Section III.C explains what the data reveal about overrepresentation of emergent bilingual students and students of color in Arizona and New York, and closes with a discussion of the implications of these findings for civil rights enforcement efforts.

---

149. *See id.* at 2245.
150. *Id.* at 2246.

A. Measuring Disproportionality: The Data Sets and Their Limitations

This Article relies on data published by the OCR to analyze the overrepresentation of emergent bilingual students in special education in two states: New York and Arizona.[151] Beginning in 2009, OCR released data on the racial composition of each disability category by district and school, including the number of emergent bilingual students.[152] The fact that these data are publicly available is the direct result of new provisions in the 2004 IDEA reauthorization[153] and represents a significant victory for special education advocates. Previously, this kind of data would likely only have been made available to advocates with the knowledge and resources to bring a Freedom of Information Act Request,[154] or the relationships to negotiate with district administrators.[155]

Analysis of district-level data is important for many reasons. First, access to special education data allows advocates and researchers to assess whether there is systematic over- or underrepresentation in their city or state for certain groups of students. Second, making these data public increases transparency and allows advocates, families, and community members to hold their schools accountable for systematic overrepresentation. Given the obstacles to litigation and the limitations of civil rights enforcement,[156] local organizing and advocacy may be the most effective way to address overrepresentation. Third, advocates and researchers could rely on data to pinpoint districts that are particularly problematic and identify the policies or practices that

---

151. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "New York" and/or "Arizona" for 2015, select "Students with Disabilities, by Disability Categories (2009+)").

152. *See id.*

153. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647, 2732 (codified as amended at 20 U.S.C. § 1416).

154. For example, prior to the passage of the Student Safety Act in 2011, advocates in New York used Freedom of Information Law requests to obtain data on suspensions from the City Department of Education. *See, e.g.*, N.Y.C.L. UNION, EDUCATION INTERRUPTED: THE GROWING USE OF SUSPENSIONS IN NEW YORK CITY SCHOOLS 5 (2011),
https://www.nyclu.org/sites/default/files/publications/Suspension_Report_FINAL_no Spreads.pdf [https://perma.cc/A2FS-GLKC].

155. For example, three studies on disproportionality obtained data through research agreements with state departments of education. While the researchers' descriptions of the states or cities in question allowed readers to guess at the location, they did not explicitly name them. *See* Artiles et al., *Within-Group Diversity*, *supra* note 39, at 286; Sullivan, *supra* note 12, at 320; Valenzuela et al., *supra* note 22, at 428–29.

156. See *supra* Section I.A.

fuel overrepresentation. Conversely, district-level data enable researchers to locate districts where emergent bilingual students are proportionally represented, offering models of effective supports for emergent bilingual students and students of color.

However, the OCR data still have significant limitations. First, the data are redacted whenever there are two or fewer students in the category, and the total number of students reported in each category only includes students from the non-redacted category. [157] For example, if a district has four Black students and six Latinx students classified as SLI, OCR reports just ten students in the category, and data for all other racial categories are redacted.[158] In this scenario, there is no way to determine if additional white, Asian, or American Indian students are also classified as SLI. This lack of data likely skews the analysis in favor of overrepresentation and makes it difficult to assess if there is systemic underrepresentation in each state. While the statewide data indicate that overrepresentation is more pervasive, underrepresentation of emergent bilingual students is also a matter of concern given past studies that found that educators delay referrals until a student achieves English proficiency. [159] However, without complete data, it is impossible to assess if delayed referrals result in a pattern of underrepresentation.

Moreover, the number of districts that have redacted the total number of students in each special education category means that state-level data cannot be aggregated from OCR data alone. Instead, this Article draws on IDEA Section 218 data[160] — namely the Child Count data sets[161] — to conduct state-level analysis. However, Child Count data are divided into two sets by age: 3–5 and 6–21. Enrollment data are necessary to determine whether emergent bilingual students are proportionally represented in special education but are not

---

157. The 2004 IDEA Reauthorization explicitly provides that states "shall not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children or where the available data is insufficient to yield statistically reliable information." Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647, 2732 (codified as amended at 20 U.S.C. § 1416). This provision likely explains the extensive redaction of data.

158. The Author replaced redacted data in the racial categories with zeros to allow neater calculation of the total comparison group. However, the Author excluded districts with redacted data in the relevant category from the ultimate analysis of racial disproportionality.

159. *See* Samson & Lesaux, *supra* note 37, at 158–59; *see also* HARRY & KLINGNER, *supra* note 44, at 122–23.

160. *See* 20 U.S.C. § 1418.

161. *See* Bollmer et al., *Using the Risk Ratio*, *supra* note 24, at 188.

available through the Child Count data set. Instead, this Article uses enrollment data from the New York and Arizona State Departments of Education.[162] Given that students generally attend school between ages 5 and 18, it is likely that these two data sets do not precisely align.

Next, the disproportionality measures are easily skewed by small sample sizes, either because of the small number of students enrolled or because of the small number of students in each category. To address this problem, this Article follows the recommendations of a Westat team of consultants and excluded (1) all districts where there were fewer than ten emergent bilingual students enrolled, (2) all districts where there were fewer than ten students enrolled in a racial category, and (3) the comparison group (either non-emergent bilingual students or students in other racial categories) was less than ten.[163] This Article also excludes from the analysis all districts where the number of students in every racial or ethnic category and the total number of students are redacted.

Fourth, while the number of emergent bilingual students in each category is reported, those data are not crossed with race, and so it is impossible to use OCR data to explore questions of how race and language intersect in special education placement. [164] Emergent bilingual students and students of color are overlapping but distinct groups; while the majority of emergent bilingual students in each state are likely students of color, not all students of color are emergent bilingual students. However, to make sense of overrepresentation, we need to examine how students' intersecting identities may impact their experiences in the school system in general and special education in particular. Specifically, an emergent bilingual's racial identity may increase the likelihood that they are referred to special education and could also influence their classification. In an effort to address the racial dynamics that may be at play when emergent bilingual students are referred to special education, this Article also analyzes racial data for each special education category. Considering the racial data is a

162. *See infra* notes 171, 174 and accompanying text.

163. *See* Bollmer et al., *Using the Risk Ratio, supra* note 24, at 193–94.

164. Elizabeth B. Kozleski has also highlighted how the OCR data complicates efforts to explore "the interactions between and among a number of identities simultaneously, such as race, gender, and language." Elizabeth B. Kozleski, *Reifying Categories: Measurement in Search of Understanding, in* DisCrit: Disability Studies and Critical Race Theory in Education 101, 111 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016). While this is certainly true, the OCR data does not necessarily normalize racial and disability categories. Indeed, the aim in this Article is to analyze and contextualize data precisely to question the process of categorization.

useful starting point for understanding how race may map on to language status to drive overrepresentation.

Lastly, OCR data are ultimately only as good as local reporting systems. If districts have ineffective systems for reporting special education data or simply report data incorrectly, there is no way to verify their work. The high number of reported school shootings in the 2015–2016 school discipline data — two-thirds of which never took place — demonstrated that OCR data are not infallible.[165] The kinds of data collected also vary from state to state. For example, New York does not report the racial composition of special education categories for charter schools, while Arizona does. Partly to address issues with sample size and partly to align the two sets, this Article excludes charter schools from the analysis. The overrepresentation of emergent bilingual students in charter schools remains a question for future research.

Because of these limitations, this Article only analyzes the disproportionality in a select number of districts. However, these districts represent a significant percentage of students statewide for almost all categories analyzed. Including charter schools, there are 976 districts in total in New York, and 634 in Arizona, serving 2,731,958 and 1,134,663 students respectively.[166] While only 105 New York districts had sufficient data to allow for an analysis of overrepresentation in the SLI category for emergent bilingual students, these districts serve 1,598,068 students, which is 58% of all students statewide.[167] Similarly, the total enrollment of the 76 Arizona districts analyzed to assess whether emergent bilingual students are proportionately represented in the SLD category includes 64% of all school students in the state.[168] As such, the districts included in the analysis are likely broadly representative of the state.

Because of these limitations, this Article's analysis should be understood as preliminary rather than conclusive. One of the major findings of this Article is that OCR data reporting must be improved to ensure greater transparency and accountability. However, even

---

165. *See* Anya Kamenetz, *The School Shootings That Weren't*, NPR (Aug. 27, 2018, 9:26 PM), https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent [https://perma.cc/5JZB-3XQZ].

166. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "New York" and/or "Arizona" for 2015, select "Demographics: Enrollment Data").

167. *See infra* Tables 1, 2.

168. *See infra* Tables 1, 3.

taking into account these limitations, the analysis in this Article suggests that there is systemic overrepresentation of emergent bilingual students in both New York and Arizona that merits greater attention from policymakers.

B. Methodology

To determine whether emergent bilingual students and students of color are overrepresented in special education, this Article uses district and statewide data to calculate risk ratios. The risk ratio is recommended by the federal DOE's IDEA Data Center as a key measure of disproportionality, is widely accepted in the field,[169] and allows for a single measure of disproportionate representation. It is calculated by dividing the percentage of all emergent bilingual students in a given disability category by the percentage of English-proficient students in the given category. [170] When analyzing representation of a racial or ethnic group in a special education category, the comparison group includes the students in all other racial categories. [171] A risk ratio of 1 indicates no difference between the racial or ethnic group (or emergent bilingual students) and the comparison group. [172] Researchers have determined the threshold for under- and overrepresentation differently, including using the cutoff of 1.5 or 2.0, but this Article follows the practice of defining underrepresentation as any score below 0.8 and overrepresentation as any score over 1.2.[173] For example, in Arizona, 2.62% of emergent bilingual students are

---

169. *See* Julie M. Bollmer et al., *Methods for Assessing Racial/Ethnic Disproportionality in Special Education: A Technical Assistance Guide (Revised)*, IDEA DATA CTR. (May 2014) [hereinafter Bollmer et al., *Methods for Assessing Racial/Ethnic Disproportionality in Special Education*], https://ideadata.org/sites/default/files/media/documents/2017-09/idc_ta_guide_for_508 -010716.pdf [https://perma.cc/8KQN-J32N].

170. *See* Bollmer et al., *Using the Risk Ratio*, *supra* note 24, at 187.

171. *See* Sullivan, *supra* note 12, at 323–24. For students of color, some researchers advocate for using white students as the comparison group because (1) nationally, white students are the majority, and (2) white students are the implicit baseline against which students of color are measured. *See* Martha J. Coutinho & Donald Oswald, *Disproportionate Representation in Special Education: A Synthesis and Recommendations*, 9 J. CHILD & FAM. STUD. 135, 138 (2000). For the purpose of this Article, the Author has followed the guidance of Bollmer and her colleagues and used all other students in each district, including all other racial categories, as the comparison group. *See* Bollmer et al., *Using the Risk Ratio*, *supra* note 24, at 187–88.

172. *See* Bollmer et al., *Methods for Assessing Racial/Ethnic Disproportionality in Special Education*, *supra* note 169, at 22.

173. *See* Sullivan, *supra* note 12, at 323–24. Because the state level thresholds are so high, a lower threshold for overrepresentation was chosen to provide a better sense of the range of districts with overrepresentation not identified under the states' systems.

classified as SLI, while just 1.51% of English-proficient students are classified as SLI.[174] Then, the risk ratio for emergent bilingual students in SLI is 1.74, indicating that emergent bilingual students are overrepresented in the category.[175]

However, the risk ratio has a few limitations. First, it is affected by each district's demographic composition, including the demographic composition of the comparison group.[176] Because of this, the IDEA Data Center recommends calculating a weighted risk ratio (WRR) for all districts.[177] The weighted risk ratio accounts for this variation by using the district-level risk ratio for the student group "for the numerator and a weighted risk for all other students for the denominator."[178] The district risks for all other students are weighted according to the racial or ethnic (or emergent bilingual or non-emergent bilingual) composition of statewide student enrollment. However, the WRR is not included in the tables below because they only rarely diverge from the risk ratio and further inflate outlier risk ratios. Significant variation between the two measures is noted in the footnotes.

Second, the risk ratio cannot be calculated where no students in the comparison group are represented in the special education category. To address this challenge, the IDEA Data Center proposes using an alternative risk ratio (ARR), which is calculated by dividing the district-level risk for either emergent bilingual students or students in a given racial or ethnic group by the state-level risk for the comparison group.[179] The ARR is particularly useful for analyzing data from many rural school districts where only white students are represented in a given special education category, offering a more accurate picture of overrepresentation statewide. Where the measure is illustrative, this Article includes discussion in the footnotes.

The goal of this analysis is to determine whether emergent bilingual students and students of color are overrepresented in special education at the district and state levels and to document variation across districts. While this Article does make some observations and offers tentative hypotheses, the goal is *not* to systematically explain this variation. Statistical analysis of the factors driving overrepresentation

---

174. *See infra* Table 5.

175. *See infra* Table 5.

176. *See* Bollmer et al., *Using the Risk Ratio*, *supra* note 24, at 190–91.

177. *See* Bollmer et al., *Methods for Assessing Racial/Ethnic Disproportionality in Special Education*, *supra* note 169, at 32.

178. Bollmer et al., *Using the Risk Ratio*, *supra* note 24, at 192–93.

179. *See id.* at 193.

is beyond the scope of this project and remains an area for further research.

C. Findings

This Article's analysis of OCR data suggests four general trends. First, it indicates that emergent bilingual students are significantly overrepresented in special education in both Arizona and New York, particularly in the SLI category. Second, while Black, Latinx, and American Indian students are all overrepresented in the high-incidence categories, the categories in which they are overrepresented differ between the two states. Third, in New York, both emergent bilingual students and Latinx students are twice as likely as the comparison group to be classified as SLI, while in Arizona, only emergent bilingual students are overrepresented in the category. Fourth, both New York's and Arizona's state-determined thresholds for determining overrepresentation mask these patterns, undermining the IDEA's goals of creating greater transparency and accountability.

i. Emergent Bilingual Students

Analysis of both statewide and district-level data indicates that emergent bilingual students are overrepresented in many of the high-incidence categories in both states. The most marked overrepresentation is in the SLI category. In New York, 7.9% of emergent bilingual students are classified as SLI, and they are roughly twice as likely as their English-proficient peers to be classified as SLI.[180] There is evidence of overrepresentation in 13% of reported districts and 17% of reported districts with emergent bilingual students enrolled.[181] The median risk ratio in districts that had sufficient data for analysis is 2.97, meaning that students in these districts are almost three times as likely as non-emergent bilingual students to be classified as SLI, and all districts between the 25th and 75th percentile have a risk ratio above the threshold for overrepresentation.[182] Because emergent bilingual students are substantially underrepresented in the ED category in both states and no reported districts show

---

180. *See infra* Table 4.

181. *See infra* Table 6. Emergent bilingual students are enrolled in 530 reporting districts, and 90 districts show evidence of overrepresentation in this category. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "New York" for 2015, select "Demographics: Enrollment Data"). Data analysis on file with Author.

182. *See infra* Table 6.

overrepresentation of emergent bilingual students, this Article does not include a full analysis of this category.

Similarly, in Arizona, 2.62% of emergent bilingual students are classified as SLI and are 1.7 times as likely as their peers to be placed in the category.[183] While the median risk ratio for the analyzed districts is lower (1.57), a slightly higher percentage of districts have evidence of disproportionality: 15% of reported districts and 18% of reported districts with emergent bilingual students.[184] There is also evidence of significant disproportionality in the SLD category in 21% of reported districts and 27% of reported districts with emergent bilingual students enrolled.[185]

Illustrations of the range of risk ratios across data reveal not only the large number of analyzed districts that fall above the threshold for determining representation, but also the dramatic variation across school districts. For example, in New York, the analyzed districts range from risk ratios of 0.1 to risk ratios that are significantly higher, including two outliers of 21.92 and 23.56.[186] Similarly, in Arizona, the analyzed districts range from risk ratios of 0.34 to 8.23.[187] While the range is narrower, risk ratios for emergent bilingual students in the SLD category also range significantly between school districts.[188] This variation suggests a wide range of practices across districts, indicating that while there are some particularly egregious districts, there are also some districts where emergent bilingual students are proportionately represented that could provide guidance on appropriately referring, evaluating, and classifying emergent bilingual students.

A marked distinction between the two states is that emergent bilingual students in New York are more than three times as likely to be classified as ID than English-proficient students.[189] This fact is particularly striking because elsewhere nationally, the number of

---

183. *See infra* Table 5.

184. *See infra* Table 7. Emergent bilingual students are enrolled in 158 reporting districts, and 29 districts show evidence of overrepresentation in this category. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "Arizona" for 2015, select "Demographics: Enrollment Data"). Data analysis on file with Author.

185. *See infra* Table 7. There are 168 reporting districts with emergent bilingual students enrolled, and 45 show evidence of overrepresentation in this category. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "Arizona" for 2015, select "Demographics: Enrollment Data"). Data analysis on file with Author.

186. *See infra* note 298.

187. *See infra* Figure 2.

188. *See infra* Figures 3, 4.

189. *See infra* Table 4.

students classified as ID has fallen significantly as the category has become a frequent target of litigation.[190] In Arizona, for example, emergent bilingual students are underrepresented in ID, and just 0.3% of emergent bilingual students are in the category.[191] While the number of districts where emergent bilingual students are disproportionately categorized as ID is small, New York City is among them. With almost a million students, NYC public school students comprise slightly less than half of the total number of students statewide, and hence the statewide risk ratio is likely driven by the New York City data. Emergent bilingual students in the five boroughs are almost four times as likely as their peers to be classified as ID[192] and represent 38% of the students categorized as such citywide.[193] Interestingly, even as the number of students classified as ID dropped by more than half from 2009 to 2015, the percentage of emergent bilingual students among them was roughly the same in 2009 and 2015.[194] In 2013, the proportion of students in the ID category who were emergent bilingual students actually increased from 38% to 47%.[195]

It is possible that the large number of students in the category in New York City is driven by an interest in removing students from the regular classroom, and potentially from the school. More than three-quarters of the students in the category spend less than 40% of the school day in the classroom.[196] These students are likely placed in a 12:1 classroom, where they are segregated from their peers.[197] If schools do not have a 12:1 classroom, the child may be transferred to another school. While regulations[198] implemented in 2012 required

---

190. *See* Losen & Orfield, *supra* note 21, at xix.

191. *See infra* Table 5.

192. *See infra* Table 14.

193. *See infra* Table 15. Out of 818 students citywide who were classified as ID in 2015, 310 were emergent bilingual students.

194. *See infra* Table 15.

195. *See infra* Table 15.

196. *See Civil Rights Data Collection: Detailed Data Tables, supra* note 10 (select "Search for Districts," then search "New York City Public Schools" for 2009, 2011, 2013, and 2015, select "Students with Disabilities, by Disability Categories (2009+)"). Inexplicably, the reported number of students in different placements are much higher than the reported total for the category. For example, in 2015, there were 818 students classified as ID, but the total number of students in each kind of placement adds up to 997. However, in each of the reported years, it is consistently true that the percentage of students who spend less than 40% of the day in a regular classroom was greater than 75%. *See id.*

197. *See supra* note 2 for an explanation of self-contained classrooms.

198. *See* N.Y.C. Dep't of Educ., Chancellor's Reg. No. A-101 (V)(A)(1) (Mar. 31, 2020).

schools to create 12:1 classrooms rather than initiating transfers, in practice, students still received transfers.[199] The accountability system incentivized schools to seek removal: when low-performing students were reassigned, their test scores no longer factored into the school's AYP measure.

ii. Students of Color

There is also evidence of overrepresentation of Black, Latinx, and American Indian students in the high-incidence categories in both New York and Arizona. In both states, Black students are the most significantly overrepresented group: they are overrepresented in all four categories in New York, and all but SLI in Arizona.[200] Black students in New York are almost three times as likely as their peers to be classified ED, while Black students in Arizona are almost 2.5 times as likely to be classified as ED.[201] This is not surprising, as historically, Black students have been disproportionately placed in the category. Similarly, American Indian students are slightly overrepresented in the ID category in both states. These students are 1.68 times as likely as all other racial groups to be identified as SLD in Arizona, and 16% of reported districts show evidence of overrepresentation in the category.[202] With the exception of white students in Arizona — who are 1.5 times as likely as all other students to be identified as ED — white and Asian students are either proportionally represented or underrepresented across the board.[203]

---

199. *See* Yasmeen Khan, *Special Education Reform Brings City More in Line with National Trend*, WNYC (Aug. 9, 2012), https://www.wnyc.org/story/302216-special-ed-reform-brings-city-more-in-line-with-national-trend/ [https://perma.cc/BEE9-AF3D]. In the fall of 2012, the Author worked as an education advocate for students in transitional housing. She found that it was difficult but not impossible to obtain transfers. On two separate occasions, the Author worked with parents to secure transfers where a child's IEP required placement in a self-contained classroom, but their school of origin lacked that option. In both cases, the child would have been alone in a class created just for them, and parents felt strongly that it was better to transfer the children so they would, at a minimum, have classmates.

200. *See infra* Tables 8, 9. Black students are only slightly overrepresented in the SLI category in New York. The statewide risk ratio for Black students classified as SLI is 1.2, the minimum threshold for determining overrepresentation. *See infra* Table 8. The median risk ratio and weighted risk ratio for analyzed districts is 1.37. *See infra* Table 11.

201. *See infra* Tables 8, 9.

202. *See infra* Tables 9, 10.

203. *See infra* Tables 8, 9.

However, the data for Latinx students diverge between the states. In both states, the statewide risk ratio for Latinx students in the SLD category is slightly above the overrepresentation threshold. Latinx students are also slightly overrepresented in the ID category in each state. But in New York, Latinx students — like their emergent bilingual counterparts — are twice as likely to be identified as SLI, while in Arizona, the risk ratio of 0.98 indicates that Latinx students are proportionally represented.[204] Seventeen percent of reported districts in Arizona show evidence of overrepresentation of Latinx students in the SLI category, suggesting that use of the category is more widespread at the district level than it may initially appear.[205] But Latinx overrepresentation appears most significant in the SLD category, with 41% of analyzed districts showing evidence of overrepresentation.[206] The fact that no racial groups are significantly overrepresented in the SLI category in Arizona suggests that educators in New York may rely more heavily on this category.

Why is it that in New York, both emergent bilingual students and Latinx students are twice as likely to be identified as SLI? While emergent bilingual students are slightly overrepresented in Arizona, and there is evidence of disproportionality at the district level, the pattern is not nearly as strong as in New York. One explanation is that identification, assessment, and placement practices simply differ from state to state, although this would not fully account for the convergence of the data on emergent bilingual students and Latinx students. Another possibility is that the Latinx students identified as SLI are both current and former ELLs. However, it is impossible to test this hypothesis without further data about students with an SLI classification.

A third, highly tentative hypothesis is that the SLI category has undergone a process of racialization in New York. Michael Omi and Howard Winant define racialization as "the extension of racial meaning to a previously racially unclassified relationship, social practice, or group."[207] In the context of special education, racialization is a useful framework for making sense of how categories like ED came to be associated with Black students, or how ID became a common label for Chicanx students in the southwest. In a cultural environment where narratives of language learning and assimilation are frequently

---

204. *See infra* Tables 8, 9.

205. *See infra* Table 11.

206. *See infra* Table 10.

207. Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s, at 111 (3d ed. 2015).

linked to Latinx immigrants, it is possible that deficit discourses around Latinx children and language learning may inform their special education placement even if they are not considered an English Learner. As previously discussed, the classroom does not exist in a vacuum, but rather is shaped by its cultural and political context, and it is easy to imagine how everyday decisions made by educators might be informed by racialized discourse outside the four walls of the school.[208]

The fact that the districts with the highest rates of Latinx disproportionality in the SLI category in New York tend to be majority-white, suburban school districts that have been riven by conflict over immigration offers further support to the racialization hypothesis. Out of the ten districts with the highest risk ratios for Latinx students in SLI, eight are located in New York City suburbs and Long Island;[209] half are majority-white districts,[210] and two are roughly

---

208. One counterargument might be that poverty rather than race is the driving force behind the overrepresentation of Latinx students. Researchers have explored the relationship between socioeconomic status (SES) and placement in special education extensively, with some researchers finding that SES fully accounts for racial differences in placement and others finding that even when SES is accounted for, racial disproportionality still exists. *Compare* Shifrer et al., *supra* note 36 (arguing that SES entirely accounts for the disproportionate representation of Black and Latinx students in special education but that differences in SES do not explain overrepresentation of language minority students), *with* Russell J. Skiba et al., *Unproven Links: Can Poverty Explain Ethnic Disproportionality in Special Education?*, 39 J. SPECIAL EDUC. 130 (2005) (arguing that poverty makes a weak and inconsistent contribution to the prediction of disproportionality across a number of disability categories and where it does, the primary effect is to magnify racial disparity). Because OCR data does not include information on SES, this Article could not incorporate this variable into the analysis. Educators frequently explain the high numbers of students of color in special education as the direct result of poverty, but at least one researcher has found that these explanations carry coded racial meaning. *See* Ahram et al., *supra* note 147, at 2247.

209. The ten districts are Mamaroneck Union Free School District, Fort Plain Central School District, Glen Cove City School District, Union Free School District of the Tarrytowns, Monticello Central School District, Southampton Union Free School District, Dobbs Ferry Union School District, Rye City School District, Portchester-Rye Union Free School District, and Bedford Central School District. Fort Plain Central School District and Monticello Central School District are the only two districts not in the NYC suburbs. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10. For an explanation of how the risk ratios for these districts were calculated, see *supra* Section.III B. Data analysis on file with Author.

210. Mamaroneck Union Free School District is 70% white; Fort Plain Central School District is 88% white; Dobbs Ferry Union Free School District is 64% white; Rye City School District is 84% white; and Bedford Central School District is 58% white. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10 (select "Search for Districts," then search "New York" for 2015, select "Demographics: Enrollment Data").

50% white. [211]   This pattern parallels findings from research on overrepresentation of Black students in special education, which has found that Black students are more likely to be placed in special education in white-majority schools.[212]

The district with the most pronounced overrepresentation of Latinx students is particularly illustrative.[213] Located in Westchester County, the Mamaroneck Union Free School District has made headlines in the last decade for a pattern of civil rights violations. In 2012, OCR found that an elementary school district had disproportionately assigned students of color to a single kindergarten classroom, separating them from their more affluent white peers.[214] In 2016, the New York Civil Liberties Union successfully appealed the district's refusal to enroll a 16 year old from Guatemala, justifying their decision by arguing that he had completed the highest level of compulsory education in his home country.[215] In May 2020, two former Black students filed suit against the school district, alleging a hostile racial environment where teachers and administrators tolerated racial bullying and students' regular usage of the n-word.[216] These incidents suggest a tense racial climate in Mamaroneck schools that likely influences decisions about special education placement. Testing the racialization hypothesis would require a more comprehensive study, including both qualitative data about the process by which educators decide on the SLI label and quantitative analysis of the factors that correlate with placement in the

---

211. Monticello Central School District is 47% white, and Southampton Union Free School District is 49% white. Students of color are only an absolute majority in two districts: Glen Cove City School District and Port Chester-Rye Union Free School District. *See id.*

212. *See* Matt Barnum, *How School Segregation Affects Whether a Black Student Gets Labeled as Having a Disability*, CHALKBEAT (May 28, 2019, 10:52 AM), https://chalkbeat.org/posts/us/2019/05/28/new-studies-show-that-segregation-affects-st udents-chances-of-being-identified-as-disabled/ [https://perma.cc/ZYV8-UQZS]; *see also* HARRY & KLINGNER, *supra* note 44, at 187.

213. Mamaroneck's SLI risk ratio for Latinx students is 29.23; its SLI risk ratio for emergent bilingual students is 10.7. *See Civil Rights Data Collection: Detailed Data Tables*, *supra* note 10. Data analysis on file with Author.

214. *See* Stefani Kim, *Are Minority Students at Larchmont School Being Disproportionately Assigned to Same Class?*, PATCH (Sept. 13, 2012, 3:14 AM), https://patch.com/new-york/larchmont/larchmont-s-central-school-kindergarten-less-r acially0102a46474 [https://perma.cc/DJ3V-C7MY].

215. *See Immigrant Student Enrolling Today in Mamaroneck High School Following Commissioner's Order*, AM. C.L. UNION (May 17, 2016), https://www.aclu.org/press-releases/immigrant-student-enrolling-today-mamaroneck-high-school-following-commissioners [https://perma.cc/E9V9-MA4V].

216. *See* Complaint at 2–4, 31, A.A. v. Mamaroneck Union Free Sch. Dist., No. 7:20-cv-03849-CS (S.D.N.Y May 18, 2020).

category, but circumstantial evidence suggests that racial discrimination plays a role in the overrepresentation of Latinx students in special education.

At the same time, it is important to note the wide variation among school districts in New York.[217] Risk ratios range as high as 29.23 in Mamaroneck and almost all points in between, underlining the existence of multiple districts with egregious practices. But Latinx students are proportionally represented in SLI in almost 40 districts, suggesting that the overrepresentation of students of color in the category is not inevitable. Local practices matter, and sharing successful approaches from these districts may, with proper oversight and accountability, help reduce disproportionality in special education for Latinx students. However, states have consistently failed to acknowledge and address overrepresentation.

iii. Implications for Enforcement

State standards for determining overrepresentation discount this evidence of widespread overrepresentation. Under the 2004 IDEA authorization, states may determine their own criteria for determining when disproportionality exists.[218] New regulations in 2016 set a standard methodology for calculating disproportionality measures and clarified that the threshold for determining overrepresentation must be "reasonable" but gave no further guidance.[219] As a result, researchers have shown that nationally, states have moved to increase their thresholds for determining overrepresentation. For example, while most academic research uses 1.2 or 1.5 as the threshold risk ratio for overrepresentation, Arizona's threshold is three.[220] New York requires a showing that both the weighted risk ratio and the risk ratio are four or over, and additionally, the district must (1) have at least 75 students with disabilities enrolled in early October, (2) a minimum of 30 students (including students with and without a disability) of a particular race or ethnicity enrolled in early October, (3) at least 75

---

217. *See infra* Figure 5.

218. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647, 2738–40 (codified as amended 20 U.S.C. § 1418); *see also* Natasha M. Strassfeld, *The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims*, 67 CASE W. RES. L. REV. 1121, 1131 (2017).

219. *See* 34 C.F.R. § 300.647 (b)(1)(i).

220. *See* ARIZ. DEP'T OF EDUC., ARIZONA REPORT OF PUBLIC AGENCY PERFORMANCE ON RACIAL/ETHNIC DISPROPORTIONATE REPRESENTATION 1 (2015), https://cms.azed.gov/home/GetDocumentFile?id=5616a0efaadebe10bc57437e [https://perma.cc/QB4T-HTTQ].

students of all other races or ethnicities enrolled in the district, and (4) at least ten students with disabilities of a particular race or ethnicity and disability enrolled in the district in early October.[221]

These requirements significantly limit the number of districts that satisfy the criteria for overrepresentation. Using those criteria, only two districts in New York would be identified for overrepresentation of emergent bilingual students in SLD, just 17 for SLI, and no district — including New York City — would be flagged for overrepresentation in the ID category. Similarly, in Arizona, the state would only find evidence of overrepresentation in the SLI category in eight districts, and only 11 districts meet the requirement of a risk ratio greater than three in the SLD category. The state criteria also mask racial disproportionality. In New York, only 19 districts would be flagged for overrepresentation of Latinx students in SLI.

The failure of states to develop truly reasonable criteria has the effect of undermining the 2004 IDEA reauthorization goal of reducing overrepresentation through local action and enforcement.[222] This failure is compounded by the fact that, as explained above, comprehensive OCR data are not available for all districts, making it difficult for local advocates and community members to hold schools accountable for overrepresentation. Yet overrepresentation is not inevitable, even if it is intractable. As the data show, there are districts where emergent bilingual students and students of color are not overrepresented in special education. By strengthening enforcement, improving transparency, and moving away from procedural compliance towards transformation of classroom practice, overrepresentation can be addressed.

IV. TOWARDS RACE-CONSCIOUS REMEDIES

This Part explores efforts to address overrepresentation in the courts, agencies, and classrooms. Section IV.A describes the obstacles facing would-be litigants who seek to challenge overrepresentation in the courts and the limitations of both monitoring and enforcement, closing with recommendations to strengthen oversight. Section IV.B explains how the current focus on procedural compliance fails to root

---

221. *See State Performance Plan (SPP) for 2005–2012 — Revised February 2013 — Indicator 9*, N.Y. ST. DEP'T EDUCATION (Mar. 5, 2013), http://www.p12.nysed.gov/specialed/spp/2013/ind9.htm [https://perma.cc/Y236-YWPF].

222. *See infra* Part IV.

out the underlying causes of overrepresentation and discusses the need for a race-conscious approach to transforming classroom practice.

A. Strengthening Transparency and Accountability

Overrepresentation in special education is a civil rights issue that warrants immediate action to ensure that students receive an appropriate education. However, individuals and families lack adequate remedies at law to challenge systemic overrepresentation of students of color in general and emergent bilingual students in particular. Low-income students and students of color are the least likely to have access to legal assistance, [223] and even if they are represented, the legal remedies within the IDEA framework — ranging from compensatory services to private school tuition — are designed to improve outcomes for students with disabilities rather than address systemic practices that contribute to misidentification.[224] In the past two decades, the courts have also closed the door on class action lawsuits challenging overrepresentation. Under the Supreme Court's decision in *Alexander v. Sandoval*,[225] private litigants cannot bring a discrimination claim based on disparate impact under Title VI's implementing regulations, nor add a Title VI discriminatory impact claim to a court challenge based on disability law.[226] Recent court

---

223. There is extensive literature on the barriers to legal representation that low-income parents of color face and the consequences for student outcomes. *See, e.g.*, Baldwin Clark, *supra* note 56; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1434 (2011); Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 264–65 (2008).

224. For a discussion of the lack of remedies in the case of misidentification, see Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373 (2016).

225. 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists." (internal citations omitted)).

226. *See* Daniel Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION 168 (Daniel J. Losen & Gary Orfield eds., 2002). Despite the holding in *Alexander v. Sandoval*, scholars have argued that both anti-discrimination law and disability law could be leveraged to challenge overrepresentation. Elsewhere, Losen and Welner have argued that advocates should bring claims under Section 1983 instead of Title VI, but the Third Circuit's holding in *Blunt v. Lower Merion School District*, 767 F.3d 247 (3d Cir. 2014), that Section 1983 claims also require proof of intentional discrimination suggests that this approach is unlikely to be successful. *See* Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education*

decisions have demonstrated that proving discriminatory intent in the context of overrepresentation in special education is extraordinarily difficult for plaintiffs.[227] Moreover, emergent bilingual students may struggle to successfully challenge either the adequacy of language education or the appropriate provision of educational services under the IDEA. The high standard established in *Horne v. Flores* poses an obstacle to mounting a successful challenge under the EEOA.[228] And courts have been unreceptive to challenges to inadequate referral and assessment procedures that rest on the child find requirements of the IDEA.[229]

Without a strategy for recourse in the courts, students and families must rely on public enforcement through the state and federal governments. But public enforcement has also had limited success in addressing the disproportionate representation of students of color in special education. Responding to public pressure, Congress amended the IDEA in 2004 to require that local educational agencies have policies and procedures to prevent inappropriate overidentification or disproportionate representation and monitor districts for significant discrepancies in disciplinary practices, including racial and ethnic disparities.[230] States were subsequently required to identify the percentage of districts in the state with "disproportionate

---

Services for Minority Children, 36 HARV. C.R.-C.L. L. REV. 407, 410 (2001); Strassfeld, *supra* note 218, at 1145. While she acknowledges that courts have largely dismissed challenges to overrepresentation brought under disability law, Claire Raj argued that routine misidentification should be viewed as a disregard of obligations under the IDEA and discriminatory against students who are perceived as disabled, and hence actionable under the Americans with Disabilities Act and Section 504. *See* Raj *supra* note 224, at 377.

227. In *Blunt v. Lower Merion School District*, the Third Circuit upheld a district court decision that the Black plaintiffs had not established a prima facie case of discrimination despite statistical evidence that Black students were overrepresented requirements. *See* 767 F.3d at 301–03. The holding suggests that only direct evidence of discriminatory intent, such as racist statements by school administrators, would be sufficient to meet the Title VI standard. *See* Strassfeld, *supra* note 218, at 1140–47.

228. Horne v. Flores, 557 U.S. 433 (2009).

229. *See* Claire Raj, *The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity*, 87 TEMP. L. REV. 283, 329–30 (2015) (discussing K.A.B. *ex rel.* Susan B. v. Downingtown Area Sch. Dist., No. 11-1158, 2013 WL 3742413 (E.D. Pa. July 16, 2013)). Raj argued that instead of considering claims under the EEOA and IDEA separately, courts should read the two statutes together to require more robust language programs that allow emergent bilingual students with disabilities to fully access the services and accommodations they are entitled to. *See id.* at 331. While this is a compelling argument, it has not yet been successful in the courts. *See id.* at 325.

230. *See* Susan Fread Albrecht et al., *Federal Policy on Disproportionality in Special Education: Is It Moving Us Forward?*, 23 J. DISABILITY POL'Y STUD. 14, 15 (2012).

representation of racial and ethnic groups in specific disability categories that is the result of inappropriate identification."[231]

However, ambiguities in the Office of Special Education Program's (OSEP) guidance had the effect of creating a dual system of monitoring, requiring that states determine where disproportionate representation results from inappropriate identification and set a threshold for significant disproportionality with respect to identification, placement, and discipline. [232] OSEP itself did not mandate a measurement tool or suggest a threshold.[233] As a result, states had great latitude in determining their own metrics for assessing significant overrepresentation, with the predictable result that states increased their overrepresentation thresholds from the more reasonable 2.0 to higher thresholds of 3.0 or 4.0 over a five-year period.[234]

As explained above, higher thresholds for determining disproportionality mask the extent of the problem in schools by reducing the number of districts that satisfy the criteria for overrepresentation. [235] State officials openly acknowledged their interest in manipulating the overrepresentation threshold to cloak evidence of disproportionality. A state education official told a national advisory group that the majority of the districts in her state would be subject to corrective action if the threshold were lower, overburdening state officials responsible for enforcement, while an official from another state argued that his state could not risk losing federal funding for the IDEA by fully disclosing widespread overrepresentation.[236] In 2013, the U.S. Government Accountability Office echoed academic researchers' concerns, issuing a report on overrepresentation that found that (1) states did not consistently report overidentification, and (2) a lack of uniformity across states' disproportionality monitoring and measures complicated attempts to make state comparisons or interpret findings of disproportionate representation.[237]

---

231. *Id.* at 16.

232. *See id.* at 16–17.

233. *See id.* at 17.

234. *See id.* at 19.

235. *See supra* Part III.

236. *See* Alfredo J. Artiles, *Toward an Interdisciplinary Understanding of Educational Equity and Difference: The Case of the Racialization of Ability*, 40 EDUC. RESEARCHER 431, 440 (2011) [hereinafter Artiles, *Racialization of Ability*].

237. *See* Strassfeld, *supra* note 218, at 1125.

In an attempt to address these discrepancies, the Obama Administration issued new regulations in December 2016 requiring that states take corrective action when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement, and that states use comprehensive, coordinated early intervention services to address significant disproportionality to serve students from age three through grade 12.[238] The regulations also require states to establish a standard methodology for determining significant disproportionality, set a "reasonable risk ratio threshold," and determine standards for measuring "reasonable progress."   While these regulations are a significant improvement over previous standards, they still grant states discretion to define a "reasonable" threshold for determining disproportionality.[239] However, the Trump Administration initially resisted implementing the regulations.   In July 2018, the DOE announced that implementation would be postponed until July 1, 2020, in order to "thoroughly review the significant disproportionality regulations and ensure that they effectively address the issue of significant disproportionality and best serve children with disabilities."[240] The Administration reversed course after the Council of Parent Attorneys and Advocates filed suit and prevailed in the initial round of litigation.[241] Given its resistance to the regulation, it seems unlikely that the Administration vigorously enforced it.[242]

---

238. *See* Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 92376 (Dec. 19, 2016) (to be codified at 34 C.F.R. pt. 300).

239. *See* Strassfeld, *supra* note 218, at 1148.

240. *Regulation Postponed Two Years to Ensure Effective Implementation*, OFF. SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T EDUC. (July 3, 2018), https://sites.ed.gov/idea/regulation-postponed-two-years-to-ensure-effective-impleme ntation/ [https://perma.cc/6A9N-KZLM].

241. *See* Laura Meckler, *Education Department Implements Special-Education Rule After Losing Court Case*, WASH. POST (May 22, 2019, 2:24 PM), https://www.washingtonpost.com/local/education/education-department-implements-special-education-rule-after-losing-court-case/2019/05/22/a44aae76-7ca7-11e9-8bb7-0f c796cf2ec0_story.html?noredirect=on [https://perma.cc/C3AC-Z7NF].

242. For a general discussion of the Trump Administration's rollback of civil rights enforcement, see Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017,   8:00   AM), https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts -federal-government   [https://perma.cc/7MDR-9LEQ].   Another   ProPublica investigation found that under the Trump Administration, OCR had closed more than 1,200 investigations begun under the Obama Administration and investigators only found violations in 35% of investigations lasting more than 180 days. *See* Annie Waldman, *DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited from*

Even if states fail to fully disclose disproportionality, OCR's publicly available data have the potential to increase transparency and could be leveraged by advocates to pressure state officials to take steps to remedy overrepresentation. But as described above, the data have significant limitations that complicate analysis. The lack of aggregated statewide data and the significant redaction of district-level data represent the most significant problems, but the fact that OCR does not report data on the racial identity of emergent bilingual students also poses an obstacle to understanding how race and language intersect in special education. If states fail to comply with regulations requiring that they set reasonable risk ratio thresholds and advocates are unable to conduct independent analyses of the data, then disproportionality will continue to be rendered invisible.

To address the widespread overrepresentation of emergent bilingual students and students of color, three immediate steps are necessary to improve transparency and accountability. First, the DOE should not only robustly enforce the new regulation requiring that states establish reasonable risk ratios and take corrective action to address significant overrepresentation, but should also set a recommended threshold for determining overrepresentation. This threshold should not exceed 2.0. Second, OCR should reestablish the policy, first instituted under Assistant Secretary Catherine Lhamon, of automatically expanding the scope of discrimination complaints to determine if there is evidence of disparate impact on students of color.[243] This policy offered children and families a route to challenge systemic disproportionality without requiring them to carry the burden of clearly stating this claim when they file a complaint. Third, the federal DOE should expand the data published through the Civil Rights Data Collection to ensure transparency. At a minimum, OCR should publish (1) aggregated state data and (2) the total number of students in each category by district, including students in any redacted racial categories, to allow for a more accurate analysis of whether students are overrepresented. Additionally, the DOE should consider publishing data on the racial identity of emergent bilingual students in each special education

---

Obama, PROPUBLICA (June 21, 2018, 10:00 AM), https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-pr obes-inherited-from-obama [https://perma.cc/D36U-N7Z6].

243. *See* Erica L. Green, *Education Dept. Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-bet sy-devos.html [https://perma.cc/S4LZ-J4CX]; Huseman & Waldman, *supra* note 242.

category to allow for analysis of how racial identity and language status interact in the context of special education.

B. From Procedural Compliance to School Transformation

Improving enforcement is not enough: to uproot overrepresentation, it is necessary to transform educator practice. Current enforcement efforts generally focus on procedural violations, failing to address the underlying causes of overrepresentation. In *Does Compliance Matter in Special Education?*, Catherine Kramarczuk Voulgarides offers a provocative ethnographic portrait of three suburban districts in a northeastern state that had been repeatedly cited for disproportionality by the state department of education.[244] In each of the districts, administrators responded to citations by streamlining paperwork, pressuring psychologists to accelerate outstanding evaluations, and ensuring that IEP meetings were held annually as required by law.[245] Yet complying procedurally with the IDEA did not lead to *substantive* compliance with the IDEA's mandate to provide all students with a free appropriate public education.[246] For example, Voulgarides described consistency and efficiency as the primary goals of IEP meetings, rather than meaningful discussion of the effectiveness of services and students' academic progress.[247] Moreover, this obsession with procedural compliance avoided more serious engagement with how educators' views on race, language, and culture informed their treatment of students of color.[248]

---

244. *See* VOULGARIDES, *supra* note 49.

245. *See id.* at 16–30.

246. *See id.* at 29.

247. *See id.* at 23–25. Voulgarides described how an expert hired to address the lack of behavioral interventions in one of the districts struggled to improve classroom practice while satisfying expectations of "a quick fix." *See id.* at 94. "All of my training on how to holistically understand a student doesn't matter here," she told Voulgarides, "because this is a district that responds to the state." *Id.* at 93. As a result of compliance pressures, psychologists moved quickly to create behavioral assessments and intervention plans, but they were not consistently and effectively implemented in the classroom and did not meaningfully impact student outcomes. *See id.* at 94.

248. *See id.* at 28–29. For example, Voulgarides described how a Black student was targeted for disciplinary surveillance after an IEP meeting where a guardian successfully advocated for additional services. *See id.* at 25–28. The student had shown his classroom teacher an iPod that he claimed was his, but the teacher recognized that it had been stolen from the technology lab. *See id.* at 26. At the subsequent IEP meeting, the student's foster grandmother, the school psychologist, and a district administrator agreed that the student was acting out because of his frustrations at school, and overruled the teacher, who felt the student should be removed from her class, placed in a more restrictive setting, and considered for an IEP diploma. *See id.* at 27. In her frustration, the teacher sent an email to all school staff telling them that

And "[c]ollectively, the social forces associated with the logic of compliance contributed to the production of racialized outcomes."[249] Much as high state risk ratio thresholds and data redactions mask disproportionality, color-blind procedural compliance masks racial inequities and reproduces them "under the guise of equal treatment as equal protection."[250]

This concern also applies to two major types of policy initiatives that aim to address the overrepresentation of emergent bilingual students in special education: response to intervention (RTI) and changes to assessment practices. After the IDEA was reauthorized in 2004, the federal regulations were changed to require states to include a process for identifying students with learning disabilities "based on the child's response to scientific, research-based intervention." [251] RTI is a three-tiered process that has been widely adopted to prevent misidentification.[252] The first tier consists of high-quality instruction and progress monitoring in the classroom, the second of intervention for struggling students, and the third of intensified support either one-on-one or in small group settings.[253] If students do not improve, the school should refer the student for a special education evaluation.[254] In addition, some states have responded to academic research that suggests that existing evaluation methods are not adequate for assessing emergent bilingual students by issuing guidance

---

the student had stolen the iPod and encouraging them to monitor his behavior. *See id.* Within a matter of days, the student had been accused of two different infractions and was eventually suspended. *See id.* at 28. Despite protestation from the district administrator, the school principal made no objection to the breach of confidentiality. *See id.* at 27–28. Technically, this district was in compliance with the IDEA's procedural mandates, because an IEP meeting was held and all stakeholders participated, yet 23 out of a total of 40 Black students districtwide were classified with a disability. *See id.* at 26. This story illustrates not only how deeply racist stereotypes about Black students informed the school's disciplinary response, but also how procedural compliance fails to address fundamental inequities in the school system.

249. *Id.* at 98.

250. *Id.* at 100.

251. 34 C.F.R. § 300.307.

252. *See* Artiles, *Racialization of Ability*, *supra* note 236, at 437.

253. *See* CAL. DEP'T OF EDUC., CALIFORNIA PRACTITIONERS' GUIDE FOR EDUCATING ENGLISH LEARNERS WITH DISABILITIES 53–76 (2019), https://www.cde.ca.gov/sp/se/ac/documents/ab2785guide.pdf [https://perma.cc/PQG8-JHH4]; Janette K. Klingner & Beth Harry, *The Special Education Referral and Decision-Making Process of English Language Learners: Child Study Team Meetings and Placement Conferences*, 108 TCHRS. COLL. REC. 2247, 2249 (2006).

254. *See* Klingner & Harry, *supra* note 253, at 2249.

on more appropriate strategies.[255] For example, in 2019, California released a nearly 500-page manual on best practices in evaluating emergent bilingual students for placement in special education.[256] These efforts to change school practices represent a critical step to reduce misidentification by acknowledging how classroom conditions can contribute to over-referral, providing additional services to struggling students, and creating a check on educator discretion. However, some disability scholars have pointed out that there is insufficient evidence to prove that RTI is appropriate for culturally and linguistically diverse students.[257] Moreover, relying exclusively on RTI and improved diagnostic practices fails to address the other systemic factors that contribute to overrepresentation, particularly deficit discourses about emergent bilingual students' innate capacity.[258] Voulgarides argued that these approaches may in fact reinforce "deficit-based beliefs about individuals, because under this logic educators are doing all they can to ensure that students receive a free appropriate public education."[259]

There are a few promising case studies of districts that have sought to address disproportionality not only by shifting their approaches to intervention and evaluation but also by seeking to create more inclusive classrooms. In a case study of a school district in Wisconsin, Aydin Bal and his colleagues described how administrators were moved to action after a decade of focusing exclusively on technical solutions — i.e., improving assessment and monitoring RTI

---

255. For research on the limitations of assessment tools and methodologies for evaluating emergent bilingual students for special education placement, see, e.g., David E. DeMatthews, D. Brent Edwards Jr. & Timothy E. Nelson, *Identification Problems: US Special Education Eligibility for English Language Learners*, 68 INT'L J. EDUC. RSCH. 27 (2014); Klingner & Harry, *supra* note 252, at 2248–49; Johanne Paradis, *Grammatical Morphology in Children Learning English as a Second Language: Implications of Similarities with Specific Language Impairment*, 36 LANGUAGE SPEECH & HEARING SERVS. SCHOOLS 172 (2005); Emilie Richardson, *Breaking the Norm: Accurate Evaluation of English Language Learners with Special Education Needs*, 17 B.U. PUB. INT. L.J. 289 (2008).

256. *See* CAL. DEP'T OF EDUC., *supra* note 253.

257. *See, e.g.*, Artiles, *Racialization of Ability*, *supra* note 236, at 437.

258. *See, e.g.*, VOULGARIDES, *supra* note 49, at 85–87. Voulgarides cited to recent research suggesting that patterns of racial and linguistic overrepresentation persist in the second and third tiers of RTI, and that the number of Black students classified as SLD actually increased over a five-year period in California despite the implementation of RTI. *See id.* at 86.

259. *Id.* at 84. Artiles also critiqued the reliance on RTI, arguing that it represents "a color-blind commitment in which the race-disability knot will be untied through technical solutions — that is, more accurate diagnostic decisions" at the expense of examining the social and political context in which these decisions are made. *See* Artiles, *Racialization of Ability*, *supra* note 236, at 437.

implementation — failed to reduce their rates of overrepresentation.[260] The district's strategy was twofold. First, the administration decided to recommit to the development of strong culturally responsive educational practices, building educator expertise through learning rounds and targeted coaching.[261] The district also redirected 15% of its IDEA funding to target struggling readers, including assigning special education teachers to train general education teachers on how to improve the "accessibility of core instruction and efficacy of interventions."[262] While this strategy retains RTI as a tool for reducing misidentification, it also aims to address how classroom context contributes to overrepresentation, and addresses deficit discourses by challenging educators to shift the way they represent communities of color in their instructional curriculum and praxis.

Federal and local governments should look to race-conscious remedies like these rather than a color-blind commitment to procedural compliance to address the disproportionate representation of emergent bilingual students and students of color in special education. There is no silver bullet that will immediately eliminate overrepresentation, but overrepresentation is not inevitable, and there is a role for government to play in incubating strategies to directly address racial and linguistic inequities in the classroom. A "carrot and stick" approach of offering financial incentives for states that demonstrate a commitment to reducing overrepresentation while withholding IDEA funding in whole or in part from states that fail to transparently report data on disproportionality is one possible approach. Congress could build on the model of the Bilingual Education Act of 1968[263] or Race to the Top[264] and provide grants to states to strengthen instruction for emergent bilingual students, implement culturally responsive education, and develop training and coaching for educators on how to address racial and linguistic discrimination in the classroom. It is possible that, much like the Common Core, such an approach may face pushback from states on federalism grounds, [265] but the IDEA is clear that racial

---

260. *See* Aydin Bal, Amanda L. Sullivan & John Harper, *A Situated Analysis of Special Education Disproportionality for Systemic Transformation in an Urban School District*, 35 REMEDIAL & SPECIAL EDUC. 3, 11–12 (2014).

261. *See id.* at 11.

262. *Id.*

263. *See* Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 783, 816–19.

264. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 282, 283–84.

265. *See, e.g.*, Tim Murphy, *Inside the Mammoth Backlash to Common Core*, MOTHER   JONES   (Oct.   2014),

overrepresentation in special education is a violation of students' civil rights and requires a remedy. This strategy is not a quick fix, but a problem as deep and intractable as overrepresentation demands long-term vision and commitment to realize the promise of an inclusive education system.

CONCLUSION

"An interesting paradox in the racialization of disabilities," wrote disabilities scholar Alfredo Artiles, "is that the civil rights response for one group of individuals (i.e., learners with disabilities) has become a potential source of inequities for another group (i.e., racial minority students) despite their shared histories of struggle for equity."[266] This is equally true of emergent bilingual students. Indeed, emergent bilingual students and students of color are frequently one and the same, and the overrepresentation of emergent bilingual students and students of color in special education is a sweeping problem. While historically, Black and American Indian students have been the most overrepresented at the national level, at the state level, the problem has expanded to encompass emergent bilingual and Latinx students. In New York, emergent bilingual students are three times as likely to be classified as ID and twice as likely to be identified as SLI; while in Arizona, emergent bilingual students are more than one and a half times more likely to be classified in SLI. While exact patterns vary between the states, students of color are disproportionately represented across the high-incidence categories. Overrepresentation is driven by limited rights and resources for emergent bilingual students, explicit and implicit restrictive language policies, and contentious debates over language and identity, which fuel deficit discourses about students of color and influence the decisions made by educators in referring, assessing, and placing students in special education. Existing enforcement efforts to resolve disproportionality are not sufficient to address the scope of the challenge and may in fact reinforce inequality by masking it with procedural compliance.

Addressing the root causes of overrepresentation requires both improving transparency and accountability and transforming practices in schools, shedding color-blindness in favor of race consciousness. First, the federal DOE should vigorously enforce new regulations

---

https://www.motherjones.com/politics/2014/09/common-core-education-reform-backl ash-obamacare/ [https://perma.cc/9ALP-UEUD].

266. Artiles, *Racialization of Ability*, *supra* note 236, at 440.

requiring states to take corrective action to address disproportionality and should set a recommended threshold for determining when risk ratios indicate that certain groups are overrepresented. Second, the DOE should reinstitute the policy of automatically expanding the scope of complaints to determine if there is a disparate impact on students of color and emergent bilingual students. Third, the DOE should shift the way they record and report data to enable advocates and researchers to perform reliable statistical analysis. Fourth, the federal government should link enforcement with initiatives to incubate culturally responsive curriculum and pedagogy, recognizing the need for race-conscious remedies that address the root causes of inequality in public schools. The time to act is now: students like Luz cannot afford to wait.

APPENDIX

Table 1: Districts Analyzed for Disproportional Representation of Emergent Bilingual Students

	Specific Learning Disability		Speech and Language Impairment		Intellectual Disability		Emotional Disturbance	
	Number Reported	Number Analyzed	Number Reported	Number Analyzed	Number Reported	Number Analyzed	Number Reported	Number Analyzed
New York	677	116	671	105	516	13	574	4
Arizona	217	76	191	46	106	8	172	0[267]

---

267. Data for LEP students are redacted (two or fewer) in all districts reporting data on emotional disturbance.

Table 2: Number of Students Served by Analyzed Districts, New York

Special Education Category	Emergent Bilingual/Racial Category	Number of Overall Students Included in Analysis	Percentage of Total Number of Students Statewide
Speech and Language Impaired	Emergent Bilingual	1,598,068	58%
	Latinx	1,899,921	70%
	Black	1,601,560	59%
	White	1,918,039	70%
Specific Learning Disability	Emergent Bilingual	1,640,927	60%
	American Indian	1,099,709	40%
	Latinx	2,123,187	78%
	Black	1,968,749	72%
	White	2,212,640	81%
Intellectual Disability	Emergent Bilingual	1,108,554	41%
	Latinx	1,200,894	44%
	Black	1,222,430	45%
	White	1,187,559	43%
Emotional Disturbance	Emergent Bilingual	1,073,464	39%
	Latinx	1,254,312	46%
	Black	1,286,478	47%
	White	1,294,462	47%

Table 3: Number of Students Served by Analyzed Districts, Arizona

Special Education Category	Emergent Bilingual/Racial Category	Number of Overall Students Included in Analysis	Percentage of Total Number of Students Statewide
Speech and Language Impaired	Emergent Bilingual	522,432	46%
	Latinx	710,799	63%
	Black	196,191	17%
	White	695,767	61%
Specific Learning Disability	Emergent Bilingual	720,914	64%
	American Indian	626,833	55%
	Latinx	885,754	78%
	Black	739,717	65%
	White	870,165	77%
Intellectual Disability	Emergent Bilingual	123,233	11%
	Latinx	750,790	66%
	Black	428,828	38%
	White	707,833	62%
Emotional Disturbance	Latinx	629,292	55%
	Black	484,383	43%
	White	654,316	58%

Table 4: Statewide Representation of Emergent Bilinguals in
Special Education by Category, New York

Category Name	Percentage of All Students in Special Education Category[268]	Percentage of English-Proficient Students in Special Education Category	Percentage of Emergent Bilinguals in Special Education Category	Risk Ratio: Emergent Bilingual Students[269]
Emotional Disturbance	0.92%	1%	0.4%	0.411
Intellectual Disability	0.48%	0.4%	1.3%	3.324
Specific Learning Disability	6.3%	6.2%	7.8%	1.265
Speech or Language Impairment	4%	3.7%	7.9%	1.99

---

268. *See IDEA Section 618 Data Products: State Level Data Files*, U.S. DEP'T EDUCATION, https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bccee [https://perma.cc/N57S-NYCA] (last visited Dec. 26, 2020) (select "Child Count and Educational Environments" and "2015").

269. As explained in Section III.A, statewide enrollment data is unavailable through the OCR data set and so data from the state-level DOEs was used to calculate the statewide risk ratios. *See NY State Public School Enrollment (2015–16)*, DATA.NYSED.GOV, https://data.nysed.gov/enrollment.php?year=2016&state=yes [https://perma.cc/J7TH-EZU7] (last visited Dec. 26, 2020).

Table 5: Statewide Representation of Emergent Bilinguals in
Special Education by Category, Arizona

Category Name	Percentage of All Students in Special Education Category[270]	Percentage of English-Proficient Students in Special Education Category	Percentage of Emergent Bilinguals in Special Education Category	Risk Ratio: Emergent Bilingual Students[271]
Emotional Disturbance	0.66%	0.7%	0.2%	0.275
Intellectual Disability	0.63%	0.7%	0.3%	0.535
Specific Learning Disability	4.7%	4.6%	6%	1.297
Speech or Language Impairment	1.6%	1.51%	2.62%	1.74

---

270. *See IDEA Section 618 Data Products: State Level Data Files, supra* note 268.

271. As explained in Section III.A, statewide enrollment data is unavailable through the OCR data set and so data from the state-level DOEs was used to calculate the statewide risk ratios. *See Accountability & Research Data*, ARIZ. DEP'T EDUCATION, https://www.azed.gov/accountability-research/data/ [https://perma.cc/BGZ3-47FL] (last visited Oct. 30, 2020); *Table 204.20: English Language Learner (ELL) Students Enrolled in Public Elementary and Secondary Schools, by State: Selected Years, Fall 2000 Through Fall 2015*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d17/tables/dt17_204.20.asp?current=yes [https://perma.cc/6LE2-RT7G] (last visited Oct. 30, 2020).

Table 6: District Representation of Emergent Bilingual Students in Special Education, New York

Category	Percentage of Districts w/ Disproportionate Representation[272]		25th Percentile Risk Ratio	Median Risk Ratio	75th Percentile Risk Ratio
	Under	Over			
Intellectual Disability[273]	0.2%	1.6%	1.08	1.7	3.85
Specific Learning Disability[274]	3.7%	9.7%	0.92	1.3	1.94
Speech or Language Impairment[275]	0.7%	13.4%	1.61	2.97	4.66

Table 7: District Representation of Emergent Bilingual Students in Special Education, Arizona

Category	Percentage Districts w/ Disproportionate Representation[276]		25th Percentile Risk Ratio	Median Risk Ratio	75th Percentile Risk Ratio
	Under	Over			
Intellectual Disability	4.7%	2.83%	0.18	0.38	1.7
Specific Learning Disability[277]	11%	21%	0.6	1.34	2.3
Speech and Language Impairment[278]	7%	15%	0.99	1.57	2.64

---

272. This percentage is calculated using the number of reported districts, not overall districts. The percentage of students statewide included in each analysis is included in the footnotes *infra*. All district-level data analysis is based on the OCR data. *See supra* note 10. Data analysis on file with Author. See *supra* Section III.B for an explanation of the Author's methodology.

273. Data for this category includes three alternate risk ratios calculated for districts where no non-emergent bilingual students were included in the category. Overall, 41% of students statewide were included in this analysis.

274. Districts included in this analysis represent 60% of students statewide.

275. Districts included in this analysis represent 58% of students statewide.

276. This percentage is calculated using the number of reported districts, not overall districts.

277. Districts included in this analysis represent 64% of students statewide.

278. Districts included in this analysis represent 46% of students statewide.

Table 8: Statewide Representation of Students in Special Education
by Racial/Ethnic Category and Disability Category, New York

Category	Risk Ratio: American Indian	Risk Ratio: Asian/Native Hawaiian[279]	Risk Ratio: Black	Risk Ratio: Latinx	Risk Ratio: White
Emotional Disturbance	1.2	0.15	2.88	0.93	0.61
Intellectual Disability	1.37	0.58	1.94	1.23	0.61
Specific Learning Disability	1.1	0.33	1.45	1.33	0.8
Speech or Language Impairment	1.07	0.59	1.2	1.96	0.56

Table 9: Statewide Representation of Students in Special Education
by Racial/Ethnic Category and Disability Category, Arizona

Category	Risk Ratio: American Indian	Risk Ratio: Asian/Native Hawaiian	Risk Ratio: Black	Risk Ratio: Latinx	Risk Ratio: White
Emotional Disturbance	1.04	0.13	2.45	0.5	1.54
Intellectual Disability	1.54	0.7	1.68	1.21	0.68
Specific Learning Disability	1.68	0.24	1.3	1.26	0.72
Speech or Language Impairment	1.07	0.65	0.72	0.98	1.12

---

279. For unexplained and inexplicable reasons, the New York State Education Department combines Asian and Native Hawaiian enrollment in its data reporting. To allow for an accurate comparison, this Article also combines the Asian and Native Hawaiian categories for its analysis of Arizona data. *See NY State Public School Enrollment (2015–16), supra* note 269.

Table 10: District Representation of Students Classified as SLD by Racial/Ethnic Category

State	Racial/Ethnic Category	Percentage of Districts w/ Disproportionate Representation [280]		25th Percentile Risk Ratio	Median Risk Ratio	75th Percentile Risk Ratio
		Under	Over			
New York	American Indian[281]	0.6%[282]	1.6%	0.85	1.29	2.77
	Latinx	9.7%	19%	0.82	1.15	1.57
	Black	2.8%	24%	1.22	1.77	2.34
	White[283]	21%	22.5%	0.85	1.15	1.92
Arizona	American Indian	6.5%	16%	0.84	1.29	2.23
	Latinx	4.1%	41%	1.13	1.5	1.85

280. For New York, for American Indian students, calculations were performed for 20 districts, representing 40% of students statewide; for Latinx students, calculations were performed for 280 districts, representing 78% of students statewide; for Black students, calculations were performed for 215 districts, representing 72% of students statewide; and for white students, calculations were performed for 322 districts, representing 81% of students statewide. The percentage of districts with over- and underrepresentation was calculated by dividing the number of districts in each category by the total number of reported districts (677 in total). For Arizona, for American Indian students, calculations were performed for 58 districts, representing 55% of students statewide; for Latinx, 125 districts, representing 78% of students statewide; for Black students, 56 districts, representing 65% of students statewide; and for white students, 119 districts, representing 77% of students statewide. This calculation excluded all districts where the number of students in the relevant category was redacted, which explains why the number of districts analyzed is significantly lower than the overall total. The percentage of districts with over- and underrepresentation was calculated by dividing the number of districts in each category with the total number of reported districts (217 districts).

281. For American Indian students, the median weighted risk ratio (WRR) is 2.03, significantly higher than the risk ratio. It seems likely that the WRR is inflated for the same reasons described for Latinx students in the SLI category. See *infra* note 286.

282. The percentage of districts with over- and underrepresentation was calculated by determining the number of districts with risk ratios of over 1.2 and under 0.8. Districts with no students in the comparison group were excluded, and so the alternative risk ratios are not included in this calculation. In general, incorporating these districts through the inclusion of alternative risk ratios does not significantly impact the percentage of districts with disproportionate representation or the median risk ratios. However, inclusion of alternative risk ratios does have an impact on measures of district-level disproportionality for white students for some categories. See *infra* notes 283, 288, 292–294, 296–297.

283. Including alternative risk ratios for districts where no students in the comparison group are receiving services (i.e., only white students are classified as SLD) suggests that white students are proportionally represented in SLD. Moreover, it allows 641 districts to be analyzed as opposed to just 119. When the alternative risk ratio is included, 27% of districts show evidence of overrepresentation of white students, 36% show evidence of underrepresentation, and the median risk ratio is 0.92.

	Black	7.8%	8.3%	0.73	0.98	1.32
	White	28%	9.2%	0.63	0.79	0.98

Table 11: District Representation of Students Classified as SLI by Racial/Ethnic Category

State	Racial/Ethnic Category	Percentage of Districts w/ Disproportionate Representation[284]		25th Percentile Risk Ratio	Median Risk Ratio	75th Percentile Risk Ratio
		Under	Over			
New York[285]	Latinx[286]	2.8%	22%	1.14	1.78	2.75
	Black[287]	2.7%	8.9%	0.88	1.37	2.01
	White[288]	14.8%	10.5%	0.5	0.85	1.4
Arizona[289]	Latinx	4.7%	17%	0.93	1.2	1.81
	Black	6.3%	0%	0.25	0.42	0.66
	White	7.3%	23%	0.93	1.34	1.72

284. For New York, calculations for Latinx students were performed for 201 districts, representing 70% of students statewide; for Black students, 108 districts, representing 59% of students statewide; and for white students, 213 districts, representing 70% of students. For Arizona, calculations for Latinx students were performed for 65 districts, representing 63% of students statewide; for Black students, 13 districts, and for white students 74 districts, representing 17% and 61% of all students respectively.

285. The districts included in the analysis of Latinx students account for 70% of all students statewide. For Black students, the districts analyzed represent 59% of all students statewide, and for white students the districts analyzed account for 70% of all students statewide. The percentage of districts that are over- and underrepresented is calculated by dividing the number of districts in each category by the number of reported districts (671 in total).

286. The WRR for Latinx students differ significantly from the risk ratios. The 25th percentile WRR is 1.5, the median is 2.35, and the 75th percentile is 3.7. It is possible that the WRR is slightly inflated here because some districts with large risk ratios — such as Mamaroneck Union Free District — have no Black or Asian students classified as SLI, and the zero risk ratios for these categories artificially inflates the WRR calculation. *See* Bollmer et al., *Methods for Assessing Racial/Ethnic Disproportionality in Special Education*, *supra* note 169.

287. The weighted risk ratios for Black students are slightly higher than the risk ratios. The 25th percentile WRR is 1.17, the median is 1.67, and the 75th percentile is 2.6.

288. As in the SLD category, inclusion of alternative risk ratios for districts where only white students are classified as SLI changes the implications of the data, suggesting that white students are largely underrepresented in this category. Out of a total of 606 districts, just 10.6% of districts show evidence of overrepresentation, and 68% of districts show evidence of underrepresentation. The median risk ratio is just 0.38.

289. The districts included in the analysis of Latinx students represent 63% of all students statewide. For Black students, the districts analyzed represent 17% of all students statewide, and for white students the districts analyzed account for 61% of all students statewide. The percentage of districts with over- and underrepresentation was calculated by dividing the number of districts in each category by the total number of reported districts (191 districts).

Table 12: District Representation of Students Classified as ED by Racial/Ethnic Category

State	Racial/Ethnic Category	Percentage of Districts w/ Disproportionate Representation[290]		25th Percentile Risk Ratio	Median Risk Ratio	75th Percentile Risk Ratio
		Under	Over			
New York[291]	Latinx	4.7%	17%	0.62	0.82	1.2
	Black[292]	0%	6.1%	1.52	2.78	4.41
	White[293]	2.8%	2.4%	0.44	0.89	1.91
Arizona	Latinx	20%	1.2%	0.31	0.49	0.71
	Black	2.9%	10.5%	0.94	1.7	3.65
	White[294]	0%	100%	2.25	2.97	4.27

290. For New York, calculations for Latinx students were performed for 35 districts, representing 46% of students statewide; and for Black and white students respectively, calculations were performed for 42 districts, representing 47% of students statewide. The percentage of districts with over- and underrepresentation was calculated by dividing the number of districts in each category by the number of reported districts (574). For Arizona, calculations were performed for Latinx students for 42 districts, representing 55% of students statewide; for Black students, calculations were performed for 28 districts, and for white students 44 districts, representing 43% and 58% of students statewide respectively. The percentage of districts with over and underrepresentation was calculated by dividing the number of districts in each category by the number of reported districts (172).

291. The median and 75th percentile weighted risk ratios skewed higher for all racial groups in New York, likely because of a few outlier districts where there are no students in other racial categories with the given classification. See *supra* note 286.

292. Including districts where Black students are the only students in the category by incorporating alternative risk ratios does lower the median risk ratio for both ED and ID, but the data still suggests widespread overrepresentation of Black students in both categories.

293. As in the SLI category, incorporating alternative risk ratios suggests that white students are significantly underrepresented in the ED categories: the median risk ratio for the combined data set of risk ratios and alternative risk ratios is 0.35.

294. An initial glance at this data suggests that white students are significantly overrepresented in the ED category at the district level in Arizona. Inclusion of alternative risk ratios where white students are the only students classified as ED indicates that while white students are still overrepresented, this pattern is less extreme than the data suggests. Out of 70 districts for which calculations could be performed, 49 show evidence of overrepresentation, and 18 show evidence of underrepresentation. The median risk ratio is 2.18, lower than the median risk ratio for Black students.

Table 13: District Representation of Students Classified as ID by Racial/Ethnic Category

State	Racial/Ethnic Category	Percentage of Districts w/ Disproportionate Representation[295]		25th Percentile Risk Ratio	Median	75th Percentile
		Under	Over			
New York	Latinx	1.4%	1.1%	0.7	0.9	1.41
	Black	0.6%	3.5%	1.49	2.03	5.87
	White[296]	2.1%	1.9%	0.56	0.96	2.39
Arizona	Latinx	7.1%	22%	0.92	1.45	2.08
	Black	3%	7.1%	0.87	1.26	1.77
	White[297]	8.9%	12.5%	0.75	0.95	1.75

Table 14: Representation of Students in Special Education by Language Status/ Racial/Ethnic Category, New York City

Category	Risk Ratio: Emergent Bilingual	Risk Ratio: Asian	Risk Ratio: Latinx	Risk Ratio: Black	Risk Ratio: White
Emotional Disturbance	0.05	0.04	0.77	4.45	0.3
Intellectual Disability	3.83	0.44	1.14	1.73	0.75
Specific Learning Disability	1.12	0.26	1.53	1.49	0.71
Speech or Language Impairment	1.6	0.4	2.11	0.83	0.73

---

295. For New York, for Latinx students, calculations were performed for 20 districts, representing 44% of students statewide; and for Black and white students, calculations were performed for 22 districts, representing 45% and 43% of students statewide, respectively. To calculate the percentage of districts with over- and underrepresentation, the number of districts in each category was divided by the total number of reported districts (516 districts in total). For Arizona, calculations were performed for 59 districts for Latinx students, representing 66% of students statewide; and for Black and white students, calculations were performed for 23 and 44 districts respectively, representing 38% and 62% of students statewide. To calculate the percentage of districts with over- and underrepresentation, the number of districts in each category was divided by the total number of reported districts (168).

296. When districts where only white students are classified as ID are included through the incorporation of alternative risk ratios, the data suggest that white students are underrepresented at the district level. The 25th percentile risk ratio is 0.34, the median is 0.64, and the 75th percentile risk ratio is 1.1.

297. As in the other categories, inclusion of districts where only white students were classified as ID reinforces the argument that white students are not overrepresented in the category. Just 13% of districts show evidence of overrepresentation.

Table 15: Number of Students Classified as ID, New York City
2009–2015

Year[298]	Counts by Racial/Ethnic Category									
	American Indian	Asian/Pacific Islander	Asian	Hawaiian/Pacific Islander	Latinx	Black	White	Two or More	Total	Emergent Bilingual (LEP)
2009	0	150	NA	NA	780	675	210	NA	1815	690
2013	≤ 2	NA	51	≤ 2	363	265	109	≤ 2	788	372
2015	≤ 2	NA	64	≤ 2	360	295	99	≤ 2	818	310

---

298. New York did not report any students classified as ID in 2011. This is likely a reporting error, and as such, the Article does not include this data here.

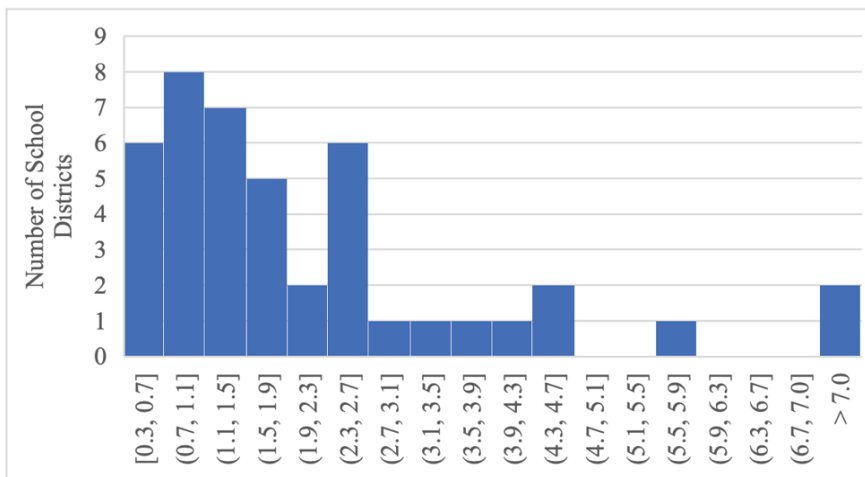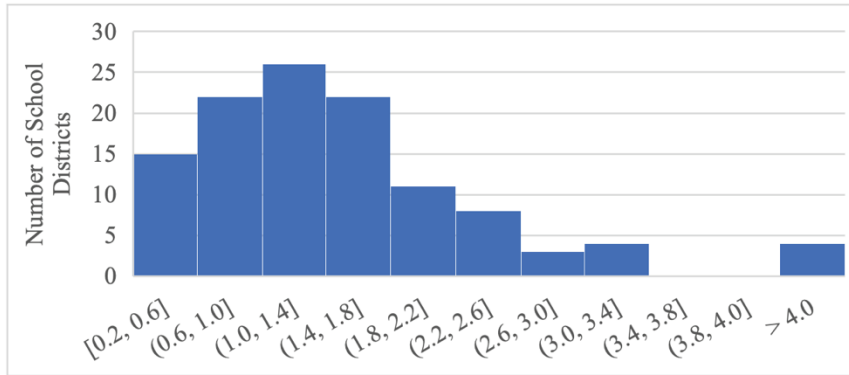**Figure 1: Distribution of Risk Ratios Across School Districts, Emergent Bilingual Students in SLI, New York[299]**
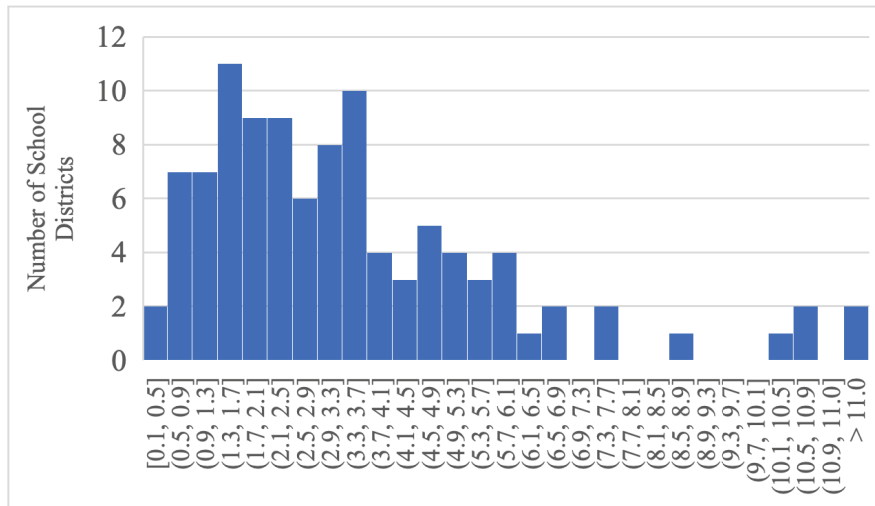
Figure 2: Distribution of Risk Ratios Across School Districts, Emergent Bilingual Students in SLI, Arizona

---

299. Islip Union Free School District (risk ratio of 23.56) and Chappaqua Central School District (risk ratio of 21.92) are excluded from this graph.

Figure 3: Distribution of Risk Ratios Across School Districts, Emergent Bilingual Students in SLD, New York

Figure 4: Distribution of Risk Ratios Across School Districts, Emergent Bilingual Students in SLD, Arizona
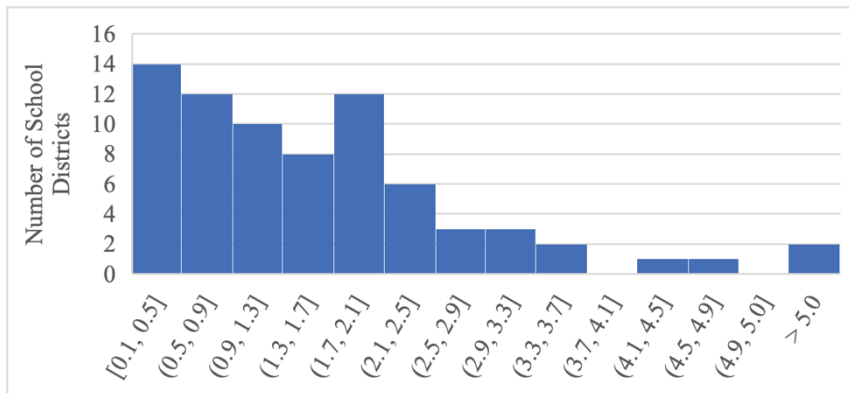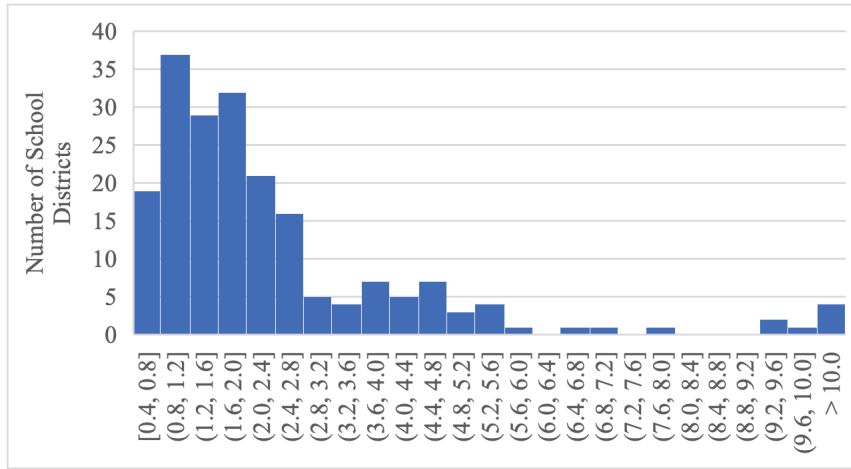
Figure 5: Distribution of Risk Ratios Across School Districts, Latinx Students in SLI, New York[300]

---

    300. Mamaroneck Union Free School District (risk ratio of 29.23) is excluded from this graph.