# Substantively Immaterial?
## How the IDEA Enables Special Education Labels to be Used as Tools of Inequity

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It all started in second grade. S.H., a Black girl in a predominantly white suburban school district near Philadelphia, began attracting the school psychologist's attention.[2] First S.H. scored below benchmark on a reading test.[3] Then her teacher reported that she was "struggling" to understand place value in math or to grasp main ideas when reading.[4] Finally, in fifth grade, the school psychologist concluded that S.H. had a learning disability in reading and math.[5] S.H. remained in special education—missing the opportunity to take eighth-grade science, middle school Spanish, and higher-level courses in high school—until tenth grade, when an independent evaluation found that "S.H.'s designation as learning disabled was, and had

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1. [Acknowledgements have been omitted.]

2. S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 251 (3d Cir. 2013); Census 2000 School District Tabulation, DEP'T OF EDUC. NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/edge/Census/Master.asp?geo=districts&id=P6&state=42&district=97014160&type=P&T=1&u=1&et=1 (last visited Apr. 7, 2022) (showing that in 2000, nearly 90 percent of children in Lower Merion School District were white).

3. S.H., 729 F.3d at 251.

4. Id. at 252.

5. Id.

always been, erroneous."[6] She had no disability at all.

When Chanselor Bell, a Black boy in Albuquerque, New Mexico, was in third grade, the school district identified him as a student with "mental retardation."[7] After living in Texas for three years, he returned to Albuquerque Public Schools in sixth grade, when he was again given the same label, despite his "obvious academic progress" and "social competence."[8] Consequently, Bell was placed in segregated special education classes for all of middle school. Over the years, Bell came to believe that his disability reflected his potential and "downwardly adjusted his academic and career expectations."[9] Bell was a junior in high school by the time the school district finally determined that his special education needs could be construed as a "learning disability," and not the highly stigmatizing label that had shaped his educational experience.[10]

S.H. and Bell are just two students affected by disproportionality, or the overrepresentation or underrepresentation of racial minority students

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6. Id. at 253.

7. Bell v. Bd. of Educ. of Albuquerque Pub. Schs., No. CIV06–1137JB/ACT, 2008 WL 5991062, at *1 (D.N.M. Nov. 28, 2008). The label is now known as "intellectual disability." 34 C.F.R. § 300.8(c)(6) (2017).

8. Bell, 2008 WL 5991062, at *1; Third Amended Complaint at ¶ 11, Bell, 2008 WL 5991062 (No. CIV06–1137JB/ACT) [hereinafter Third Amended Complaint].

9. Third Amended Complaint, supra note 8, at ¶ 17.

10. Bell, 2008 WL 5991062, at *2.

in special education.[11] Disproportionality encompasses both cases where minority students who have impairments are not identified for special education[12] and cases like S.H.'s, where students who do not require special education may be identified for it to their detriment.[13] Following

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11. See generally MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1 (M. Suzanne Donovan & Christopher T. Cross eds., 2002) (examining the disproportionate representation of minority students in special education); Daniel J. Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 HARV. C.R.-C.L. L. REV. 407, 421 (2001).

12. See Paul L. Morgan et al., Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools, 46 EDUC. RESEARCHER 305, 306 (2017).

13. I use "impairment" to refer to the underlying condition(s) affecting students and "disability" to refer to "the social meaning given to the impairment." Rabia Belt & Doron Dorfman, Disability, Law, and the Humanities: The Rise of Disability Legal Studies, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 145, 147 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020).
Consistent with disability justice movements, I use identity-first language to refer to "disabled students" or "disabled children" throughout this Note. See Labib Rahman, Disability Language Guide (2019), https://disability.stanford.edu/sites/g/files/sbiybj1401/f/disability-language-guide-stanford_1.pdf. However, in referring to specific people, it is important

Professor Claire Raj, I will term cases like S.H.'s as misidentification.[14] However, disproportionality can also include cases like Bell's in which minority students who experience some impairment receive different and more stigmatizing labels than their white peers with comparable impairments. Minority students, particularly Black students, are not only more likely to be identified for special education in general, but more likely to be identified under disadvantageous disability categories. I will refer to this phenomenon as mislabeling.

The causes of disproportionality are rooted in the very structure of the Individuals with Disabilities Education Act (IDEA).[15] The IDEA mandates that states identify students who meet the criteria for one or more of thirteen IDEA-eligible disability categories and provide them with a "free appropriate public education" (FAPE) through an individualized education program (IEP).[16] As I will argue, however, the application of

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to defer to individual preferences as to whether to use people-first or identity-first language. See id.

14. Claire Raj, The Misidentification of Children with Disabilities: A Harm with No Foul, 48 ARIZ. L.J. 373, 391 (2016).

15. 20 U.S.C. §§ 1400–82.

16. 20 U.S.C. §§ 1401(9), 1414(a)(1), 1414(d). The thirteen disability categories covered under IDEA are autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairments, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment (including blindness). 34 C.F.R. § 300.8(c) (2017).

such labels fundamentally runs afoul of the IDEA's aspiration towards individualization.

The IDEA's highly individualized process of disability identification and IEP development allows families with greater financial resources and more cultural capital to secure more advantageous labels for their children—and consequently to reap the benefits of individualized services. At the same time, such insistence on individualization leaves students who receive disadvantageous labels without legal recourse. If plaintiffs claim that they have been identified under an inappropriate disability label, they face an uphill battle: even if they do successfully file a mislabeling complaint, the same financial, informational, or social disadvantages that kept them from securing a more advantageous label in the first place may again hinder their legal claim. In pressing their claim, plaintiffs face courts that sever these labels from their social meanings and fail to consider the broader context of disproportionality surrounding their claims. Ultimately, mislabeling claims demonstrate that given the way the IDEA's disability categories are conceptualized, applied, and litigated, these categories act as tools of inequity, wholly at odds with the law's purported goal of individualization.

In what follows, I survey a set of mislabeling cases, where students claim that they were identified under an inappropriate disability label and examine their implications for ongoing debates about the underlying causes of disproportionality and the IDEA's focus on individualization. In Part I, I introduce the problem of disproportionality, emphasizing that many scholars understand disability labels like those used by the IDEA as social categories, as well as educational and medical ones. In Part II,

I argue that the IDEA's promise of individualization ultimately allows families with greater resources and cultural capital to secure labels that they understand to be more advantageous and that lead to a superior educational experience. In Part III, I trace the narrow legal path available to plaintiffs who believe they have been mislabeled, finding that courts fail to consider the social context underlying these claims and consequently enable these labels to be weaponized by well-resourced families. Finally, in Part IV, I briefly suggest ways to disentangle the IDEA's laudable goals of individualization from its effects in practice.

## I. The Disproportionality Debate

### A. Race and Special Education

In 1972, plaintiffs in Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania[17] drew on the legal framework of Brown v. Board of Education[18] to argue that the state's denial of educational services to cognitively disabled children violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[19] The district court required the state to provide each child with a free appropriate

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17. 343 F. Supp. 279 (E.D. Pa. 1972).

18. 347 U.S. 483 (1954).

19. Natasha M. Strassfeld, The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims, 67 CASE W. RSRV. L. REV. 1121, 1127–29 (2017) (noting that Brown "provided the legal foundation" for plaintiffs in PARC).

public education individualized to their needs, a right that would be codified first in the Education for All Handicapped Children Act of 1975 (EHA) and later in the IDEA.[20]

Many scholars frame the opening of schoolhouse doors to disabled students as part of Brown's legacy.[21] The relationship, however, between racial integration and disability rights is not always symbiotic: scholars have traced a trend towards segregation by ability since Brown, ostensibly meant to better meet students' needs but often with the effect of stymying desegregation efforts.[22] Educational researcher Lloyd Dunn first identified dramatic racial disparities in special education in 1968, finding that 60% to 80% of students identified as "educable mentally retarded" came from "low status" backgrounds.[23] Later scholars argued that special education increasingly furthered "racial segregation under the guise of 'disability.'"[24] Racially diverse schools, faced with integration mandates, began tracking students based on ability, using

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20. Id.

21. See id.; Beth A. Ferri & David J. Connor, Tools of Exclusion: Race, Disability, and (Re)segregated Education, 107 TCHRS. COLL. REC. 453, 455–56 (2005).

22. Ferri & Connor, supra note 21, at 458.

23. Lloyd M. Dunn, Special Education for the Mildly Retarded—Is Much of It Justifiable?, 35 EXCEPTIONAL CHILD. 5, 6 (1968). Lloyd's study did not disaggregate the effects of race and poverty, grouping Black, Latinx, non-English speaking, and low-income students together. Id.

24. Ferri & Connor, supra note 21, at 454.

racially biased criteria that partially recreated racial segregation.[25] In particular, desegregation after Brown coincided with the insurgence of standardized testing normed on white, middle-class students.[26] This shift impacted students differently depending on their race: for Black and other marginalized minority students, identification as disabled led to segregated special education settings.[27] In contrast, some white students identified for special education received additional educational supports that enabled them to remain in general education.[28]

By the 1990s, disproportionality garnered congressional attention. The 1997 amendments to the IDEA required states to begin monitoring school districts for "significant disproportionality" and to review district policies as necessary.[29] When Congress reauthorized the IDEA in 2004, it "prioritized the problem of racial disproportionality [in part] because neither the 1997 amendments nor [the Office of Civil Rights] appeared

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25. Id. at 457 ("'Black and White students with comparable academic abilities are found in different academic tracks . . . [resulting in] the pervasive resegregation' of students.") (citing Roslyn Arlin Michelson, Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools, 38 AM. EDUC. RSCH. J. 215, 216–17 (2001)).

26. Id. at 457–58.

27. Id.

28. Id. at 458.

29. Strassfeld, supra note 19, at 1130.

to have had much impact on the problem."[30] In addition to monitoring for disproportionality, the 2004 reauthorization required states to adopt policies "designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities."[31]

However, states remained free to define what constituted disproportionality, leading to wildly disparate standards.[32] Moreover, states were incentivized to avoid reporting districts for "inappropriate" identification, lest they be forced to set aside special education funding to address these issues.[33] As the Department of Education acknowledged, "[S]ome states' definitions may be preventing them from identifying disproportionality."[34] In response, the Obama Administration issued new and revised regulations in December 2016 to monitor

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30. Susan Fread Albrecht et al., Federal Policy on Disproportionality in Special Education: Is It Moving Us Forward?, 23 J. OF DISABILITY POL'Y STUD. 14, 15 (2011).

31. 20 U.S.C. § 1412(a)(24).

32. Strassfeld, supra note 19, at 1131.

33. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13–137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION 18–21 (2013); Strassfeld, supra note 19, at 1139.

34. U.S. GOV'T ACCOUNTABILITY OFF., supra note 33, at 18.

disproportionality more effectively.[35] Though these new regulations sought to establish greater uniformity, states still retain substantial flexibility. On the one hand, states must use a standard methodology to determine whether "significant disproportionality" exists within the state and within each district, including setting a "reasonable risk ratio threshold" and "reasonable" minimum number of students within each reported subgroup.[36] On the other hand, states still may determine what these "reasonable" standards entail; for example, states can still decline to identify a district that has exceeded risk ratio thresholds for significant disproportionality so long as they are making "reasonable" progress—a standard determined by the state.[37]

Despite increased scrutiny, Black and American Indian students remain more likely to be identified for special education than their white peers.[38] In 2016, Black students were 40% more likely to be identified as

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35. 34 C.F.R. §§ 300–99 (2017). Though the Trump Administration sought to delay their implementation, a district court required their implementation in 2019. Council of Parent Att'ys & Advocs. Inc. v. DeVos, 365 F. Supp. 3d 28, 47–56 (D.D.C. 2019).

36. 34 C.F.R. § 300.647(b)(1)(i) (2017).

37. Strassfeld, supra note 19, at 1148.

38. NAT'L CTR. FOR LEARNING DISABILITIES, SIGNIFICANT DISPROPORTIONALITY IN SPECIAL EDUCATION: CURRENT TRENDS AND ACTIONS FOR IMPACT 2 (2020), https://www.ncld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf. Additionally, some evidence

requiring special education compared to all other students, and American Indian/Alaska Native students received special education nearly twice as often.[39] Notably, disproportionality is not consistent across all disability categories: Black students were more likely to be identified in disability categories for which the identification process is more subjective, like specific learning disability, intellectual disability, and emotional disturbance.[40] Scholars have also referred to many of these labels as

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suggests that emergent bilingual students are disproportionately placed into special education, particularly under the categories of intellectual disability, speech or language Impairment, and specific learning disability. See generally Emma Curran Donnelly Hulse, Disabling Language: The Overrepresentation of Emergent Bilingual Students in Special Education in New York and Arizona, 48 FORDHAM URB. L.J. 2 (2021).

39. NAT'L CTR. FOR LEARNING DISABILITIES, supra note 38, at 2. White and Asian students were less likely than the general student population to be identified for special education. Id.

40. Id. at 4; Rebecca Vallas, The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform, 17 VA. J. SOC. POL'Y & L. 181, 183 (2009) ("Often termed the 'judgmental disability categories,' [intellectual disability, emotional disturbance, and learning disability] are inherently much more subjective in nature, as they rely on (1) the opinions and judgments of individuals tasked with referral, and (2) the state or school district's necessarily arbitrary decision of where to draw the line between 'normal' and 'disabled.'"). For example, "emotional disturbance"

"lower-status" disabilities, as they are associated with greater social stigma, lower rates of inclusion in the general education classroom, and other negative educational outcomes.[41] In contrast, "higher-status" disabilities, like autism, speech and language impairment, and Attention-Deficit/Hyperactivity Disorder (ADHD) are associated with less stigma and more advantageous services.[42]

B. Two Stories about Disproportionality

Scholarship on disproportionality in special education, particularly as it concerns Black students, broadly coalesces around two schools of thought: in the first, higher rates of identification for special education among Black students are justified because they reflect the unfortunate reality that higher rates of poverty among Black students lead to a higher incidence of impairments. I will call this type of reasoning epidemiological

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encompasses schizophrenia, but may also include any psychological condition that persists "over a long period of time and to a marked degree that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(4) (2017); Nicole M. Oelrich, A New "IDEA": Ending Racial Disparity in the Identification of Students with Emotional Disturbance, 57 S.D. L. REV. 9, 18–22 (2012).

41. Rachel Elizabeth Fish, Standing Out and Sorting In: Exploring the Role of Racial Composition in Racial Disparities in Special Education, 56 AM. EDUC. RSCH. J. 2573, 2576–78 (2019) (identifying emotional disturbance and intellectual disability as "lower-status" disabilities and specific learning disability as a "stratified-status" disability).

42. Id.

explanations. In the other school of thought, disproportionality is attributable to dominant cultural norms that pathologize Black students, leading them to be more frequently identified for special education—and more likely to be identified for lower-status disability categories. I term these cultural explanations. As I will demonstrate, cultural explanations, by recognizing the IDEA's labels as social categories, better reflect how disproportionality plays out in practice.

Advocates of epidemiological explanations argue that the higher share of Black and other minority students in special education is justified because such disproportionality is rooted in actual differences in the rate at which students experience impairments.[43] These scholars often explain this difference through "the poverty hypothesis."[44] Poverty is highly associated with identification for special education: in 2012, children living at or below the federal poverty level ($23,624 for a family of four) were more than twice as likely to be identified for moderate or severe learning disabilities as children in households at four times the poverty level ($94,496 for a family of four).[45] The reasons are myriad.

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43. See Morgan et al., supra note 12, at 305.

44. Alfredo J. Artiles et al., Justifying and Explaining Disproportionality, 1968–2008: A Critique of Underlying Views of Cultures, 76 EXCEPTIONAL CHILD. 279, 282 (2010).

45. COMM. TO EVALUATE THE SUPPLEMENTAL SECURITY INCOME DISABILITY PROGRAM FOR CHILD. WITH MENTAL DISORDERS, MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 107, 283 (Thomas F. Boat & Joel T. Wu, eds. 2015).

For example, poverty is highly associated with factors that may lead to impairments, including: low birth weight; exposure to environmental toxins; and adverse childhood experiences like economic hardship, experiences of violence, or living with a parent with substance abuse issues.[46] In fact, some studies suggest that when family income is taken into account, minority students are less likely to be identified for special education.[47] For proponents of epidemiological explanations, identification for special education, even at racially disproportionate rates, entitles students with real impairments to crucial services, including, as I will discuss in Part II, individualized services.[48] For these scholars, insofar as misidentification and mislabeling may exist, these substantive benefits outweigh any negative consequences.

Other scholars advance cultural explanations of disproportionality.[49] For these scholars, increased identification of minority students for special education is attributable not to—or not merely to—the higher incidence of impairments in those groups, but rather to the construction and maintenance of a dominant cultural norm based on the performance

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46. NAT'L CTR. FOR LEARNING DISABILITIES, supra note 38, at 2.

47. Morgan et al., supra note 12, at 309–317.

48. Id. at 318–19.

49. In referring to these as cultural explanations, I follow Professors Alfredo Artiles and LaToya Baldwin Clark. Artiles et al., supra note 44, at 295–96; LaToya Baldwin Clark, Beyond Bias: Cultural Capital in Anti-Discrimination Law, 53 HARV. C.R.-C.L. L.R. 381, 382–92 (2018).

of white, middle-class students.[50] These scholars contest the poverty hypothesis as an adequate explanation for disproportionality.[51] For example, they point to research suggesting that even among students in the same income bracket, Black and Latinx students were more likely to be identified for special education.[52] Critically, these scholars point out that regardless of the rate of impairment, Black and marginalized

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50. See, e.g., Fish, supra note 41, at 2575–76 (describing how the "subjectivity [of special education identification] allows biases, preferences, politics, and other individual and contextual factors to shape which students are seen as having disabilities"); Artiles et al., supra note 44, at 295–96 (arguing that "disproportionality is a symptom of larger cultural and historical processes"); Roey Ahram et al., Addressing Racial/Ethnic Disproportionality in Special Education: Case Studies of Suburban School Districts, 113 TCHRS. COLL. REC. 2233, 2257 (2011) ("In this respect, cultural deficit thinking has the effect of pathologizing academic and behavioral discrepancies of low-income and minority students."); Subini Ancy Annamma et al., Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/Ability, 16 RACE ETHNICITY & EDUC. 1, 3 (2013) ("[S]ocietal interpretations of and responses to specific differences from the normed body are what signify a dis/ability . . . dis/ability categories are not 'given' or 'real' on their own.").

51. See, e.g., Artiles et al., supra note 44, at 282–83.

52. Todd Grindal et al., Racial Differences in Special Education Identification and Placement: Evidence Across Three States, 89 HARV. EDUC. REV. 525, 539 (2019).

minority students' impairments are interpreted as manifestations of lower-status disabilities, which are associated with greater social stigma, more restrictive educational settings, and higher rates of school discipline.[53] Indeed, even Black students from non-low-income backgrounds were identified with intellectual disability and emotional disturbance at twice the rate of white students of the same income background.[54]

Emerging evidence suggests that perceptions of students' impairments vary depending on social context, buttressing cultural explanations. For example, recent research suggests that minority students' likelihood of being identified for special education in the categories with greatest disproportionality varies based on their schools' racial demographics: in a study of all students in Wisconsin, Professor Rachel Elizabeth Fish demonstrated that the share of Black, Latinx, and Native American students identified for lower-status disabilities, like intellectual disability and emotional disturbance, increased in settings with a greater share of white students.[55]

Though a full explanation of these mechanisms is beyond the scope

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53. See infra Parts I.B.1, I.B.2.

54. Grindal et al., supra note 52, at 539.

55. Fish, supra note 41, at 2580, 2690–95 (finding that "racial distinctiveness, or being surrounded by fewer same-race peers, appears to drive the salience of race in sorting into special education"). Conversely, white students' likelihood of being identified with higher-status disabilities increased as the share of minority students increased. Id. at 2695.

of this Note, these scholars generally point to the role of bias in referral and assessment for disability. Indeed, researchers have found that racial disparities are starkest for "subjective" disability categorizations that are more susceptible to the biases of educators, administrators, and psychologists.[56] Some labels used by the IDEA—including specific learning disability, intellectual disability, emotional disturbance—are not formal medical diagnoses but catchall labels that are especially susceptible to bias.[57] For example, research suggests that Black and Latinx boys are more likely to be referred for emotional disturbance than white boys exhibiting the same behavior.[58] In particular, White teachers from a different cultural background from their Black students may view as inappropriate the same behavior that Black teachers view as "cooperative, energetic and ambitious," leading them to refer students for emotional disturbance evaluation more often than their Black colleagues.[59]

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56. NAT'L CTR. FOR LEARNING DISABILITIES, supra note 38, at 4; see supra note 40.

57. See supra note 40.

58. See Rachel Elizabeth Fish, The Racialized Construction of Exceptionality: Experimental Evidence of Race/Ethnicity Effects on Teachers' Interventions, 62 SOC. SCI. RSCH 317, 328 (2017). See also BETH HARRY & JANETTE K. KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS 58 (2014).

59. Oelrich, supra note 40, at 26. In one study, Black teachers viewed

Thus, for scholars advancing cultural explanations, the special education system, despite conferring substantive benefits, also funnels Black and other minority students toward lower-status disabilities, with significant negative consequences. Evidence suggests that identification for lower-status disabilities can lead to collateral harms, like placement in more restrictive classroom settings and higher rates of school discipline, especially compared to peers with higher-status disabilities.

1. Restrictive settings

According to the National Center for Learning Disabilities, while a majority (55%) of white disabled students spend more than 80% of their school day in a general education class, only a third of Black disabled

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Black boys' externalized, demonstrative behaviors as "fun loving, happy, cooperative, energetic, and ambitious," while white teachers described the same students as "talkative, lazy, high strung, and frivolous." Id. (citing HERBERT GROSSMAN, SPECIAL EDUCATION IN A DIVERSE SOCIETY 63–64 (1995)). See also HARRY & KLINGNER, supra note 58, at 58 (noting that teachers often misinterpret Black students' body language as indicative of aggression, low achievement, and potential for special education); SUBINI ANCY ANNAMMA, THE PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS 43 (2018) (noting how "White children are permitted to have a host of behaviors that are said to reflect brilliance," like "obedience, speed, and quietness," while those same behaviors are often used as evidence of disabilities in minority students, particularly Black girls).

students have the same opportunity.[60] The disparate application of lower-status disability labels may contribute to this difference: for example, in 2019, students identified for emotional disturbance—a category disproportionately applied to Black students—were nearly twice as likely to attend a separate school for disabled students compared to students identified with autism, a higher-status disability category more often associated with white students.[61] Nearly half (47.7%) of students identified as intellectually disabled, who are disproportionately Black, spend less than 40% of their time in a general classroom, compared to a third (33.3%) of students identified with autism.[62]

2. School discipline

Black disabled students are also more likely to be suspended than their disabled peers: According to a study of federal data on school suspensions, 31% of Black secondary school students with disabilities were suspended in the 2009–10 school year, compared to 19.3% of disabled students overall.[63] Students with lower-status disabilities,

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60. NAT'L CTR. FOR LEARNING DISABILITIES, supra note 38, at 4–5.

61. DEP'T OF EDUC. NAT'L CTR. FOR EDUC. STAT., DIG. EDUC. STAT. 2020, tbl. 204.60 (56th ed. 2020), https://nces.ed.gov/programs/digest/d20/tables/dt20_204.60.asp [hereinafter DIG. EDUC. STAT. 2020] (noting that 11.8% of students with emotional disturbance attended separate schools, compared to 6.7% of students with autism); see Fish, supra note 41, at 2577; Baldwin Clark, supra note 49, at 383.

62. DIG. EDUC. STAT. 2020, supra note 61.

63. Daniel J. Losen et al., Disturbing Inequities: Exploring the

including emotional disturbance and intellectual disability, faced particularly high suspension rates.[64] Strikingly, schools suspended students identified with emotional disturbance seven times more often than they suspended children identified with autism.[65]

Proponents of the cultural explanation of disproportionality resist the idea that such disparate treatment can be reduced to the differential incidence of impairments; rather they argue that such disparities are a consequence of the social meanings associated with the disability labels employed by the IDEA. Choices to identify Black and racial minority students under a lower-status disability category reflect and perpetuate dominant cultural norms, often to these students' detriment. Moreover, as I will demonstrate in the following Part, families often recognize these dynamics and leverage their resources accordingly.

This debate has critical implications for the IDEA's use of disability categories: if proponents of epidemiological explanations are correct, the IDEA may provide beneficial resources for students who need additional support, even if cultural biases inflect the identification process. On the other hand, cultural explanations suggest that the IDEA's categories carry potent social meanings, allowing well-resourced families to wield them as tools of advantage. As I demonstrate in Part II, the IDEA's expectation

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Relationship Between Racial Disparities in Special Education Identification and Discipline, 5 J. APPLIED RSCH. ON CHILD., no. 2, 2014, at 1, 1.

64. Id. at 5–7.

65. Id. at 7.

that students and families individually advocate for their rights enables well-resourced families to do just that.

## II. The IDEA and the Promise of Individualization

### A. The Promise of Individualization

The IDEA purports to provide an individualized education that meets the particular needs of each student, irrespective of the nature or scope of their disability.[66] Insofar as the IDEA provides one of the few legal mechanisms by which families can require schools to provide certain services, it is undeniably a powerful tool in favor of educational equity. However, as I argue in this Part, the IDEA's highly individualized process allows well-resourced parents—who better recognize the social meanings of the IDEA's categories—to wield it as a tool of inequity.

The IDEA mandates that states identify students who meet the criteria for one or more of thirteen IDEA-eligible disability categories and provide them with a "free appropriate public education" (FAPE) through an Individualized Education Program (IEP).[67] Schools and families collaboratively create an IEP for each student, which describes how the district will provide FAPE. IEPs must include the student's disability, the goals for their education, the services to be provided, and the extent to which the student will be included in general education.[68]

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66. 20 U.S.C. § 1400(d)(1)(A). See 20 U.S.C. §§ 1412(a)(4), 1414(d) (describing requirements for individualized education programs).

67. 20 U.S.C. § 1412(a)(1)(A).

68. 20 U.S.C. § 1414(d)(1)(A).

Initially, in Board of Education v. Rowley ex rel. Rowley, the Supreme Court held that FAPE only required the education to confer "some educational benefit."[69] In Joseph F. ex rel. Endrew F. v. Douglas County School District RE-1, the Court clarified that a student's IEP must be "appropriately ambitious" and "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[70]

In practice, the process of securing a truly individualized education typically requires families to marshal substantial financial, informational, and social resources. Scholars have long argued that the IDEA's emphasis on individualization exacerbates socioeconomic and racial disparities in access to appropriate special education services.[71] As Professor Eloise Pasachoff points out, the IDEA's "construction of the right at an individualized level"—as opposed to the generalized rights in the education clauses of state constitutions—creates inequities

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69. 458 U.S. 176, 200 (1982).

70. 137 S. Ct. 988, 1000–01 (2017).

71. See generally Claire Raj & Emily Suski, Endrew F.'s Unintended Consequences, 46 J.L. & EDUC. 499 (2017); Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement, 86 NOTRE DAME L. REV. 1413 (2011); Elisa Hyman et al., How the IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education, 20 AM. U. J. GENDER SOC. POL'Y & L. 107 (2011); Daniela Caruso, Bargaining and Distribution in Special Education, 14 CORNELL J.L. & PUB. POL'Y 171 (2005).

in enforcement.[72] More recently, Professor LaToya Baldwin Clark highlighted the role of cultural capital in enabling parents to secure more advantageous outcomes for their children.[73] Building on this research, I argue that consistent with cultural explanations of disproportionality, the IDEA allows well-resourced families to advocate for higher-status labels—rendering disadvantaged students both more vulnerable to mislabeling and less able to reap the benefits of individualization.

### B. Labels as Levers of Advantage

While some disability labels are associated with worse educational outcomes, others enable more privileged students to enjoy the substantive benefits of special education without stigmatic and collateral harms. Scholars have argued that historically, the proliferation of labels like "learning disability" in the wake of desegregation provided white, middle-class families with a "less stigmatizing way to explain their children's difficulties and also to gain access to special services."[74] This dynamic persists today: a recent study of Wisconsin students found that white students who struggled academically were more likely than their racial minority peers to be identified with higher-status disabilities like autism or ADHD when they attended schools with higher proportions

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72. Pasachoff, supra note 71, at 1435.

73. Baldwin Clark, supra note 49, at 382–92.

74. Ferri & Connor, supra note 21, at 458. Today specific learning disability is far more likely to be applied to children who live in poverty. NAT'L CTR. FOR LEARNING DISABILITIES, supra note 38, at 2.

of minority students.[75] For these white students, identification for special education led to "greater teacher resources, accommodations that facilitate access to the general education curriculum, and a destigmatizing explanation for low performance."[76] These benefits contrast starkly with the harms facing Black and other marginalized minority students who are disproportionately identified with lower-status disabilities.[77]

Research suggests that parents often recognize the cultural meanings associated with these labels. In contrast to teachers who perceive students' disabilities as "fixed," "universal," and stemming from the students' underlying impairments, parents are more likely to view their children's disability "as a complex interplay of their children's impairments with the kinds of instruction they received, and with the school environment overall."[78] In navigating potential labels, parents weigh considerations of stigma, access, and other social factors.[79] Consequently, even when they largely concur with professionals about their child's underlying impairments, parents often go to "great lengths to advocate for the classification of their children under labels they

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75. Fish, supra note 41, at 2595.

76. Id.

77. See supra Parts I.B.1, I.B.2.

78. Priya Lalvani, Disability, Stigma and Otherness: Perspectives of Parents and Teachers, 62 INT'L. J. DISABILITY DEV. & EDUC. 383, 386, 389 (2015).

79. Id. at 383–84.

believe[] [a]re less stigmati[z]ing than those ascribed to their children by professionals."[80]

Consequently, families with the means to do so are highly motivated to pursue higher-status disability labels. Professor Fish suggests that the identification of white students for higher-status disabilities in racially diverse schools is driven by advocacy by families.[81] Professor Baldwin Clark's discussion of cultural capital in identification for autism provides a key example of this dynamic at work.[82] She highlights how white, middle-class families whose children might have otherwise received an emotional disturbance label questioned educational and medical professional opinions.[83] These parents leveraged their social and cultural capital to secure an autism diagnosis, which is associated with less restrictive classroom settings, better post-school outcomes, lower rates of school discipline, and more positive social perception compared to emotional disturbance.[84]

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80. Id. (emphasis added). See supra note 13 (noting the distinction between impairment and disability).

81. Fish, supra note 41, at 2595, 2598 ("When their own children are racially distinct, in contrast, White families with low-performing children may advocate for higher-status disabilities, which allocate more teacher resources to their children and also distinguish and separate them from merely low-performing peers.").

82. Baldwin Clark, supra note 49, at 400–04.

83. Id. at 429.

84. Id. at 400–04.

C. The Resources of Individualization

In theory, the IDEA's individualized approach should mitigate the effects of a student's disability categorization, as students are entitled to services individualized to their particular needs. In practice, however, the structure of the IDEA limits access to individualized services to families with greater financial, informational, and social resources. As Professor Baldwin Clark notes, the special education process is built on an expectation that parents mount a vigorous defense of their child's educational rights—and consequently, the benefits of individualization are likely to be available only for families that do so.[85] For less advantaged students—the very students who are more likely to be mislabeled—the label can indeed determine the quality of the education they receive.

This inequity is apparent at each step in the process: because the right to an individualized education is constructed at the individual level, each student's access to individualized services depends on effective participation by their families.[86] In order to effectively advocate for their children, parents and guardians must first have the informational and social resources to understand their child's impairments, the social implications of their child's disability label, and the services their child requires.[87] Even if they are fully apprised of their child's needs, lower-income families may not even be aware of the universe of services

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85. Id. at 430–31.

86. Pasachoff, supra note 71, at 1435–36.

87. Baldwin Clark, supra note 49, at 436.

available, especially as such information is not widely accessible.[88] Despite these information asymmetries,[89] courts have denied parents' discovery requests for information about other students' IEP services, holding that parents' lack of knowledge of other students' services is irrelevant to whether their child received FAPE.[90] In contrast, wealthier parents with greater social capital are more able to glean such key information from their social networks or from educational or medical professionals.[91]

Secondly, more advantaged families can also negotiate more effectively on their child's behalf. As discussed in Part II.A., IEPs are the product of repeated negotiations between school districts and families, and research suggests that families with greater financial and social resources are better equipped to navigate this process. As Professor Baldwin Clark points out, white, middle-class families are better able to use both social and cultural capital to negotiate with districts.[92] In

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88. Pasachoff, supra note 71, at 1437–40. Because IEP proceedings are confidential, parents have no way of determining what services similarly situated students received. Id. at 1437.

89. Id. (identifying how the IDEA's design features create "information asymmetries").

90. Id. (citing Hupp v. Switz. of Ohio Loc. Sch. Dist., No. 2:07-CV-628, 2008 WL 2323783, at *2–3 (S.D. Ohio June 3, 2008)).

91. See id. at 1438–39; Baldwin Clark, supra note 49, at 425–26.

92. Baldwin Clark, supra note 49, at 421–31; see Raj & Suski, supra note 71, at 507–08.

particular, parents with the resources to plausibly threaten litigation may be more successful even when they do not ultimately bring a case as they turn IEP meetings into a "bilateral exchange of promises," in which the school district may accede to their concerns in exchange for avoiding costly litigation.[93]

Finally, well-resourced families are better able to successfully challenge school district actions through formal legal proceedings. They are more likely to have the time and wealth required to hire attorneys and pay for effective expert testimony.[94] Though the IDEA allows prevailing parents to obtain attorneys' fees from the other party, Supreme Court decisions have limited the effect of this policy.[95] For example, the Court precludes recovery of attorneys' fees in cases where districts and parents resolve the dispute after the formal proceeding is initiated but before the final ruling on the merits—an exceptionally common outcome.[96] Moreover, even prevailing plaintiffs cannot recover the cost of expert testimony, though such testimony is often critical to their success.[97]

Parents with greater resources are also better able to gather key forms of evidence. For example, in Endrew F., the Court relied

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93. Caruso, supra note 71, at 178–79.

94. Pasachoff, supra note 71, at 1443–50.

95. Id. at 1446.

96. Id. at 1448 (discussing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001)).

97. Id. (discussing Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)).

on evidence of Endrew's performance and evaluations at a private school.[98] Though families are often able to claim reimbursement for private school tuition if they prevail,[99] even the temporary outlay of tuition can be prohibitive for most families. Professors Claire Raj and Emily Suski argue that without the family resources to cover a private school education, attorneys' fees, and expert testimony, Endrew would likely not have been able to demonstrate that the school district's IEPs were not reasonably calculated to enable him to make progress.[100]

Families without these advantages are more likely to rely on districts' determinations, resulting in less individualized services. For example, one study found that the New York City school system "developed an intervention package that it offers to every, or nearly every child, on the autism spectrum."[101] With rare exceptions, only "highly resourced" parents challenged these ready-made packages.[102] Thus, though the IEP development process should, in theory, mitigate any initial

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98. Joseph F. ex rel. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct. 988, 996–97 (2017) (noting how Endrew's behavioral intervention plan at his private school "permit[ed] him to make a degree of academic progress that had eluded him in the public school"); see Raj & Suski, supra note 71, at 501.

99. 34 C.F.R. § 300.148(c) (2006).

100. Raj & Suski, supra note 71, at 501–02; Endrew F., 137 S.Ct. at 999.

101. Karen Syma Czapanskiy, Kids and Rules: Challenging Individualization in Special Education, 45 J.L. & EDUC. 1, 14 (2016).

102. Id.

disadvantages from an inappropriate label, for students with fewer financial, informational, and social resources, the label can indeed dictate the education they receive.

The IDEA's "construction of the right at an individualized level" allows well-resourced families to reap the benefits of individualization, including by securing higher-status disability labels associated with more advantageous services.[103] As I demonstrate in Part III, students without such advantages are also unlikely to find success through legal action. To add insult to injury, courts often use the logic of individualization to bar mislabeling claims, leaving students who believe they have been inappropriately labeled with no legal recourse.

## III. A Narrow Path for Mislabeling Claims

Mislabeling cases—where plaintiffs allege that they were identified for special education services under the wrong disability label—offer a close look at the kind of contestation over students' labels that occurs informally in schools and district offices across the country. Plaintiffs in mislabeling cases occupy a unique intersection of advantage and disadvantage. On one hand, they were typically identified with a lower-status label, suggesting that they were disadvantaged in the special education identification process. Yet, at the same time, mislabeling plaintiffs are among the privileged few who have the means to attempt to leverage the judicial system to secure their preferred label. Plaintiffs who reach a district court at all have already argued their case at a due process hearing, exhausted administrative remedies, and appealed an

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103. Pasachoff, supra note 71, at 1435.

adverse finding—a process that itself requires incredible resources.[104] Consequently, plaintiffs in mislabeling cases may simultaneously be viewed as victims of disproportionality or as among those seeking to leverage the IDEA to secure more advantageous labels.

In what follows, I survey a set of twenty-five district court and appellate cases where plaintiffs made mislabeling claims.[105] Though this set of cases is not exhaustive, it represents decisions from nine circuits and spans a diverse range of circumstances.[106] In reviewing these cases, I demonstrate that with a few exceptions, courts held that mislabeling, in the absence of other failures, does not constitute a denial of a free appropriate public education under the IDEA. I then extract several themes from this set of cases, situating these cases within the extant scholarship on disproportionality and individualization. In particular, I point out that, consistent with critiques of the IDEA's focus on individualization, mislabeling claims often turned on plaintiffs'

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104. 34 C.F.R. §§ 300.507(a), 300.508(a), 300.516(a) (2006); 20 U.S.C. §§ 1415(g)(1)-(2), 1415(l); see also Esther Canty-Barnes, The Due Process Complaint, in SPECIAL EDUCATION ADVOCACY 327, 347–49 (Ruth Colker & Julie K Waterstone eds., 2011).

105. I collected cases where plaintiffs allege "mislabeling," "miscategorization," or "misclassification" in arguing that they had been denied FAPE. Despite these differences in terminology, I will refer to them collectively as "mislabeling" cases to distinguish them from misidentification cases.

106. See infra Appendix A.

informational, financial, and social resources. Finally, despite plaintiffs' concerns about the social consequences of mislabeling, courts almost without exception failed to evaluate these individual claims in their broader social context.

### A. Mislabeling: Procedural and Substantive Claims

Plaintiffs alleging mislabeling may argue that mislabeling constitutes a procedural violation or a substantive violation of the IDEA. The IDEA imposes procedural obligations on school districts: districts must identify and evaluate students suspected of having a disability; reevaluate students in a timely manner; provide IEPs developed with proper parental participation; ensure parental notice, consent, and access to records; and offer mediation and other dispute resolution measures.[107] Mislabeling plaintiffs may allege a procedural violation by pointing to the district's failure to follow these procedures. Plaintiffs may also claim that mislabeling constitutes a substantive violation by arguing that, in light of the mislabeling, the district failed to provide them with a free appropriate public education.

However, plaintiffs in mislabeling cases face substantial hurdles in both paths. If plaintiffs claim a procedural violation, they are likely to be successful only in narrow instances, such as where the district withheld key information from parents. Meanwhile, if plaintiffs allege a substantive violation, courts generally find that they were nonetheless provided with FAPE so long as their IEP was sufficiently individualized—that is, if their IEP was nonetheless tailored to their needs.

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[107.] 20 U.S.C. § 1415.

1. Procedural claims

In my survey of cases, plaintiffs argued that mislabeling constituted a procedural violation of the IDEA by alleging that mislabeling violated the IDEA's Child Find requirement, that mislabeling stemmed from the district's failure to fully evaluate the student, or that mislabeling impeded parental participation.

Plaintiffs in some mislabeling cases pointed to the IDEA's Child Find requirement, which obligates states to seek out and evaluate children to determine if they are eligible for special education services.[108] However, this argument proved unavailing. For example, in Lauren C. ex rel. Tracey K. v. Lewisville Independent School District, the Eastern District of Texas held that the school district met their Child Find obligations where a student diagnosed with autism by her physician was given a label of intellectual disability and speech impairment.[109] The court reasoned that the Child Find requirement does not require students to be categorized by their correct disability "so long as each child who has a disability [listed in the IDEA] . . . is regarded as a child with a disability."[110] While Child Find obligates districts to screen students for potential disabilities, it does not require their findings to align with those of independent experts.

Plaintiffs also claimed that their mislabeling stems from the district's

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108. 20 U.S.C. § 1412(a)(3)(A).

109. Lauren C. ex rel. Tracey K. v. Lewisville Indep. Sch. Dist., No. 4:15-CV-00544, 2017 WL 2813935, at *5 (E.D. Tex. June 29, 2017).

110. Id. at *6 (quoting 20 U.S.C. § 1412(a)(3)(A)).

failure to fully evaluate students in a timely manner.[111] Courts have found this procedural error in some mislabeling cases. For example, in Bell v. Board of Education of Albuquerque Public Schools, the court found that the district failed to reevaluate Bell, who was labeled as "mentally retarded," in a timely manner.[112] However, in Bell, the district did not contest that it had originally mislabeled Bell, and for at least two years before his reevaluation, the district had evidence supporting Bell's eligibility under learning disability.[113] In the absence of clear procedural failures like the withholding of information in Bell, courts generally did not find that failure to identify a particular disability constitutes a procedural error. Only one case, Minnetonka Public Schools v. M.L.K. ex rel. S.K., held that the district failed to properly evaluate the student because it "did

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111. The IDEA requires school districts to perform an initial evaluation when a request is initiated by a parent, state agency, or school district and to reevaluate the student at least every three years, when conditions warrant reevaluation, or when a parent or teacher requests revaluation. 20 U.S.C. §§ 1414(a)(1)(B), 1414(a)(2)(A), 1414(a)(2)(B).

112. Bell v. Bd. of Educ. of Albuquerque Pub. Schs., No. CIV06–1137JB/ACT, 2008 WL 5991062, at *2, *25 (D.N.M. Nov. 28, 2008).

113. Id. at *25 ("[Albuquerque Public Schools] was already in possession of most of the information that would ultimately result in Bell no longer being labeled mentally retarded well before [Albuquerque Public Schools] undertook that reevaluation."). In this way, Bell resembles Amanda J., infra note 117, where the district withheld key information from the student's parents.

not properly identify Student's most debilitating disabilities."[114]

Moreover, even when courts find a procedural violation, they may not find that the student was denied FAPE. The IDEA notes that a procedural violation constitutes a denial of FAPE only if the procedural inadequacies "impeded the child's right to a free appropriate public education," "significantly impeded" parental participation, or "caused a deprivation of educational benefits."[115]

In my review of cases, mislabeling plaintiffs were able to show that procedural errors led to a denial of FAPE only in cases where errors "significantly impeded the parents' opportunity to participate in the decision-making process."[116] For example, in Amanda J. ex rel. Annette J. v. Clark County School District, the Ninth Circuit found that the school district denied Amanda FAPE when they failed to disclose an evaluation suggesting that she fit criteria for autism, in direct violation of the IDEA's procedural requirements protecting parental participation.[117] However,

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114. No. 20–1036 (DWF/KMM), 2021 WL 780723, at *9 (D. Minn. Mar. 1, 2021).

115. 20 U.S.C. § 1415(f)(3)(E)(ii).

116. Id.

117. 267 F.3d 877, 894 (9th Cir. 2001). The IDEA guarantees the "opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child." 20 U.S.C. § 1415(b)(1)(A) (emphasis added). See also Bell, 2008 WL 5991062, at *29–30 (finding that the school district's failure to provide

the Ninth Circuit later clarified that mislabeling in the absence of other procedural violations does not constitute a violation of the IDEA, noting in Weissburg v. Lancaster School District that the "IDEA does not give a student the legal right to a proper disability classification."[118] District courts within the Ninth Circuit have sided with Weissburg's narrower interpretation of Amanda J.: for example, in D.H. v. Etiwanda School District, where the district failed to identify D.H.'s primary disability as autism, the Central District of California held that Amanda J. did not carve out a procedural violation for mislabeling cases, but merely "supports the proposition that where procedural violations result in a loss of educational benefits or infringe on the parties' right to participate in the IEP process, a child has been denied FAPE."[119]

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accurate information to Bell's family deprived them of meaningful participation in the IEP process and thus resulted in a denial of FAPE).

118. 591 F.3d 1255, 1258–1260 (9th Cir. 2010) (holding that a student who "was not classified as autistic as he should have been . . . nonetheless received the educational benefits to which he was entitled under the IDEA," but that prevailing on a category determination was enough to make the parents "prevailing parties" and eligible for attorneys' fees, in light of a California law requiring that autistic students be taught by certified teachers).

119. D.H. v. Etiwanda Sch. Dist., No. CV-12–05097-MWF (OPx), 2014 WL 12852454, at *9, *13 (C.D. Cal. Mar. 31, 2014) (citing Weissburg., 591 F.3d at 1259).

2. Substantive claims

Plaintiffs also face an uphill battle in demonstrating that mislabeling constitutes a substantive violation of the IDEA. At least three circuit courts have held that mislabeling in and of itself does not constitute a substantive violation of the IDEA so long as the student's IEP is individualized to their needs.[120] As these courts emphasized, the IDEA requires only that each child with a disability is identified as a child with a disability; it does not require they are labeled with a disability preferred by their family or even independent experts.[121] They reasoned that at its core, the "IDEA concerns itself not with labels but with whether a student is receiving a free and appropriate education."[122] The Eighth Circuit went so far as to assert that "Given the IDEA's strong emphasis on identifying a disabled child's specific needs . . . the particular disability diagnosis affixed to a child in an IEP will, in many cases, be

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120. Heather S. ex rel. Kathy S. v. Wisconsin, 125 F.3d 1045, 1055 (7th Cir. 1997) (holding that an IEP involving placement in a program for students with "cognitive disability" was substantively appropriate, though parents objected to the cognitive disability label); Fort Osage R-1 Sch. Dist v. Sims ex rel. B.S., 641 F.3d 996, 1003–05 (8th Cir. 2011) (holding that even if a student with Down Syndrome had received an autism diagnosis, her IEP would not have been substantially different); Weissburg, 591 F.3d at 1259–1260 (holding that the IDEA did not give a student the legal right to a proper disability classification).

121. 20 U.S.C. § 1412(a)(3)(B).

122. Heather S., 125 F.3d at 1055.

substantively immaterial because the IEP will be tailored to the child's specific needs."[123]

Plaintiffs must instead rely on a heavily fact-dependent inquiry to demonstrate that their mislabeling led to such different treatment as to constitute a denial of FAPE. Plaintiffs bringing mislabeling claims must overcome several main hurdles: First, they must convince the court that the student really was mislabeled. As I discuss in Part III.B., plaintiffs' success on this question depends largely on the court's perceptions of the credibility of experts and other witnesses and even the student's self-presentation. Second, even if the court is convinced that mislabeling occurred, it may still find that the district provided the same services that it would have provided under the new label.[124] For example, in E.C. v.

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123. Fort Osage, 641 F.3d at 1004 (emphasis added).

124. Courts have routinely held that even if the student was mislabeled, plaintiffs failed to show a denial of FAPE. See, e.g., Joanna S. v. S. Kingstown Pub. Sch. Dist., No. 15–267 S, 2017 WL 1034528, at *2–3 (D.R.I. Mar. 17, 2017); Z.H. ex rel. R.H. v. Lewisville Indep. Sch. Dist., No. 4:12cv775, 2015 WL 1384442, at *12–13, *15 (E.D. Tex. Mar. 24, 2015); Hernandez ex rel. J.V. v. Bd of Educ. of Albuquerque Pub. Schs., No. 13cv00939 WJ-WPL, 2015 WL 13667171, at *5–8 (D.N.M. Feb. 24, 2015); J.D. ex rel. K.D. v. Crown Point Sch. Corp., No. 2:10-CV-508-TLS, 2012 WL 639922, at *17–22 (N.D. Ind. Feb. 24, 2012); Hailey M. ex rel. Melinda B. v. Matayoshi, No. 10–00733 LEK-BMK, 2011 WL 3957206, at *6 (D. Haw. Sept. 7, 2011); Fort Osage, 641 F.3d at 1003–05; Walker v. District of Columbia, 157 F. Supp. 2d 11, 32 (D.D.C. 2001).

U.S.D. 385 Andover, the District of Kansas noted that though E.C.'s primary disability was not listed as autism, his IEP nevertheless met his underlying needs, including those potentially stemming from autism.[125]

Finally, even if courts acknowledge that mislabeling affected the services provided, plaintiffs must still show that services differed to such an extent that it constitutes a denial of FAPE. Courts in mislabeling cases often emphasize that the IDEA does not guarantee disabled students a right to an optimal education, following the Supreme Court's determination in Rowley that schools are not required to provide services that maximize disabled students' potential.[126] For example, in R.C. ex. rel. S.K. v. Keller Independent School District, the Northern District of Texas acknowledged that though "an autistic child may generally have different needs than a child with [emotional disturbance]," R.C.'s IEP was sufficiently individualized to provide him with "educational benefits."[127] Similarly, the Central District of California emphasized in D.H. v. Etiwanda School District that the focus should be on whether the services provided were appropriate, not on the merits of potential alternatives—even if the alternatives would have been better for the student.[128]

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125. No. 18–1106-EFM, 2020 WL 2747222, at *6 (D. Kan. May 27, 2020) ("[Experts] concluded that, even though E.C.'s primary exceptionality was not listed as autism, his IEP was nevertheless properly constructed to meet his educational needs.").

126. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 198 (1982).

127. 958 F. Supp. 2d 718, 732, 736–37 (N.D. Tex. 2013).

128. No. CV-12–05097-MWF (OPx), 2014 WL 12852454, at *8 (C.D. Cal.

At first glance, the Endrew F. standard, which requires an IEP that is reasonably calculated to enable a child to make progress "in light of [their] circumstances," would seem to provide greater protection for mislabeled students.[129] Because a student's diagnostic classification forms a part of the student's circumstances, mislabeling itself could constitute evidence of the district's failure to adequately consider a student's "present levels of achievement, disability, and potential for growth," and consequently its failure to provide services reasonably calculated to enable the student to make progress.[130] However, the post-Endrew F. mislabeling cases suggest that the analysis remains largely unchanged: plaintiffs must still show that mislabeling led to services egregious enough to independently constitute a denial of FAPE. In at least two post-Endrew F. mislabeling cases, the courts held that the

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Mar. 31, 2014) ("The court must focus 'primarily on the District's proposed placement, not on the alternative that the family preferred.' Even if the parents' preference is better for the child, the District's placement is still appropriate if it was reasonably calculated to provide educational benefit to the child.") (citation omitted).

129. Joseph F. ex rel. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct. 988, 999–1001 (2017) (emphasizing that IEPs should be constructed only after "careful consideration of the child's present levels of achievement, disability, and potential for growth"). See also Baldwin Clark, supra note 49, at 436 (making a similar argument).

130. Endrew F., 137 S.Ct. at 994.

plaintiffs failed to meet this standard.[131] In particular, the District of Kansas echoed language in pre-Endrew F. cases, emphasizing that the inquiry is not whether "the IEP is ideal, but rather if it is reasonable."[132] One post-Endrew F. case did find that a district's failure to identify the student's dyslexia and ADHD diagnoses on his IEP constituted a failure to provide FAPE.[133] However, in that case, the student's mislabeling accompanied the district's failure to make any adjustments despite years of very minimal progress—a failure that likely would have constituted a denial of FAPE even under the Rowley standard and even in the absence of mislabeling.[134] None of these post-Endrew F. cases viewed mislabeling as evidence that the district was insufficiently attentive to the students' circumstances.

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131. Glass ex rel. A.G. v. District of Columbia, No. 19–2148 (RC), 2020 WL 6799139, at *13 (D.D.C. Nov. 19, 2020) (holding that classifying A.G. under emotional disturbance rather than autism "was reasonably designed in light of all of the circumstances to allow A.G. to make educational progress"); E.C. v. U.S.D. 385 Andover, No. 18–1106-EFM, 2020 WL 2747222, at *5 (D. Kan. May 27, 2020).

132. E.C., 2020 WL 2747222, at *5 (emphasis added) (quoting Endrew F., 137 S.Ct. at 999 (2017)).

133. Minnetonka Pub. Schs. v. M.L.K. ex rel. S.K., No. 20–1036 (DWF/KMM), 2021 WL 780723, at *9 (D. Minn. Mar. 1, 2021) ("The District's failure to accurately identify and classify Student's dyslexia and ADHD did not amount to a harmless misclassification.").

134. Id.

B. Doubling Disadvantage

Courts' approach to mislabeling cases compounds existing inequities in special education. As my review of cases demonstrates, the very students who are more likely to be given lower-status disability labels—and more likely to have such labels hinder their education—were also less likely to successfully argue that mislabeling denied them a free appropriate public education.

In particular, courts often allowed districts to wield the language of individualization as a shield against mislabeling claims. The Eighth Circuit claimed, for example, that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs."[135] Yet, as discussed in Part II, the likelihood that a student will, in fact, receive an education tailored to their needs depends in large part on their family's ability to effectively navigate the IEP development process. A lower-status label may be immaterial if the student's family has the resources to effectively advocate for their needs. For other students, including those most likely to be mislabeled, that label may shape their educational experience.

Yet, if such families pursue a mislabeling claim, they again find the odds stacked against them. Based on the cases surveyed, courts' approach to mislabeling claims often advantaged families with the financial, informational, and cultural resources to effectively navigate

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135. Fort Osage R-1 Sch. Dist v. Sims ex rel. B.S., 641 F.3d 996, 1004 (8th Cir. 2011).

the special education system in the first place. For one, the most successful mislabeling claims involved plaintiffs who were able to identify key procedural errors, like the district's failure to disclose evaluations. Families with greater informational resources are more likely to identify such errors. For example, in Amanda J., Amanda's parents were first alerted to the possibility that she could be eligible for services under an autism label—and of the school district's error—when Amanda's uncle, a physician, recommended that she be evaluated for autism.[136] This key advantage ultimately led to Amanda's family uncovering the district's failure to disclose evaluations. Only highly informed families are likely to have the familiarity with the IDEA necessary to not only take note of such errors but to recognize them as potential IDEA violations.

Mislabeling cases also favored plaintiffs with the financial resources to secure key evidence. Consistent with Professors Raj and Suski's comment on Endrew F., plaintiffs could present stronger evidence of the harms of mislabeling if they had the financial ability to transfer their child to a private school or program willing to provide services under a different label. For example, in Draper v. Atlanta Independent School System, J.D., who was given a label of "mild intellectual disabilities," was able to attend a private program to the tune of $11,000, which increased his reading level from a third-grade to fifth-grade level.[137] These promising results encouraged J.D.'s family to continue to insist on further evaluation

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136. Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 886 (9th Cir. 2001).

137. 480 F. Supp. 2d 1331, 1335–37 (N.D. Ga. 2007).

and "it was only due to this continued insistence" that J.D. was ultimately diagnosed with a learning disability.[138]

Additionally, mislabeling claims often turned on courts' assessment of expert credibility—a dynamic that advantages families with the informational and financial resources to procure high-quality expert testimony. For example, in Draper, the Administrative Law Judge (ALJ) was persuaded by the credibility of the plaintiffs' experts.[139] Another successful mislabeling case involved "22 witnesses, including [the student], his mother, [the student's] three expert witnesses, 11 of [student's] teachers, his speech and language pathologist, transition specialist, and others."[140] In contrast, in an unsuccessful mislabeling case, the court dismissed the testimony of a plaintiff's expert who performed only a file review, rather than a full evaluation, as mere "conjecture and speculation."[141]

More subtly, courts' preference for cases where the district admitted error may also advantage families with the financial, informational, and cultural resources to secure an admission of mislabeling prior to formal litigation. For example, in a particularly egregious case, the Southern

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138. Id. at 1337.

139. Id. at 1342–43.

140. Bell v. Bd. of Educ. of Albuquerque Pub. Schs., No. CIV06–1137JB/ACT, 2008 WL 5991062, at *8 (D.N.M. Nov. 28, 2008).

141. Hernandez ex rel. J.V. v. Bd of Educ. of Albuquerque Pub. Schs., No. 13cv00939 WJ-WPL, 2015 WL 13667171, at *8 (D.N.M. Feb. 24, 2015).

District of New York found in favor of a student who was mislabeled as "severely cognitively impaired" and placed in a non-credit-earning program at a school for children with severe developmental disabilities.[142] She remained there for nearly a decade before "[d]efendants finally realized their error," and she was ultimately identified as a student with a speech-language, auditory, and language processing disorder.[143] In Bell, where the district revised its initial assessment prior to the legal action, the court noted that the student's prior IEPs relied on the "incorrect assumption that he was mentally retarded."[144] This suggests that mislabeled plaintiffs who were able to rectify an initial label prior to litigation also tended to be more successful in formally pursuing their claims.

### C. Labels as a Site of Contestation

Mislabeling cases reflect the fundamental disagreement at the heart of the disproportionality debate: Courts largely viewed students' labels as reflecting discoverable facts about their impairments, mirroring epidemiological explanations of disproportionality and entirely ignoring the broader social context of disproportionality. In contrast, mislabeling plaintiffs demonstrated an understanding of the social meaning of IDEA labels, cognizant of the ways they could harm their child. In neglecting to address the broader social context, courts not only failed to appreciate

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142. M.W. v. N.Y.C. Dep't of Educ., No. 15cv5029, 2015 WL 5025368, at *4 (S.D.N.Y. Aug. 25, 2015).

143. Id. at *1.

144. Bell, 2008 WL 5991062, at *2, *26.

the full meaning of plaintiffs' claims, but they also ceded these issues to the informal means by which parents and districts negotiate these labels.

By their very nature, mislabeling cases fall in a gray area: a student with a discrete set of impairments may logically fit multiple of the IDEA's thirteen categories.[145] Yet, despite the subjective nature of many IDEA labels, courts hearing mislabeling claims treated the application of even subjective labels like emotional disturbance and intellectual disability as matters of verifiable fact—sometimes verifiable by the judges themselves. Though the legal standard does not require courts to address whether the plaintiff's classification was correct—only whether it constituted a denial of FAPE—several courts nonetheless held that the student's original label was correct.[146] In some such cases, the court went so

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145. See Fish, supra note 41, at 2575 (noting that "indicators of some disability categories partially overlap with one another, creating grey areas of qualification where social factors could affect the particular category that is diagnosed").

146. See, e.g., Hernandez, 2015 WL 13667171, at *5; Pohorecki v. Anthony Wayne Loc. Sch. Dist., 637 F. Supp. 2d 547, 556–559 (N.D. Ohio 2009) (holding that the district "properly classified" the student's disability as emotional disturbance, after comparing the statutory criteria for emotional disturbance and autism); Couture v. Bd of Educ. of Albuquerque Pub. Schs., No. 05–972 JH/DJS, 2009 WL 10708112, at *6 (D.N.M. Mar. 30, 2009) (holding that the preponderance of evidence supports the district's decision to label the student as "emotionally disturbed").

far as to apply the criteria for the proposed label from the bench: For example, instead of addressing the opinion of the plaintiff's psychologist, the court in Pohorecki v. Anthony Wayne Local School District considered how well the record of the student's impairments comported with various diagnostic criteria.[147] In other cases, judges relied on their own impressions of a student's impairments. For example, in Draper, the ALJ "found that based on J.D.'s demeanor and articulate speech, it was 'incredulous that anyone, let alone supposedly trained professionals, could have deemed [J.D.] mentally retarded.'"[148]

By viewing disability labels as discoverable facts, courts obscured the subjectivity inherent in their application. Even in cases where they found in favor of plaintiffs, courts reasoned that the district made a mistake about the student's true categorization—rather than a choice that negatively impacted the student. As discussed in Part III.B., courts were most receptive to mislabeling claims where the district made some admission of error about the student's underlying impairment. In these cases, the courts' language suggests that they viewed these students as in fact having their "new" disability categorization, paving the way for a

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147. Pohorecki, 637 F. Supp. 2d at 550, 556–559 (noting that there is no evidence the student experiences symptoms of autism listed in IDEA regulations).

148. Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1343 (N.D. Ga. 2007). The ALJ also noted that "J.D.'s testimony regarding the school system's treatment of him was highly credible . . . . A lesser spirit would have been crushed long ago." Id. at 1343 n.2.

substantive finding in their favor: for example, in one case, "defendants finally realized their error"; in another, the student's prior IEP had relied on an "incorrect assumption" about the student's disability.[149]

Critically, courts failed to recognize that mislabeling itself could constitute a substantive harm. Bell was an exception: in considering whether the district's procedural error constituted a denial of FAPE, the District of New Mexico heard expert testimony that "a label of mental retardation affects the expectations that family members have of the student."[150] The court acknowledged that, given the inclusion of disability categorizations in IDEA regulations, "at least some importance can and, in the appropriate circumstances, should be attached to them."[151] However, even the court in Bell was not willing to hold that the subjective effects of mislabeling on Bell constituted a substantive violation.[152]

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149. M.W. v. N.Y.C. Dep't of Educ., No. 15cv5029, 2015 WL 5025368, at *1 (S.D.N.Y. Aug. 25, 2015); Bell, 2008 WL 5991062, at *2, *26.

150. Bell, 2008 WL 5991062, at *31 ("Based on the label of mental retardation, Ms. Bell thought that Bell's intellect was far below normal intellect and that he had a limited capacity to learn. . . . After Bell's eligibility changed, however, Ms. Bell began raising questions about his IQ. . . . Thus, Ms. Bell's perception of Bell's abilities began to change when she was informed of his new diagnosis. Had she possessed the information earlier, it is almost certain that she would have approached the IEP process differently.") (citation omitted).

151. Id. at *28.

152. Id. at *32.

Though the court acknowledged that being labeled as "mentally retarded" affected Bell's expectations for himself—leading him to believe that he couldn't learn—the court did not find that this "affected his educational programming or deprived him of educational opportunities."[153]

Finally, courts uniformly failed to situate plaintiffs' mislabeling claims within the broader context of disproportionality. Few decisions mentioned students' race. For example, the District of New Mexico's recital of the facts in Bell failed to mention that Bell is Black.[154] It is unclear if such omissions are because courts did not view students' race as relevant to mislabeling claims, or because Black and other marginalized minority students were less likely to have the resources to bring mislabeling cases in the first place. Similarly, no decisions cited data on disproportionality. The exclusion of such context is particularly glaring when the majority of cases surveyed concerned categories like emotional disturbance and intellectual disability that are central to debates around disproportionality.[155]

In contrast, mislabeling plaintiffs appeared at least partially motivated by their understanding of the social meaning of IDEA labels. The majority

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153. Id. Bell described how his label affected him: "[M]entally retarded just basically means that you just come to school, but you don't—you know, you can't learn. You don't know nothing, and you won't learn. And learning disability means you still have time to learn and catch up, and pass." Id. at *4.

154. Id. at *2–3. See Third Amended Complaint at ¶ 7.

155. See infra Appendix A.

of mislabeling cases surveyed involved plaintiffs seeking to replace a lower-status label, typically with a higher-status label: for example, eight out of twenty-five cases involved plaintiffs seeking to replace an initial label of emotional disturbance, often with autism, and a further eight involved an initial label of intellectual disability (formerly called "mental retardation" or "cognitive disability").[156] Thirteen cases involved plaintiffs requesting an autism label, while only two sought to replace an initial label of autism.[157]

Consistent with cultural explanations of disproportionality discussed in Part II, plaintiffs recognized the social meanings of various labels, often explicitly raising concerns about stigma and the collateral harms associated with lower-status labels: for example, in one case, parents objected to their child's placement in a program for cognitively disabled students because the student "equate[d] such an identification with being labeled 'mentally retarded.'"[158] In other cases, plaintiffs appeared to be motivated by the often dire collateral harms associated with lower-status disabilities: in Couture v. Board of Education of Albuquerque Public

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156. See infra Appendix A; 34 C.F.R. § 300.8(c)(6) (2017).

157. See infra Appendix A. See also Baldwin Clark, supra note 49; Fish, supra note 41, at 2577 (identifying autism as a higher-status label).

158. Heather S. ex rel. Kathy S. v. Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997). See also B.B. ex rel. Brunes v. Perry Twp. Sch. Corp., Nos. 1:07-cv-0323-DFH-JMS, 1:07-cv-0731-DFH-JMS, 2008 WL 2745094, at *8 (S.D. Ind. July 11, 2008) (discussing how the parents "want[ed] to avoid the stigma that can be associated with the 'autism' label").

Schools, the plaintiff parent objected to the use of physical restraints on her son and other "strategies that would not be tolerated if directed at non-disabled children."[159] In Hailey M. ex rel. Melinda B. v. Matayoshi, plaintiffs alleged that Hailey's "basic academic skill training had been neglected due to her [being labeled as 'mentally retarded']."[160] In other words, these plaintiffs viewed students' labels as potentially conferring harm—harm that would be no less real even if the label accurately described the student's impairments.

The IDEA's highly individualized process allows disability identification to become a site of dispute and negotiation between families, medical professionals, and educators. Yet mislabeling cases often treated the question of the student's label as a straightforward factual matter.[161] In ceding this ground to informal contestation, courts inevitably disadvantage students without the financial, informational, and social resources to effectively navigate this system—the very students who are most subject to mislabeling. The IDEA may not have intended to "concern[] itself with labels," but the IDEA—through its application of these categories and its construction of special education as an individual right—renders these labels a potential tool of inequity.[162]

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159. No. 05–972 JH/DJS, 2009 WL 10708112, at *4 (D.N.M. Mar. 30, 2009).

160. No. 10–00733 LEK-BMK, 2011 WL 3957206, at *14 (D. Haw. Sept. 7, 2011).

161. See supra Part III.B.

162. Heather S., 125 F.3d at 1055.

## IV. The Cure for the Ills of Individualization

Mislabeling cases demonstrate that the IDEA's application of disability categories with highly distinct social meanings stands fundamentally at odds with its aspirations toward individualization. In this Part, I consider how courts in mislabeling cases can better account for the broader context of disproportionality and begin to propose how the IDEA can better live up to its laudable ideals.

### A. Contextualizing Mislabeling

Mislabeling claims provide a key mechanism by which families may secure a more appropriate label for their child. Yet, as discussed in Part III, courts sever their consideration of mislabeling claims from their broader context of disproportionality.

Instead, courts should recognize that school districts are making a choice about how to classify a student—a choice made in a social context rife with inequity and with critical consequences for the most disadvantaged students. First, courts should explicitly consider the potential harms of mislabeling itself, including its impact on students' ability to benefit from their educational services. For example, in Bell, the court should have considered, as evidence of a substantive violation as well as a procedural one, the effects that Bell's mislabeling had on his and his family's expectations for his future academic potential.[163] The perception that Bell "had a limited capacity to learn" surely affected not only his parents' ability to advocate for him but also likely affected his

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163. See supra notes 150-153.

ability to take full advantage of the educational services he was given.[164] In particular, advocates should draw on educational studies and disability studies literature to demonstrate the substantive harms of stigmatizing labels like Bell's.[165]

Additionally, courts should consider mislabeling claims in the context of district- and school-level disproportionality. As discussed in Part I.A., federal regulations now require states to collect district-level data on disproportionality.[166] Courts could use this data to contextualize plaintiffs' mislabeling claims and even to apply a presumption in favor of plaintiffs who allege a type of mislabeling reported to be present in that district. For example, in Blunt v. Lower Merion School District, a group of Black students alleged that intentional discrimination led to their inappropriate identification for special education.[167] The plaintiffs presented extensive statistical evidence demonstrating that in that school district, nearly twice as many Black students received special education compared to white students, relative to their share of the general school population.[168] In fact, the Pennsylvania Department of Education had identified Lower Merion as a district where Black students were disproportionately

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164. Bell v. Bd. of Educ. of Albuquerque Pub. Schs., No. CIV06–1137JB/ACT, 2008 WL 5991062, at *31 (D.N.M. Nov. 28, 2008).

165. See supra Part I.B.

166. 34 C.F.R. § 300.647 (2017).

167. 826 F. Supp. 2d 749, 753 (E.D. Pa. 2011).

168. Id. at 756–58.

likely to be identified as disabled.[169] Though the district court held that this disproportionality data failed to constitute evidence for plaintiffs' intentional discrimination claim,[170] such statistical evidence could support individual mislabeling claims arising from Lower Merion and other districts with comparable evidence of disproportionality.

Encouraging courts to consider disproportionality data may risk further incentivizing states to avoid identifying districts for disproportionality, stymying efforts to monitor and curb disproportionality. However, I do not think this is likely; even if courts apply a presumption based on district-level disproportionality data, mislabeling cases will likely remain rare and difficult to successfully pursue. Consequently, the additional risk of liability may still pale in comparison to the funding consequences that districts already face if they are identified as exhibiting significant disproportionality.[171] Moreover, such a presumption could be paired with stronger federal guidelines requiring a greater level of uniformity in disproportionality thresholds.[172]

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169. Id. at 757.

170. Id. at 764 (holding on school district's summary judgment motion that even stark statistical evidence of disproportionality was not evidence from which a reasonable inference could be drawn that the defendant intentionally segregated students by race).

171. U.S. GOV'T ACCOUNTABILITY OFF., supra note 33, at 18–21; Strassfeld, supra note 19, at 1139–40.

172. See, e.g., Lindsey Herzik, Note, A Better IDEA: Implementing a Nationwide Definition for Significant Disproportionality to Combat

B. The Cure for Individualization

Even if plaintiffs in mislabeling cases could rely on courts to thoughtfully consider the social context of students' labels, individual cases cannot be a systemic solution to disproportionality. Given the immense challenges facing families who seek to challenge IDEA labels—if they even become aware that they can be challenged—private enforcement provides, at best, a limited avenue for relief.[173] At the same time, Supreme Court precedent in the past two decades has likely closed the door on class action claims challenging disproportionality.[174] Addressing disproportionality will require a greater role for public enforcement, through the U.S. Department of Education Office of Civil

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Overrepresentation of Minority Students in Special Education, 52 SAN DIEGO L. REV. 951, 963–966 (2015) (arguing for a federal standard for disproportionality).

173. See generally Pasachoff, supra note 71.

174. Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that no right of action exists for a disparate impact claim under Title VI of the Civil Rights Act). Though some scholars have suggested pursuing disproportionality claims under 42 U.S.C. § 1983, an influential circuit court decision suggests that such claims may also require proof of intentional discrimination. Losen & Welner, supra note 11, at 410; Blunt, 767 F.3d at 301–03. See also Hulse, supra note 38, at 423 n.226 (discussing the impact of Blunt on potential disproportionality claims under § 1983).

Rights and equivalent state agencies.[175]

Though a full consideration of solutions to disproportionality is beyond the scope of this Note, I suggest that addressing racial disproportionality in special education will require reforms to the IDEA itself. Other scholars grappling with inequities arising from the IDEA's focus on individualization have proposed reforms like making the special education process less individualized or providing greater resources for families to navigate a highly individualized process. I argue that these concerns should also motivate policymakers to reframe the IDEA's approach to identification for special education.

Some scholars propose moving away from the IDEA's highly individualized model. For example, Professor Karen Syma Czapanskiy has proposed providing uniform and publicly available IEPs for every child "in the same situation."[176] For Professor Czapanskiy, the problem with districts like New York City that use standardized IEPs is not their use, but their lack of transparency.[177] Yet if standardized plans are

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175. See DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: PREVENTING RACIAL DISCRIMINATION IN SPECIAL EDUCATION 11–13 (Dec. 28, 2016) (noting that past investigations have revealed that biased referral policies contribute to "over-identification" of minority students for special education).

176. Czapanskiy, supra note 101, at 15–18; Karen Syma Czapanskiy, Special Kids, Special Parents, Special Education, 47 U. MICH. J.L. REFORM 733, 761 (2014).

177. Czapanskiy, supra note 176, at 763–64.

based on the IDEA's existing categories, these categories will remain a site of contestation as families seek access to more advantageous programs—even if the standardization of IEPs may reduce the breadth of the disparity.[178] Other scholars, like Professor Baldwin Clark, hope to retain the IDEA's ideal of individualization while helping disadvantaged families navigate its burdens. For example, Professor Baldwin Clark proposes providing ombudsmen to act as liaisons between the family and the school; "navigators" through the special education process, akin to those who assist consumers with the Affordable Care Act's health care exchanges; and legal advocacy to families who request it.[179] Similarly, Professor Pasachoff proposes creating a "user-friendly" database capturing relevant information about IEPs and demographic characteristics to enable families to better advocate for their children's rights.[180]

In this Note, I have located the problem not in individualization itself, but in the IDEA's approach to identification for special education. The IDEA's requirement that students be identified under a disability category exclusive to the special education context inevitably allows these categories to take on social meaning and become sites of

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178. Czapanskiy primarily discusses autism, both an IDEA category and a medical diagnosis, but she suggests that her rule-based approach could apply to subcategories within the IDEA's categories, if not the categories themselves. Czapanskiy, supra note 101, at 2 n.6.

179. Baldwin Clark, supra note 49, at 437–38.

180. Pasachoff, supra note 71, at 1466.

contestation between educators, families, and even courts. If, as courts in mislabeling cases often claim,[181] the IDEA allows students to receive a free appropriate public education regardless of the category under which they are identified, surely school districts should be able to provide individualized services without reliance on these labels.

Several alternatives exist: for one, these categories could be phased out in favor of formal diagnoses. Though scholars also raise concerns about the racially disproportionate application of medical or psychiatric diagnoses,[182] the removal of an additional layer of categorization may eliminate opportunities for inequity. However, not all students eligible for special education may have concurrent medical diagnoses, and by eschewing formal medical diagnoses, the IDEA allows students who may not have access to private medical assessment to receive appropriate services and accommodations.

Instead, I suggest deemphasizing the role of disability categories in favor of a more pragmatic approach to disability identification. Rather than asking what disability the student has, the IDEA, in identifying and evaluating students, should ask whether the student could benefit from a given educational service.[183] This modest reframing has at least

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181. See supra note 124.

182. See, e.g., JONATHAN METZL, THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE (2010).

183. This follows a context-informed approach to identity adjudication suggested by Laura Lane Steele. Laura Lane Steele, Adjudicating Identity, 9 Tex. A&M L. Rev. 267, 273 (2022) ("Unlike a context-detached

three distinct advantages. First, while educators, parents, and courts currently talk past each other about whether disability labels are matters of discoverable fact or social designations, this approach coalesces stakeholders around the same central question. As my survey of mislabeling cases demonstrates, disagreements about what disability a student really has are often actually debates about the collateral harms a student may suffer if they are given a lower-status label: will they be placed in a more restrictive setting? Will they be subject to greater levels of school discipline? Will they be regarded by educators as incapable of learning? Focusing the question on services clarifies the stakes of the question and enables the parties involved to address these concerns head-on.

Secondly, this approach would allow students with similar needs to be treated similarly, reducing the opportunity for inequity. For example, both students currently identified for emotional disturbance and those identified for autism could benefit from a social skills playgroup at school.[184] Similarly, specialized instruction for students with specific learning disabilities may also aid students identified as intellectually

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approach, a context-informed approach understands the identity question to depend on why that particular law is asking the identity question in the first place. It begins the identity inquiry by locating the function or purpose of the applicable law. It then asks whether identity adjudication is necessary at all, and if so, what definition of identity would best serve those purposes.").

184. This example was drawn from Baldwin Clark, supra note 49, at 442.

disabled. These students should be tracked into the same services, rather than allowing their labels to become mechanisms of segregation and inequity.

Finally, this approach may also benefit students who are not identified for special education. While this Note has focused on inequities among IDEA-eligible students, decisions about identification for special education inevitably implicate questions of resource allocation between students who are IDEA-eligible and those who are not. For example, as Professors Mark Kelman and Gillian Lester point out, students who face considerable educational challenges but do not qualify for special education services are effectively barred from accessing potentially beneficial resources.[185] Determining eligibility based on students' potential to benefit rather than criteria for a discrete set of disability categories would enable these students to access special education services as well.

These suggestions are far from sufficient to remediate the dynamics I have outlined in this Note. So long as special education "serve[s] as a place for students who cannot or will not be assimilated" into dominant white cultural norms, the causes of disproportionality will find purchase

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185. See MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 4–6 (1998) (discussing equity concerns between students recognized as having learning disabilities and those who are regarded merely as "'slow' learners").

at some step of the process.[186] Well-resourced parents who currently advocate for their students to receive higher-status labels are likely also better placed to secure higher-status services. In the long run, destabilizing these dynamics requires more structural changes to both the special education process itself and the general education context in which it is situated. For example, fully funding the IDEA may reduce the extent to which families feel the need to use labels as a way to compete for scarce educational resources.[187] Implementing educational practices that ease barriers to integrating disabled students into general education may reduce the extent to which lower-status labels can be used to segregate.[188] Finally, culturally responsive and sustaining educational frameworks can destabilize expectations based around

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186. Beth A. Ferri & David J. Connor, Special Education and the Subverting of Brown, 8 J. GENDER RACE & JUST. 57, 60 (2004).

187. See, e.g., Evie Blad, Why the Feds Still Fall Short on Special Education Funding, EDUC. WK. (Jan. 10, 2020), https://www.edweek.org/teaching-learning/why-the-feds-still-fall-short-on-special-education-funding/2020/01.

188. For example, Universal Design for Learning allows students of varying abilities to access a shared curriculum, by providing flexibility in the ways that information is presented and by ensuring appropriate accommodations, supports, and challenges. James D. Basham, et al., Opportunity in Crisis: The Role of Universal Design for Learning in Educational Redesign, 18 LEARNING DISABILITIES 71, 81 (2020).

white, middle-class students and reduce the likelihood that Black or other minority students will be mislabeled or misidentified in the first place.[189]

## Conclusion

In its ideal form, the IDEA's aspirations of individualization are laudable. But disabled students do not navigate an ideal world. They navigate a society where the disability labels that open the door to the services they need may also be accompanied by substantive harm—and where the application of these labels is inflected by cultural bias. They navigate a special education system that requires not just care, but considerable financial resources and social capital to truly realize the promises of individualization. In this context, the combination of the IDEA's use of categorical labels and its construction of a right at the individual level allows these labels to function as tools of inequity.

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189. See, e.g., Culturally Responsive-Sustaining Education, NYU STEINHARDT, https://steinhardt.nyu.edu/metrocenter/research/culturally-responsive-sustaining-education (last visited Feb. 15, 2022.) Additionally, at least one scholar has suggested adopting a culturally sensitive definition of emotional disturbance which is pegged to "appropriate age, cultural, or ethnic norms." Oelrich, supra note 40, at 38–41.

## APPENDIX A: MISLABELING CASES[190]

| CASE | COURT | YEAR | INITIAL LABEL | LABEL REQUESTED | VIOLATION ALLEGED | HOLDING | NEW LABEL PRIOR CASE |
|---|---|---|---|---|---|---|---|
| **J.A. ex rel. M.A. v. E. Ramapo Cent. Sch. Dist.** | S.D.N.Y. | 2009 | Other health impairments | Autism | Substantive | For plaintiff | Yes |
| **M.H. v. N.Y.C. Dep't of Educ.** | S.D.N.Y. | 2011 | Other health impairments | Emotional disturbance | Substantive | For district | No |
| **M.W. v. N.Y.C. Dep't of Educ.** | S.D.N.Y. | 2015 | Intellectual disability | Unknown | Substantive | For plaintiff | Yes |
| **Y.A. v. N.Y.C. Dep't of Educ.** | S.D.N.Y. | 2016 | Other health impairments | Autism, others | Procedural, substantive | For plaintiff | No |
| **Joanna S. v. S. Kingstown Pub. Sch. Dist.** | D.R.I. | 2017 | Emotional disturbance | Autism | Substantive | For district | No |
| **Z.H. ex rel. R.H. v. Lewisville Indep. Sch. Dist.** | E.D. Tex. | 2015 | Emotional disturbance | Autism | Procedural, substantive | For district | Yes |
| **Lauren C. ex rel. Tracey K. v. Lewisville Indep. Sch. Dist.** | E.D. Tex. | 2017 | Intellectual disability, speech or Language impairment | Autism | Procedural, substantive | For district | No |
| **R.C. ex rel. S.K. v. Keller Indep. Sch. Dist.** | N.D. Tex. | 2013 | Emotional disturbance | Autism | Substantive | For district | No |
| **D.B. ex rel. C.B. v. Houston Indep. Sch. Dist.** | S.D. Tex. | 2017 | Emotional disturbance | Autism | Substantive | For district | No |
| **Pohorecki v. Anthony Wayne Loc. Sch. Dist.** | N.D. Ohio | 2009 | Emotional disturbance | Autism, other health impairments | Substantive | For district | No |
| **Heather S. ex rel. Kathy S. v. Wisconsin** | 7th Cir. | 1997 | Learning disabled, visual impairment, other health impairments | Parents objected to cognitive disability placement | Substantive | For district | No |
| **J.D. ex rel. K.D. v. Crown Point Sch. Corp.** | N.D. Ind. | 2012 | Hearing impairment, specific learning disability | Specific learning disability (ADHD) | Procedural, substantive | For district | No |
| **B.B. ex rel. Brunes v. Perry Twp Sch. Corp.** | S.D. Ind. | 2008 | Other health impairments, Autism (suggested) | Parents objected to autism | Procedural | For plaintiffs | No |
| **Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.** | 8th Cir. | 2011 | Other health impairments (Down Syndrome, autism) | Autism | Procedural, substantive | For district | Yes |
| **Minnetonka Pub. Schs. v. M.L.K. ex rel. S.K.** | D. Minn. | 2021 | Autism, specific learning disability | Specific learning disability | Procedural, substantive | For plaintiffs | Yes |
| **Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.** | 9th Cir. | 2001 | Speech or language impairment, intellectual disability. | Autism | Procedural, substantive | For plaintiffs | Yes |

190. Cases were categorized as "mislabeling" cases if the student received IEP services under at least one label, and plaintiffs alleged that student should have been identified under at least one other label. Additional cases on related issues were discussed but included in the set of mislabeling cases. E.g., Weissburg v. Lancaster Sch. Dist., 591 F.3d 1255 (9th Cir. 2010).

| CASE | COURT | YEAR | INITIAL LABEL | LABEL REQUESTED | VIOLATION ALLEGED | HOLDING | NEW LABEL PRIOR CASE |
|---|---|---|---|---|---|---|---|
| **D.H. v. Etiwanda Sch. Dist.** | C.D. Cal. | 2014 | Specific learning disability | Autism | Procedural, substantive | For district | Yes |
| **Hailey M. ex rel. Melinda B. v. Matayoshi** | D. Haw. | 2011 | Intellectual disability | Specific learning disability | Procedural, substantive | For district | Yes |
| **Bell v. Bd. of Educ. of Albuquerque Pub. Schs.** | D.N.M. | 2008 | Intellectual disability | Specific learning disability | Procedural, substantive | For plaintiff on procedural claim | Yes |
| **Couture v. Bd. of Educ. of Albuquerque Pub. Schs.** | D.N.M. | 2009 | Emotional disturbance | Specific learning disability | Substantive | For district | No |
| **Hernandez ex. reL. J.V. v. Bd. of Educ. of Albuquerque Pub. Schs.** | D.N.M. | 2015 | Intellectual disability | Hearing impairment | Substantive | For district | No |
| **E.C. v. U.S.D. 385 Andover** | D. Kan. | 2020 | Unspecified (likely emotional disturbance) | Autism | Procedural, substantive | For district | No |
| **Draper v. Atlanta Indep. Sch. Sys.** | N.D. Ga. | 2013 | Intellectual disability | Specific learning disability | Procedural, substantive | For plaintiff | No |
| **Walker v. District of Columbia** | D.D.C. | 2001 | Intellectual disability | Other health impairments | Substantive | For district | No |
| **Glass ex rel. A.G. v. District of Columbia** | D.D.C. | 2020 | Emotional disturbance, others | Autism | Substantive | For district | No |