

7-31-2022

The Missing Piece of the Puzzle: The Intersection of Race and Special Education

Tsega Zewdneh Shiferaw

Follow this and additional works at: <https://digitalcommons.law.udc.edu/udclr>



Part of the [Disability Law Commons](#), [Education Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Tsega Z. Shiferaw, *The Missing Piece of the Puzzle: The Intersection of Race and Special Education*, 25 U.D.C. L. Rev. 94 (2022).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol25/iss1/7>

This Article is brought to you for free and open access by the Journals at Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law. For more information, please contact lawlibraryhelp@udc.edu.

THE MISSING PIECE OF THE PUZZLE: THE INTERSECTION OF RACE AND SPECIAL EDUCATION

By Tsega Zewdneh Shiferaw

INTRODUCTION

The privileges allotted to Americans cannot be compared to any other country's citizens. Americans have the liberty of saying what they want, thinking what they want, and acting freely in public. Nebiyat Shiferaw ("Nebiyat") is a thirty-year-old African American man who is unable to speak and live independently because he has autism, also known as autism spectrum disorder ("ASD"). Nebiyat does not experience the same liberties as most Americans; he has gone through special education programs and has overcome discrimination, not because of the Individuals with Disabilities Education Act ("IDEA"), but because of his parents advocating for him. As a substitute special education teacher, I witnessed what takes place when children do not have advocates.

In 2017, I met two young boys of color named Jordan and Manuel who endured the discriminatory practices of a flawed special education system. Jordan was African American and was pulled out of class repeatedly for not raising his hand to speak. Manuel was a Latino immigrant placed in the special education class because he was still learning the English language. Unfortunately, the special education system has failed children of color, primarily African American boys, which results in young African American boys being vulnerable and experiencing more discipline throughout their childhood and into adulthood.

The school-to-prison pipeline is an issue that is inadvertently leading to a 'school-to-death' pipeline. Solomon E. Smith ("Smith"), of Springfield, Florida, was an African American man who

did not have the privilege to act freely in public.¹ Smith was diagnosed with a developmental disorder at a young age and this challenge led to his inability to articulate himself clearly in the face of suspected danger.² Smith was going on a walk in his neighborhood unarmed when he was tased by a police officer.³ The footage of the incident depicts Smith being confused and defenseless about what was happening while the police officer expressed aggressive behavior.⁴ Smith is no different than Jordan. Both Smith and Jordan struggled with developmental challenges, their inability to articulate themselves as a result of their disorder. Jordan’s issue was limited to controlling himself in a classroom and articulating his challenges with his teacher—it did not lead to physical harm. For Smith, that challenge of understanding social cues led to him falling victim to police brutality.⁵ There is no telling what Jordan could possibly fall victim to as an opinionated young Black boy with loads of energy and special needs.

The school-to-prison pipeline is an issue that is inadvertently leading to a ‘school-to-death’ pipeline. The school-to-prison pipeline is a topic that has been recognized, but there is little commentary on the ‘school-to-death’ pipeline. Smith was once a child with similar characteristics and special needs as Jordan. However, just like Jordan, Smith did not receive special treatment by authorities and was ultimately tased by the police officers. In recent years, African American males, such as Smith, have been killed and prosecuted at the hands of police officers at alarmingly high rates. These African American men have been disciplined more severely than their white counterparts for various crimes and in some situations the males may have experienced a long

¹ S. Brady Calhoun & Erika Orstad, *Springfield police officer charged with felony in battery case*, MYPANHANDLE.COM, (June 9, 2020), <https://www.mypanhandle.com/news/springfield-police-and-bay-county-sheriffs-deputies-holding-news-conference>.

² *Id.*

³ *Hoodsite: Springfield Police Officer Over Excessive Force on Unarmed Black Man With Special Needs*, YOUTUBE (June 10, 2020), <https://www.youtube.com/watch?v=kJNgOhmeCyY>.

⁴ *Id.*

⁵ *Id.*

history of excessive punishment. These types of behaviors are mirroring the treatment of African American boys who are enrolled in special education programs more often than their white counterparts.⁶ The enrollment of African American boys in special education programs may be complex but the root of the issue is racism.

Robert Green Ingersoll once said, “tolerance is giving every other human being every right that you claim for yourself.”⁷ That quote should be remembered whenever one questions the purpose of promoting the importance of equality and equity in special education programs. There has been explanation for the high rates of incarceration, but the special education, or school-to-prison pipeline, has not been scrutinized as extensively. This article identifies how the behavior of African American boys results in their wrongful placement in special education programs.

This article will further examine why African American males are being targeted in special education programs and disproportionately placed in special education more than other races, utilizing the lens of Critical Race Theory. Critical Race Theory (hereinafter “CRT”) is the study of the relationship among race, racism, and power.⁸ CRT scholars and activists work to transform the relationship between race, racism, and power, while considering the same issues that civil rights and ethnic scholars have addressed but in a broader perspective.⁹ The perspective allows for discourse that includes economics, history, emotions, and self-interest among other topics.¹⁰ The intersection of race and special education cannot be addressed without taking into

⁶ Gabriel L. Schwartz & Jacquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, PLOS ONE (June 24, 2020), <https://doi.org/10.1371/journal.pone.0229686>; see also Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education>.

⁷ Robert Green Ingersoll, *Tolerance is giving every other human being every right that you claim for yourself*, ALLGREATQUOTES, <https://www.allgreatquotes.com/quote-376692> (last visited July 19, 2022).

⁸ Richard Delgado & Jean Stefancic, *CRITICAL RACE THEORY: AN INTRODUCTION 3* (Richard Delgado et al. eds., 3d ed. 2017).

⁹ *Id.*

¹⁰ *Id.*

consideration the CRT perspective. African American students are diagnosed at higher rates than white students, but they do not receive access to the same resources. The lack of resources negatively impacts their educational experience and in return disenfranchises African American students. Therefore, this article will also propose transformative methods of statute reformation on a state level to protect African American boys with special needs in the education system.

To provide context, the article begins with a discussion of how African American children are diagnosed with autism and other special needs. This article will reveal why in some cases Black children are not diagnosed with ASD in a timely manner. It will also discuss why other Black and brown boys are seen as problems in the classroom, then misdiagnosed with ASD, and placed into the special education programs. Section II will explain the importance experienced discrimination is and how it affects their likelihood of going to juvenile centers and prison institutions. Section III will expound on how African American boys are overlooked in schools and pushed out of mainstream classrooms and schools. Finally, section IV introduces the current structure of special education programs and the rights children are entitled to under IDEA.¹¹ This section will further explain how African American children are disenfranchised and how the Individualized Educational Plans (“IEPs”) are not always inclusive and considerate of the individual needs of each child.

I. The Initial Discrimination of Black Children in Special Education Programs

In this section, I will address the discrimination black boys experience at the onset of their special education journey. The United States of America education system is designed to provide every child with access to education, but these children are facing issues both of inequality and

¹¹ U.S. DEP’T OF JUST., *A Guide to Disability Rights Laws*, (2020), <https://www.ada.gov/cguide.htm>.

inequity. This section will provide the history of special education in schools, the statistics of children diagnosed with ASD, and the faulty diagnoses received by Black children.

Democracy has been defined in many ways, but the most appropriate definition is, “the absence of hereditary or arbitrary class distinctions or privileges.”¹² In Ancient Greek society, when democracy was first introduced, it was emphasized there should be no distinction between the private and public sector.¹³ Demos, or the citizens of a democracy, have an unrestricted right to make a decision on any matter they consider appropriate.¹⁴ What right is more important than the right to be independent? Nothing, is more important than the right to be independent and awarded the same privileges as anyone else. Education can be considered one of the keys to independence and freedom. Unfortunately, education can also be a way to limit individuals.

Special education was established in 1975 through the IDEA, which supplies guidelines for public schools to provide free education to students with disabilities. But these guidelines are general and simply require the schools to consider the individual needs of the child without instructions on how to do so sufficiently.¹⁵ In the National Association for the Advancement of Colored People’s (“NAACP”) report, “Dismantling the School-to-Prison Pipeline,” it was revealed that schools in urban areas have reached new levels of school discipline.¹⁶ According to the report, across the country, the amount of suspensions, expulsions, and school-based arrests have increased tremendously.¹⁷ Chicago was one of the prime urban area locations for these increases, with the amount of school suspensions quadrupling.¹⁸

¹² MERRIAM-WEBSTER, *Democracy* (<https://www.merriam-webster.com/> (last visited July 19, 2022)).

¹³ Guillermo O’Donnell, *Horizontal Accountability in New Democracies*, 9.3 J. OF DEMOCRACY 112 (1998).

¹⁴ *Id.*

¹⁵ *A Guide to Disability Rights Laws*, U.S. DEP’T OF JUST. (Feb. 2020), <https://www.ada.gov/cguide.htm>.

¹⁶ Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison-Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5, (Jan. 2011), https://www.naacpldf.org/wp-content/uploads/PRRAC-journal-Jan_Feb-2011-Dismantling_the_School-to-Prison_Pipeline.pdf.

¹⁷ *Id.*

¹⁸ *Id.*

America is facing a problem regarding the intersection of race and special education that may not be considered very important to the majority but it is an issue that has snowballed into something affecting the entire criminal justice system. The United States Census Bureau reported that within the United States of America (“United States”), 40.6 million people have a disability.¹⁹ This data is disturbingly high but the number of children being diagnosed with ASD is even more shocking. Autism Speaks, one of the most well-known autism advocacy organization charities supporting families and children with ASD, reported that one out of twenty-seven boys and one out of 116 girls are diagnosed with Autism.²⁰ Citizens of the United States have allowed the disabled population to be neglected, unemployed, and dependent on the government. The legal system should step in and protect this population with revised and inclusive statutes. The population that has been considered a minority group is growing and exposing an already existing issue.

It has also been revealed that the prevalence of African American children in special education is an issue. Not only is the prevalence an issue but the lack of representation of African American children in the implemented national surveys is misleading.²¹ Autism Speaks, one of the most well-known charities supporting families and children with ASD, shared statistics from the Centers for Disease Control and Prevention (“CDC”).²² The CDC reported one in forty-four children are diagnosed with ASD but Autism Speaks failed to provide specific statistics regarding

¹⁹*Anniversary of Americans With Disabilities Act: July 26, 2020*, UNITED CENSUS BUREAU (June 17, 2020), <https://www.census.gov/newsroom/facts-for-features/2020/disabilities-act.html#:~:text=40.6%20million%20or%2012.6%25,the%20United%20States%20in%202018>.

²⁰ *Autism Statistics and Facts*, AUTISM SPEAKS, <https://www.autismspeaks.org/autism-statistics> (last visited Feb. 8, 2022).

²¹ Jessica Wright, *U.S. Autism Prevalence in Black Children Based on Few Families*, SPECTRUM (May 4, 2019), <https://www.spectrumnews.org/news/u-s-autism-prevalence-in-black-children-based-on-few-families>.

²² *Our Work*, AUTISM SPEAKS, <https://www.autismspeaks.org/autism-statistics> (last visited Feb. 8, 2022); *see also id.* at 6.

race.²³ An organization that provides various resources for the ASD population and their families should account for the role race has on a child with ASD's life. While the issue of race has not been explored by Autism Speaks, agencies such as the CDC have collected imperative data that reveals the disparities amongst the races.

The CDC compares the prevalence of Autism among the Black, Latinx, and white children. Children of color are more likely to be diagnosed later and are diagnosed less than their white counterparts.²⁴ As Black and brown boys are diagnosed with autism later, they are often misdiagnosed with other conditions. Misdiagnosis is defined as “an incorrect diagnosis,” and a diagnosis is an “investigation or analysis of the causes or nature of a condition, situation, or problem.”²⁵ This leads to the number of students being referred to special education programs being challenged as children of color are the main group of students being sent out of mainstream classrooms.²⁶

It appears a lot of blame is placed on the actual schools for how they are handling the students of color who are in the special education programs and their behavior. Rather than providing community and family members with alternative methods for remedying “bad” behavior, they are simply provided with IEPs.²⁷ Additionally, there is no explanation as to why these young boys are truly acting out. Most articles discuss racial disparities, but they do not fully explain the differences between the home environments of white boys and Black and brown boys.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ Merriam-Webster, *Misdiagnosis, Diagnosis*, MERRIAM-WEBSTER (<https://www.merriam-webster.com> (last visited Feb. 13, 2022)).

²⁶ Monika Williams Shealey & Martha Scott Lue, *Why Are All the Black Kids Still in Special Education? Revisiting the Issue of Disproportionate Representation*, 8 MULTICULTURAL PERSPS. 3 (2006) (referencing that alternative methods include considering the specific needs of the child and focusing less on disciplinary actions).

²⁷ Jason B. Allen, *I Lived the Struggle of Black Boys in Special Education, Which Is Why I Decided to Return to the Classroom*, THE 74 (Dec. 4, 2018), <https://www.the74million.org/article/allen-i-lived-the-struggle-of-black-boys-in-special-education-which-is-why-i-decided-to-return-to-the-classroom-2>.

For example, articles like the NAACP's report do not attempt to focus on the root causes of African American boys' behavior.²⁸ Dr. Carla R. Monroe ("Dr. Monroe"), a former middle school teacher in an urban school district and researcher, wrote an article that did reference the causes for some of the African American boys' behavior.²⁹ Those causes included but are not limited to the parents of the children's socio-economic status along with the stressors associated with living in urban areas.³⁰ Along with those causes, Dr. Monroe included alternative methods to try and work with the boys.³¹ Those alternative methods include more training for educators, but non-educators need to be made aware of the discrimination these children of color face. This article works to address the issues and provide a different perspective on how to address the Black children with special needs, their families, and their specific needs.

There are clear disparities of ASD diagnoses between children of different races. This results in Black and brown boys experiencing disproportionate levels of discrimination. Such children are either misdiagnosed, receive a delayed diagnosis of ASD, or go undiagnosed. The delayed diagnosis may seem like an issue reserved for scientific researchers, but it has a significant impact on the educational rights of the children. Delayed or faulty diagnoses result in fewer Black and brown boys with ASD enrolling in special education programs for the right reasons.³² Special education and IEPs have become an informal way of weeding out Black and brown boys with behavior issues.³³ The number of school-targeted and disciplined African American children

²⁸ Legal Def. and Educ. Fund, Inc., *Dismantling the School-to-Prison Pipeline*, NAACP (June 27, 2018) https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline__Criminal-Justice__.pdf.

²⁹ Carla R. Monroe, *Why Are "Bad Boys" Always Black*, 79 THE CLEARING HOUSE 45 (2010).

³⁰ *Id.*

³¹ *Id.*

³² David S. Mandell et. al., *Racial/Ethnic Disparities in the Identification of Children With Autism Spectrum Disorders*, 99 AM. J. PUB. HEALTH 493 (2009).

³³ *Id.* at 21.

depends on the school district, the teachers' experience, educational level of the children, and the children's home environment.

There is already a clear understanding of how these schools' disciplinary methods are leading to prison, but a different side needs to be exposed: the side of the challenges Black boys experience in the special education system. The issue of African American boys not receiving enough access to proper special education resources is not addressed enough. Special education resources, such as speech therapists and or disability specific groups are not always easily accessible but they should be.³⁴ It is imperative to properly address this issue, because mental health and or disability can be the root cause of a criminal record. There are some African American men in prison today that struggle with special needs or mental health issues. Socio-economic status, mental health background, upbringing, juvenile/criminal history, and level of education all play a role in one's life. As a result, the following needs to be considered when they are arrested and sentenced to prison: juvenile/criminal history, socio-economic status, background, upbringing, and level of education. There are instances where a person has an extensive criminal history and their identity as a 'criminal' disenfranchises their return to society because they are unable to gain employment. This ultimately leads to recidivism, which is defined as the tendency of a convicted criminal to reoffend.³⁵

In other cases where a person is arrested, his educational background plays a significant role in why he has been forced to live out his life in a certain way.³⁶ The fact that in 1998 "35.6% of juvenile offenders ha[d] learning disabilities" is alarming and leads us to question effects of a

³⁴ *Parents and Families*, INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/parents-families> (last visited July 29, 2022).

³⁵ Dylan Rogers Elliott, *An End Run Around Employment Obstacles: Small Business Development Programs for Returning Citizens*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 339 (2019).

³⁶ *Id.* at 345.

faulty special education system and its relation to criminal activities.³⁷ The issue of the special education-to-school pipeline is a multifaceted issue and involves residential segregation along with disparities in educational programs. A lot of the schools where African American boys are targeted are in urban areas. Also, educational segregation relates to residential segregation because taxes play a role in the resources the schools receive. These issues of educational segregation along with faulty diagnoses, and the connection to incarceration can be troubling, but can also be resolved with specific resources that cater to the needs of these Black children with special needs.

II. The Lack of Access to Resources

This section will continue to consider the similarities between the special education system and the prison industrial complex. This section will first examine how children of color are diagnosed compared to their white counterparts and second, look at the role race plays regarding health care access. I will then assert that the special education systems have discriminated against Black and brown students diagnosed with special needs by failing to provide the appropriate resources for the students, parents, and the schools. As a result, Black and brown students are not provided with adequate resources to succeed in their respective educational programs.

The misdiagnosis of Black children has not only hindered students from achieving their full potential in classrooms but it is a form of discrimination.³⁸ The CDC's lack of specific statistics regarding the number of Black and brown boys with ASD is not consistent with the National Survey of Children's Health.³⁹ The CDC and National Survey of Children's Health should be more reflective of each other as the National Survey of Children's Health provides a breakdown by race

³⁷ Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, 16 ABA JUV. JUST. CTR. (1998), <https://files.eric.ed.gov/fulltext/ED419201.pdf>.

³⁸ *Id.* at 17.

³⁹ *Supra* note 20; *see also supra* note 21.

and reported 2.79% of Black children had Autism compared to 2.57% of white children living with ASD.⁴⁰ A large number of Black and brown children living with autism are less likely to receive access to healthcare services than white children.⁴¹ These populations have limited access to health care services. As a result, the children suffer because their developmental needs are not met at the appropriate time due to delayed access to evaluation, diagnosis, and autism-related services.⁴² The proper diagnosis and health care of a child is imperative to their development and allows them to reach their full potential.

Diagnosis for ASD can take place early in a child's life and early intervention services are available between the ages of 0 to 3 years.⁴³ Unlike other disorders, ASD cannot be detected with medical tests, so it is vital that the doctors observe the behavior of the child and review their developmental history.⁴⁴ Unfortunately, the early intervention and screening resources are not made readily available and parents have to search for them.⁴⁵ This leaves Black and brown parents at a disadvantage. Therefore, there is an inherent bias against African American children being diagnosed due to the lack of resources.

To receive access to early intervention services, it also helps to meet with the child's doctor.⁴⁶ Children who do not have insurance are disadvantaged because they may not have the

⁴⁰ *Supra* note 21.

⁴¹ Nat'l Ctr. on Birth Defects & Dev. Disabilities, *Spotlight On: Racial and Ethnic Differences in Children Identified with Autism Spectrum Disorder (ASD)*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/addm-community-report/differences-in-children.html> (last visited Mar. 14, 2021).

⁴² *Id.*

⁴³ Nat'l Ctr. on Birth Defects & Dev. Disabilities, *Autism Spectrum Disorder (ASD): Accessing Services for ASD*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/accessing-services-for-autism-spectrum-disorder.html> (last visited Feb. 13, 2022).

⁴⁴ Nat'l Ctr. on Birth Defects & Dev. Disabilities, *Autism Spectrum Disorder (ASD): Screening & Diagnosis*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/screening.html> (last visited Mar. 15, 2021).

⁴⁵ *Supra* note 43 (explaining how early intervention and screening resources are not always made readily available to many children which results in the children experiencing significant delays in development).

⁴⁶ *Id.* at 35.

means to meet with their doctor regularly. As it is suggested that a doctor review the child's medical and developmental history to properly diagnosis ASD, that documentation can only exist if the said child has insurance and the ability to receive the proper health resources necessary for their care.

Although the Affordable Care Act, introduced by President Barack Obama, provided many poverty-stricken families with Medicaid, a program that provides health coverage to low-income people, under the Trump Administration, policy changes led to an increased number of African Americans and Latinx being uninsured.⁴⁷ The majority, being 72% of the white population, is insured through their employers.⁴⁸ As this nation is still experiencing the by-product of an extremely racist society, white children can experience the luxuries associated with proper health care because of the “ideology of racial hierarchy” that is deeply rooted in American history.⁴⁹ ‘Whiteness’ is a concept that “has value for its possessor and conveys a host of privileges and benefits.”⁵⁰ This leads to an evident issue regarding health care because African American and Latinx children do not experience the same property interest of ‘whiteness’, the “idea that white skin and identity are economically valuable.”⁵¹

Parents of color do not experience the same privileges as the white population amongst their struggle to find health care resources for their children. Although IDEA sets out the legal framework for parents to benefit from what the government programs have to offer, there is no way to prove that this information is shared with everyone.⁵² In addition, before children can

⁴⁷ Samantha Artiga, et al., *Changes in Health Coverage by Race and Ethnicity since the ACA, 2010-2019*, KFF (July 16, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity>; *see also* About Us, MEDICAID.GOV, <https://www.medicaid.gov/about-us/index.html> (last visited July 19, 2022).

⁴⁸ *Id.*

⁴⁹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1717 (June 1993).

⁵⁰ *Id.* at 186.

⁵¹ Delgado, *supra* note 8, at 182.

⁵² Individuals with Disabilities Act, U.S. DEP'T OF EDUC., <https://sites.ed.gov/idea/about-idea> (last visited Feb. 13, 2022).

receive any assistance, according to IDEA section 1414 the parents must provide consent.⁵³ This socio-economic discrimination in medicine leaves children disenfranchised and contributes to the lack of proper diagnoses of African American and Latinx children.

The early signs of autism are subtle but like continuous doctor observations offer, autism signs can be detected through continuous observation by the parents. Therefore, consistent and attentive parental care is also considered vital. Historically and in present day, Black and brown families experience higher rates of poverty.⁵⁴ In 2019, African Americans represented 13.2% of the United States population, but made up 23.8% of those in a poverty population.⁵⁵ Poverty is associated with several other challenges and as a result, the development of a child can often be overlooked by the parents. In comparison, white families do not experience the same levels of poverty or the stressors associated with poverty. Thus, they have the liberty to notice developmental challenges whereas Black and Latinx parents may not have the same amount of time to monitor early childhood development and schedule appointments with specialists.

The Autism and Developmental Disabilities Monitoring Network (“ADDMN”) reports more white children are identified with ASD than African American and Latinx children.⁵⁶ White children were reported 1.1 times more likely to be diagnosed than Black children and 1.2 times more likely than Latinx children.⁵⁷ These statistics highlight how racism impacts the autism development of children. When examining the issue of misdiagnosis or lack of diagnosis through

⁵³ Individuals with Disabilities Act, Section 1414, U.S. DEP’T OF EDUC., <https://sites.ed.gov/idea/statute-chapter-33/subchapter-ii/1414> (last visited Feb. 13, 2022).

⁵⁴ John Cramer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

⁵⁵ *Id.*

⁵⁶ Nat’l Ctr. on Birth Defects & Dev. Disabilities, *Spotlight On: Racial and Ethnic Differences in Children Identified with Autism Spectrum Disorder (ASD)*, CTR. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/ncbddd/autism/addm-community-report/differences-in-children.html> (last visited Mar. 14, 2021).

⁵⁷ *Id.*

the lens of CRT, it is essential to note that “racism is ordinary, not aberrational.”⁵⁸ Racism is not limited to adults, nor is it reserved for social movements. That is why Black and Latinx children are still experiencing institutional racism when seeking health care and education resources.

III. OVERLOOKED AND PUSHED OUT

There is no clear explanation for why African American boys are being targeted more than other races nor why they are placed in the special education system and being suspended. This section will reveal why the young boys are being seen as problems in the classroom, experiencing punishment within the school, and how that treatment may lead these young boys to be victims of juvenile centers and prison institutions. This section will also inspect the relationship between race and disciplinary actions. Finally, this section will view the behavior of African American boys and their placement into special education programs through a CRT lens.

The United States has a history of disciplining African American boys more severely without considering their age or potential disabilities. In *Powell v. Alabama*, Ozie Powell and other African American boys were charged and found guilty of raping two white women.⁵⁹ Aside from the Due Process Clause violation prohibiting the boys from adequate legal representation, among these boys, one was blind in one eye and another had syphilis.⁶⁰ When this case was heard in the lower court, no one treated these young boys as if they were boys. Yet, what took place in Scottsboro, Alabama was no different than what took place before slavery was abolished. The young boys were held in prison awaiting their trials and were initially found guilty, judged by a

⁵⁸ *Supra* note 8, at 7.

⁵⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶⁰ John Edmod Mays & Richard S. Jaffe, *History Correctedd – The Scottsboro Boys Are Officially Innocent*, THE CHAMPION (Mar. 2014), https://www.rjaffelaw.com/documents/Jaffe_History_Corrected_March_2014.pdf (last visited Feb. 13, 2022).

jury with no African Americans.⁶¹ These young boys did not receive an ounce of justice until the case reached the United States Supreme Court.⁶²

American history proves young Black boys have never been treated as children. Instead, they have been consistently judged and treated more harshly than their white counterparts. In the present day, there is little to no change in the way African Americans and Latinx boys are disciplined in schools.

There are various causes of disproportionality in school discipline. Studies, along with United States' history, prove that African American males are disciplined with greater frequency and severity than their white counterparts.⁶³ Jason B. Allen (“Allen”) discusses how young African American boys are perceived as threats in the classroom and forced into special education programs.⁶⁴ In his article, Allen told the story of RaQuan, who was immediately grouped with the special education students on the first day of middle school.⁶⁵ That did not serve the student in any way but made him feel marginalized.⁶⁶

Special education systems are not designed to be an in-school suspension program. Using the special education system in this manner supports Derrick A. Bell’s theory of interest convergence. Interest convergence is a concept that explains white people’s motives for contributing to the Civil Rights Movement, or helping minorities, because doing so benefits them.⁶⁷ Concerning special education, it appears that school systems are eager to place African American boys into special education only when it benefits them. Research shows various centers

⁶¹ *Id.*

⁶² *Id.*

⁶³ Monroe, *supra* note 18.

⁶⁴ Allen, *supra* note 27.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

on average diagnose African American boys with ASD at 64.9 months, more than three years after parents express initial concerns.⁶⁸ This becomes problematic as the children are placed in these programs without receiving the proper resources they need to be successful academically. Boys like RaQuan are placed in the program immediately when it benefits the teachers and administrators.⁶⁹

The lack of cultural awareness on the teacher's behalf plays a role in the African American and Latinx boys being pushed out of the classroom, but that is not the only root cause for the discipline directed towards African American males.⁷⁰ The treatment these children endure in the classroom is no different than the risk they face as African American males on the street. Dr. Monroe states in "Why Are 'Bad Boys' Always Black," that there is "growing evidence [which] supports the view that school inequities involving African Americans are best addressed through race-conscious approaches at the teacher preparation and professional development levels."⁷¹ Matthew Lynch ("Lynch") offers a brief counternarrative to Dr. Monroe's argument in "Black Boys in Crisis: Why Are So Many of Them in Special Education."⁷² Lynch explains that with increased ASD diagnoses, "the mental image that even today's youngest educators have of special education students is probably not accurate."⁷³ This narrative is irresponsible and should not be adopted by educators or lawmakers because it holds no one accountable. It also does not remedy the number of young African American men with disabilities being victims of police brutality or

⁶⁸ John N. Constanino, et al., *Timing of the Diagnosis of Autism in African American Children*, PEDIATRICS (Sept. 2020), <https://pediatrics.aappublications.org/content/146/3/e20193629>.

⁶⁹ Allen, *supra* note 27.

⁷⁰ Monroe, *supra* note 19.

⁷¹ *Id.*

⁷² Matthew Lynch, *Black Boys in Crisis: Why Are So Many Of Them In Special Education*, THE EDVOCATE (Oct. 28, 2018), <https://www.theedadvocate.org/black-boys-crisis-many-special-education>.

⁷³ *Id.*

being imprisoned. Reform needs to occur in the classrooms, and teachers cannot use the excuse of a child's behavior to push them out of the mainstream classroom.

There have been explanations for the high rates of incarceration, but the special education and school-to-prison pipeline has not been examined as extensively. Critical race theorists believe in the permanency of racism in that it is “the usual way society does business,” and “the common everyday experience of most people of color in [the] country.”⁷⁴ The idea that race is a social construct also falls under CRT.⁷⁵ Under this theory, these groups of children are marginalized and discriminated against for no other reason than the color of their skin. African American and Latinx boys experience challenges from getting diagnosed to receiving adequate IEPs.

IV. NON-INCLUSIVE INDIVIDUALIZED EDUCATION PLANS

This section focuses on the history of IDEA and how the lack of reform has adverse effects on African American children in the special education system. These African American children and their families are forced to endure the stressors of living with a mental disability in addition to the stress of not receiving the advantages of proper education.

IDEA was passed in 1975 and was amended by the Every Students Succeeds Act in 2015.⁷⁶ This law provides free special education services to eligible children with disabilities along with related services such as formula and discretionary grants that support special education and early intervention services.⁷⁷ In addition, this law requires each state to provide students with free and appropriate public education and holds states accountable if they violate these requirements.⁷⁸

⁷⁴ Delgado, *supra* note 8, at 7.

⁷⁵ *Id.*

⁷⁶ *Id.* at 52.

⁷⁷ *Id.*

⁷⁸ *Id.*

IDEA section 1414(d)(3), along with section 300.324, provide the structure of the IEPs, but they fail to address the intersectionality the children experience in their daily lives.⁷⁹ Intersectionality is a term coined by Kimberlé Crenshaw and used to convey “the various ways in which race and gender interact to shape the multiple dimensions of Black women’s employment experiences.”⁸⁰ Arguably, that definition could be modified for children as Black and brown boys with ASD experience multiple identities that intersect. Not only are these children experiencing the challenges associated with being African American and Latinx, but they also belong to another minority group, their race/ethnic group.

It is essential the law reflects and meets the needs of the population it is intended for. As of right now, IDEA takes into consideration special factors related to the individual specific disabilities, but those factors are not related to race.⁸¹ This lack makes it important that statutes like IDEA focus on the formation and development of the IEP program while considering the special factors necessary for Black and brown students enrolled in their school’s special education programs. Still, for the system to truly benefit the child, it must consider the individual needs of the parents as well.

If there was language more specific than special factors in the statute considering students of different socioeconomic statuses, it would help to make the law more inclusive. An example would be updating language in section 300.324 (a) of Subpart D of the IDEA, where it would read “the employment schedule of the parents and their ability to work with the child outside of school” must be taken into consideration.⁸² Under section 300.324 (a)(2), where special factors are taken

⁷⁹ U.S. DEP’T OF EDUC., *Individuals with Disabilities Act: Sec. 300.324 Development, review, and revision of IEP*, <https://sites.ed.gov/idea/regs/b/d/300.324> (last visited Mar. 14, 2021).

⁸⁰ Kimberlé Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (July 1991).

⁸¹ U.S. DEP’T OF EDUC., *supra* note 52, § 300.324(d).

⁸² U.S. DEP’T OF EDUC., *supra* note 52, § 300.324(a).

in to consideration, it would benefit the child if there were language that referenced “the socioeconomic status of the child” and “the preferred communication method of the child’s home” in order to be more inclusive. These points would benefit the teachers, parents, and children because they would provide the children with an even more individualized IEP. The specific language would allow children to meet their “measurable annual goals” which would “includ[e] [their] academic and functional goals.”⁸³

IDEA needs imaginative and innovative amendments that benefit African American and Latinx children.⁸⁴ But change can only take place when an institution understands there is a need that must be met. The inconsistency of the number of African American and Latinx children diagnosed with ASD may contribute to the lack of urgency for reform.⁸⁵ African American and Latinx with ASD are not represented properly in the data but IDEA has the ability to promote equity and equality. The American Academy of Pediatrics conducted a study that reported “[B]lack children with ASD were diagnosed an average of more than three years after their parents’ express concerns about their development.”⁸⁶ Developmental and ASD screenings are meant to take place at nine, eighteen, and thirty months, but “584 [B]lack children with autism enrolled in an autism research network...on average...were diagnosed at [sixty-five] months.”⁸⁷ One way that IDEA could promote equity and equality is by using CRT.

Approaching IDEA or special education reform through the lens of CRT would require lawmakers to consider the experiences of African American and Latinx boys and their families.⁸⁸

⁸³ Individuals with Disabilities Act: § 300.320(a)(2).

⁸⁴ Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 3 (June 2018).

⁸⁵ *Supra* note 21.

⁸⁶ Melissa Jenco, *Study: Black children’s autism diagnosis typically delayed 3 years*, AM. ACAD. OF PEDIATRICS (Aug. 25, 2020), <https://www.aappublications.org/news/2020/08/25/autismdiagnosisdelay082520>.

⁸⁷ *Id.* (citing John N. Constanino, et al., *Timing of the Diagnosis of Autism in African American Children*, AM. ACAD. OF PEDIATRICS (Sept. 2020), <https://pediatrics.aappublications.org/content/146/3/e20193629>).

⁸⁸ *Id.* at 41.

African American children with mental disabilities are at a disservice when IEPs only require the following components: current performance; annual goals; special education and related services; participation with non-disabled children; participation in state and district-wide tests; dates and places; transition service needs; needed transition services; age of majority; and measuring progress.⁸⁹ The purpose of these sections are to measure the children's progress, but if they are not considering outside factors such as their home environments, socio-economic status, their parents access to resources, and any related therapy then it does not serve as an accurate measuring tool.

Another amendment of IDEA is a serious demand because there is an overrepresentation of students of color being discriminated against in the special education system. As the number of African American males in the special education system increases, the demand for restructuring must also take place. This prevalence is disheartening, alarming, and an issue this country does not show enough attention to. Since there has not been a decrease in the number of children being referred or pushed out in the special education system, there needs to be at least a modification of the laws in place that are supposed to protect these children. The final step to IDEA reform would be to require an extensive training program for young and current teachers that may not understand how to discern between a disability and behavioral issues. The lack of intentionality in the language from IDEA and the Every Student Succeeds Act has the potential to push these African American and Latinx boys further into special education programs and into juvenile centers or prison. Inevitably, without another amendment, these children may end up in harm's way.

CONCLUSION

⁸⁹ U.S. DEP'T OF EDUC., *A Guide to the Individualized Education Program*, <https://www2.ed.gov/parents/needs/speced/iepguide/index.html#contents> (last visited Mar. 14, 2021).

There is no telling where students like Jordan and Manuel are now or whether they benefited from the special education system as it is set-up today. The intersection of race and special education is multi-faceted and has left many African American and Latinx children undiagnosed or receiving a delayed diagnosis. But the bigger issue is that the special education system is broken and leaves students of color with disabilities disenfranchised. Instead of reaping all the benefits they are entitled to, students of color are discriminated against by the out-of-date exclusive language in IDEA along with the Every Student Succeeds Act.

IDEA needs to be amended with inclusive language to invoke change in the special education system. The systemic racism in this country has left many people disenfranchised, but reform must take place in the ASD diagnosis of African American and Latinx boys, IDEA, and the classrooms these boys are being pushed out of.