



Dear Colleague Letter: Preventing Racial Discrimination in Special Education

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Notice of Significant Guidance. The U.S. Department of Education (Department) has determined that this letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). See www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf. Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this letter to provide State and local educational agencies with information to assist them in meeting their obligations under Federal civil rights laws, including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and implementing regulations that the Department enforces. 42 U.S.C. § 2000d-2000d-7; 34 C.F.R. pt. 100; 29 U.S.C. § 794; 34 C.F.R. pt. 104; 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35. This letter also provides members of the public with information about their rights under the laws and regulations.

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

December 12, 2016

Dear Colleague:

I write to remind States, districts, and public schools, including charter schools, of their obligation under Title VI of the Civil Rights Act of 1964 (Title VI) not to discriminate on the basis of race, color, or national origin in the administration of special education or related aids and services.¹

This guidance also addresses the interplay of Title VI obligations with the requirements of the following Federal disability laws: Section 504 of the Rehabilitation Act of 1973 (Section 504)

¹ The Department's Office for Civil Rights (OCR) enforces Title VI, which prohibits discrimination based on race, color, or national origin by schools and other recipients of Federal financial assistance from the Department. 42 U.S.C. § 2000d-2000d-7; 34 C.F.R. pt. 100. For ease of readability, this letter sometimes uses the phrases "discrimination on the basis of race" and "racial discrimination" to refer to discrimination on the basis of race, color, or national origin.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. [OCR-00098]

and Title II of the Americans with Disabilities Act of 1990 (Title II) (both as amended);² and the Individuals with Disabilities Education Act (IDEA).³ This guidance focuses specifically on the subset of students who need special education services as part of the free appropriate public education (FAPE) to which they are entitled, as well as students inappropriately identified as needing those services.

Special education and related services are vital to students with disabilities who need such services, and I applaud the dedication of thousands of State, district, and school administrators and educators in meeting students' individual educational needs. Unfortunately though, our enforcement experience continues to confirm: (1) over-identification of students of color as having disabilities; (2) under-identification of students of color who do have disabilities;⁴ and (3) unlawful delays in evaluating students of color for disability and their need for special education services.⁵

² Section 504 is a Federal law that prohibits discrimination against individuals with disabilities in programs or activities of entities, such as public schools and charter schools, that receive Federal financial assistance. 29 U.S.C. § 794; 34 C.F.R. pt. 104. OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including public school districts. Title II is a Federal law that prohibits discrimination against individuals with disabilities in State and local government services, programs, and activities (including public schools and public school districts), regardless of whether they receive Federal financial assistance. In the education context, OCR shares in the enforcement of Title II with the U.S. Department of Justice (DOJ). Section 504 and Title II use the same definition of disability. 29 U.S.C. § 705(9) (B), (20) (B) (definition of disability under Section 504 is the same as under the ADA). 42 U.S.C. § 12102. As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. 28 C.F.R. § 35.103. Accordingly, this guidance will not directly address Title II requirements. To the extent that Title II provides additional or greater protection, covered entities must also comply with Title II's substantive requirements. 42 U.S.C. § 12201(a).

³ The IDEA is a Federal law that provides financial assistance to States, and through them to local school districts, to assist them in providing special education and related services to eligible children with disabilities. 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R. pt. 300. The Department's Office of Special Education Programs, a component of the Department's Office of Special Education and Rehabilitative Services, administers the IDEA. OCR does not enforce the IDEA. All students with disabilities who are eligible for special education and related services under the IDEA, however, are also protected by Section 504 and Title II. Consequently, OCR enforces the Section 504 and Title II rights of students with disabilities who are also covered by the IDEA. OCR would investigate allegations of disability discrimination under Section 504 and Title II concerning these IDEA-eligible students.

⁴ *Cf.* Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, Notice of Proposed Rulemaking, 81 Fed. Reg. 10,968, 10,977 (Mar. 2, 2016) ("While decades of research, Congress, and [the Government Accountability Office] have found that the overrepresentation of children of color among children with disabilities is a significant problem, some experts and respondents to the June 2014 Request For Information have noted that under-identification in special education is a problem for children of color in a number of communities.").

⁵ *Over-identification* means the inappropriate identification of a student who does not actually have a disability and who does not need services as a student with a disability. *Under-identification* refers to the failure to appropriately identify a student who has a disability and who does need services as a student with a disability. Over-identification does not mean the same thing as overrepresentation; *overrepresentation* occurs when a high percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district. Likewise, under-identification does not mean the same thing as underrepresentation; *underrepresentation* occurs when a low percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district.

Over-identification, under-identification, and belated evaluation of students of color to determine whether they have disabilities and need special education services can violate Title VI and Section 504, and in so doing harm students' civil rights to equal educational opportunity.

I share this guidance to assist States,⁶ districts, and schools (including magnet and charter schools),⁷ in recognizing, redressing, and preventing racial discrimination in special education in violation of the Federal civil rights laws enforced by the Office for Civil Rights (OCR) at the U.S. Department of Education.⁸ The guidance explains the Title VI requirement that students of all races, colors, and national origins have equitable access to general education interventions and to a timely referral for an evaluation under the IDEA or Section 504 if a district has reason to believe that a student has a disability for which special education or related services are needed.⁹ In addition, it explains that Title VI requires students of all races and national origins to be treated equitably in the evaluation process, in the quality of special education services and supports they receive, and in the degree of restrictiveness of their educational environment.

OCR recognizes, and seeks to support, the efforts of teachers, school staff, and administrators to provide students with equitable access to high-quality general and special education instruction, and to address racial discrimination in special education. Thank you for your efforts to ensure equal educational opportunities.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

⁶ States, as recipients of Federal financial assistance, are obligated to ensure that districts to which they provide any assistance are not engaging in discrimination on the basis of race, color, national origin, sex, or disability including in the administration of their special education programs. 34 C.F.R. §§ 100.3(b) (1); 100.3(b) (2), 100.4(b), 104.4, 106. *See also* 34 C.F.R. §§ 76.500, 76.770 for related State and subgrantee requirements.

⁷ Charter schools are subject to the same Federal civil rights obligations as all other public schools. For additional information about the applicability of Federal civil rights laws to charter schools, see OCR, *Dear Colleague Letter: Charter Schools* (May 8, 2014), www.ed.gov/ocr/letters/colleague-201405-charter.pdf.

⁸ This guidance describes the obligations of States, districts and schools. Readers should be aware, however, that the obligations described in this guidance also apply to recipients of Federal financial assistance that are responsible for the education of students in juvenile justice facilities. *See* OCR and DOJ, *Dear Colleague Letter: Civil Rights of Students in Juvenile Justice Residential Facilities* (Dec. 8, 2014), www.ed.gov/policy/gen/guid/correctional-education/cr-letter.pdf.

⁹ *Evaluation* in this guidance refers to the Section 504 requirement to conduct an initial preplacement evaluation of any person who, because of disability, needs or is believed to need special education or related services (34 C.F.R. § 104.35) and the IDEA requirement to conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability under Part B of the IDEA (34 C.F.R. § 300.301).

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Introduction

Students with disabilities have a civil right to receive necessary individualized special education and/or related aids and services, and such services are invaluable to their educational development.¹⁰ Failure to timely identify, evaluate, and provide a student with a disability with needed special education services¹¹ or related aids and services adversely affects the student by depriving the student of needed services. Racial discrimination that leads to such a failure not only unlawfully limits a student's current access to necessary services, but can have serious long-term educational consequences. For example, a student with a reading disability who is not evaluated until fourth grade despite struggling with reading in prior years may have fallen behind—not only in reading but in other subjects as well—as a result of the evaluation delay.¹²

For students who do not have disabilities and are mistakenly identified as having disabilities and who receive special education services as a result, special education services are inappropriate and may have negative consequences for the educational development of such students, by limiting the student's access to proper instruction.¹³ Racial discrimination that leads to inappropriate identification in special education, and the provision of unnecessary special education services and inappropriate placement in more restrictive special education settings, not only unlawfully limits the educational opportunities of individual students who are subject to inappropriate identification or inappropriate placement, but also deprives all students in that school, who are thereby consigned to learn in a discriminatory and more racially segregated environment.

¹⁰ 34 C.F.R. §§ 104.33, 104.35. Under Section 504 of the Rehabilitation Act of 1973 (Section 504), free appropriate public education includes the provision of regular or special education and related aids and services. This guidance, due to the focus on special education, typically refers to special education and related aids and services.

¹¹ This guidance uses *special education services* to refer to special education and related services under the Individuals with Disabilities Education Act (IDEA), or special education or related aids and services under Section 504, as appropriate. *Evaluation* in this guidance refers to the Section 504 requirement to conduct a preplacement evaluation (34 C.F.R. § 104.35) and the IDEA requirement to conduct an initial evaluation (34 C.F.R. § 300.301). Under the IDEA, a district must conduct a full and individual evaluation to determine if a child has a disability as defined in the IDEA and needs special education and related services because of that disability before the initial provision of special education and related services. 34 C.F.R. §§ 300.300-300.311. Under Section 504, a district must evaluate a student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education or any significant change in placement. 34 C.F.R. § 104.35(a).

¹² *Achieving High Educational Standards for All: Conference Summary*, National Research Council, 43-44 (2002) (“[M]any children are not identified as having a reading disability until 3rd or 4th grade. By then, they typically are lagging badly in their reading skills, which, in turn, increasingly causes them difficulties in other subjects.”)

¹³ Identification of a student as a student with a disability does not, however, necessarily result in the removal of the student from the regular education environment. Districts must educate each student with a disability with students without disabilities to the maximum extent appropriate to the needs of the student with a disability, and must place the student with a disability in the regular educational environment unless it is demonstrated that the education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 104.34(a). *See also* 34 C.F.R. § 300.114 (a) (2).

I. Legal Framework¹⁴

A. Section 504 Obligations

Section 504 requires that districts provide a free appropriate public education (FAPE) to students with disabilities.¹⁵ Under Section 504, FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain procedural requirements related to educational setting, evaluation and placement, and procedural safeguards.¹⁶

Implementation of an individualized education program (IEP) developed and implemented in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the Section 504 FAPE standard.¹⁷ Therefore, references to a district's Section 504 FAPE obligations are also intended to include obligations when IDEA-eligible students with disabilities receive special education and related services in accordance with their IEPs. This guidance focuses specifically on the subset of students who need special education services as part of FAPE to which they are entitled, as well as students inappropriately identified as needing those services.

¹⁴ Much of the analytical framework laid out in this guidance also applies to discrimination based on sex under Title IX of the Education Amendments of 1972 (Title IX) with respect to the over-identification or under-identification of students with disabilities based on sex. The Office for Civil Rights (OCR) in the U.S. Department of Education (Department) enforces Title IX, which prohibits discrimination on the basis of sex in Federally-assisted education programs and activities. 20 U.S.C. §§ 1681 *et seq.*

¹⁵ 34 C.F.R. § 104.33. Under Section 504, districts are required to conduct a preplacement evaluation of any student who has, or is believed to have, a disability, and who needs or is believed to need special education or related services because of a disability. 34 C.F.R. § 104.35(a). Consistent with the Section 504 obligation to provide a free appropriate public education to public elementary or secondary school students with disabilities, OCR interprets § 104.35 to require that any necessary evaluation must be conducted in a timely manner.

¹⁶ 34 C.F.R. § 104.33(b).

¹⁷ 34 C.F.R. § 104.33(b)(2). Part B of the IDEA provides Federal funds to State educational agencies, and through them to eligible local educational agencies, to assist in providing special education and related services to eligible students with disabilities. 20 U.S.C. §§ 1401, 1411-1419; 34 C.F.R. pt. 300. The Department's Office of Special Education Programs, a component of the Department's Office of Special Education and Rehabilitative Services, administers the IDEA. OCR does not enforce the IDEA.

B. Title VI Obligations

Title VI protects students from discrimination based on race, color, or national origin¹⁸ in connection with all academic, educational, extracurricular, athletic, and other activities of a school, including a school's effort to meet its obligations to students with disabilities under Section 504¹⁹ or the IDEA.²⁰

School conduct can result in unlawful discrimination based on race in two ways: first, if a student is subjected to different treatment based on the student's race, and second, if a policy is race-neutral on its face and is administered in an evenhanded manner but has an unjustified adverse disparate impact, *i.e.*, a disproportionate and unjustified effect on students of a particular race.²¹

¹⁸ For ease of readability, this letter sometimes uses the phrases "discrimination on the basis of race" and "racial discrimination" to refer to discrimination on the basis of race, color, or national origin. Because Title VI prohibits discrimination on the basis of national origin, the legal principles described in this guidance also apply to discrimination against English learner (EL) students—students identified as having limited English proficiency in speaking, listening, reading, or writing English through procedures established by districts. *Lau v. Nichols*, 414 U.S. 563 (1974); 20 U.S.C. § 8101(20) (classifying students born outside the U.S. or who are non-native English speakers and have "difficulties in speaking, reading, writing, or understanding the English language" as English learners under the Elementary and Secondary Education Act, as amended). The IDEA also adopts this definition. 20 U.S.C. § 1401(18) (as amended by Section 9215(ss) (1) (C) of the Every Student Succeeds Act). Title VI also requires schools to take affirmative steps to ensure that EL students can participate meaningfully and equally in educational programs. The Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703(f), enforced by the U.S. Department of Justice (DOJ), imposes similar requirements. For more information about districts' and schools' obligations related to EL students, see OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

¹⁹ Under Section 504, a person with a disability is an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. 29 U.S.C. § 705(9) (B), (20) (B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j).

²⁰ Under the IDEA, a child must be evaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311, as having a disability and needing special education and related services because of that disability. The IDEA includes thirteen disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment including blindness. 20 U.S.C. § 1401(3) and 34 C.F.R. § 300.8. Although a child's need for special education is a critical part of the IDEA's definition of *child with a disability* and thus of a child's entitlement to FAPE under the IDEA, a child who has an impairment listed in the IDEA can be considered a child with a disability if the child needs a related service that consists of specially designed instruction that is considered special education rather than a related service under State standards. 34 C.F.R. § 300.8(a) (2) (ii). All students with disabilities who are eligible for special education and related services under the IDEA are also protected by Section 504 and Title II. Consequently, OCR enforces the Section 504 and Title II rights of students with disabilities who are also covered by the IDEA.

²¹ 34 C.F.R. § 100.3(a) and (b).

i. Different Treatment

Title VI prohibits schools from intentionally treating students differently based on race, color, or national origin.²² Absent direct evidence of racially discriminatory intent (*e.g.*, remarks, testimony, or admissions by school officials revealing racially discriminatory motives), OCR will examine circumstantial evidence that allows OCR to infer, or rebut, discriminatory intent from the facts of the investigation as a whole or from the totality of the circumstances.²³ Under Title VI, OCR will find that a school engaged in unlawful intentional discrimination²⁴ if, based upon the facts of the specific case: (1) the school treats any student(s) differently from similarly situated student(s)²⁵ of another race, and (2) the school cannot articulate a legitimate, nondiscriminatory reason for the different treatment, or (3) the nondiscriminatory reason articulated by the school is a pretext for discrimination rather than the actual reason for the different treatment.²⁶

A school must treat a student with a disability differently than students without disabilities if, after an individualized analysis of that student's needs, that different treatment is determined to be necessary to provide FAPE to that student or provide aids, benefits, or services that are as effective as those provided to others.²⁷

²² 34 C.F.R. § 100.3(a).

²³ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (discussing the “sensitive inquiry into such circumstantial and direct evidence of intent as may be available” in Title VI case based on race).

²⁴ See generally *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (an employment discrimination case setting forth a three-part test that also applies, where appropriate, in the context of discrimination in education under Title VI and Title IV of the Civil Rights Act of 1964 in court and administrative litigation to determine whether an institution has engaged in prohibited discrimination).

²⁵ Students are similarly situated when they are comparable (even if not identical) in all material aspects. See *Simpson v. Franciscan All., Inc.*, 827 F.3d 656, 661 (7th Cir. 2016) (“Although comparators do not have to be identical in every conceivable way, they cannot be ‘similarly situated’ unless they are directly comparable in all material aspects.”); *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (“The similarly-situated analysis calls for a ‘flexible, common-sense’ examination of all relevant factors.”). OCR considers whether students are similarly situated on a case-by-case basis, but some relevant aspects in this context may include age, grade level, degree of mental or physical impairment, and degree of academic or behavior challenges. Students are not necessarily similarly situated, however, simply because they have been identified as having the same disability, or in the same IDEA disability category.

²⁶ OCR will determine whether the reason offered by the school is a pretext for discrimination on a case-by-case basis. As part of this analysis, OCR may consider facts including, but not limited to, evidence of the following: reliance on racial or cultural stereotypes; credibility of the school or staff members; failure to follow established procedures, including unexplained change in criteria midstream; use of vague or subjective criteria or procedures; previous adverse treatment of the student; other instances in which non-class members were favored; and appropriate statistical comparisons.

²⁷ 34 C.F.R. §§ 104.4(b)(1)(iv), 104.33. If a school uses an IEP developed and implemented in accordance with the IDEA to satisfy its Section 504 FAPE obligations, the IEP team would make the individualized analysis of that student's needs. 34 C.F.R. § 104.33(b) (2).

A school's compliance with its Section 504 FAPE obligations, however, does not necessarily demonstrate compliance with its Title VI obligation not to treat students differently based on race. A school that provides appropriate special education services to each individual student with a disability who needs such services could, for example, discriminate on the basis of race outside of the provision of FAPE. By way of illustration, if a school provided FAPE for one student, and provided FAPE as well as special access to an after-school book club to a similarly situated student of a different race, when both students wished to participate in the book club, OCR would find that the school discriminated on the basis of race if the school could not articulate a legitimate, nondiscriminatory reason for treating the students differently that was not a pretext for discrimination.

ii. Disparate Impact

A school also violates Title VI by evenhandedly implementing a facially race-neutral criterion, policy, practice, or procedure that was not adopted for a discriminatory purpose, but that nonetheless has an unjustified effect of discriminating against students on the basis of race.²⁸ OCR uses a three-step analysis to determine whether a facially neutral criterion, policy, practice, or procedure has an unlawful disparate impact on the basis of race.

Under Title VI, first OCR would assess whether the criterion, policy, practice, or procedure has an adverse effect on students of a particular race as compared with students of other races. If there is insufficient evidence of such an adverse effect, then OCR would not find a Title VI disparate impact violation.

If there is such evidence of a disparate impact, next OCR will consider whether there is sufficient evidence to show that the school's criterion, policy, practice, or procedure is necessary to advance a legitimate, nondiscriminatory educational goal.²⁹ If the criterion, policy, practice, or procedure is not necessary to advance a legitimate, nondiscriminatory educational goal, then OCR would find a Title VI violation.

If OCR finds that the criterion, policy, practice, or procedure is necessary to advance a legitimate, nondiscriminatory educational goal, OCR will consider whether there is a comparably effective alternative criterion, policy, practice, or procedure that would achieve the school's goal with less adverse impact.³⁰ If there is a comparably effective criterion, policy, practice, or procedure with less disparate impact, Title VI prohibits the district from implementing the criterion, policy, practice, or procedure with more adverse impact.

²⁸ 34 C.F.R. § 100.3(a).

²⁹ See *Elston*, 997 F.2d at 1411-12 (explaining that courts have required schools to demonstrate an "educational necessity" for the challenged program, practice, or procedure).

³⁰ See *Elston*, 997 F.2d at 1413.

Under the three-part test above, complying with Section 504 and the IDEA are legitimate, nondiscriminatory educational goals. In many instances, however, districts have some discretion in the policies that they use to meet those obligations. If districts or schools select criteria, policies, practices, or procedures that result in an adverse impact on students of a particular race in order to meet their obligations under Section 504 or the IDEA, OCR will determine whether a comparably effective alternative policy or practice would meet the district's Section 504 or IDEA obligations with less of a burden or adverse impact on the disproportionately affected racial group.

iii. OCR Investigations

OCR will consider information from a variety of sources when investigating whether a district or school discriminated against students or a student on the basis of race. For example, OCR may review district policies and procedures and student files, and may interview district and school staff, parents, and others with relevant information. OCR may also review district or school data on interventions, referrals for evaluation, evaluations, special education placements, and changes in placement, including changes in placement that stem from disciplinary removals.³¹ Data that show racial disparities in the impact of certain policies and practices might be an indicator of potential violations, but the presence of racial disparities alone would not be sufficient to establish a violation. For example, if data showed a high percentage of students of a certain race receiving special education services, as compared to the overall enrollment of students of that race in regular education, but OCR's investigation found that all students had been appropriately identified as students with disabilities, and that no racial discrimination had occurred, OCR would not find a violation of Title VI. In addition, OCR may find a violation of Title VI if the evidence shows different treatment of a student or students based on race.

³¹ OCR may consider data States are required by the IDEA and its implementing regulations to report to the Department. The unofficial copy of the applicable regulations – the Equity in IDEA final rule – is available at www.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-significant-disproportionality-final-regs-unofficial-copy.pdf. (Note, the official version of this document is the one published in the Federal Register. This document has been sent to the Office of the Federal Register but has not yet been scheduled for publication.) This rule establishes a standard methodology that States must use to determine whether significant disproportionality, based on race and ethnicity, in the identification, placement, or discipline of students with disabilities under the IDEA is occurring in the State and the LEAs of the State. If an LEA is found to have significant disproportionality, the State must ensure that the remedies established by section 618(d)(2) of the IDEA and 34 C.F.R. § 300.646(c) and (d) are implemented. A finding of significant disproportionality under the IDEA is based on numerical disparities that show overrepresentation of students of a certain race or ethnicity, compared to all other students. OCR may find a violation under Title VI or Section 504 regardless of whether a district is found to have significant disproportionality under the IDEA.

II. Preventing Racial Discrimination in Special Education

A. Referral for Evaluation

Districts and schools must not discriminate on the basis of race in referring students for evaluation.³² Racial discrimination in referrals can result in under-identification for special education of students who need services and over-identification for special education of students who do not actually need services.

i. Non-Discriminatory Referrals

In its investigations, OCR has found that the initial referral of a student for evaluation is one of a series of decision points that might generate Title VI concerns, especially to the extent that it entails the subjective exercise of unguided discretion in which racial biases or stereotypes (consciously or unconsciously held views about a certain group) may be manifested. Districts must ensure that district staff do not discriminate against students by relying, explicitly or implicitly, on stereotypes or biased perceptions in their decisions about students. For example, researchers report racial stereotypes can influence adult expectations about student abilities and behavior,³³ potentially undermining achievement and inappropriately influencing referral decisions.

OCR's investigations have revealed instances in which similarly situated students of different races are treated differently in the referral process. For example, district staff may refer only Latino and black students for evaluation, while not referring white students in the same class with similar behavior and academic records. Alternatively, district staff may fail to refer Latino or black students who are experiencing behavioral and academic difficulties that might be related to disability while referring white students with similar behavior and academic records in the same class.

Districts and schools must ensure that any criteria for referring students for evaluations are based on whether the districts or schools suspect or have reason to suspect that a student has a disability and needs special education or related services because of that disability.³⁴ Districts and schools are free to select any lawful steps that are effective to prevent and redress the

³² 34 C.F.R. § 100.3(a), (b)(v).

³³ E.g., Jason A. Okonofua et al., *Two Strikes: Race and the Disciplining of Young Students*, 26 Psychological Science 617 (2015); Walter S. Gilliam et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, Yale Child Study Center (Sept. 2016). For additional information about implicit bias, generally, see also Richard A. Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Cal. L. R. 1169 (2006); Jerry Kang, *Implicit Bias Primer for Courts*, National Center for State Courts (2009).

The cited publications throughout this guidance are provided for informational purposes only. Their citation is not intended to suggest endorsement by the Department or the Federal government of the authors' conclusions.

³⁴ 34 C.F.R. § 104.35(a).

unlawful influence of racial stereotypes on the referral process in violation of Title VI.³⁵ In OCR’s enforcement experience, OCR has observed districts effectively using practices such as: developing written procedures that advise teachers and staff of when to refer students for evaluation; providing training to teachers and other staff on how to implement these procedures; and assigning school administrators responsibility for reviewing and evaluating teacher referrals to monitor for the presence of bias and address potential bias. Districts may also choose, for example, to proactively review their data on referrals for evaluation to examine for unusual racial disparities and, if such disparities are found, investigate whether the disparities resulted from racial discrimination. In addition, OCR has seen districts effectively providing cultural awareness training to school personnel on how to identify and counter racial stereotypes, work with a diverse student population, and identify circumstances under which bias may inadvertently affect the referral process so that countervailing procedures can be implemented.

Federal civil rights laws do not dictate particular methods districts and schools must use to ensure nondiscrimination on the basis of race in referring a student for an evaluation, conducting an evaluation, and providing Section 504 FAPE. Instead, these civil rights laws require that districts and schools satisfy the obligation not to discriminate.

Example 1: A staff member trained in data analysis identifies significant racial disparities in a school’s data on referral for evaluation. The staff member recognizes that these disparities might either reflect genuine differences between students, or might be the product of racial discrimination. To determine whether similarly situated students had equitable access to general education interventions—that is, interventions to help individual students within the general education context—and were treated equitably in the referral process, the staff member reviews the special education records of all students. The staff member notices that in a class with 11 black students and 14 white students, the teacher referred five black students for evaluation, based on “aggressive behavior” and “violent themes in writing.” The teacher did not refer any white students, although four white students in the class received general education interventions following numerous behavioral infractions and poor academic progress. The parents of one of the five black students filed a complaint with OCR, alleging that the school discriminated against those black students on the basis of race.³⁶

OCR would find sufficient evidence of a violation of Title VI if evidence supports the conclusion that any teacher relied on racial stereotypes in determining whether to refer students for general interventions and evaluation. To increase the likelihood of compliance with Title VI, the school could choose to provide training to all teachers to increase awareness of racial bias in special education referrals and to provide instruction

³⁵ 34 C.F.R. § 100.3(a).

³⁶ This guidance uses the term parent to include both parents and other guardians.

about how to teach students from different cultural and racial backgrounds without introducing bias. The district could also choose to provide targeted training about special education referral criteria for the teacher who may have made inappropriate evaluation referrals based on race, and provide the teacher with an experienced mentor.

ii. Providing Equitable Access to General Education Interventions

One common method that is used in an effort to improve student achievement and school climate and/or reduce inappropriate special education referrals is the implementation of evidence-based³⁷ intervention strategies to provide help and support, within the general education setting, to students who need such support. An intervention framework must not, however, serve as a substitute, or a precondition, for an evaluation for students believed to need such an evaluation. If a district has reason to believe a student has a disability and needs special education or related services because of that disability, Section 504 requires the district to timely evaluate the student, regardless of whether the student has received any general education intervention services.³⁸

Districts can provide interventions to students who are performing poorly in general education classrooms for reasons unrelated to disability, such as diminished opportunity to learn because of lack of exposure to early learning opportunities. Special education and related services are not appropriate for such students who do not have disabilities: the purpose of special education and related aids and services is to serve students with disabilities who need such education, aids, and services *because of* their disability. Schools could provide training to assist educators in distinguishing between disability and non-disability related factors that could provide an explanation for a student's academic and/or behavioral challenges.

Example 2: A middle school is monitoring its referral data and finds that 30 percent of its American Indian students are referred for evaluation, while only 10 percent of students of all other races are referred for evaluation. The district reviews the special education files of all referred students and determines that many American Indian students were referred for evaluation because they performed below grade level in reading. Two teachers who had referred a large number of American Indian students for evaluation indicated that they believed that these students were performing below grade level because they had attended a different neighborhood elementary school than other students and there were significant differences in curriculum between the schools. The teachers indicated that they had referred some students not because they believed the students have a disability, but because they were concerned that the students would not receive appropriate educational interventions in general education. A parent of one of the American Indian

³⁷ For one example of “evidence-based,” see the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 8101(21)(A).

³⁸ 34 C.F.R. § 104.35(a).

students filed a complaint with OCR, alleging that the middle school discriminated against the American Indian students.

OCR would find sufficient evidence of a violation of Title VI if the district's practice of referring students not suspected of having a disability and needing special education or related services is based on race. To avoid inappropriate referrals, the district could choose to instruct all administrators and teachers that students must be referred for evaluation when a disability is suspected. The district could also implement and provide training to increase awareness of a tiered intervention program that provides individualized interventions to students regardless of whether they are students with disabilities, but does not delay evaluation when disability is suspected. In addition, the district could choose to undertake a more careful evaluation of whether its elementary schools are providing comparable preparation for middle school academic success.

Example 3: A district determines by using a home language survey and evaluating potential English learner (EL) students for English language proficiency that Asian students in the district are more likely to enter kindergarten without the basic English reading skills that most of their peers have developed, not because of a disability, but because their home languages are not English. The district recognizes that these students are at increased risk of being inappropriately identified as students with disabilities due to limited English proficiency. In order to avoid improperly identifying students with disabilities on the basis of national origin, and as required by Title VI, the district takes affirmative steps to timely identify all students who are not proficient in English and provide them with appropriate language services. Also, as part of more robust professional development on the definitions of disability and requirements of Section 504 and the IDEA, the district trains staff that EL students may also be students with disabilities and must be referred for evaluation in an appropriate language if the school has reason to believe a student has a disability and needs special education or related services. The district also uses evidence-based tiered curricular supports, including small group and individual instruction, to improve students' literacy skills and to ensure that early deficits do not place students of any race at increased risk of being mis-identified later as having a disability. The policies result in improvement in student literacy and decrease the likelihood of inappropriate referrals for evaluation.

OCR would find insufficient evidence of a violation of Title VI or Section 504 based on these facts. The district is fulfilling its obligation under Title VI to identify all students who are not proficient in English and provide them with appropriate language services. The district is also fulfilling its obligation under Title VI not to refer students for evaluation because of their EL status. In addition, OCR would find that the district's actions are also consistent with its obligation under Section 504 to refer all students, including EL students, suspected of having a disability and needing special education or related services.

Districts that use intervention strategies may choose from a variety of intervention strategies, protocols, and frameworks.³⁹ Many intervention frameworks include a universal screening process to identify all students who are at risk for poor learning outcomes and behavioral problems. Students identified through the screening process may be referred to a student study team⁴⁰ and receive general education interventions, such as informal classroom interventions, after-school programs, tutoring, or mentoring. If a district offers interventions to students in the general education setting, Title VI requires districts to provide students with an equitable opportunity to receive such interventions regardless of race, color, or national origin.⁴¹

Example 4: A middle school teacher timely recommends two black students for an evaluation due to recurring spelling errors and poor learning outcomes as a result. The teacher refers a third student, who is white, and who also makes recurring spelling errors and has poor learning outcomes, to the student study team. The teacher indicated in a progress report that the white student is a “good kid,” but requires extra assistance in completing homework assignments. The student study team arranges for the white student to receive writing interventions in the general education setting, including tutoring by trained community members and assistance from writing teachers employed by the district. The teacher is not able to state any particular reason for treating the black students differently from the white student. The parent of the white student files a complaint with OCR, alleging the middle school discriminated on the basis of race against the student.

OCR would find sufficient evidence of a violation of Title VI because the district does not have a legitimate, nondiscriminatory reason for timely referring students of one race for evaluation, while providing a similarly situated student of another race general education interventions. OCR would also find that the school violated Section 504 by failing to refer the white student for an evaluation if it had reason to suspect that the student may have had a disability and needed special education or related services, and the remedy would require referral of the white student for evaluation.

³⁹ There are many effective frameworks for providing interventions and the Department does not endorse any particular one.

⁴⁰ This guidance uses the term “student study team” to refer to a team which may include general and special education teachers who provide instructional support and strategies to address a student’s behavioral and academic issues in general education, but which is not necessarily an IEP Team or group prescribed in the Section 504 regulations to make placement decisions (“Section 504 team”). See 34 C.F.R. §§ 300.321 and 104.35(c). A student study team may also be referred to by other terms, including but not limited to, “intervention assistance team,” “student assistance team,” “building team,” or “child study team.”

⁴¹ 34 C.F.R. § 100.3(a), (b)(1). For additional information about States’ and districts’ obligations to avoid race-based discrimination in access to educational resources, see OCR, *Dear Colleague Letter: Resource Comparability* (Oct. 1, 2014), www.ed.gov/ocr/letters/colleague-resourcecomp-201410.pdf.

iii. Preventing Race-Based Under-Identification of Students with Disabilities

Under Section 504, districts have an obligation to timely evaluate any student the district has reason to believe has a disability and needs special education or related services.⁴² The failure to appropriately identify a student who has a disability and who needs services as a student with a disability—under-identification—may have serious educational consequences and violates Section 504. Belated evaluation of students with disabilities who need services also results in under-identification during the time period that these students have not yet been evaluated and identified as students with disabilities who need services.⁴³ If a district under-identifies a student or students with disabilities of a particular race due to racial discrimination, the district also violates Title VI’s prohibition of discrimination based on race.⁴⁴

Research indicates that, in some districts and some disability categories, students of color may be under-identified as students with disabilities who need services.⁴⁵ Complex factors may contribute to under-identification of students of color, when it occurs.⁴⁶

⁴² 34 C.F.R. § 104.35(a).

⁴³ If a district believes or has reason to believe a student has a disability and because of the disability needs special education or related services, then Section 504 requires the district to conduct an evaluation of that student. Districts violate this Section 504 obligation when they delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected. 34 C.F.R. § 104.35(a). *See also* OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD* (Jul. 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

⁴⁴ 34 C.F.R. § 100.3(a).

⁴⁵ *E.g.*, Paul Morgan et al., *Minorities are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions*, 44 Educational Researcher 278 (2015); Jacob Hibell et al., *Who is Placed in Special Education?*, 83 Sociology of Education 312 (2010); Paul L. Morgan et al., *Racial and Ethnic Disparities in ADHD Diagnosis from Kindergarten to Eighth Grade*, 132 Pediatrics 85, 86 (2013) (finding that black children are only two-thirds as likely as white children to be diagnosed with attention-deficit/hyperactivity disorder (ADHD)).

⁴⁶ Although this guidance discusses under-identification in the context of referral, under-identification may result not only from an inappropriate failure to refer for evaluation a student whom the district has reason to suspect has a disability and needs special education or related services, but also from a failure to properly identify a student as a student with a disability in the evaluation process. A student who does not have a disability may be mistakenly identified as a student with a disability. In addition, a student who has a specific disability may be mis-identified as a student with a different type of disability. For example, black students may be more likely to be classified as emotionally disturbed while white students with similar behavior may be more likely to be classified as having ADHD. *See* Paul L. Morgan et al., 132 Pediatrics, *supra*, at 90 (finding that “racial/ethnic minority children are much less likely than otherwise identical white children to receive an ADHD diagnosis”); Martha J. Coutinho et al., *Gender and Sociodemographic Factors and the Disproportionate Identification of Culturally and Linguistically Diverse Students with Emotional Disturbance*, 27 Behavioral Disorders 109, 121 (2002) (finding that black students who live in largely white communities are more likely to be identified as having emotional disturbance than those who live in more diverse communities, supporting the hypothesis that “students who ‘stand out’ by virtue of being a member of a small ethnic minority may be more likely to be identified as having ED, a result based on [racial/ethnic] difference rather than on disability”). Both the failure to evaluate for disability and a need for special education or related services, and the failure to conduct an appropriate evaluation to properly identify a student as having a disability and needing special education or related services, constitute violations of Section 504. 34 C.F.R. § 104.35. Districts must establish and implement a system of procedural safeguards for parents to appeal district actions regarding the identification, evaluation, or educational placement of students with disabilities who need or

(footnote continued on next page)

Students of color may be less likely to have access to health care during early childhood, leading to decreased opportunities for early identification of disabilities such as autism by health professionals.⁴⁷ Districts are obligated to timely evaluate any child suspected of having a disability and needing services,⁴⁸ and early universal screening can assist districts in timely identifying students who may have a disability and need services.

Students may also be at risk of under-identification if they attend schools with fewer resources, because a student may be less likely to be referred for evaluation for exhibiting certain academic or behavior challenges if the student is in an environment where students generally exhibit a higher degree of academic and behavior challenges.⁴⁹ Because students of color more often than their white peers attend schools with less access to educational resources,⁵⁰ students of color may be disproportionately at risk for under-identification that occurs for this reason.

As noted above, OCR has found that the referral of a student for evaluation may entail the subjective exercise of unguided discretion in which racial biases or stereotypes may be manifested. Students of color may also be either over-identified or under-identified due to biases held by staff about the reasons underlying academic or behavioral challenges. OCR will find a violation of Title VI if district staff discriminate against students by relying, explicitly or implicitly, on stereotypes or biased interpretations, in their decisions about students.

Example 5: A teacher at an elementary school notices that two students, a black student and a white student, have trouble turning in homework assignments, require extra time to complete work, and have more difficulty than other students in organizing and following instructions. The teacher suspects that the white student may have attention-deficit/hyperactivity disorder (ADHD), or another disability, and need services, and refers the student for an evaluation. The teacher does not refer the black student for

are believed to need special education or related services. 34 C.F.R. § 104.36. The district also must tell parents about this “due process” system, notify them of any evaluation or placement actions, allow them to examine their child’s records, afford them an impartial hearing with opportunity for parent participation and representation by counsel, and provide them a review procedure. 34 C.F.R. § 104.36.

⁴⁷ Glenn Flores, MD & The Committee on Pediatric Research, *Technical Report-Racial and Ethnic Disparities in the Health and Health Care of Children*, 125 *Pediatrics* 979, 982, 986, 987 (2010) (finding that non-white children had less access to pediatric care providers, greater adjusted odds of not being referred to a specialist by health care provider, lower adjusted odds of being diagnosed with ADHD, and increased adjusted odds of receiving a delayed diagnosis of autism).

⁴⁸ 34 C.F.R. § 104.35.

⁴⁹ Jacob Hibell et al., *supra*, at 315, 327 (the study also found that schools with high enrollment of students of color were less likely in general to place students in special education).

⁵⁰ National Academy of Sciences, *supra*, at 170-175, 173-175, 201. Recent data indicate that black and Latino students represent 38% of students in schools that offer AP courses, but 29% of students enrolled in at least one AP course, and that black, Latino, and American Indian or Alaska Native students are more likely to attend schools with higher concentrations of inexperienced teachers. OCR, 2013-2014 *Civil Rights Data Collection: A First Look*, 6, 9 (updated Sept. 29, 2016), www.ed.gov/ocr/docs/2013-14-first-look.pdf. See also OCR, *Dear Colleague Letter: Resource Comparability* (Oct. 1, 2014), www.ed.gov/ocr/letters/colleague-resourcecomp-201410.pdf.

evaluation, because she believes that the black student's excessive daydreaming and inattentiveness in class are the causes of the other observed behaviors and all are due to lack of motivation. The teacher believes that the black student is not committed to his schoolwork because his family does not value education. The teacher arranges a conference with the parents of the black student in order to discuss how the family can provide additional support for the black student at home, and reinforce the importance of completing homework assignments on time and following instructions. The parent of the black student files a complaint with OCR, alleging the school discriminated against the student on the basis of race.

OCR would find sufficient evidence that the district violated the Section 504 obligation to evaluate because the teacher had reason to suspect that the black student had a disability—based on the same indicators of disability that led her to refer the white student for an evaluation—and may have needed special education and/or related services to address her disability, but did not refer the black student for an evaluation due to her beliefs about the student and her family. Further, OCR would also find that treating similarly situated students of different races differently in deciding whether to conduct an evaluation is also a violation of Title VI, unless there is a legitimate, non-discriminatory reason for doing so. In this example, the failure to evaluate a student of a certain race whom the district had reason to believe had a disability could result in race-based under-identification, in violation of Title VI.

In OCR's enforcement experience, OCR has also observed in some instances that some districts delay evaluations of EL students for special education and related services because of their EL status. This practice is impermissible under Section 504 and the IDEA, and may result in under-identification of EL students as students with disabilities in violation of Title VI.⁵¹

Example 6: In the first month of the school year, a teacher suspects that a Spanish-speaking EL student with very limited proficiency in English has a learning disability. The teacher would ordinarily refer the student for an evaluation if the student is suspected of having a learning disability and needing special education services due to the disability. The teacher delays referring the EL student for an evaluation, however, because he believes it would not be possible to appropriately evaluate the student until the student achieves intermediate proficiency in English. The parent of the EL student files a complaint with OCR, alleging discrimination on the basis of national origin.

⁵¹ For additional information about States' and districts' obligations under Title VI, Section 504, the IDEA, and the EEOA to timely evaluate EL students for special education services and provide them with dual services, see Section F of OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

OCR would find sufficient evidence that the district violated Section 504 and Title VI by delaying an evaluation of a student who is believed to have a disability and need special education or related services because of the student's EL status. If a student is suspected of having a disability and needing special education and/or related services, the district must evaluate the student, subject to parental consent,⁵² in an appropriate language and in a timely manner.⁵³

B. Evaluation

Before a student receives special education services under Section 504, the district must evaluate to determine if the student has a disability, and if so, whether the student needs special education or related services because of the disability.⁵⁴ Generally, the evaluation and placement determinations regarding whether a student is eligible to receive services under Section 504 must address two questions: 1) whether the student has a disability under Section 504, and 2) if so, whether the student, based on his or her individual educational needs, needs regular or special education, related aids and services, or supplementary aids and services because of the disability, and in what setting the student should receive these services. Section 504 requires districts to establish standards and procedures to ensure the appropriate evaluation and placement of a student with a disability.⁵⁵ Under the IDEA,⁵⁶ States and districts must have in effect policies and procedures to locate, identify, and evaluate students who are suspected of having disabilities as defined by the IDEA, regardless of the severity of their disability, who are in need of special education and related services.⁵⁷

Whether pursuant to Section 504 or the IDEA, districts must ensure that they comply with the nondiscrimination requirements of Title VI and do not treat similarly situated students of different races differently in the type of evaluation procedures used by the district, unless the district has a legitimate, nondiscriminatory reason for the difference in treatment. Districts also

⁵² 34 C.F.R. § 104.35(a). If a school wants to evaluate a student for the first time (initial or preplacement evaluation) and the parent refuses, the school cannot proceed with the evaluation. Instead, the school may, but is not required to, seek a decision from a hearing officer to permit the evaluation. *See also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQs 41-43) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

⁵³ 34 C.F.R. § 104.35(a).

⁵⁴ 34 C.F.R. § 104.35(a). *See also* 34 C.F.R. § 300.301(a).

⁵⁵ 34 C.F.R. § 104.35(b)-(c). For example, in addition to avoiding over-identification and under-identification, districts must also avoid mis-identification—identification of a student as having a different disability than the student actually has—which may prevent the student from receiving the appropriate disability-related services.

⁵⁶ As stated earlier, OCR does not administer or enforce the IDEA. The Department's Office of Special Education Programs, a component of the Department's Office of Special Education and Rehabilitative Services, administers the IDEA. Nonetheless, all IDEA-eligible students with disabilities are also protected by Section 504, and OCR would investigate allegations of disability discrimination concerning IDEA-eligible students. 34 C.F.R. § 104.36.

⁵⁷ 34 C.F.R. § 300.111.

must avoid treating similarly situated students of different races differently in the amount and type of documentation supporting educational placement decisions.⁵⁸

Example 7: A teacher refers a Latino student and an American Indian student for preplacement evaluations due to concerns that both students are performing below grade level in math and reading. The evaluation team for the Latino student reviews the student's academic records, considers reports from the student's teachers and parents, administers appropriate assessments, and observes the student in two of the student's classes before determining that the student does not have a disability. The evaluation team for the American Indian student, however, only arranges for an assessment to determine the student's IQ and based on that assessment, determines that the student has a learning disability. The American Indian student files a complaint with OCR, alleging discrimination on the basis of race.

*OCR would find sufficient evidence of a violation of Title VI unless there is a legitimate, nondiscriminatory reason that explains the different treatment of two similarly situated students of different races in the evaluation process. OCR would also find a violation of Section 504 if the team determined that the American Indian student had a learning disability based solely upon an assessment to determine the student's IQ.*⁵⁹ Section 504 requires that a group of knowledgeable persons consider information from a variety of sources in the evaluation process and that tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely provide a single general IQ test.

In addition, districts must not treat similarly situated students differently based on race in interpreting test results, evaluating student files, and considering any information relevant to placement decisions.⁶⁰ For example, a district violates Title VI if students of one race who earned test scores in a certain range are more likely to be identified as students with disabilities than students of another race who earned test scores in the same range, without a legitimate reason for the different treatment.

⁵⁸ 34 C.F.R. § 100.3(a), (b)(v).

⁵⁹ 34 C.F.R. § 104.35(b) (2), (c). The IDEA also requires the use of specified procedures to determine whether a student has a specific learning disability; reliance on a single general IQ test would not satisfy these IDEA requirements. 34 C.F.R. §§ 300.307-300.311; 34 C.F.R. § 300.304(b)(2) (prohibiting the use of a single measure or assessment as the sole criterion for determining whether a child has a disability and his or her educational needs).

⁶⁰ 34 C.F.R. §100.3(a), (b)(v).

Example 8: A district monitors its special education enrollment data and finds that black students are overrepresented in a particular high school’s special education program. District staff proactively undertake an analysis to determine whether the racial disparities are the result of racial discrimination. The district first analyzes the data on each step leading to special education services, including referral and preplacement evaluations, and determines that one step is contributing significantly to overrepresentation: black students in this particular district are not more likely to be referred for evaluation than other students, but once referred, the district’s black students are more likely to be identified as students with disabilities. The district reviews the student file of each student who was referred and evaluated—including academic and behavioral evaluations, interviews with decision makers, class assignments, and test instruments—in order to ensure that students of all races are being treated equitably in the evaluation process. Following a thorough review, the district finds that all identification decisions were appropriate, and that black students were not more likely to be identified as having a disability than similarly situated students of other races.

OCR would not find sufficient evidence that the district has violated Title VI, based on these facts. The evaluations were appropriate and similarly situated students of different races were treated equitably.

Districts must ensure that disability assessments will provide results that are valid for *all* students to whom the assessment is administered, regardless of race or national origin.⁶¹ An assessment is valid if it measures what it intends to measure and minimizes the influence of any skills or concepts that are not being tested.⁶²

A district must not use an evaluation or testing procedure that has a disproportionate adverse impact on a racial or ethnic group if there is a comparably effective evaluation or testing procedure that accomplishes the district’s important educational goal with less adverse impact (e.g., less over-identification or under-identification).⁶³

⁶¹ 34 C.F.R. §100.3(a). See also OCR, *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers*, 21, 29-30 (Dec. 2000) (archived), www.ed.gov/offices/OCR/archives/pdf/TestingResource.pdf; *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (upholding district court finding that use of certain unvalidated IQ tests for placement of students into classes for students with intellectual disabilities had a discriminatory effect on black students and violated Title VI).

⁶² See also OCR, *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers*, 22 (Dec. 2000) (archived), www.ed.gov/offices/OCR/archives/pdf/TestingResource.pdf.

⁶³ See Legal Framework section on pages 9-10.

C. Special Education Services

Under Title VI, districts must ensure that students of all races are treated equitably in the special education process and receive equitable access to comparable special education programs and services. To ensure that students receive appropriate educational services and placements, districts and schools must follow the placement procedures established by Section 504 and the IDEA for students with disabilities.⁶⁴

Districts must ensure that students are treated equitably in the provision of special education and related aids and services under Section 504 or in the implementation of IEPs, where applicable. For example, OCR may find a violation if students of one race receive speech and language services to meet their educational needs, and students of another race with similar educational needs do not. In addition, OCR may find a violation if students of one race receive instruction from a teacher who is credentialed in special education, while students of another race receive instruction from a teacher who lacks those credentials.

Section 504 and the IDEA require students with disabilities to be educated with students without disabilities to the maximum extent appropriate to the needs of the student with the disability.⁶⁵ Districts must give students equal access, without regard to race, to the most integrated setting appropriate for the student.⁶⁶

OCR generally does not investigate Section 504 complaints challenging individual placement decisions except in extraordinary circumstances, so long as the district complies with Section 504's procedural requirements.⁶⁷ OCR generally does, however, investigate Section 504 cases that may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.⁶⁸ Under Title VI, OCR investigates complaints that the district has placed a student (or students) in a discriminatory manner based on race.

⁶⁴ 34 C.F.R. § 104.35; 20 U.S.C. §§ 1412, 1414; 34 C.F.R. § 300.324. For further information about Section 504 and districts' obligations to comply with this law, please see OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html. For further information about the IDEA, please see idea.ed.gov.

⁶⁵ 34 C.F.R. § 104.34(a).

⁶⁶ 34 C.F.R. §§ 100.3(b)(ii), (iii), 104.4(b) (2).

⁶⁷ 34 C.F.R. pt. 104, App. A, subpt. D, para. 5. One way of meeting Section 504's procedural safeguards requirements is complying with the IDEA's procedural safeguard requirements. 34 C.F.R. § 104.36.

⁶⁸ 34 C.F.R. pt. 104, App. A, subpt. D, para. 5.

Example 9: In the first four months of the academic year, five Latino students and four Asian students have been identified as students with disabilities. Each student was referred for evaluation because district staff suspected a disability, based on disruptive classroom behavior. Each of these students has committed two minor behavioral infractions and one moderate behavioral infraction under the school's discipline code. Evaluation of the students produced comparable results. A Section 504 (or IEP) team meeting is convened for each student, and the Asian students are placed in a self-contained special education setting for 80 percent of the school day. The Latino students remain in the general education setting and attend classes with students without disabilities, but receive additional counseling services from the school psychologist. The parent of one of the Asian students files a complaint with OCR, alleging the school discriminated against that student on the basis of race.

OCR would find sufficient evidence of a violation of Title VI unless there is a legitimate, nondiscriminatory and non-pretextual reason for the district's decision to place students of one particular race in a more restrictive educational environment while permitting similarly situated students of another race to remain in the general education setting and receive additional services. OCR would also find sufficient evidence of a violation of Section 504 if placement decisions were made categorically, rather than based on individualized consideration of each student's needs by a group of knowledgeable persons. To ensure compliance with Section 504 and Title VI, OCR would consider whether the school had undertaken the appropriate individualized analysis of each student, regardless of race or disability, to make certain that his or her individual educational needs were met. A district is required to place a student with a disability in the regular education environment operated by the district unless the recipient can demonstrate that the education of the student in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily.⁶⁹

Example 10: A district operates an alternative school for students with emotional disturbance, an educational setting that is more restrictive than the district's other schools because it limits students' opportunities to interact with students without disabilities. One high school in the district has a policy of automatically initiating a transfer to the alternative school for any student with emotional disturbance who has received three office referrals for behavioral infractions. The principal uniformly enforces the policy, which results in half of the school's black students with emotional disturbance transferring to the alternative school, and no transfers of students of any other race with emotional disturbance. A parent of one of the black students transferred to the alternative school files a complaint with OCR, alleging the district discriminated against that student on the basis of race.

⁶⁹ 34 C.F.R. §104.34(a).

*OCR would find sufficient evidence of a violation of Section 504 because the high school's blanket policy does not allow for individualized consideration of the needs of students with disabilities. Section 504 requires that students with disabilities receive services based on an individual evaluation in order to ensure their educational needs are met as adequately as the needs of their nondisabled peers. Section 504 also requires that placement decisions be made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. In addition, this policy had a disproportionate adverse effect on black students, thus raising Title VI concerns. OCR would also find sufficient evidence of a violation of Title VI unless the policy was necessary to meet an important educational goal, and no comparably effective alternative policy would have less of an adverse impact on black students. Based on these facts, OCR would also consider whether the school's discipline policies and practices discriminate based on race.*⁷⁰

III. Conclusion

OCR is committed to working with States, districts, and schools to ensure that students of all races have equal access to learning opportunities, including general education interventions and, as appropriate, special education or related aids and services. OCR seeks to assist districts and schools in ensuring that all students, regardless of race, color, or national origin, are timely referred for evaluation when a disability is suspected and that all students with disabilities who need special education services receive high-quality special education services in the most integrated setting appropriate for that student. We applaud the efforts of administrators and teachers who work to ensure that all students have equal access to appropriate learning opportunities. If you need technical assistance, please contact the OCR office serving your State or territory by visiting www.ed.gov/ocr/ or by calling 1-800-421-3481 (TDD 800-877-8339).

⁷⁰ For additional information about States' and districts' obligation to avoid race-based discrimination in school discipline, see OCR and DOJ, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), www.ed.gov/ocr/letters/colleague-201401-title-vi.pdf.