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## ARTICLE

# EXPLORING MINNESOTA'S PROBLEMATIC RACIAL IMBALANCE IN SPECIAL EDUCATION SERVICES FOR STUDENTS WITH EMOTIONAL OR BEHAVIORAL DISORDERS

ELIZABETH R. SCHILTZ\* AND SAMIA YOUNG\*\*

On January 23, 2020, the authors of this article began their work together on a one-time course offered at the University of St. Thomas School of Law (UST Law) called “IEP Clinic Design.” Professor Elizabeth Schiltz was exploring the idea of establishing a clinic at UST Law that could offer services in a woefully underserved<sup>1</sup> legal field: helping parents and students navigate the complex federal and state laws governing special education services. This course offered an opportunity for a small group of students to work with Schiltz to conduct research, outreach, and analysis to determine how such a clinic might be structured. The five students enrolled in the class<sup>2</sup> all had varying degrees of professional or personal experience in the field of special education and shared a deep commitment to exploring how law students might serve in this area.

By the last day of class, exactly three months later, the world had changed. The upheavals wrought by the global coronavirus pandemic transformed social interactions across the globe. At midnight on March 27, 2020, the residents of Minnesota joined much of the globe in sheltering at home under the emergency order of its governor.<sup>3</sup> (UST Law had already moved its instruction online two weeks earlier.) But that was only the first

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1. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 23 (2017) (identifying legal problems related to access to special education services as affecting 15 percent of low-income households with a child in school). See also Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth With Special Education Needs*, 11 CLINICAL L. REV. 271 (2005) (discussing lack of law school clinics serving special education needs).

2. Shannon Eckman (J.D. 2021), Kau Guannu (J.D. 2020), Wendy Raymond (J.D. 2021), Eduardo Salgado Diaz (J.D. 2021), and Samia Young (J.D. 2020).

3. Minn. Exec. Order No. 20-20 (Mar. 25, 2020), [https://mn.gov/governor/assets/3a.%20EO%2020-20%20FINAL%20SIGNED%20Filed\\_tcm1055-425020.pdf](https://mn.gov/governor/assets/3a.%20EO%2020-20%20FINAL%20SIGNED%20Filed_tcm1055-425020.pdf).

of that spring's global social earthquakes. On May 25, 2020, George Floyd was killed by a police officer who was captured on video kneeling on Floyd's neck during an arrest for allegedly passing a counterfeit twenty-dollar bill, about three miles away from UST Law. The killing of yet another Black person at the hands of a white police officer sparked protests not only in Minneapolis but across the nation<sup>4</sup> and the globe,<sup>5</sup> spurring a global call to examine not only the excessive use of force against Black people by police officers, but also wider underlying systemic structures that continue to have disproportionate negative effects on Black people.

Even before George Floyd's death, the partners in the IEP Clinic Design course had concluded that a particular aspect of systemic injustice merited sustained focus: the fact that Black and American Indian students receiving special education services in Minnesota are significantly more likely to be labeled as having an emotional or behavioral disorder (EBD)<sup>6</sup> than other students. This is problematic for a number of reasons. The criteria for eligibility for this diagnosis are based on behaviors, rather than any specific disability; many of the specific criteria applied are largely subjective and thus possibly shaped by implicit biases. The diagnosis often leads to segregation in special EBD classrooms or even more restrictive settings, with lower chances of high school graduation and a greater possibility of entry into the "school to prison pipeline."<sup>7</sup> The focus of educators in such settings is on modifying behavior rather than addressing learning or dealing with undiagnosed disabilities. This focus emphasizes short-term goals aimed at preparing students to enter society or act appropriately in the segregated school setting, rather than longer-term goals aimed at social, emotional, and academic learning that is the focus of general education.

The disproportionate nature of the EBD diagnosis given to special education students who are Black or American Indian is a national problem that has been widely noted and debated for decades.<sup>8</sup> UST Law's Community Justice Project (CJP) has studied and documented this phenomenon for years. It appears to be a persistent instance of a systemic structure in place

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4. *List of George Floyd Protests in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_George\\_Floyd\\_protests\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_George_Floyd_protests_in_the_United_States) (last visited May 4, 2021).

5. *List of George Floyd Protests Outside the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_George\\_Floyd\\_protests\\_outside\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_George_Floyd_protests_outside_the_United_States) (last visited May 4, 2021).

6. "Emotional or behavioral disorders" (EBD) is the terminology used by the state of Minnesota to refer to the category of disability that the federal law refers to as "emotional disturbance" (ED). *Compare* MINN. STAT. § 125A.02, subd. 1 (Minnesota definition), and 34 C.F.R. § 300.8(c)(4)(i) (federal definition). This article will use the abbreviation EBD unless specifically referring to the federal definition.

7. Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 412–22 (2016).

8. Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373, 389–91 (2016).

in our community that has significant disproportionate negative effects on Black and American Indian people. In this article we explore this problem and suggest some possible ways for UST Law to help our community address it. In part I, we explain the legal framework in which the EBD definition resides—an interwoven web of federal and state laws and regulations governing the provision of special education services. We highlight the many elements of the relevant legal definitions that not only leave space for but require subjective evaluations easily influenced by implicit biases. In part II, we describe the disproportionate application of the EBD diagnosis to Black and American Indian students and the negative impacts of this diagnosis. In part III, we describe how a special education clinic at UST Law might attempt to address these issues in our community.

## I. LEGAL FRAMEWORK

### A. *Federal Law*

#### 1. *The Individuals with Disabilities Education Act.*

The Individuals with Disabilities Education Act<sup>9</sup> (IDEA) conditions federal special education funding on each state's fulfilling its obligation to provide a "free appropriate public education" (FAPE) to every "child with a disability" between the ages of three and twenty-one.<sup>10</sup> The primary purpose of the IDEA is to ensure that every such child receives a FAPE "that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>11</sup> The FAPE must be provided "at public expense, under public supervision and direction, and without charge," and the FAPE must be provided in accordance with an "individualized education program" (IEP).<sup>12</sup>

The IEP concept is key to the implementation of the IDEA. It requires the school to work with the student and the student's parents to create a written plan specifying all the services and aids that will be provided to support the student's education for the upcoming year, documenting the student's present levels of academic achievement and functional performance, and including measurable annual academic and functional goals designed to enable the student to be involved in and make progress in the general educational curriculum.<sup>13</sup> Another key concept in the IDEA is that students with disabilities are to be educated in the "least restrictive environ-

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9. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2018).

10. 20 U.S.C. § 1412(a) (allowing states to retain some flexibility in providing services to children between the ages of three and five and eighteen and twenty-one). *See also* 20 U.S.C. § 1412(a)(1)(B).

11. 20 U.S.C. § 1400(d)(1)(a).

12. 20 U.S.C. § 1401(9)(a).

13. 20 U.S.C. § 1414(d).

ment.”<sup>14</sup> This means that children with disabilities, “to the maximum extent appropriate,” must be educated:

with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>15</sup>

The IEP must include an explanation of the extent to which the child will not participate with nondisabled children in a regular class.<sup>16</sup>

The IDEA defines the “child with a disability” who is entitled to its protections as any child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), *serious emotional disturbance* (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.<sup>17</sup>

None of the conditions listed in (i) above, including “emotional disturbance,” are defined in the IDEA itself. Instead, the definitions are found in the regulations implementing the IDEA, which are promulgated by the United States Department of Education (DOE).

## 2. *The Department of Education’s IDEA Regulations.*

The regulations implementing the IDEA define emotional disturbance (ED)<sup>18</sup> as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.

14. 20 U.S.C. § 1412(a)(5)(A).

15. *Id.*

16. 20 U.S.C. § 1414(d)(V).

17. 20 U.S.C. § 1401(3) (emphasis added).

18. *See supra* note 6 and accompanying text.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.<sup>19</sup>

While this definition includes schizophrenia, children who are “socially maladjusted” and do not meet the above criteria are not deemed as having an emotional disturbance.<sup>20</sup>

The vagueness and subjectivity of important terms in the definition of emotional disturbance have been the matter of much scholarly comment and critique and the cause of frequent litigation. This discussion can be found primarily in scholarship in the field of psychology (the field responsible for applying the definition).<sup>21</sup> Dr. Amanda L. Sullivan, a psychology scholar who has researched this area extensively, asks: “How does one determine ‘long period of time,’ ‘marked degree,’ ‘satisfactory’ relationship, or ‘inappropriate’ feelings or behaviors?”<sup>22</sup> Compounding the confusion is the definition’s exclusion of children who are “socially maladjusted”—an equally vague and undefined term.<sup>23</sup> The federal definition of emotional disturbance was based largely on the research of Dr. Eli M. Bower, who identified the five factors later included in the definition as the factors that characterized students labeled with ED by medical professionals.<sup>24</sup> Sullivan notes, however, that Bower has criticized the social maladjustment exclusion as being inconsistent with his research, which defined the ED category by the types of social maladjustment he identified.<sup>25</sup> Bower wrote:

To use a definition that operationally and conceptually defines emotional disturbance by their social maladjustments, then dis-

19. 34 C.F.R. § 300.8(c)(4)(i).

20. 34 C.F.R. § 300.8(c)(4)(ii).

21. The same critiques can be found in legal scholarship, as well, though fewer law journal articles address this issue. See, e.g., Julia C. Dimoff, *The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health*, 6 DEPAUL J. HEALTH CARE L. 319, 330–36 (2003).

22. Amanda L. Sullivan, *Wading Through Quicksand: Making Sense of Minority Disproportionality in Identification of Emotional Disturbance*, 43 BEHAV. DISORDERS 244, 246 (2017).

23. R. Skiba and K. Grizzle explain the exclusion as “an accident of history”:

How then, did the social maladjustment exclusion become affixed to the federal definition of SED? The definition of serious emotional disturbance used in PL 94-142 was drafted 10 years earlier . . . The United States Senate chose the term “emotionally disturbed or socially maladjusted.” But in . . . a “highly irregular political move,” the bill was referred to a subcommittee of the House Committee on Interstate and Foreign Commerce, even though the Committee on Education and Labor had been working on similar legislation for years. As a result of relegating the legislation to a committee lacking educational experience, concern for providing services to adjudicated juvenile delinquents became mistranslated as the exclusion of socially maladjusted children. Although psychologists, educators, and administrators have struggled to define and make sense of the social maladjustment exclusionary clause, retrospection suggests that the clause may be quite simply, an accident of history.

Russell Skiba & Ken Grizzle, *The Social Maladjustment Exclusion: Issues of Definition and Assessment*, 20 SCH. PSYCH. REV. 580, 594 (1991).

24. William Dikel & Daniel Stewart, *Emotional/Behavioral Disorders and Special Education: Recommendations for System Redesign of a Failed Category*, 34 HAMLINE L. REV. 589, 590–91 (2011).

25. *Id.*

qualifies them on the same basis, fits Tweedledee's logic, "If it were so, it might be; and if it were so, it would be; but as it isn't, it ain't."<sup>26</sup>

The subjectivity of the criteria for the ED label raises questions about whether unconscious bias may be contributing to the disproportionality in this diagnosis for students who are Black or American Indian. Legal scholar Theresa Glennon has presented a convincing case for such biases in her work.<sup>27</sup> Dr. Sullivan cautions that evidence of bias in eligibility identification is inconclusive, although at least one study has shown bias in referral for eligibility.<sup>28</sup> Sullivan argues, though, that:

[a]lthough not yet well substantiated in special education, behavioral differences between children from dominant and nondominant cultural backgrounds may be related to general tendencies for White observers to interpret behavior differently based on the race and gender of the actor. Research has frequently demonstrated racial bias in numerous decision-making contexts related to capability, culpability, and treatment all of which are certainly interwoven in notions of ED—across a wide variety of fields including social psychology, criminal justice, economics, and various helping professions. . . . It is unlikely educators and related service providers involved in special education disability identification are immune to such biases when the decisions rendered parallel those in other contexts where there is robust evidence of bias. Furthermore, educational research indicates teacher's tendencies to perceive and respond differently to students' behavior in ways that disadvantage students from some racial minority backgrounds . . . and may contribute to problematic behaviors or spill over into special education processes.<sup>29</sup>

Psychology scholars note that the confusion about the definition is displayed in inconsistent case law. Sullivan writes:

Studies of professional practices and interpretations in case law suggest that as a field, there is no consensus on the meaning of ED or how best to determine eligibility for special education. Case law reveals contradictory interpretations of the category by the range of actors—educators, related service providers, families, judges—involved in making decisions about the meaning of ED and its applicability to individuals. More fundamentally, this

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26. Eli M. Bower, *Defining Emotional Disturbance: Public Policy and Research*, 19 PSYCHOL. SCHS. 55, 58 (1982).

27. See generally Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995); Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295 (1993). See also, Raj, *supra* note 8, at 382–83 and sources cited therein.

28. Sullivan, *supra* note 22, at 247 (citing SUZANNE M. DONAVAN & CHRISTOPHER T. CROSS, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION (2002) as documenting bias in referral).

29. Sullivan, *supra* note 22, at 248 (citations omitted).

case law reveals varying, and at times wildly inappropriate (e.g., irrational and unempirical), conceptualizations of psychopathology, volition, culpability, the purpose of special education, and students' rights to treatment versus penalty that parallel divergent scholarly perspectives.<sup>30</sup>

Sullivan's rather harsh conclusion is that, though the law might not make sense, it's "just" the law, not science. She writes:

It is . . . prudent to remain cognizant that ED . . . refers to an administrative category, not clinical disorder, and its definition ultimately was determined by policy makers, not the scholarly and practice communities. Unlike disorders (e.g., psychiatric conditions enumerated in the American Psychiatric Association's 2013 *Diagnostic and Statistical Manual of Mental Disorder* . . . and related scholarship), which provide common nomenclature, features, and thorough description, and can be used to inform treatment and predict outcomes, at most, ED can be considered a 'crude categorization' that 'offers little help in understanding individual children.'<sup>31</sup>

The drafters of the regulation containing this definition should presumably not have the option of dismissing its inadequacies in the same way. However, the DOE has punted on making any changes to the ED definition, despite its awareness of the definition's inadequacies. In 1993, the DOE solicited public comments on the definition.<sup>32</sup> The DOE noted that "[t]he comments received in response to the notice of inquiry expressed a wide range of opinions and no consensus on the definition was reached. Given the lack of consensus and the fact that Congress did not make any changes that required changing the definition, the [DOE] recommended that the definition of *emotional disturbance* remain unchanged."<sup>33</sup> The DOE has had occasion to revisit whether the definition should be revised in connection with changes to the IDEA in 1999 and 2004, and each time it declined to make any changes in the definition.<sup>34</sup>

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30. Sullivan, *supra* note 22, at 246 (citations omitted). Articles cited by Sullivan include: Shanna Sadeh & Amanda L. Sullivan, *Ethical and Legal Landmines: Causal Inference in Special Education Decisions*, 54 PSYCHOL. SCHS. 1134 (2017); Allison H. Cloth et al., *Social Maladjustment and Special Education: State Regulations and Continued Controversy*, 22 J. EMOTIONAL & BEHAV. DISORDERS 214 (2014); Amanda L. Sullivan & Shanna Sadeh, *Differentiating Social Maladjustment From Emotional Disturbance: An Analysis of Case Law*, 43 SCH. PSYCH. REV. 450 (2014); K.W. Merrell & H. M. Walker, *Deconstructing a Definition: Social Maladjustment, Emotional Disturbance, and Moving the EBD Field Forward*, 41 PSYCHOL. SCHS. 899 (2004).

31. Sullivan, *supra* note 22, at 247.

32. Invitation to Comment on the Regulatory Definition of "Serious Emotional Disturbance" and the Use of This Term in the Individuals with Disabilities Education Act, 58 Fed. Reg. 7938 (Feb. 10, 1993).

33. Assistance to State for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12542 (Mar. 12, 1999).

34. Dikel & Stewart, *supra* note 24, at 591–92.



## B. State Law

### 1. Role of State Law in the IDEA's Disability Definitions.

An additional layer of complexity arises from the fact that the IDEA permits states to develop their own definitions and criteria to identify children eligible for special education services, as long as they do not conflict with the federal definition.<sup>35</sup> States have taken advantage of this flexibility to implement a wide range of definitions.<sup>36</sup>

### 2. Minnesota's Definition of EBD

Minnesota's legal definition of a "child with a disability" introduces one very obvious difference from the federal ED definition by broadening the term to "emotional or behavioral disorder"<sup>37</sup> (thus, "EBD" rather than "ED"). Minnesota's exclusionary language is also different. It eschews the federal "socially maladjusted" exclusion entirely, providing instead: "A child with a short-term or temporary physical or emotional illness or disability, as determined by the rules of the [commissioner of education ("commissioner")], is not a child with a disability."<sup>38</sup>

The pertinent regulations define EBD as:

an established pattern of one or more of the following emotional or behavioral responses:

- (A) withdrawal or anxiety, depression, problems with mood or feelings of self-worth;
- (B) disordered thought processes with unusual behavior patterns and atypical communication styles; or
- (C) aggression, hyperactivity, or impulsivity.

The established pattern of emotional or behavioral responses must adversely affect educational or developmental performance, including intrapersonal, academic, vocational, or social skills; be significantly different from appropriate age, cultural, or ethnic norms; and be more than temporary, expected responses to stressful events in the environment.<sup>39</sup>

The regulation goes on to offer examples of behavior that would fall under each category. The following behaviors are examples of category (A) behavior: "isolating self from peers; displaying intense fears or school refusal; overly perfectionistic; failing to express emotion; displaying a pervasive sad disposition; developing physical symptoms related to worry or stress; or

35. Dikel & Stewart, *supra* note 24, at 592.

36. See, e.g., Cloth et al., *supra* note 30 (summarizing state variations in social maladjustment definitions); Sullivan & Sadeh, *Differentiating Social Maladjustment from Emotional Disturbance: An Analysis of Case Law*, *supra* note 30.

37. MINN. STAT. § 125A.02, subd. 1.

38. *Id.* at subd. 2.

39. MINN. R. 3525.1329, subp. 1.

changes in eating or sleeping patterns.”<sup>40</sup> Category (B) might be evidenced by “reality distortion beyond normal developmental fantasy and play or talk; inappropriate laughter, crying, sounds, or language; self-mutilation, developmentally inappropriate sexual acting out, or developmentally inappropriate self-stimulation; rigid, ritualistic patterning; perseveration or obsession with specific objects; overly affectionate behavior towards unfamiliar persons; or hallucinating or delusions of grandeur.”<sup>41</sup> Category (C) behavior examples are “physically or verbally abusive behaviors; impulsive or violent, destructive, or intimidating behaviors; or behaviors that are threatening to others or excessively antagonistic.”<sup>42</sup> These examples are couched in language attempting to offer some boundaries. The behavior must represent “a significant difference from peers,” and the pattern of behavior “must not be the result of cultural factors and must be based on evaluation data which *may* include a diagnosis of mental disorder by a licensed mental health professional.”<sup>43</sup>

The regulation goes on to embellish these categories by repeating similar ideas with additional words. The student’s pattern of behavior has to adversely affect his or her educational performance, resulting in “an inability to demonstrate satisfactory social competence that is significantly different from appropriate age, cultural, or ethnic norms” or “a pattern of unsatisfactory educational progress that is not primarily the result of intellectual, sensory, physical health, cultural, or linguistic factors; illegal chemical use; autism spectrum disorders . . .; or inconsistent educational programming.”<sup>44</sup>

The imprecise and subjective nature of many of the terms found in this definition are obvious: “significantly different from appropriate age, cultural, or ethnic norms”; “failing to express emotion”; “displaying a pervasive sad disposition”; “intimidating behaviors”; “significant difference from peers”; and “not . . . the result of cultural factors.” None of these terms are defined. Moreover, note that the regulation provides that evaluation data forming the basis for this diagnosis *may*, but are not required to, include a diagnosis of mental disorder by a licensed mental health professional. The regulation requires only that the evaluation be supported by current or existing data from the following:

- (1) clinically significant score on standardized, nationally normed behavior rating scales;
- (2) individually administered, standardized, nationally normed tests of intellectual ability and academic achievement;

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40. *Id.* at subp. 2a.A(1).

41. *Id.* at subp. 2a.A(2).

42. *Id.* at subp. 2a.A(3).

43. *Id.* at subp. 2a.A (emphasis added).

44. *Id.* at subp. 2a(B).

- (3) three systematic observations in the classroom or other learning environment;
- (4) record review;
- (5) interviews with parent, pupil, and teacher;
- (6) health history review procedures;
- (7) a mental health screening; and
- (8) functional behavioral assessment.<sup>45</sup>

In a 2011 article, William Dikel, clinical professor of psychiatry at the University of Minnesota, and Daniel Stewart, supervising attorney at the Minnesota Disability Law Center, note that, in their practical experiences, most of the children in Minnesota who are eligible under the EBD category qualify by virtue of behavior that demonstrates “aggression, hyperactivity, or impulsivity.”<sup>46</sup> They find this eligibility route particularly problematic for a number of reasons. The EBD label is applied to a student based solely on inappropriate behavior diverging from the behavior of peers and is not tied to any particular disability; they note that “this becomes a tautological issue as the behavioral symptoms become the disability itself.”<sup>47</sup> Without a precise understanding of the student’s disabilities, it is difficult, if not impossible, to implement effective interventions that might reduce the problematic behavior. This is particularly problematic because “research indicates that the vast majority of students under the EBD category already have a diagnosed mental health disorder or have very significant evidence of having an undiagnosed disorder.”<sup>48</sup> So the application of the EBD label based on the behavior manifesting a disability can prevent further attempts to identify the actual underlying disability.

Minnesota’s definition of EBD is even more open-ended and imprecise than the federal definition of ED and is thus subject to the same sorts of criticisms for inconsistent and inexact application as the federal definition. Indeed, the Minnesota definition seems to leave even more room for subjective interpretation, with the attendant danger of the possible influence of unconscious bias, to which we will now turn.

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45. MINN. R. 3525.1329, subp. 3(A).

46. Dikel & Stewart, *supra* note 24, at 595.

47. Dikel & Stewart, *supra* note 24, at 595.

48. Dikel & Stewart, *supra* note 24, at 595.

## II. DISPROPORTIONAL DIAGNOSIS OF EBD IN BLACK AND AMERICAN INDIAN STUDENTS

### A. *Disproportionality of Black and American Indian Students' Representation in Special Education Has Been a Long-Standing Matter of Concern Nationally*

Racial disproportionality in special education programs has long been recognized as a complex and controversial issue.<sup>49</sup> Many studies indicate a disproportionately high representation of students of color, in particular Black and American Indian students, in disability categories across the country, with particularly striking overrepresentation in the ED category.<sup>50</sup> Other studies suggest an underrepresentation of racial and ethnic minority students, including in the ED category.<sup>51</sup> The complexities of controlling for factors such as poverty, family socioeconomic status, financial condition of schools, and state accountability systems in such studies are staggering.<sup>52</sup> The potential harms of over- and underrepresentation of a given race in special education programs are equally problematic. If Black and American Indian students are underrepresented and special education services are beneficial, those students are missing out on support that not only would help them, but also to which they are legally entitled under the IDEA. If Black and American Indian students are overrepresented and the special education services offered are harmful (with potentially stigmatizing or marginalizing effects that outweigh any benefit), then those students may be disproportionately harmed.<sup>53</sup>

The consistent history of studies showing racial discrepancies has prompted federal action to attempt to generate better data, and to address disproportionality when identified. This federal action is based on a conclusion that minority students (particularly Black students) are overrepresented in special education services. The IDEA Amendments of 1997 incorporated the following into the findings and purposes section of the IDEA:

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49. See, e.g., Sullivan, *supra* note 22, at 245 (summarizing and citing studies showing underrepresentation and overrepresentation).

50. See Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HAR. C.R.-C.L. L. REV. 407, 411–17 (2001) (summarizing history of such findings); see also studies cited in Sullivan, *supra* note 22, at 245.

51. Paul L. Morgan, George Farkas, Marianne M. Hillemeier & Steve Maczuga, *Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools*, 46 EDUC. RESCHER. 305, 309–17; see also studies cited in Sullivan, *supra* note 22, at 245.

52. For a succinct snapshot of studies attempting to account for such variables, Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education>. See also Sullivan, *supra* note 22, at 248–49; Raj, *supra* note 8, at 383–85.

53. See Sullivan, *supra* note 22, at 245 (displaying a simple graphic representing “[s]ampling of interpretations of disproportionality patterns based on combinations of assumptions about accuracy of identification and benefit of services”). See also Raj, *supra* note 8, at 386–90 (discussing harms of disproportional identification).

(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998–1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.<sup>54</sup>

To address these problematic findings, Congress mandated that states collect data on the numbers of children with disabilities who are receiving special education services, by race, ethnicity, and disability category.<sup>55</sup> A few years later, in the Individuals with Disabilities Education Improvement Act of 2004, Congress required that states also collect data on the “incidence, duration, and type of disciplinary actions, including suspensions and expulsions.”<sup>56</sup> If these data reveal “significant disproportionality based on race and ethnicity,” school districts must review and revise their placement policies and publicly report on this revision, and must dedicate 15 percent of their federal IDEA money to serve children in the groups that were significantly overidentified.<sup>57</sup>

The DOE regulations implementing these provisions initially gave individual states the authority to define “significant disproportionality.” But a 2013 Government Accountability Office report concluded that “the way some States defined overrepresentation made it unlikely that any districts would be identified” and thus recommended “a standard approach for defining significant disproportionality to be used by all states.”<sup>58</sup> The DOE initiated rulemaking procedures, eventually formulating a rule that established some common parameters for analysis of disproportionality, but gave states some flexibility in establishing “reasonable risk ratio thresholds” for some degree of disproportionality, in consultation with a broad group of stakeholders.<sup>59</sup> These regulations became effective on January 18, 2017, but

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54. 20 U.S.C. § 1400(c)(12) (emphasis added).

55. 20 U.S.C. § 1418.

56. 20 U.S.C. § 1418(d)(1)(C).

57. 20 U.S.C. § 1418(d)(2).

58. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-137, *INDIVIDUALS WITH DISABILITIES ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION* 22 (2013).

59. Final Regulation Regarding Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 81 Fed. Reg. 92376 (Dec. 19, 2016).

states were given until July 1, 2018 to implement the new rules. In July 2018, the DOE postponed the compliance date by two years.<sup>60</sup> This postponement was effectively challenged in court as violating the Administrative Procedures Act for failure to provide a reasoned explanation for delaying implementation.<sup>61</sup>

Despite these measures, the disproportionate identification of Black and American Indian students in special education persists, particularly in the ED category. The DOE's *41st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*<sup>62</sup> (*41st Annual Report*), analyzing data received from schools nationwide from Fall 2017, reports that Black students were 1.4 times more likely to be receiving special education services than all other racial or ethnic groups combined, and American Indian students were 1.6 times more likely. Black students were 2 times more likely to be categorized as ED than all other racial or ethnic groups combined, and American Indian students were 1.6 times more likely.<sup>63</sup>

### B. *Disproportionality Data in Minnesota*

The disproportionate representation of Minnesota's Black and American Indian students in special education in general, and in particular in the EBD category, has long been recognized. The Minnesota Department of Education (MDOE) documented such disparities in a 1992 report showing student placement rates in the EBD category of 4.4 percent for Black students and 4.5 percent for American Indian students, as opposed to 2.8 percent for all groups.<sup>64</sup> A 1998 report based on 1997 enrollments showed a rate of 3.57 percent for Black students, 5.02 percent for American Indian students, and 1.89 percent for all groups.<sup>65</sup> The 1998 report was part of a 230-page manual published by the Minnesota Division of Special Education, entitled *Reducing Bias in Special Education Assessment for American Indian and African American Students: A Vision for a Better Education*. This Manual acknowledges the complexity of identifying the causes of

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60. Final Rule Delaying Compliance Date Regarding Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 31306 (July 3, 2018).

61. Council of Parent Attorneys and Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28 (D.D.C. 2019).

62. U.S. DEP'T OF EDUC., 41ST ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 48 (2019) [hereinafter 41ST ANNUAL REPORT].

63. *Id.* at 49.

64. See DIV. OF SPECIAL EDUC., MINN. DEP'T OF CHILD., FAMS. & LEARNING, REDUCING BIAS IN SPECIAL EDUCATION ASSESSMENT FOR AMERICAN INDIAN AND AFRICAN AMERICAN STUDENTS 1 (1998) [hereinafter REDUCING BIAS REPORT]. This report notes that disproportional placement has been a concern reaching back to 1980.

65. *Id.* at 2.

these persistent disproportionalities, citing observations of focus groups that pointed to the following issues:

- Broad social issues (poverty, racism, family stability);
- General education system issues (the capacity of schools to provide effective instruction to a changing and challenging student body);
- Higher education issues (teacher recruitment and preparation for working with a changing student population); and
- Special education system issues (assessment, eligibility criteria, instructional practices).<sup>66</sup>

As the title suggests, this manual contains extensive guidelines for supporting “non-biased assessment practices” to address these disproportionalities. The suggestions include such things as:

1. Applying a Sociocultural Checklist to students in the referral stage, to “assist schools in documenting that they systematically gathered information and ruled out race and culture, communication, socioeconomic and other diversity factors as the primary cause of a student’s academic difficulties”;<sup>67</sup>
2. If the Sociocultural Checklist indicates sociocultural concerns, following a special assessment procedure<sup>68</sup> that includes culturally sensitive observation and interview guidelines for student and family interviews;<sup>69</sup> and
3. Paying particular attention to the appropriateness of standardized test instruments for diverse students.<sup>70</sup>

These guidelines do not, however, appear to have borne much fruit.

A more recent analysis of Minnesota’s disproportionality child count data from 2013 to 2016 revealed that, while Black students account for only approximately 11 percent (99,600) of the general student population and approximately 12 percent of students in special education, they represented 52 percent of the students in the EBD category from 2013 to 2016.<sup>71</sup> In contrast, Black students accounted for only 1.7 percent of the 9 percent of all students in special education who receive the more specific diagnosis of Autism Spectrum Disorder.<sup>72</sup>

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66. *Id.* at 8.

67. *Id.* at 52–64.

68. *Id.* at 63.

69. *Id.* at 65–66.

70. REDUCING BIAS REPORT, *supra* note 64, at 68–142.

71. MINN. DEP’T OF EDUC., SPECIAL EDUCATION EQUITY COMMUNITIES OF PRACTICE PROJECT 7, <https://www.leg.mn.gov/docs/2020/other/200711.pdf> (last visited May 4, 2021) [hereinafter SEECPP REPORT].

72. *Id.* at 5.

### C. *Negative Consequences of EBD Diagnosis*

Overuse of the EBD category for Black and American Indian students is widely perceived as problematic because there is strong evidence that the interventions and strategies used to educate students in this category are largely incompatible with IDEA's ideals, ineffective, and, in fact, harmful.

#### 1. *Students with ED classifications are disproportionately excluded from general education settings.*

The DOE's *41st Annual Report* reveals that only 48 percent of students in the ED category spend 80 percent or more of their school day in regular classes—17.4 percent spend 40 percent to 79 percent of the day in regular classes, 18 percent spend less than 40 percent of the day in regular classes, and 16.6 percent are educated in “other environments.”<sup>73</sup> “Other environments” are defined as “separate school, residential facility, homebound/hospital environment, correctional facilities, or parentally placed in private schools.”<sup>74</sup> For context, of children with all disabilities, 63.5 percent spend 80 percent or more of the day in regular classes, and only 5.1 percent are educated in the totally segregated “other environments.”<sup>75</sup>

Segregating ED students falls short of the IDEA's aspiration of educating students with disabilities in the least restrictive environment, to the greatest extent possible. Of course, the behaviors that a student in the ED category manifests may make it difficult to educate her in a general education classroom, both because of the effect of these behaviors on other students and because of the lack of training and resources for general education teachers.<sup>76</sup> However, studies also suggest that “segregated placements of students with behavioral health conditions can cause these students' behaviors to worsen because they model each other's anti-social and challenging behaviors.”<sup>77</sup>

In their 2011 study of Minnesota's EBD population, Dikel and Stewart note that students with an EBD label tend to be viewed from a behavioral rather than a clinical perspective. Thus, educational goals, services, accommodations, and modifications are based on behaviors rather than disability.<sup>78</sup> Segregated classrooms exacerbate this tendency. Many studies document the lower academic and social achievement of students with EBD

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73. 41ST ANNUAL REPORT, *supra* note 62, at 55.

74. 41ST ANNUAL REPORT, *supra* note 62, at 55.

75. 41ST ANNUAL REPORT, *supra* note 62, at 55. See also L. Kate Mitchell, “We Can't Tolerate That Behavior in This School!”: *The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 N.Y.U. REV. L. & SOC. CHANGE 407, 417–18 (2017) (documenting segregation of students in ED categories).

76. Mitchell, *supra* note 75, at 418–19.

77. Mitchell, *supra* note 75, at 419.

78. Dikel & Stewart, *supra* note 24, at 596.



in our schools.<sup>79</sup> Students with the EBD label “may be placed on an EBD ‘track’ that has the potential to lead to a Setting IV<sup>80</sup> EBD school. Setting IV EBD schools are often locked from the inside and outside, have seclusion rooms, metal detectors and police, and use restraints on students.”<sup>81</sup>

2. *Students with ED classifications are more often subject to discipline in the form of suspensions or expulsions.*

Students with disabilities are subject to disproportionate rates of disciplinary actions in the form of suspension or expulsion, with students in the EBD category at particularly high risk.<sup>82</sup> This appears to be the case in Minnesota as well. Minnesota’s 2016–2018 disproportionality child count data shows that Black students in special education comprise 40 percent of all disciplinary actions in the state, although Black students as a whole only represent 11 percent of the student population.<sup>83</sup> This data also indicates an upward trend in the disproportionality of EBD diagnoses, as well as both out-of-school and in-school suspensions.<sup>84</sup> When students are suspended or expelled, they do not receive the educational services they need, further diminishing their chances of academic progress and increasing their chances of dropping out of school altogether. This, in turn, increases the chances that the students will become involved with the criminal justice system.<sup>85</sup>

3. *Students with ED classifications are more likely to end up involved in the juvenile justice system.*

The overrepresentation of students with disabilities generally in the juvenile justice system has long been a concern.<sup>86</sup> Once again, students in the EBD category appear to be of particular concern. A recent study by Aleksis P. Kincaid and Amanda L. Sullivan examines data on this topic from the state of Minnesota. Kincaid and Sullivan note how hard it is to research the involvement of students with disabilities in the juvenile justice system because of the lack of systematic reporting. IDEA’s reporting mandates only

79. Cannon et al., *supra* note 7, at 413–15.

80. This is the designation for schools that are segregated, serving only students receiving services under the IDEA who, for various reasons, are not deemed to be best served in an integrated setting. See *Arc Guide to Least Restrictive Environment (LRE) in Education*, ARC MINN. (2019), <https://arcminnesota.org/resource/arc-guide-to-least-restrictive-environment-lre-in-education>.

81. Dikel & Stewart, *supra* note 24, at 597.

82. Cannon et al., *supra* note 7, at 416–18.

83. SEEPC REPORT, *supra* note 71, at 12–13.

84. SEEPC REPORT, *supra* note 71, at 12.

85. Cannon et al., *supra* note 7, at 417–20.

86. See, e.g., Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909 (2010); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & Fam. Advoc. 3 (2003).

apply to students with disabilities who are receiving special education services while in correctional facilities; there is little or no screening of youth entering the juvenile justice system for disabilities, and little interagency coordination of educational records.<sup>87</sup> The data that is reported shows that approximately 0.3 percent of all students with disabilities are educated in correctional facilities, “ranging from a high of 1.7% of students with emotional disturbance to no students with autism.”<sup>88</sup> Kincaid and Sullivan found that, in Minnesota, youth with ED had a statistically significantly higher risk of being involved in the juvenile courts than youth without disabilities, or youth with most other disabilities.<sup>89</sup> Across three different models of calculation, they found the risk for students labeled ED to be 2.85 percent, 2.59 percent, and 1.98 percent higher than for students without disabilities.<sup>90</sup> No other disability category had higher risk ratios.<sup>91</sup>

The study’s statistical analysis was careful and attempted to correct for covariates such as sex, race-ethnicity, free-and-reduced lunch eligibility (as a proxy for parental income), and academic performance.<sup>92</sup> Nevertheless, the authors caution that, just as with the research to date on racial disproportionality in special education programs, teasing out the effects of other complicating factors that might affect these findings is difficult but important. They offer a roadmap of possible complexities to be considered in future research:

These findings should be investigated further relative to the complicated and controversial body of literature on racial disproportionality in special education identification and outcomes, particularly for students with behavioral difficulties, and the complex intersections of race, educational opportunity, and achievement gaps in the school-to-prison pipeline. Additional research on the experiences of students with disabilities prior to court appearance wherein these varied lenses are applied could help explain their overrepresentation. In addition, arrest rates and information about county attorneys’ propensity to refer youth to court or divert them from the juvenile justice system could provide valuable insight into why certain groups of students with disabilities are overrepresented in juvenile courts.<sup>93</sup>

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87. Aleksis P. Kincaid & Amanda L. Sullivan, *Double Jeopardy? Disproportionality in First Juvenile Court Involvement by Disability Status*, 85 EXCEPTIONAL CHILD. 453, 455 (2019).

88. *Id.* (emphasis added).

89. *Id.* at 461.

90. *Id.*

91. *Id.*

92. *Id.* at 458.

93. Kincaid & Sullivan, *supra* note 87, at 464.

### III. POSSIBLE APPROACHES TO ADDRESSING THE PROBLEM

The statistically disproportionate classification of Minnesota's Black and American Indian students as falling into the EBD category is a fact, regardless of our inability to directly isolate its cause. Similarly, the statistically disproportionate rates of students in the EBD category who experience segregated education, expulsion and suspension, and involvement in the juvenile justice system are facts, regardless of the obstacles to teasing out the many variables that might contribute to this disproportion. Finally, the vague and subjective nature of the ED and EBD definitions is also a fact, leaving open the possibility that this classification is more likely to be influenced by unconscious biases than disability classifications that are based on more objective criteria, even if studies have not conclusively proven such influences.

Taken together, these realities offer a compelling argument for UST Law to continue and intensify its involvement in this area. This could be done by establishing a clinic in which students are trained to assist local students receiving special education services and their parents, with a particular focus on students with an EBD diagnosis. The guiding document for all services and placement decisions under the IDEA is the IEP.<sup>94</sup> This document is negotiated annually by a team consisting of education professionals, the student, and the student's parents or guardians. Because it is unlikely that families would have the ability to get legal assistance at the time of classification, the annual review of the IEP may be the most productive point for counsel to intervene and attempt to assess the legitimacy of the diagnosis and the resultant decisions about services and placement.

Professor Schiltz offered such a clinic for the first time in the 2021 spring semester. In collaboration with the Minnesota Disability Law (MDL) Center of Mid-Minnesota Legal Aid, UST Law students have begun building a platform to train parents and students to navigate the complexities of special education placement and services, as well as to provide direct services to families with annual IEP reviews, analyzing IEPs for proper documentation of diagnoses, least restrictive placement possibilities, and appropriate, measurable academic goals. Experience gained over the years with such direct service work might someday offer the basis for more systemic reform work to address disproportionality in special education services in our community, in collaboration with and building on the work already begun in this area by the CJP.

In a message for the International Day of Persons with Disabilities on December 3, 2019, Pope Francis said:

In recent years inclusive processes have been put in place and developed, but this is still not enough, because, in addition to

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94. See the following statutes and accompanying texts: 20 U.S.C. § 1414(d); 20 U.S.C. § 1414(a)(5)(A); 20 U.S.C. § 1414(d)(v).

physical barriers, prejudice also gives rise to limitations on access to education for all, employment and participation. In order to build themselves, people with disabilities not only need to exist but they also need to belong to a community.<sup>95</sup>

UST Law's continued efforts to address the racially disproportionate application of the EBD label in special education offer a response to Pope Francis's call, potentially dismantling barriers to accessing fully integrated educational opportunities for all members of our community.

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95. *Message of The Holy Father Francis for International Day of Persons with Disabilities*, VATICAN (Dec. 3, 2019), [http://www.vatican.va/content/francesco/en/messages/pont-messages/2019/documents/papa-francesco\\_20191203\\_messaggio-disabilita.html](http://www.vatican.va/content/francesco/en/messages/pont-messages/2019/documents/papa-francesco_20191203_messaggio-disabilita.html).