



Preventing Disproportionality through Nondiscriminatory Tiered Services

**Amanda L. Sullivan
Mollie R. Weeks
Tara Kulkarni
Annie Goerdt**

Equity by Design

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KEY TERMS

Disproportionality - Under IDEA, this means unequal special education identification, placement, or discipline. For more information, see <https://sites.ed.gov/idea/files/significant-disproportionality-qa-03-08-17-1.pdf>. In the broader professional literature, disproportionality generally refers to “the extent to which membership within a given ethnic group affects the probability of being placed in a specific special education disability category” (Oswald, Coutinho, Best, & Singh, 2008; p. 198).

Nondiscriminatory - No person shall on the grounds of race, creed, color, national origin, age, ancestry, nationality, gender, disability, religion, affectional or sexual orientation, gender identity or expression, income level or ability to read, write or speak English be excluded from participation in, be denied the benefits of, or otherwise subjected to discrimination or retaliation under any program or activity (42 USC 2000d).

Coordinated Early Intervening Services - Services to K12 students needing academic and behavioral supports to achieve in general education. CEIS may include instructional or behavioral services, assessment, or other supports, and professional development to allow educators and other service providers to provide research-based instruction, intervention, assessment, etc. For more information, see https://www2.ed.gov/policy/speced/guid/idea/ceis_pg3.html.

Multitier Systems of Support - An evidence-based framework for integrating services to support students' academic achievement, behavior, and social-emotional development.

Title VI - Federal law prohibiting discrimination in public elementary and secondary schools based on race, color, or national origin, among other bases (Lhamon, 2014).

Individuals with Disabilities Education Improvement Act - Federal legislation that requires State Education Agencies (SEAs) and local education agencies (LEAs) to provide free and appropriate public education (FAPE) to all eligible children with disabilities (20 U.S.C. §§ 1412(a)(1), 1413(a)(1)).

For more than 50 years, culturally and linguistically diverse (CLD) students have been disproportionately identified for special education relative to their representation in the general enrollment in schools. Scholars have long been concerned about whether such disproportionate identification is due to inappropriate labeling of students from marginalized racial, cultural, and socioeconomic statuses (Sullivan & Proctor, 2016). Federal regulations pertaining to disproportionate representation in special education presume that over-identification of special needs among racial-minority students may be attributable to inappropriate or discriminatory school policies, procedures, and practices. Discriminations occur when students are incorrectly identified with a disability because of their social status or educators' responses to that social status (e.g., biased perceptions of behavior or ability).

Most disproportionality research focuses on over-representation of CLD children in special education. However, disproportionality also includes inappropriate under-identification (Waitoller, Artiles, & Cheney, 2010), which may also undermine equity when students are denied services to which they are legally entitled and need because of their social status (e.g., refusal to consider whether an English learner might also have a disability; failure of educators to recognize autism in racial-minority students). In addition, disparities in students' treatment after identification, particularly in placement and discipline, are problematic. This brief provides an overview of state and district legal requirements related to disproportionality; addresses common pitfalls in policy, practices, and procedures; and discusses how to proactively structure policies and procedures in multitier systems of service delivery to prevent discrimination related to disproportionality.

Federal Policy Related to Disproportionality

Schools' responses to disproportionality are closely tied to rules and regulations that have resulted from various reauthorizations of the Individuals with Disabilities Education Improvement Act (IDEA). IDEA's 1997 reauthorization introduced requirements for states to define and monitor local education agencies (LEAs) for "significant disproportionality" in special education identification, placements, and discipline by students' race/ethnicity (20 U.S.C. § 1418(d)(1)). Estimation of significant disproportionality must include numerical data on any student identified for special education in an LEA except those students unilaterally placed by the courts or health care providers. Most importantly, determination of significant disproportionality is not based on contextual information or consideration of whether observed patterns reflect appropriate identification. The 2004 reauthorization also added the mandate that 15% of an LEA's federal special education funds be directed to coordinated early intervening services (CEIS) when significant disproportionality in identification, placement, or discipline was found (20 U.S.C. § 1418(d)(2)). Most recently, new disproportionality regulations released at the end of 2016 require states to apply a standard methodology to determine significant disproportionality, identify root causes when significant disproportionality is found, and address those causes through CEIS for P12 students in general or special education (USDOE, 2016a). Funds should be redirected towards the benefit of those groups affected by the observed disproportionality, but not used exclusively for those groups. Any unexpended funds of the 15% set aside for CEIS are forfeited to the federal government.

An additional federal law applicable to disproportionality is the Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin. Discrimination

prohibited under Title VI includes disproportionality in special education resulting from discrimination due to students' race/ethnicity or language status. The Office of Civil Rights (OCR) enforces Title VI. In OCR's responses to disproportionality, numerical estimations of disproportionality are not treated as evidence of discrimination. Instead, OCR has focused on the context in which disproportionality may occur, paying particular attention to the appropriateness of district and schools' policies, procedures, and practices, and the consistency with which they are applied. In investigating complaints of discrimination, where reliable, valid, nondiscriminatory general and special education policies and procedures were not in place or were not consistently implemented, districts are found at fault and corrective action is required. The expectation is that districts and schools should consistently implement reliable and valid assessment and intervention procedures for all students, and make individualized special education decisions for every student. For example, discrimination occurs when policies or procedures advantage some groups over others, such as discipline policies that target behaviors more common in one group than another (e.g., prohibiting hairstyles common to a particular ethnicity).

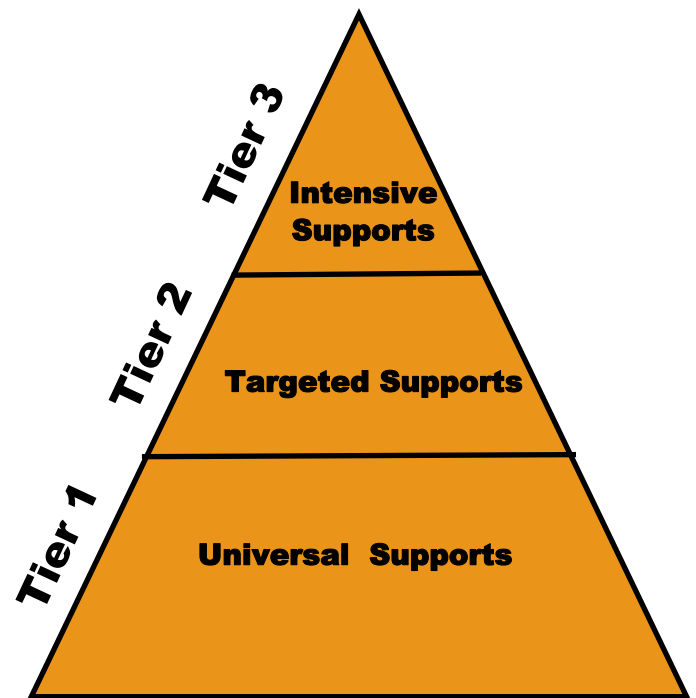


Conversely, discrimination may also occur when policies and procedures are fair, but are applied inequitably, such as when racially minoritized students are provided evidence-based instruction or intervention less frequently or less consistently than white students, or when racially minoritized students are barred from special education because of an LEA's concern for avoiding 'significant disproportionality' under IDEA.

From a Title VI standpoint, there are numerous factors that may contribute to disproportionality. These include, but are not limited to, a lack of access to scientifically based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; and differences in academic achievement levels. Districts must ensure compliance with Title VI by treating all students equally in the educational decisions surrounding special education—that is, screening and pre-referral intervention, evaluation and eligibility determination, and formulation and implementation of individualized educational programs (IEPs). One common method used to reduce disproportionate special education referrals is the implementation of evidence-based intervention strategies to provide support for students (34 C.F.R. § 104.35 (a)). Title VI requires students be provided with equitable opportunities to receive interventions regardless of race, color, or national origin (34 C.F.R. § 100.3(a), (b)(1)). Disproportionality in intervention services can also be reduced by providing training to educators in differentiating disability from contextual factors that could contribute to a student's academic or behavioral challenges (Lhamon, 2016).

Nondiscriminatory Multitier Systems of Service Delivery

Coordinating and implementing the various elements identified above can seem a daunting undertaking. Notably, although disproportionality is likely a multiply determined phenomenon (Skiba et al., 2008), it is important for educators to explore solutions targeting malleable factors within schools and to avoid simply admiring the problem by suggesting that the causes of disproportionality are outside the purview of educators' and schools' effects. Efforts to address disproportionality must also be comprehensive in nature as no one intervention has been found to be successful in isolation (Skiba et al., 2008). Multitier systems of support (MTSS) provide a valuable framework for planning and coordinating efforts related to monitoring, CEIS, pre-referral procedures, and special education decision making for individual students.



MTSS is a framework for coordinating delivery of research-based instruction, prevention, and intervention supports of increasing intensity and specialization, as well as integrating school improvement planning, evaluation systems, and initiatives to support student learning and development.

Common examples are response to intervention (RTI) and schoolwide positive behavior interventions and supports (PBIS), but many states and school systems are merging academic and social-emotional supports in unified MTSS. Common features of MTSS include site-wide multilevel or graduated instructional, behavioral, and/or social emotional supports for preventing academic difficulties and responding to students' diverse needs; assessment procedures (e.g., screening, progress monitoring); and data-based decision making based on student response data to guide instruction, intervention, and other supports for students with varying needs, including special education evaluation and IEP planning. Team-based collaborative planning, implementation, and evaluation of MTSS and the practices delivered within it are also critical features of effective, sustainable MTSS.

MTSS is commonly described in tiers: Tier 1 refers to schoolwide or universal supports available to all students; Tier 2 refers to targeted services for specific needs beyond what is supported by the general curriculum, instruction, and other whole school programming. Tier 3 and beyond include the most intensive, sustained supports from severe, chronic difficulties and may include individualized services such as special education, wraparound services, and intensive therapies. This framework provides a valuable means of organizing the actions discussed above along with existing initiatives. The following are practical suggestions to address disproportionality through proactive prevention within MTSS.

Tier 1 Supports to Address Disproportionality

There is evidence to suggest that inadequate opportunities to learn are a contributing factor to disproportionality (Harry & Klingner, 2006), highlighting the continual challenge educators face when determining whether academic or social emotional struggles are due to disability or

contextual factors that impact learning (U.S. Government Accountability Office, 2013). MTSS provides a means of coordinating and evaluating schoolwide practices to ensure that all children are provided necessary supports. One strategy for preventing disproportionality is to bolster prevention efforts by ensuring provision of high-quality, rigorous curriculum and behavioral supports, conducting universal academic and social-emotional screening to identify students at risk for difficulties, and providing evidence-based interventions within the general education setting (Lhamon, 2016). These efforts can be supported by structured instructional consultation teams to provide education for school personnel to engage in collaborative communication, systematic problem-solving, curriculum-based assessment, and the collection, charting, and analysis of classroom data (Gravois & Rosenfield, 2006).

Tier 1 efforts can include policy and procedure development, training, and evaluation endorsed by OCR to prevent discrimination in special education. Universal screening data can be used to not only gauge student learning and need for intervention, but to determine effectiveness of curriculum and instruction, and to explore the potential disparate impact of policies and schoolwide procedures and practice for various subgroups within the school. Beyond examining assessment and instruction practices, schools should pay attention to factors influencing school climate such as teacher preparation, relationships with students, and cultural competency.

Given the significant disparities between teacher and student demographics (USDOE, 2016b), there are concerns about whether teachers are equipped with the knowledge to interact with students who are different from them in a culturally-informed and sensitive way (Skiba et al., 2008).

Such disparities call for intentional efforts to increase the recruitment and retention of teachers from diverse backgrounds (USDOE, 2016b). Moreover, researchers emphasize the importance of engaging in culturally responsive pedagogy, self-assessment to understand individual cultural competency, and involving family members and cultural brokers in the special education referral and evaluation process (Skiba et al., 2008). When significant disproportionality is found under IDEA, CEIS funds can be directed to Tier 1 and Tier 2 supports to reduce development of special needs and support children at risk for later difficulties.

Tier 2 Supports to Address Disproportionality

Tier 2 often includes a collaborative, multidisciplinary team to identify and facilitate research based interventions for learning, behavior, and social emotional development. It is important to base the intervention process on well-articulated protocol, access to research-based interventions, and clear guidelines on the circumstances under which referral to determine special education eligibility would be considered. As in Tier 1, data should be used not only to gauge student progress but also to ascertain effectiveness and equity of efforts. Language specialists and other related service providers should be included to facilitate matching of interventions to student needs, and consideration of the potential influence of language acquisition, cultural differences, and other experiential considerations on student responsiveness to interventions and potential referral for special education. To avoid misattributing educational challenges to within-child factors, assessment practices should focus on low-inference decisions, which are characterized by collecting data on observable behaviors, and environmental characteristics that are malleable within the educational environment (Christ, 2008). By evaluating data on observable behaviors and educational

climate, school personnel may be able to reduce assessment bias and make accurate decisions about what a student needs to succeed in school. In addition, fidelity to all Tier 2 protocols should be measured and regularly evaluated to ensure policies and procedures are consistently implemented. Monitoring of fidelity of implementation should include consideration of whether protocols are implemented consistently with all student subgroups.



Children are placed at risk for both over- and under-representation in special education when discrimination enters into the referral process. Compared to other steps within the path to special education, referrals tend to have less guidance which leaves room for decisions based on bias (OCR, 2016), and research synthesis suggests that the referral process is the aspect of the special education identification process for which there is the most research evidence of bias (Donovan & Cross, 2002). This is especially true for referrals for behavioral concerns (Skiba et al., 2008) given culturally and racially-based differences in behavioral expectations and interpretation. One practical, yet multifaceted, suggestion for helping schools prevent disproportionality is to create more structure around the special education referral process. Effective strategies observed by the OCR (2016) include creating written procedures that provide structured guidance for school personnel about the appropriate time to refer a student for an evaluation.

They also include educating and support for teachers to implement new referral procedures; monitoring referrals for potential bias; and creating opportunities for teachers to learn about ways to identify and counter stereotypes in the classroom.

Although mandated in districts in which disproportionality is observed (USDOE, 2016), continual review and revision of local special education policies can help all schools implement referral practices in a nondiscriminatory manner.

Tier 3 Supports to Address Disproportionality

Efforts to ensure nondiscrimination should continue throughout eligibility and IEP processes. Eligibility determination may be influenced by environmental factors including low-socioeconomic status, English proficiency, racial/cultural bias in schools, and limited access to evidence-based curricula (GAO, 2013). To combat biases and discriminatory decisions, teams can adopt an ecological orientation by considering environmental factors that may influence student learning and avoiding decisions requiring a significant amount of unfounded inference. Evaluations should be tailored to the particular characteristics and needs of each student. Evaluators should investigate the technical adequacy of any instruments used, and apply multiple reliable, valid tools in every evaluation. So-called standard batteries wherein the same set of instruments are used for every students are to be avoided. When a student is found eligible for special education, parents, specialists, and related service providers should be fully involved in constructing an IEP that is designed based on the various data gathered throughout the evaluation process, as well as data obtained through the various MTSS processes, in conjunction with consideration of the students' background and experiences. As in Tiers 1 and 2, teams should rely on research-based

interventions and practices, paired with monitoring of both student progress and team's fidelity of implementation, adjusting as needed to boost integrity of implementation and effectiveness. All students, regardless of race, color, national origin, should have equal access to various interventions, supports, and placements appropriate to their identified needs rather than by their identified disability category or social statuses. As in the other Tiers, the effectiveness and potential disparate impact of efforts should be evaluated regularly, with adjustments to school policies, procedures, and practices as necessary if differential opportunity, access, or outcomes are found.

Where can you find free information about research-based MTSS and related practices?

- Center on Response to Intervention, <https://www.rti4success.org/>
- PBIS OSEP Technical Assistance Center, <http://www.pbis.org/>
- What Works Clearing House, <https://ies.ed.gov/ncee/wwc/>
- The National Implementation Research Network, <http://nirn.fpg.unc.edu/>
- RTI Action Network, www.rtinetwork.org

Disproportionality Requirements: Common Pitfalls and Recommended Actions

Requirement	Pitfalls to Avoid	Recommended Action
<p>⇒ Nondiscriminatory policies, procedures, and practices.</p>	<ul style="list-style-type: none"> • Students of racial-minority backgrounds treated differently than white students with similar performance/behavior. • Reliance on overly subjective processes. • Failure to articulate or implement research-based assessment or intervention. • Reliance on procedures or practices lacking evidence of reliability or validity. • Inconsistent or absent documentation of assessment and intervention. 	<ul style="list-style-type: none"> • Monitor referral, intervention, and assessment/evaluation procedures to ensure equitable application and effectiveness. Students with similar performance and behavior should be treated similarly. • Select and implement research-based universal screening procedures for academic, behavioral, and social-emotional development. • Use multidisciplinary intervention terms to identify and facilitate research-based pre-referral intervention. • Create and use data systems for documenting school, class, and individual assessment and intervention procedures and outcomes. • Create written procedures that provide structured guidance for school personnel about the appropriate time to refer a student for an evaluation, including processes that should be completed before evaluation is considered (e.g., behavior plans, small group intervention, 1-1 intervention, progress monitoring) • Train and support for teachers to implement new referral procedures, and include refreshers at least annually. • Allow school administrators to monitor referrals for potential bias on an annual basis, considering effects of individual, building, and group-based patterns. • Create opportunities for teachers to learn about ways to identify and counter racial stereotypes within the classroom in classroom management, relationships with students, and instruction.
<p>⇒ Consistently implemented policies, procedures, and practices.</p>	<ul style="list-style-type: none"> • Failing to ensure staff knowledge of policies, procedures, and practices. • Failure to implement as specified. • Inconsistent applications across buildings, classrooms, or groups. 	<ul style="list-style-type: none"> • Include language specialists, family members, and other relevant stakeholders, and related service providers in pre-referral planning, intervention, evaluation, and IEP planning. • Ensure background and language acquisition are taken into account in educational decision, eligibility determination, and IEP formulation. • Use a variety of reliable, valid tools in every evaluation of special education eligibility. • Individualize every evaluation and IEP process for individual student characteristics and needs.

Requirement	Pitfalls to Avoid	Recommended Action
⇒ Define and monitor 'significant disproportionality'.	<ul style="list-style-type: none"> Exclude enrollment data because of contextual factors Exclude enrollment data for certain placements or feeder schools Controlling for confounds 	<ul style="list-style-type: none"> Contextual information may be considered when determining whether disproportionality resulted from inappropriate policies, procedures, or practices. Excluded cases unilateral residential placements by justice or health systems
⇒ Reallocate 15% federal funds to comprehensive early intervening.	<ul style="list-style-type: none"> Failing to comprehensively review policies, procedures, and practices that may have contributed to disproportionality Failing to expend CEIS funds Reducing maintenance of effort under IDEA Reducing expenditures for students in private schools 	<ul style="list-style-type: none"> Review policies to determine whether intentionally or unintentionally discriminatory. Involve all stakeholders in evaluation of policies and procedures. Use best practice and research as a guide for formulating policies and procedures.
⇒ Identify and address root causes of disproportionality.	<ul style="list-style-type: none"> Failure to evaluate rationale, assumptions, effectiveness, and potential disparate impacts of policies, procedures, and practices. 	
⇒ Individualized educational decisions. Failure to coordinate with specialists and related service providers.	<ul style="list-style-type: none"> Failure to account for background, language status, educational experience, etc. in educational decision. Use of standard batteries, uniform teams, or standard category-IEP arrangements. Refusal to consider eligibility or placements for students of certain groups because of LEA or site desire to avoid 'significant disproportionality' under IDEA. 	<ul style="list-style-type: none"> Include language specialists, family members, and other relevant stakeholders, and related service providers in pre-referral planning, intervention, evaluation, and IEP planning. Ensure background and language acquisition are taken into account in educational decision, eligibility determination, and IEP formulation. Use a variety of reliable, valid tools in every evaluation of special education eligibility. Individualize every evaluation and IEP process for individual student characteristics and needs.





About the Midwest & Plains Equity Assistance Center

The mission of the Midwest & Plains Equity Assistance Center is to ensure equity in student access to and participation in high quality, research-based education by expanding states' and school systems' capacity to provide robust, effective opportunities to learn for all students, regardless of and responsive to race, sex, and national origin, and to reduce disparities in educational outcomes among and between groups. The Equity by Design briefs series is intended to provide vital background information and action steps to support educators and other equity advocates as they work to create positive educational environments for all children. For more information, visit <http://www.greatlakesequity.org>.

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