BEYOND SUSPENSIONS

Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities

BRIEFING REPORT

JULY 2019

U.S. COMMISSION ON CIVIL RIGHTS

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[1] 42 U.S.C. §1975a.

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Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities

Briefing Before

The United States Commission on Civil Rights

Held in Washington, DC

Briefing Report

July 2019

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

July 23, 2019

President Donald J. Trump
Vice President Mike Pence
Senate Majority Leader Mitch McConnell
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights ("the Commission"), I am pleased to transmit our briefing report, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*. The report is also available in full on the Commission's website at www.usccr.gov.

For this report, the Commission investigated school discipline practices and policies impacting students of color with disabilities and the possible connections to the school-to-prison pipeline, examined rates of exclusionary discipline, researched whether and under what circumstances school discipline policies unfairly and/or unlawfully target students of color with disabilities, and analyzed the federal government's responses and actions on the topic. The Commission's report reflects that several decades of research demonstrate persistent racial disparities in disciplinary rates and disparities based on disability status but much of scholarship based on this data has not analyzed how these policies affect those students who live at the intersection of these two identities. The literature available, however, does suggest that students of color with disabilities face exclusionary discipline pushing them into the school-to-prison pipeline at much higher rates than their peers without disabilities. And while exclusionary discipline has been shown to be harmful for the educational attainment of all students, students with disabilities, particularly those who are students of color, face even more challenges when they are not able to receive a quality education.

The Commission majority (six Commissioners in favor, two Commissioners in opposition) approved key findings including the following: Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers – but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses. Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities.

Data the U.S. Department of Education reports show a consistent pattern of schools suspending or expelling black students with disabilities at higher rates than their proportion of the population of students with disabilities. Data show the large majority of out-of-school suspensions are for non-violent behavior. The most recent available data reflect that, with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were more likely than white students with disabilities to be expelled without educational services.

Research reflects that, in addition to missed class time, excessive exclusionary discipline negatively impacts classroom engagement and cohesion and increases the likelihood excluded students will be retained in grade, drop out of school, or be placed in the juvenile justice system. Research also shows that zero tolerance policies and the practice of exclusionary discipline in schools in the absence of consideration and application of alternatives to exclusionary discipline are ineffective in creating safe and healthy learning environments for students, teachers, and staff.

The Commission majority voted for key recommendations, including the following: The U.S. Department of Education's Office for Civil Rights (OCR) should continue offering guidance to school communities regarding how to comply with federal nondiscrimination laws related to race and disability in the imposition of school discipline. It is critical that all teachers are provided with resources, guidance, training, and support to ensure nondiscriminatory discipline in schools. Congress should continue to provide funding to help states and school districts provide training and support and, with Congressional appropriation support, the U.S. Departments of Justice and Education should continue and expand their grant funding for these important goals. OCR should rigorously enforce the civil rights laws over which it has jurisdiction, to address allegations of discrimination in school discipline policies.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

Catherine E. Lhamon

Chair

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ACKNOWLEDGEMENTS

This report was produced under the direction of Katherine Culliton-González, Esq., the Commission's Office of Civil Rights Evaluation (OCRE) Director. Dr. Marik Xavier-Brier, Civil Rights Analyst, performed principal research and writing. Dr. LaShonda Brenson, Civil Rights Analyst, provided valuable quantitative data analysis, and Elizabeth Paukstis, Esq. contributed to the review of relevant civil rights law and policy. Graduate intern Laura Gevarter from Georgetown University also provided research and writing assistance.

Commissioners and Commissioner Special Assistants Sheryl Cozart, Jason T. Lagria, Carissa Mulder, Amy Royce, Rukku Singla, Alison Somin, and Irena Vidulovic conducted research and reviewed, edited, and examined the report.

The Commission's General Counsel Maureen Rudolph reviewed and approved the report for legal sufficiency.

The Commission acknowledges the significant contributions from the Commission's Advisory Committees in Indiana, Maryland, and Oklahoma who collected and provided testimony and Committee findings and recommendations to the Commission on issues of school discipline, the school to prison pipeline, and other related issues in their states.

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EXECUTIVE SUMMARY

Nationwide, more than 2.7 million K–12 public school students received one or more out-of-school suspensions in the 2015–2016 academic year.[1] The use of suspensions increased steadily from the late 1980s and early 1990s through the 2011–12 school year and then dropped precipitously, by approximately 20 percent between the 2011–12 and 2013–14 academic years.[2] Some of the increase through 2011 was the result of teachers and administrators punishing minor behavioral infractions (e.g., profanity, dress code violations) that in the past would have landed a student in detention, but later had led to harsher punishments such as suspensions, expulsions, or even arrests.[3] Researchers have found that school-level factors, such as a principal's perspective on discipline, significantly impact disparities in out-of-school suspension rates for students of color and students of color with disabilities.[4] Data also suggest that school discipline policies may not be impacting all students equally.[5] Moreover, data have consistently shown that the overrepresentation of students of color in school discipline rates is not due to higher rates of

[1] 2.7 million students represent approximately 5-7 percent of the total number of K-12 students in the United States. At the timing of the report, these are the most current national data available. *See* U.S. Dep't of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection: School Climate and Safety*, 2018, https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.

[2] U.S. Dep't of Education, "Rethinking School Discipline," Remarks of U.S. Secretary of Education Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package, Jan. 8, 2014, https://www.ed.gov/news/speeches/rethinking-school-discipline; Daniel Losen, Cheri Hodson, Michael Keith II, Katrina Morrison, & Shakti Belway, *Are We Closing the School Discipline Gap?*, The Center for Civil Rights Remedies, University of California, Los Angeles, 2015, https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf; Nancy Heitzeg, "Education or Incarceration: Zero Tolerance Policies and The School to Prison Pipeline," *Forum on Public Policy*, 2009, https://files.eric.ed.gov/fulltext/EJ870076.pdf; Russell Skiba, "The Failure of Zero Tolerance," *Reclaiming Children and Youth*, vol. 22 (2014), http://reclaimingjournal.com/sites/default/files/journal-article-pdfs/22_4_Skiba.pdf; *see also*, U.S. Dep't of Education, Civil Rights Data Collection database (3,141,294 suspensions in 2011-12; 2,590,902 suspensions in 2013-14), https://ocrdata.ed.gov/StateNationalEstimations.

[3] *See, e.g.*, Anti-Defamation League, *What is the School-to-Prison Pipeline?*, 2015, https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/what-is-the-school-to-prison-pipeline.pdf.

[4] Russell Skiba, Megan Trachok, Choong-Geun Chung, Timberly Baker, Adam Sheya, & Robin Hughes, *Where Should We Intervene? Contributions to Behavior, Student, and School Characteristics to Suspension and Expulsion*, Center for Civil Rights Remedies and the Research-to-Practice Collaborative, National Conference on Race and Gender Disparities in Discipline, 2013, https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/copy_of_dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/skiba-where-intervene-ccrr-conf-2013.pdf (paper on file with authors); Daniel Losen and Amir Whitaker, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California*, The Civil Rights Project at the University of California, Los Angeles, 2017, https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/lost-instruction-the-disparate-impact-of-the-school-discipline-gap-in-california.

[5] *See, e.g.*, U.S. Dep't of Education, "Rethinking School Discipline," *supra* note 2; Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2; Skiba, "The Failure of Zero Tolerance," *supra* note 2.

misbehavior by these students, but instead is driven by structural and systemic factors that this report will address.[6]

Several decades of research demonstrate persistent racial disparities in disciplinary rates and disparities based on disability status;[7] but, much of extant data have not analyzed how these policies affect those students who live at the intersection of these two identities. The literature available, however, does suggest that students of color with disabilities face exclusionary discipline[8] pushing them into the "school-to-prison pipeline" at much higher rates than their peers without disabilities.[9] And while exclusionary discipline has been shown to be harmful for the educational attainment of all students, students with disabilities, particularly those who are students of color, face even more challenges when they are not able to receive a quality education.[10]

Exclusionary discipline practices place students at risk for experiencing a wide range of correlated educational, economic, and social problems, including school avoidance, increased likelihood of dropping out, and involvement with the juvenile justice system.[11] Additionally, in recent years,

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[6] Russell Skiba and Jeffrey Sprague, "Safety Without Suspensions," *Educational Leadership*, 2008, https://www.pbis.org/common/cms/files/Coach_Trainer/Articles/Safety%20Without%20Suspensions.pdf; Russell Skiba, Robert Michael, Abra Carroll Nardo, & Reece Peterson, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment," *The Urban Review*, vol. 34 (2002), http://www.indiana.edu/~equity/docs/ColorofDiscipline2002.pdf; Pamela Fenning and Jennifer Rose, "Overrepresentation of African American Students in Exclusionary Discipline," *Urban Education*, vol. 42 (2007), 536-59; Sean Kelly, "A Crisis of Authority in Predominantly Black Schools?" *Teachers College Record*, vol. 112 (2010), 1247-74; Russell Skiba and Natasha Williams, *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior*, The Equality Project at Indiana University, 2014, 2-5; *see also* U.S. Commission on Civil Rights, *School Discipline and Disparate Impact*, 2011, https://www.usccr.gov/pubs/docs/School_Disciplineand_Disparate_Impact.pdf.

[7] *See, e.g.*, U.S. Dep't of Education, "Civil Rights Data Collection Data Snapshot: School Discipline," March 2014, https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf.

[8] National Clearinghouse on Supportive School Discipline, "Exclusionary Discipline," 2014, https://supportiveschooldiscipline.org/learn/reference-guides/exclusionary-discipline. "Exclusionary discipline describes any type of school disciplinary action that removes or excludes a student from his or her usual educational setting. Two of the most common exclusionary discipline practices at schools include suspension and expulsion." *Id. See also* Discussion and Sources at *infra* note 10 (regarding the school-to-prison pipeline).

[9] U.S. Dep't of Education, Office for Civil Rights, "Civil Rights Data Collection," https://ocrdata.ed.gov/ (last accessed Nov. 5, 2018); Daniel Losen, Director of the Center for Civil Rights Remedies at University of California-Los Angeles, Additional Written Statement for the "The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities," briefing before the U.S. Commission on Civil Rights, Dec. 8, 2017 [hereinafter Losen Additional Statement]; Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2, at 6.

[10] Daniel Losen and Amir Whitaker, *Lost Instruction*, *supra* note 4; Daniel Losen, testimony before the U.S. Commission on Civil Rights, briefing, *The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities*, Dec. 8, 2017, p. 94 [hereinafter *Briefing Transcript*].

[11] Advancement Project, Padres and Jovenes Unidos, Southwest Youth Collaborative, and Children & Family Justice Center of Northwestern University School of Law, *Education on Lockdown: The Schoolhouse to Jailhouse Track*, 2005, 16, https://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf; Johanna Wald and Daniel Losen, "Defining and Redirecting a School-to-Prison Pipeline," *New Directions for Youth Development*, vol. 99 (2003), 11, https://pdfs.semanticscholar.org/6954/11a14bda3a82dd941c504272c57a8ccc4d44.pdf?_ga=2.95874396.118423638.1541436106-983094117.1541436106.

some federal officials and school reform advocates have started examining how the education system may be systematically failing certain groups of students (e.g., students of color, students with disabilities, LGBT[12] students) who are:

> disproportionately over- or incorrectly categorized in special education, are disciplined more harshly, including referral to law enforcement for minimal misbehavior, achieve at lower levels, and eventually drop or are pushed out of school, often into juvenile justice facilities and prisons—a pattern now commonly referred to as the School-to-Prison Pipeline.[13]

All students deserve to attend schools that are nurturing, stimulating, welcoming, and safe, and defaulting to harsh discipline policies runs counter to these goals.[14] Longstanding empirical research has shown that using exclusionary school discipline policies for all levels of student infractions, regardless of severity, is often ineffective; and these practices may even increase the likelihood of future criminality and lower overall student academic performance in schools.[15] Further, data show that other disciplinary methods that do not involve exclusionary discipline can be more effective than exclusion to address many forms of school misbehavior.[16] However, there

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[12] LGBT stands for lesbian, gay, bisexual, and transgender.

[13] Sarah E. Redfield and Jason P. Nance, *School-to-Prison Pipeline*, American Bar Association, Joint Task Force on Reversing the School-to-Prison Pipeline, 2016, 7, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1765&context=facultypub.

[14] *See, e.g.*, Russell Skiba and M. Karega Rausch, "School Disciplinary Systems: Alternatives to Suspension and Expulsion," in G.G. Bear and K. M. Minke (eds), *Children's Needs III: Development, prevention, and intervention* (pp. 87-102), http://www.indiana.edu/~equity/docs/Alternatives_to_Expulsion.pdf; National Association of School Psychologists; Annenberg Institute for School Reform, "Creating Safe Passage: Collaborative Approaches to Equitable School Discipline Reform," *Voices in Urban Education*, No. 42, 2015, http://vue.annenberginstitute.org/issues/42.

[15] Edward W. Morris and Brea L. Perry, "The Punishment Gap: School Suspension and Racial Disparities in Achievement," *Social Problems*, Vol. 63, No. 1, 2016, 68–86; M. Karega Rausch and Russell J. Skiba, "The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement," Center for Evaluation and Education Policy at Indiana University, Annual Meeting of the American Educational Research Association, April, 2005, http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Academic-Cost-of-School-Discipline.pdf; Kaitlin P. Anderson, Gary W. Ritter, Gema Zamarro, "Understanding a Vicious Cycle: Do Out-of-School Suspensions Impact Student Test Scores?," Dep't of Education Reform at The University of Arkansas, EDRE working paper, March 30, 2017, http://www.uaedreform.org/downloads/2017/03/understanding-a-vicious-cycle-do-out-of-school-suspensions-impact-student-test-scores.pdf; Andy Whisman and Patricia Cahape Hammer, "The Association Between School Discipline and Mathematics Performance: A Case for Positive Discipline Approaches," Division of Teaching and Learning Office of Research, West Virginia Dep't of Education, Sept. 2014, https://files.eric.ed.gov/fulltext/ED569903.pdf; Tom Loveless, *2017 Brown Center Report on American Education: Race and school suspensions*, Brookings Institute, March 22, 2017, https://www.brookings.edu/research/2017-brown-center-report-part-iii-race-and-school-suspensions/.

[16] Barbara J. McMorris, Kara J. Beckman, Glynis Shea, Jenna Baumgartner, and Rachel C. Eggert, "Applying Restorative Practices to Minneapolis Public Schools Students Recommended for Possible Expulsion: A Pilot Program Evaluation of the Family and Youth Restorative Conference Program," University of Minnesota, Healthy Youth Development / Prevention Research Center, Dec. 2013, http://www.legalrightscenter.org/uploads/2/5/7/3/25735760/lrc_umn_report-final.pdf; Jenni Owen, Jane Wettach, and Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family Policy and Duke Law School, 2015,

are certain infractions (e.g., a student who brings a gun to school) where exclusionary discipline is necessary to secure school safety.

Too often, exclusionary discipline policies and practices such as suspensions and expulsions also remove students from the classroom in a discriminatory manner and prevent students from achieving their educational goals.[17] Moreover, federal civil rights law requires that schools that receive federal funding—including all public schools—must ensure that discipline policies and procedures are not discriminatory.[18]

Federal data collected by the U.S. Department of Education's Office for Civil Rights (OCR) show that students of color and students of color with disabilities are disproportionately subjected to out-

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https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf; Regennia L. Walker, Sean Burnette, Caron Crook, DeeAnn Robinson, Victoria McSwain, Heather Whitton, Katrina Burnette, and Ashley Mandy, "Real Life Account of PBIS at the Primary/Elementary Level," *Georgia Association for Positive Behavior Support Conference*, 2016, https://digitalcommons.georgiasouthern.edu/gapbs/2016/2016/11/; Rob Horner and George Sugai, *Effective Implementation of School-wide Positive Behavior Supports: Reducing the Need for Seclusion and Restraint*, May Institute and the OSEP Center on Positive Behavioral Interventions and Support, National Autism Center, 2011, http://www.pbis.org/common/cms/files/pbisresources/slides_robert_putnam_051911.pdf; *see also*, Joseph Durlak, Roger Weissberg, Alison Dymnicki, Rebecca Taylor, and Kriston Schellinger, "The impact of enhancing students' social and emotional learning: A meta-analysis of school-based universal interventions," *Child Development*, 82(1), 2011, 405-32, https://www.casel.org/wp-content/uploads/2016/08/PDF-3-Durlak-Weissberg-Dymnicki-Taylor-_-Schellinger-2011-Meta-analysis.pdf.

[17] *See* Discussion and Sources *cited infra* notes 202, 372-84, 555-59.

[18] *See* Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, codified at 42 U.S.C. §2000d *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq*., § 794. The Commission notes that because public charter schools receive federal funding, they are also generally subject to federal civil rights laws. The U.S. Dep't of Education's Office for Civil Rights (OCR) summarizes the applicable law as follows:

> Of course, charter schools, like all public schools and other recipients of federal financial assistance, must operate consistent with civil rights laws.
>
> The U.S. Dep't of Education (ED), Office for Civil Rights (OCR) enforces a number of civil rights laws that apply to public schools, including charter schools. These laws include: Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex in education programs; Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination on the basis of disability; and the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age. These laws apply to programs and activities that receive federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibits discrimination on the basis of disability by public entities, including public schools. Title II applies to public entities, regardless of whether they receive federal financial assistance. OCR receives and resolves more than 5,000 complaints of discrimination each year and provides technical assistance on a wide range of issues.

U.S. Dep't of Education, Office for Civil Rights, "Backgrounder: Applying Federal Civil Rights Laws to Public Charter Schools," Archived Information, https://www2.ed.gov/offices/OCR/archives/charterqa/charback.html (last accessed Sept. 26, 2018).

of-school suspensions and other exclusionary school discipline policies.[19] Students of color and students with disabilities (as a whole) are often disciplined more harshly and more frequently than their peers, resulting in serious, negative repercussions for their academic success.[20] For instance, the Department of Education found that in the 2013–14 school year, students with disabilities (as a whole) made up 12 percent of students receiving one or more out-of-school suspensions, compared to about 5 percent of students without a disability.[21] Breaking these data by race and gender show that for most boys of color with disabilities (with the exception of Latino and Asian boys), more than one out of five were suspended, and approximately one in five multiracial girls of color with disabilities were suspended.[22] Standing alone, disparate discipline rates do not necessarily indicate that a school or district is violating civil rights laws in every situation, even where the policies apply exclusionary discipline.[23] However, data showing disparate use of discipline for students of color and for students with disabilities suggest that some schools and districts may be applying disciplinary policies in unfair and possibly discriminatory ways in violation of federal civil rights protections.[24]

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[19] *See* U.S. Dep't of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1; *see also* U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection, Data Snapshot: School Discipline*, *supra* note 7.

[20] *See* U.S. Dep't of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1.

[21] U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection: A First Look*, Oct. 28, 2016, 4.

[22] *Id*. Particular suspension rates by race and gender include: Native American/Alaska Native (23%), Native Hawaiian/Pacific Islander (23%), black (25%), and multiracial (27%) boys with disabilities, and multiracial girls with disabilities (21%). *Id.*

[23] *See* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague: Preventing Racial Discrimination in Special Education," Dec. 12, 2016, 9, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf; U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," Jan. 8, 2014, 10, 13, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

[24] *See, e.g.*, U.S. Dep't of Education, Office for Civil Rights, Letter to Dr. Gearl Loden, Superintendent, Tupelo Public School District, Sept. 25, 2014, 1-3, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06115002-a.pdf (compliance review discussing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and disparate impact standards); Letter from Joshua Douglass, Chief Attorney, to Robert Neu, Superintendent, Oklahoma Public Schools, April 19, 2016, 4-5, 11-13, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07141149-a.pdf (complaint investigations discussing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and disparate impact standards as applied to school discipline policy and alleged retaliation); Letter from Joshua Douglass, Chief Attorney, to Robert Neu, Superintendent, Oklahoma Public Schools, Nov. 20, 2017, 1, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf (resolution agreement discussing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and disparate impact standards as applied to school discipline policy); U.S. Dep't of Education, Office for Civil Rights, Letter to John Sutter, Superintendent, Loleta Union School District, Nov. 22, 2017, 9, 21-23, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf.

This report is informed by expert testimony provided at the U.S. Commission on Civil Rights (Commission) December 2017 briefing,[25] which included presentations and testimony from government officials and policy experts as well as oral and written testimony from school teachers, students, parents, and policy advocates during the associated public comment period. The Commission also conducted extensive quantitative and qualitative research regarding the impact of school discipline policies on students of color with disabilities, as well as relevant civil rights laws and policies.

Although the Commission has been investigating and reporting on various disparities in school discipline since 2002,[26] this report specifically focuses on the effects of discipline practices on students of color with disabilities. Over the past several years there has been increased public attention, resulting from initiatives implemented by the federal government (e.g., the Supportive School Discipline initiative,[27] My Brother's Keeper[28] and the Rethink Discipline initiative[29]), on the disparately negative effects of some school discipline policies on students of color. However, less public attention has focused on the intersectional experiences of students of color with disabilities.

Whereas longstanding advocacy—including litigation in 1972 on behalf of black students with disabilities successfully challenging their disciplinary exclusion from school without appropriate due process[30]—and research has addressed the disparate discipline of both students of color and students with disabilities, many empirical studies have not addressed the intersection of race and disability as their main focus. A large number of studies focus either on students of color or on students with disabilities as a whole, possibly overlooking the specific issues that emerge for students whose lives are impacted by the intersection of race and disability. Therefore, this report presents data from the race literature and data from the disability literature to illustrate the severity of these issues and how the school-to-prison pipeline negatively affects students of color with

[25] United States Commission on Civil Rights, "Commission Briefing: The School-to-Prison Pipeline: The Intersection of Students of Color with Disabilities," Dec. 8, 2017.
[26] *See generally* U.S. Commission on Civil Rights, "Making a Good IDEA Better: The Reauthorization of the Individuals with Disabilities Education Act," April 12, 2002, https://www.usccr.gov/pubs/idea/paper.htm; U.S. Commission on Civil Rights, *School Discipline and Disparate Impact*, 2011, https://www.usccr.gov/pubs/docs/School_Disciplineand_Disparate_Impact.pdf.
[27] U.S. Dep't of Education, School Climate and Discipline: Federal Efforts, last modified Dec. 8, 2015, https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html.
[28] My Brother's Keeper Alliance, "MBK Alliance," https://www.obama.org/mbka/ (last accessed Nov. 5, 2018) (an initiative that "focuses on building safe and supportive communities for boys and young men of color where they feel valued and have clear pathways to opportunity.").
[29] U.S. Dep't of Education, "Rethinking Discipline," https://www2.ed.gov/policy/gen/guid/school-discipline/index.html (last accessed Dec. 19, 2018) (a website offering resources for "[a]dministrators, educators, students, parents and community members" on "the prevalence, impact, and legal implications of suspension and expulsion" and potential alternatives to exclusionary discipline).
[30] *Mills v. Bd. of Ed. of Dist. of Columbia*, 348 F. Supp. 866, 875-76 (D.D.C. 1972).

disabilities. The report also builds upon the intersectional research data that are available and presents these data whenever possible.

The Commission's research shows that many schools throughout the United States utilize and rely upon discipline policies that allow for disproportionate removal of students of color with disabilities from classrooms, often for minor infractions of school rules and often in ways that are inappropriately applied by teachers, non-administrative staff, and school officials.[31] Further, this uneven application of disciplinary policies disproportionately appears in low-income and urban communities.[32] While some schools and districts have made important progress,[33] more work still needs to be done[34] to ensure that all public school students are guaranteed equal protection of their right to an education as provided by the Fourteenth Amendment of the U.S. Constitution[35] and under federal civil rights law.[36]

Educators and school administrators are working diligently across the country not only to provide students with a quality education, but also to ensure that all students are safe at school. Teachers and administrators are forced to make difficult decisions involving the use of school discipline every day, and they must work to avoid unfairly excluding students from the educational process while ensuring the safety of school campuses and promoting their educational mission. In some schools and districts, unjustified and unnecessary use of suspensions and expulsions undermines the essential work of public education.

When schools use exclusionary discipline as a way to punish a student, students not only miss valuable instruction time, but they also lose a sense of belonging and engagement in school. Students can begin to feel like they are not valued and lose interest in their education. These feelings can be compounded when schools send the message that they are singling out students

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[31] *See infra* notes 149-52.
[32] *See infra* notes 462-64, 731-733.
[33] *See infra* notes 491-96, 500-511.
[34] Ibid.
[35] *See Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494-95 (1954) (holding that segregating schools by race violates the Equal Protection Clause); *see also Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that denying free education to noncitizen children residing in state violates the Equal Protection Clause). *See also infra* notes 51-54.
[36] *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*; *see also infra* notes 41-44, 78-92, 113-124. Restrictions or deprivations of students' right to education through unfair disciplinary proceedings may also be subject to constitutional due process clause requirements, such as notice and opportunity to be heard. *See also Goss v. Lopez*, 419 U.S. 565, 581 (1975) ("[Ohio public high school] [s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."). *See also* Introduction: Relevant Civil Rights Law, *infra* notes 62-69.

because of the students' race, ethnicity, national origin, and/or disability.[37] These actions are not only discriminatory, they can also have lifelong negative impacts.[38] These types of policies also undermine the American promise to students to provide them an equal opportunity for public education regardless of their backgrounds, in the hope of creating a more equitable future for all.[39]

Against this backdrop, the Commission investigated school discipline practices and policies impacting students of color with disabilities and the possible connections to the school-to-prison pipeline, examined the rates of exclusionary discipline, researched whether these policies unfairly and/or unlawfully target students of color with disabilities, and analyzed the federal government's responses and actions on the topic. At a December 8, 2017 briefing, the Commission convened experts to discuss if school discipline practices needed reform, and to consider the federal government's role in guaranteeing the safety of students and providing them with an equitable education. The experts' testimony and the public's comments and statements are discussed herein. After reviewing and summarizing relevant civil rights law in the Introduction, Chapters 1 and 2 examine the literature, data, and debates on school discipline reform. Chapter 3 then analyzes the federal government's enforcement practices and guidance regarding school discipline policies. The report concludes with the Commission's findings and recommendations, which are highlighted below, and discussed in full in Chapter 4:

Findings:

- Researchers and advocates have long recognized disparate discipline rates for students of color and students with disabilities. Not many empirical studies, however, have focused on the intersection of race and disability.

- Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers – but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.

- Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities.

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[37] *See generally* Danya Contractor and Cheryl Staats, *Interventions to Address Racialized Discipline Disparities and School "Push Out,"* Kirwan Institute, 2014, http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-interventions.pdf; Advancement Project and The Civil Rights Project at Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, Report from A National Summit on Zero Tolerance, June 15-16, 2000, https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf.

[38] *See infra* notes 202-204.

[39] *See infra* notes 44, 140-42, 624.

- The U.S. Department of Education recognizes that since it began collecting state-level data on suspensions and expulsions in the 1998-1999 school year, a consistent pattern persists of schools suspending or expelling black students with disabilities at higher rates than their proportion of the population of students with disabilities. The most recent CRDC data reflects that, with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were more likely than white students with disabilities to be expelled without educational services.

- In addition to missed class time, excessive exclusionary discipline negatively impacts classroom engagement and cohesion and increases the likelihood excluded students will be retained in grade, drop out of school, or be placed in the juvenile justice system. Black students with disabilities lost approximately 77 more days of instruction compared to white students with disabilities.

- According to CRDC data, 1.6 million students attend a school with a sworn law enforcement officer (SLEO) but not a school counselor and by the 2015-16 academic year, schools reported having more than 27,000 school resource officers (SROs), compared to 23,000 social workers. Latinx, Asian, and black students were all more likely than white students to attend a school with an SLEO but not a counselor.

Recommendations:

- The U.S. Department of Education's Office for Civil Rights (OCR) should continue offering guidance to school communities regarding how to comply with federal nondiscrimination laws related to race and disability in the imposition of school discipline.

- It is critical that all teachers are provided with resources, guidance, training, and support to ensure nondiscriminatory discipline in schools. Congress should continue to provide funding to help states and school districts provide training and support and, with Congressional appropriation support, DOJ and ED should continue and expand their grant funding for these important goals.

- OCR should rigorously enforce the civil rights laws under its jurisdiction to address allegations of discrimination in school discipline policies.

- Congress should provide funding as needed and incentivize states to provide funding to ensure all schools have adequate counselors and social workers.

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INTRODUCTION: RELEVANT CIVIL RIGHTS LAW

This section provides a brief summary of federal civil rights laws that are relevant to the Commission's analysis of school discipline proceedings impacting students of color with disabilities in the following chapters of this report. The main bodies of relevant law are federal constitutional and statutory law, applicable judicial decisions, and federal agency guidance and regulations.

Constitutional Law: Equal Protection and Due Process Rights

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."[40] Although the Constitution does not provide a fundamental right to receive an education,[41] this clause guarantees the rights of students to equal access to public education. It was under the Equal Protection Clause that in 1954, in *Brown v. Board of Education*, the Supreme Court held that racial segregation of students violated the right of African-American students to "equal educational opportunities,"[42] emphasizing that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[43]

Equal protection applies to more than racial discrimination in education. In 1982, in the case of *Plyler v. Doe*, the Supreme Court stressed that, although education is not a fundamental right directly guaranteed by the Constitution,[44] equal access must be protected because education is pivotal to a person's future success and ability to function in society.[45] The Court summarized that:

> Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . [E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.[46]

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[40] U.S. CONST. amend. XIV § 1.
[41] *See Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982).
[42] *Brown*, 347 U.S. 483, 493 (1954) ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").
[43] *Id.*
[44] *See Plyler*, 457 U.S. at 220–21, 223.
[45] *Id.* at 220-23 (discussing, inter alia, why the "status-based denial of basic education" does not comport with "the framework of equality embodied in the Equal Protection Clause.").
[46] *Id.* at 221.

The Court then ruled that due to this extreme impact, a Texas law excluding undocumented immigrant children from public education "can hardly be considered rational unless it furthers some substantial goal of the State."[47] The Court identified no such substantial interest, and therefore invalidated the law. Additionally, unnecessary burdens on equal access to education, such as requiring a birth certificate or threatening to report certain classes of students and parents to law enforcement, may also constitute equal protection violations.[48]

Based on this body of law, federal courts have also recognized the equal protection claims of students with disabilities.[49] In 1972, a federal court ruled that the District of Columbia school board's refusal to provide free public education to students with disabilities violated their equal protection and due process rights.[50] The named plaintiffs were seven African-American[51] students representing a class of students who were subject to being:

> labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive, and denied admission to the public schools or excluded therefrom after admission, with no provision for alternative educational placement or periodic review.[52]

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[47] *Id.* at 224.

[48] *Hispanic Interest Coalition of Ala. v. Gov. of Ala*., 691 F. 3d 1236, 1248 (11th Cir. 2012) ("Having concluded that section 28 [the policy in question] substantially burdens the rights secured by *Plyler*, we may only uphold it if the provision 'furthers some substantial state interest.'") (citation omitted); *Id.* at 1249 ("Although those might be legitimate state interests, the means chosen by Alabama 'unnecessarily burden[s]' the children's right to a basic education.") (citation omitted).

[49] *See, e.g., H.M. v. Bd. of Educ. of the Kings Local Sch. Dist.*, 117 F. Supp. 3d 992, 1002–04 (S.D. Ohio 2015) (denying school personnel's motion to dismiss the claim of students with disabilities who alleged that they were subjected to discipline procedures in violation of the Equal Protection Clause); *Barnett v. Baldwin Cty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1231–32 (S.D. Ala. 2014) (finding that school officials were not entitled to dismissal of parents' claims that the officials violated the equal protection rights of students of color with disabilities by "systematically targeting African–American, Hispanic, bi-racial, students whose parents were or are in inter-racial relationships, or Caucasian students with close friendships with student [sic.] of color" by placing them in "black boxes" or "locked closets."); *Clark v. Bd. of Educ. of Franklin Twp. Pub. Sch.*, Case No. CIV.A. 06-2736 (FLW), 2009 WL 1586940, at *3, *9-11 (D.N.J. June 4, 2009) (finding that plaintiffs presented a genuine issue of material fact as to whether a teacher violated the equal protection rights of an African-American preschooler with disabilities by suspending him for nine days, where such punishment was never inflicted on a white preschooler); *James S. ex rel. Thelma S. v. Sch. Dist. of Phila.*, 559 F. Supp. 2d 600, 627 (E.D. Pa. 2008) (allowing a student's claim that school personnel subjected him to "unequal punishment . . . for disability-related conduct" in violation of the Equal Protection Clause to proceed, and denying the school personnel's motion for dismissal on these grounds).

[50] *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866, 868, 875-76 (D.D.C. 1972).

[51] In this case, "Although all of the named minor plaintiffs are identified as Negroes the class they represent is not limited by their race. They sue on behalf of and represent all other District of Columbia residents of school age who are eligible for a free public education and who have been, or may be, excluded from such education or otherwise deprived by defendants of access to publicly supported education." *Id.* at 870.

[52] *Id.* at 868.

According to the court, many of these students were "suspended or expelled" or "reassigned" without a hearing, in direct violation of their Due Process rights (which are discussed in further detail below).[53] The court ordered the school board to implement procedures guaranteeing the students' constitutional rights, including a detailed process for determining whether a student needed a specialized education, a means for obtaining a free specialized education if needed, and a hearing before imposing any disciplinary measures harsher than a two-day suspension.[54]

The Due Process Clause of the Fourteenth Amendment protects what is termed substantive and procedural due process rights,[55] which may apply to disciplinary proceedings in schools. The Due Process Clause mandates that no state may "deprive any person of life, liberty, or property, without due process of law."[56] In 1975, the Supreme Court recognized the right of students to procedural due process with regard to disciplinary proceedings under the 14th Amendment.[57] In *Goss v. Lopez*, the Court found that because an Ohio law required children to attend public schools, Ohio had created a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence" to constitutionally required procedures.[58] According to the Court, the students' property interest in education obligated the schools to follow "fundamentally fair procedures" when disciplining students.[59] These procedures included notice and a hearing for non-minor disciplinary actions (such as, in this case, a 10-day suspension).[60]

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[53] *Id.* at 875.
[54] *Id.* at 878-83.
[55] Substantive due process requires that the government may not unduly interfere with rights deemed fundamental to a person's "life, liberty, or property." U.S. CONST. amend. XIV § 1; 16B AM. JUR. 2D *Constitutional Law* § 953 (2018). Generally, substantive due process involves a governmental deprivation of life, liberty, or property, where the government (arguably) lacks adequate justification for the action. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999). *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (holding that it unconstitutionally violates substantive due process to legally prohibit teaching German, as parents have a fundamental right to control their children's upbringing). Procedural due process, as opposed to substantive due process, guarantees individuals' right to *fair proceedings* when their fundamental rights are implicated or subject to government interference. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982) and 16B AM. JUR. 2D *Constitutional Law* § 953 (2018). To analyze a procedural due process issue, courts must first evaluate the nature of the right alleged, including protected liberty and property interests, and then determine the appropriate due process procedures employed to protect that right. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (stating, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause," and going on to analyze the appropriate balancing of interests process for the situation at issue.).
[56] U.S. CONST. amend. XIV § 1.
[57] *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Also note that the Sixth Circuit has recognized students' rights to substantive due process within the school discipline context and found that a school discipline policy would be upheld unless it was not "rationally related to a legitimate state interest." *Seal v. Morgan*, 229 F.3d 567, 575–76 (6th Cir. 2000).
[58] *Id.* at 574.
[59] *Id.* at 573-74.
[60] *Id.* at 576-79.

Although persons with disabilities are not constitutionally protected as a suspect class,[61] students with disabilities may challenge state laws that deny them public education on both equal protection and substantive due process grounds.[62] In 1972, on behalf of students with disabilities and their parents, a Pennsylvania organization argued that the state violated the equal protection rights of students with disabilities by denying them free public education and violated their parents' due process rights by withholding notice and an opportunity to be heard before excluding their children from public schools.[63] The federal court agreed with the organization's claims and approved a settlement agreement ensuring protection of the students' constitutional rights.[64]

In addition to guaranteeing equal protection and due process, the Fourteenth Amendment authorizes Congress to enforce these protections "by appropriate legislation."[65] This provision, known as the Enforcement Clause, authorizes Congress to enact laws enforcing the protections of Fourteenth Amendment rights.[66] It allows Congress to "remedy or prevent" policies or practices that may not be intentionally discriminatory, but are discriminatory in effect.[67] For example, the Supreme Court upheld Congress' power under the Enforcement Clause to enact provisions of Title II of the Americans with Disabilities Act (ADA), which addresses discrimination against people with disabilities.[68]

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[61] In *Frontiero v. Richardson*, the Supreme Court clarified that race, sex, and national origin are suspect classes because they are based on "immutable characteristic[s]" that "frequently bear[] no relation to ability to perform or contribute to society," unlike "intelligence or physical disability." 411 U.S. 677, 686–87 (1973). More than 10 years later in *City of Cleburne, Tex. v. Cleburne Living Ctr.*, the Supreme Court concluded that although developmentally disabled people do not belong to a "quasi-suspect class," such individuals were not "entirely unprotected from invidious discrimination." 473 U.S. 432, 442, 446 (1985). According to the Court, legislation that treats developmentally disabled people differently "must be rationally related to a legitimate government purpose." *Id.* at 446.

[62] *See, e.g., Pennsylvania Ass'n for Retarded Children v. Com. of Pa.*, 343 F. Supp. 279, 283 (E.D. Pa. 1972).

[63] *Id.* at 282-83.

[64] *Id.* at 293-97, 301-03.

[65] U.S. CONST. amend. XIV § 5.

[66] *See Tennessee v. Lane*, 541 U.S. 509, 518–20 (2004) (stating that Congress's enforcement power under the 14th amendment is broad and it "includes 'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" (quoting *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 81 (2000)). *See generally* 16B AM. JUR. 2D *Constitutional Law* § 828 (2018).

[67] *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.").

[68] *Id.* at 533-34, 531 (holding that Title II of the ADA, 42 U.S.C. § 12131 *et seq*., "as it applies to the class of cases implicating the fundamental right of access to the courts," "unquestionably" "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment").

Statutory Protections for Students of Color and Students with Disabilities

Congress has enacted several laws to further the principles embedded in the Equal Protection and Due Process Clauses. Three key civil rights statutory protections pertain to the nondiscrimination rights of students of color with disabilities in public schools: Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and Title II of the ADA. Each of these laws protects students against discrimination.[69] While not an anti-discrimination law, the Individuals with Disabilities Education Act (IDEA) also provides rights for certain students with disabilities to receive a free and appropriate education.[70]

Title VI of the Civil Rights Act

Congress enacted the Civil Rights Act of 1964 to prohibit racial discrimination in public accommodations, facilities, and education.[71] Title IV of the Civil Rights Act (Title IV) is the statute enacted to end segregation public schools.[72] It prohibits discrimination in public schools based on race, color, religion, sex, or national origin, and permits suits by the Attorney General to enforce those rights as well as equal protection under the law, without regard to whether the school receives federal funding.[73] Title VI of the Civil Rights Act (Title VI) is similar but limited to schools that receive federal funding. Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[74]

The Department of Education's Office for Civil Rights (OCR) is responsible for enforcing Title VI in public schools,[75] and the Department of Justice's (DOJ) Civil Rights Division may also enforce Title IV and Title VI. In a 2013 federal court filing, the DOJ summarized the important role of eradicating discriminatory discipline in desegregation cases and the applicable law as follows:

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[69] Under current law, there is not a way to make an intersectional claim. A claim for a student of color with disabilities must involve hybrid claims under different laws, because there is no law that specifically addresses individuals with intersectional identities.
[70] Individuals with Disabilities Act, Pub. L. 101-476, 20 U.S.C. § 1400 *et. seq.* For further discussion of IDEA, *see infra* notes 315, 621-22.
[71] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a *et seq*.).
[72] *See, e.g.*, 42 U.S.C. § 2000c-2 (Title IV)
[73] 42 U.S.C. § 2000c-6.
[74] Title VI of Civil Rights Act of 1964, Pub. L. No. 88-352 (codified at 42 U.S.C. § 2000d. (Title VI)).
[75] 34 C.F.R. § 100.1.

> The affirmative duty to desegregate is a continuing responsibility, and "[p]art of the affirmative duty. . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." Eliminating racial discrimination in student discipline is part of establishing a "truly unitary school system." In addition, discriminatory discipline that results in the exclusion of black students from school without educational services for significant amounts of time, or the placement of students in an alternative school that offers inferior education services, can affect the quality of education that black students receive.[76]

Title VI regulations prohibit not only intentional racial discrimination, but also "criteria or methods of administration" that have a racially discriminatory effect.[77] Any school that receives federal funding—and all public schools do—may not, directly or indirectly, administer programs "which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."[78]

Cases brought to enforce these regulations are commonly called "disparate impact" cases, but the name is a misnomer because proving this type of discrimination requires more than just a statistically disparate impact.[79] In a recent housing case resolving disparate impact claims, the Supreme Court held that a showing that the defendant's policies unfairly and directly caused the

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[76] Memorandum of Law in Support of Joint Motion to Approve Proposed Consent Order, *Barnhardt v. Meridian Mun. Separate Sch. Dist.*, *supra* note 83, at 5 (some internal citations omitted) (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979); *Tasby v. Estes*, 643 F.2d 1103, 1104 (5th Cir. 1981) (ordering a school district under a desegregation order to alter its student discipline practices in order to achieve unitary status); *Quarles v. Oxford Mun. Sep. Sch. Dist.*, 868 F.2d 750, 755-56 (5th Cir. 1989) (holding that discipline practices which resulted in both direct and statistical evidence of discriminatory punishment may be a vestige of the dual school system); *Berry v. Sch. Dist. of City of Benton Harbor*, 515 F. Supp. 344, 357 (W.D. Mich. 1981) (requiring a school district to develop a uniform code of conduct and attendant procedures as part of remedial measures for school desegregation); *U.S. v. Bd. of School Com'rs of City of Indianapolis*, 506 F. Supp. 657, 672 (S.D. Ind. 1979) (ordering in-service training on the administration of discipline as "essential" to the desegregation process), *aff'd in part, rev'd in part on other grounds*; *Reed v. Rhodes*, 455 F. Supp. 569, 601-602 (N.D. Ohio 1978) (requiring changes to disciplinary procedures to prohibit the discriminatory application of discipline in a school desegregation case); *Bradley v. Milliken*, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975) (holding that "in a segregation setting many techniques deny equal protection to black students, such as . . . discriminatory application of student discipline") and *Freeman v. Pitts*, 503 U.S. 467, 492-93 (1992)).

[77] 34 C.F.R. § 100.3(b)(2).

[78] *Id.*

[79] *See infra* notes 95, 100-03, 758-60 (education cases requiring more than mere statistical disparities to prove illegal disparate impact).

disparate impact is required.[80] The causation requirement is also found in education cases.[81] If the school policy did not cause the discriminatory impact (and it would have occurred with or without the policy), then Title VI is not violated.[82]

The school disparate impact line of cases shows that the least restrictive policies, or only policies that are necessary for legitimate, nondiscriminatory school interest, must be used. In December 2016, OCR issued one of several guidance letters regarding schools' obligations under the Title VI disparate impact regulations.[83] According to the guidance and underlying federal case law, if a disparate negative impact on a protected group is shown, OCR would then assess whether the "criterion, policy, practice, or procedure is necessary to advance a legitimate, nondiscriminatory educational goal."[84] If a disciplinary policy or practice has a disparate racial impact *and* the policy is not necessary to advance a legitimate, nondiscriminatory goal, it could violate Title VI.[85]

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[80] *Texas Dept. of Housing and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015). Moreover, the disparate impact standard used in this case under the Fair Housing Act "is substantially similar to the Title VI. . . standard." U.S. Dep't of Justice, Civil Rights Division, *Title VI Legal Manual, Section VII.A, updated Mar. 18, 2019*, https://www.justice.gov/crt/fcs/T6manual (on file).

[81] *See, e.g., Elston v. Talladega Cty. Bd. of Educ*., 997 F.2d 1394, 1407 (11th Cir. 1993).

[82] *Id.*

[83] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23. The Education Department's Office for Civil Rights utilizes "Dear Colleague" letters and accompanying supplementary materials to "help ensure that the general public understands how the decisions apply to schools, districts, and educational institutions of higher learning. When appropriate, OCR issues guidance jointly with other civil rights offices, such as the Civil Rights Division at the U.S. Dep't of Justice (DOJ)." *See* U.S. Dep't of Education, Office for Civil Rights, "Disability Discrimination: Policy Guidance," https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html. While these letters do not set legal precedents, they help to inform the public and education officials of the Education Department's (and, where appropriate, the Justice Department's) stance on major issues, the legal standards and requirements of schools, and solutions that the Department believes educational institutions should implement. *See* U.S. Dep't of Education, "U.S. Dep't of Education Releases Guidance on Civil Rights of Students with Disabilities," Dec. 28, 2016, https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-students-disabilities (explaining that "[t]hese guidance documents clarify the rights of students with disabilities and the responsibilities of educational institutions in ensuring that all students have the opportunity to learn.").

[84] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 9 (citing *Elston v. Talladega County Bd. of Educ*., 997 F.2d 1394, 1411-12 (11th Cir. 1993)); *see also Inclusive Communities Project*, 135 S. Ct. at 2522-24 (discussing that disparate impact claims require showing that barriers are not necessary to meet legitimate governmental or business interests in Fair Housing Act case, relying on Title VII and other analogous statutes).

[85] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 9. *See also Elston*, 997 F.2d at 1412 (explaining that, in disparate impact cases under Title VI, "defendants attempting to meet the 'substantial legitimate justification' burden have commonly been required to demonstrate the 'educational necessity' of their practices, that is, to show that their challenged practices 'bear a manifest demonstrable relationship to classroom education'") (citing *Georgia State Conf. of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1417-18 (11th Cir. 1985); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (explaining that in a Title VI disparate impact claim "in the educational situation" the defendant must show that the practice "has a manifest relationship to the education in question")). The *Elston* court also cited *Sharif by Salahuddin v. New York State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) ("In educational testing cases, instead of requiring defendants to demonstrate a 'business necessity,' courts have required defendants to show an 'educational necessity'") (internal citations omitted); *Groves v. Ala. State Bd. of Education*, 776 F. Supp. 1518, 1530–32 (M.D. Ala. 1991) (explaining that in Title VI disparate impact claims, although "the burden of

According to federal courts, there are other ways that illegal discriminatory effects may also be proven, such as through legal tests involving the totality of the circumstances showing that the policy in question caused the discriminatory effect.[86]

The Commission notes that while private parties may not enforce Title VI regulations regarding discriminatory effects based on race, conversely, the Supreme Court has held that these rights may be enforced by private parties with regard to disability.[87] In the 2001 case of *Alexander v. Sandoval*, the Supreme Court held that private parties may not enforce Title VI disparate impact regulations and that only the federal government can enforce them.[88] As the DOJ pointed out in its Title VI Manual updated in November 2018, federal "agencies' critical role [in enforcing Title VI disparate impact regulations] only increased after the Supreme Court's 2001 decision in *Alexander v. Sandoval*[.]"[89] DOJ updated their Title VI Legal Manual on March 18, 2019, but DOJ did not make any changes in the relevant text.[90]

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persuasion…remains with the disparate-impact plaintiff," the defendants must show that "a challenged practice serves, in a significant way, the legitimate employment goals of the employer" (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659–60 (1989)); *Board of Education v. Harris*, 444 U.S. 130, 151 (1979) (explaining that the plaintiff in a Title VI disparate impact case bears the burden of proving disparate impact, but the defendant may rebut this evidence by showing that the challenged practice is justified by "educational necessity").

[86] *See* notes 85-90 (discussing cases). *See also Inclusive Communities*, 135 S. Ct. at 2512 ("A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.")

[87] *See Alexander v. Choate*, 469 U.S. 287, 299 (1985), ruling disparate impact claims are viable for disability discrimination:

> While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under [section] 504, we assume without deciding that [section] 504 reaches at least some conduct that has an unjustifiable disparate impact upon [persons with disabilities].

[88] *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.").

[89] U.S. Dep't of Justice, Civil Rights Division, *Title VI Legal Manual, Section VII.B*, updated March 18, 2019, https://www.justice.gov/crt/fcs/T6manual (on file), citing 532 U.S. 275 (2001). The manual goes on to explain that:

> Before Sandoval, it was believed that individuals could file civil actions relying on the Title VI disparate impact standard. In Sandoval, however, the Supreme Court held that individuals did not have a right of action to enforce the Title VI disparate impact regulations in federal court. *Id*., at 293. Following Sandoval, the Civil Rights Division issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although Sandoval foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them. Nor does Sandoval affect the disparate impact provisions of other laws, such as Title VII or the Fair Housing Act. The agencies' Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism. *Id.*

[90] U.S. Dep't of Justice, Civil Rights Division, Title VI Legal Manual, Section VII.B, updated Mar. 18, 2019, https://www.justice.gov/crt/fcs/T6manual (on file), continuing to cite 532 U.S. 275 (2001), and continuing to state that:

In contrast, private plaintiffs must prove that any racial discrimination was intentional, which is a much higher standard. For example, in 2014, the Third Circuit Court of Appeals ruled in favor of the Pennsylvania Department of Education and a local public school district accused of violating Title VI and the Equal Protection Clause by disproportionately misclassifying black students as having a disability.[91] The plaintiffs presented statistical evidence showing that, over a five-year period, students of color were disproportionately overrepresented in special education programs for students with disabilities and disproportionately underrepresented in high-achievement classes.[92] The Third Circuit stated that although the defendants knew about the disparities, they did not violate Title VI because the evidence did not "raise a reasonable inference" of intentional discrimination, and the defendants did not violate the Equal Protection Clause because the plaintiffs failed to prove that the school district acted with "a racially discriminatory purpose."[93] This case illustrates the difficulties faced by private plaintiffs who challenge misclassification under Title VI and the Equal Protection Clause.[94]

Before Sandoval, it was believed that individuals could file civil actions relying on the Title VI disparate impact standard. In Sandoval, however, the Supreme Court held that individuals did not have a right of action to enforce the Title VI disparate impact regulations in federal court. *Id*. at 293. Following Sandoval, the Civil Rights Division issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although Sandoval foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained 6 their authority and responsibility to enforce them. Nor does Sandoval affect the disparate impact provisions of other laws, such as Title VII or the Fair Housing Act. The agencies' Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism.

[91] *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 256-57, 294 (3d Cir. 2014) (affirming the district court's ruling of summary judgment in favor of the public-school district).

[92] *Id.* at 294. *See also Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 757–58 (E.D. Pa. 2011). The district court's opinion summarizes in detail the plaintiffs' data, which revealed that the percentage of white students in special education classes was roughly equal to their percentage in the general student body, whereas the percentage of African-American students in special education was nearly double their percentage in the general student body. *Id.*

[93] *Blunt*, 767 F.3d at 263-64. *See also Blunt*, 826 F. Supp. 2d at 757 (acknowledging that the state board of education discovered the disparities in the school district and then closed its investigation after a year, concluding that the district had "met targets regarding 'disproportionate representation by race/ethnicity' in special education services.") (internal citations omitted).

[94] *Blunt*, 767 F.3d at 301 (acknowledging the voluminous evidence in the form of data and testimony evincing racial discrimination and contending that, nonetheless, there was "no evidence that the educators and administrators responsible for placing students intended to discriminate against them because of their race."); *see also* Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373, 403 (2016) (citing cases to discuss "the insurmountable obstacles in place for plaintiffs who attempt to seek recovery for misidentification through Title VI and the Equal-Protection clause").

Despite these difficulties, it is abundantly clear that intentional racial discrimination in public education is prohibited under Title VI, based on the standards of the Equal Protection Clause.[95] Citing leading Title VI cases, the DOJ summarized the law as follows:

> Generally, intentional discrimination occurs when the recipient acted, at least in part, because of the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment.[96] While discriminatory intent need not be the only motive, a violation occurs when the evidence shows that the entity adopted a policy at issue "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[97] Some assume that the intentional use of race should be carefully scrutinized only when the intent is to harm a group or an individual defined by race, color, or national origin. That is not true: the Supreme Court in *City of Richmond v. J.A. Croson Co*.,[98] and *Adarand Constructors, Inc., v. Pena*,[99] established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny. Accordingly, the record need not contain evidence of "bad faith, ill will or any evil motive on the part of the [recipient]."[100]

Furthermore, a school engages in intentional discrimination when "the school cannot articulate a legitimate, nondiscriminatory reason for the different treatment [impacting students of color]" or "the nondiscriminatory reason articulated by the school is a pretext for discrimination rather than the actual reason for the different treatment."[101] The Supreme Court has also held that intentional discrimination may be proved by circumstantial or contextual evidence, with key factors including substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision.[102] Finally, if the school

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[95] *See Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (*citing Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) ("Title VI. . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment").

[96] *Doe ex rel. Doe v. Lower Merion Sch. Dist*., 665 F.3d 524, 548 (3d Cir. 2011).

[97] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

[98] 488 U.S. 469, 493 (1989)

[99] 515 U.S. 200, 226 (1995).

[100] U.S. Dep't of Justice, Civil Rights Division, *Title VI Legal Manual, Section VI.B*, updated Mar. 18, 2019, https://www.justice.gov/crt/fcs/T6manual (one file), citing 532 U.S. 275 (2001), citing *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984) (for last quote in block text) and cases cited in *supra* notes 60-62.

[101] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 8; *see also Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607–08 (1983); *Choate*, 469 U.S. at 292–94 (agencies, through regulations, can make "the complex determination of what sorts of disparate impacts upon minorities constitute[] sufficiently significant social problems, and [a]re readily enough remediable, to warrant altering the practices of the federal grantees" whose policies produced the disparate impacts.).

[102] *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp*., 429 U.S. 252, 265-69 (1977).

administrators could foresee the discriminatory impact, the discrimination may be intentional, as the Supreme Court has held that, "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence. . . is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."[103]

Section 504 of the Rehabilitation Act & Americans with Disabilities Act

This body of law also informs the Commission's evaluation of school discipline policies impacting students of color with disabilities. Congress enacted the Rehabilitation Act of 1973 to combat discrimination against people with disabilities in "employment, housing, public accommodations, education" and other "public services."[104] Section 504 of the Act (Section 504)[105] defines disability as a "physical or mental impairment" that "constitutes or results in a substantial impediment[. . . .]"[106] The language of Section 504 mirrors that of the Civil Rights Act of 1964 to ban discrimination against people with disabilities "under any program or activity receiving [f]ederal financial assistance."[107] Moreover, the Act's legislative history reveals Congress' concern about discrimination against individuals misclassified as having a disability, and acknowledges that "racial and ethnic factors may contribute to misclassification."[108]

Section 504 regulations prohibit both intentional discrimination as well as discriminatory effects (unlawful disparate impact),[109] and in contrast to the Supreme Court's holding that private parties may not enforce Title VI disparate impact regulations, in *Alexander v. Choate*, the Court held that private parties may enforce Section 504's disparate impact regulations.[110] Section 504's disparate impact regulations provide that:

> A recipient [of federal funding] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect

[103] *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979); s*ee also United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009).
[104] Rehabilitation Act of 1973, PUB. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 *et seq*.); 29 U.S.C. § 701(a)(5).
[105] 29 U.S.C. § 794.
[106] 29 U.S.C. § 794; 29 U.S.C. § 705(20)(A).
[107] 29 U.S.C. § 794(a); *see also*, S. REP. NO. 93-1297, 93d Congress, 2d Sess., 1974 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390 ("Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1. . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap."). To note, the Commission recognizes that referring to people with disabilities as "handicapped" is offensive and is only used in this context to remain accurate to the original legislative text and will not be used in any other portion of this report.
[108] *Id.* at 6389.
[109] 34 C.F.R. § 104.4(b)(4); *see also Choate*, 469 U.S. at 294 n. 11.
[110] *Choate*, 469 U.S. at 294 n. 11.

> of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.[111]

Section 504 works together with the Americans with Disabilities Act (ADA) to protect the civil rights of students with disabilities.

Congress enacted the ADA in 1990, to establish a "national mandate" for eliminating discrimination against people with disabilities and to "invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[112] The ADA bans discrimination against people with disabilities in the "services, programs, or activities of a public entity."[113] Under the ADA, a student cannot be "excluded from participation in or be denied the benefits of" such schools on the basis of disability.[114] Congress amended the ADA in 2008 "to make it easier for people with disabilities to obtain protection under the ADA."[115] According to subsequent regulations, the meaning of "disability" must be "construed broadly in favor of expansive coverage."[116] DOJ and OCR share enforcement of the ADA as it applies to schools.[117]

Because the ADA and Section 504 share the same definition of disability[118] and provide for essentially the same rights for students with disabilities to be free from discrimination, they are often enforced together. The regulations governing the ADA in public schools must comply with Section 504 and must not apply a lesser standard than regulations interpreting Section 504.[119]

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[111] 34 C.F.R. § 104.4(b)(4). *See supra* note 68 regarding legislative language about persons with disabilities.
[112] 42 U.S.C. § 12101(a)-(b) (Congressional Findings and Purposes in adopting the ADA); *see also generally* Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336 (1990), § 2 (codified at 42 U.S.C. § 12102 *et. seq*.) (*see also* Part II of the ADA, codified at 42 U.S.C. § 12131 et seq.).
[113] 42 U.S.C. § 12132.
[114] 42 U.S.C. § 12132.
[115] 28 C.F.R. § 35.101. *See also* ADA Amendments Act of 2008, Pub. L. No. 110–325 (2008), 122 Stat 3553.
[116] 28 C.F.R. § 35.101.
[117] 28 C.F.R. § 35.190(b)(2) (designating the Dep't of Education to implement "programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions . . ."); 28 C.F.R. § 35.190(b)(6) (designating the Dep't of Justice to implement "programs, services, and regulatory activities relating to . . .public safety[;] . . .state and local government support services[; . . . and] all other government functions not assigned to other" agencies).
[118] 29 U.S.C. § 705(20)(B).
[119] 42 U.S.C. § 12134(b) (Relationship to other regulations, requiring consistency 29 U.S.C. § 794 (Nondiscrimination under Federal grants)); 42 U.S.C. § 12201(a).

This important body of civil rights law protects not only people with disabilities but also people "regarded as having" disabilities.[120] It may also intersect with federal protections against racial discrimination. For example, in a 1979 class action case, *Larry P. v. Riles*, a federal court ruled that California's public-school system violated Section 504, Title VI, and the Equal Protection Clause by using racially biased standardized tests that misclassified mostly black students as developmentally disabled.[121] This case arose when black plaintiffs alleged that California's system for placing students in what the state called "educable mentally retarded"[122] (E.M.R.) classes was racially discriminatory in purpose and effect.[123] At the time, black students represented 10 percent of California's general student population, but 25 percent of students in EMR classes, which were designed not to prepare students academically, but to make them "economically useful."[124] The state department of education suggested without evidence that "a higher incidence of mental retardation" existed among black Americans.[125]

According to the court, the department not only knew that the IQ tests it was using for the placement were racially biased, but also that the tests disproportionately misplaced black students in EMR, "dead-end" classes.[126] Moreover, the court asserted, the department failed to evaluate the IQ tests it was using and continued to use them despite the availability of alternative classification methods.[127] Thus, the school system was found to be in violation of both Section 504 and Title VI.

The federal court concluded that California's practices contravened Section 504's goal of ending "the erroneous denial of admission [of non-disabled students incorrectly perceived as disabled] into regular classes."[128] The court further ruled that the state's knowing and continued use of "criteria or methods of administration" like its faulty IQ tests leading to the EMR label disproportionately denied black students an adequate education and violated Title VI.[129] Additionally, the court found that the state violated the equal protection rights of black students by acting with discriminatory intent to misclassify them as having a disability, without offering a

[120] 42 U.S.C. § 12102(1)(A)-(C).
[121] *Larry P. v. Riles*, 495 F. Supp. 926, 988 (N.D. Cal. 1979), *aff'd in part, rev'd in part sub nom*. *Larry P. By Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).
[122] The Commission fully recognizes that the word "retarded" or describing an individual with a disability as "mentally retarded" is outdated and offensive. It is only used here to remain consistent with the court's language, and the usage of this term is not condoned by the Commission, nor will it be used in this report hereinafter.
[123] *Id.* at 931-33.
[124] *Id.* at 937-38 (describing EMR classes also as "special classes that doom [students] to stigma, inadequate education, and failure to develop the skills necessary to productive success in our society"). *Id*. at 931.
[125] *Id.* at 944.
[126] *Id.* at 941, 944, 945-47.
[127] *Id.* at 971-73.
[128] *Id.* at 967, 933, 988.
[129] *Id.* at 964-66, 988.

compelling or even substantial justification for its policy, and the Ninth Circuit Court of Appeals affirmed these findings (although it overturned unrelated findings).[130]

Similarly, OCR has pointed out that while Section 504 requires schools to treat students with disabilities differently than students without disabilities, within this framework, schools must also comply with Title VI's mandate not to discriminate based on race.[131] According to the 2016 OCR Guidance, schools have sometimes inappropriately placed students of color who do not have disabilities in special education ("over-identification"), or delayed or failed to evaluate students of color who do have disabilities ("under-identification").[132] Both practices could violate Title VI and Section 504 and deny students' rights to an equal education.[133] OCR also explained that under-identification of students based on their race not only constitutes illegal racial discrimination, but also has "serious educational consequences" for the child.[134] Similarly, over-identification of students of color can occur when conscious or unconscious "stereotypes or biased perceptions" affect educators' decision-making about whether students should be considered as having disabilities.[135] The OCR guidance, therefore, outlined best practices for schools to comply with Section 504 and Title VI and prevent racial discrimination in evaluating students who may or may not have disabilities.[136]

The above civil rights framework, including constitutional and statutory protections, is the basis for the Commission's examination of data regarding how students of color with disabilities may be impacted by school discipline. The following chapters describe how school discipline practices and policies may unfairly discriminate against students of color with disabilities. The report concludes with a summary of the Commission's findings and recommendations on school discipline reform, focusing on how schools can prevent discrimination against students of color with disabilities.

[130] *Id.* at 984-86. The Ninth Circuit affirmed the district court's decision but reversed the finding that one defendant, the state superintendent of public education, was "guilty of intentional discrimination under the fourteenth amendment." *See Larry P.*, 793 F.2d at 972, 983-84.
[131] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23.
[132] *Id.* at 2.
[133] *Id.* at 3.
[134] *Id.* at 16.
[135] *Id.* at 11.
[136] *Id.* at 11-24.

CHAPTER 1: SCHOOL DISCIPLINE POLICIES AND THEIR EFFECTS

This chapter discusses various school discipline policies and their effects on student performance and achievement that impact students of color and students with disabilities, as well as any relevant intersectional impacts. The topics discussed include zero tolerance, the school-to-prison pipeline, policing in schools, exclusionary discipline policies, and alternative discipline approaches.

Zero Tolerance Policies

Concern over school violence and ensuring the safety of students and teachers has been a driving force for legislators and school officials to implement "zero tolerance" discipline policies. These policies tended to focus on punishing student misbehavior through punitive measures such as school exclusion, rather than using preventive or alternative methods that focused on correcting behavioral infractions and keeping students in the classroom.[137] The "zero tolerance" approach to school discipline was implemented with the goal to address disruptive and/or violent behaviors at school. The Department of Education defines a "zero tolerance policy" as one that "mandates predetermined consequences or punishments for specific offenses."[138] At their core, these policies rely on the presumption that punitive enforcement in response to a student's negative or disruptive behavior will be a deterrent to other potentially disruptive students.[139] Zero tolerance policies can range from suspending or expelling students for serious infractions such as bringing a weapon or drugs to school, to suspending students for minor infractions such as a student "doodling" on a desk[140] or wearing a rosary to school after being told that a rosary can be a sign of gang involvement and against the dress code policy.[141]

Zero tolerance policies instruct teachers and administrators to impose severe disciplinary consequences for student behavior, regardless of the individual circumstances. This disciplinary philosophy largely utilizes a "one-size-fits-all" strategy to address disruptive behavior and operates

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[137] Skiba, "The Failure of Zero Tolerance," *supra* note 2, at 27-33.
[138] Phillip Kaufman, Xianglei Chen, Susan Choy, Sally Ruddy, Amanda Miller, Kathryn Chandler, Christopher Chapman, Michael Rand, and Patsy Klaus, *Indicators of School Crime and Safety, 1999*, U.S. Dep't of Education, Office of Educational Research and Improvement, National Center for Education Statistics, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1999, 117, https://nces.ed.gov/pubs99/1999057.pdf.
[139] Skiba, "The Failure of Zero Tolerance," *supra* note 2, at 27-33.
[140] In New York City a twelve-year-old girl was arrested, handcuffed, and detained after she was caught drawing on her desk with an erasable marker. The message said: "I love my friends Abby and Faith" and "Lex was here 2/1/10" with a "smiley face while she waited for her Spanish teacher to pass out homework." *See* Rachel Monahan, "Queens girl Alexa Gonzalez hauled out of school in handcuffs after getting caught doodling on desk," *New York Daily News*, Feb. 4, 2010, https://www.nydailynews.com/new-york/education/queens-girl-hauled-school-handcuffs-caught-doodling-desk-article-1.194141.
[141] In Houston, an 8th grader wore a rosary to school because it reminded her of her Catholic grandmother. In December 2010, a school officer informed her that she could not wear it since a rosary can be a sign of gang involvement and against the school's dress code policy. When she refused to stop wearing it, she was suspended for two days. *See* "FBISD 8th grader suspended after wearing rosary to school," KHOU Houston, Jan. 11, 2011, https://www.khou.com/article/news/fbisd-8th-grader-suspended-after-wearing-rosary-to-school/285-341261666.

on the presumption that all incidents are worthy of strict and severe intervention.[142] Many school districts have also reframed their discipline standards to increase both the number and length of suspensions and expulsions for an ever-widening range of infractions, including serious incidents (e.g., weapons, fighting) to lesser infractions (e.g., wearing hats, failing to complete homework).[143]

The current trajectory of zero tolerance policies in schools began almost 30 years ago. Due to the public's concern about a spike in juvenile crime in the 1980s,[144] Congress passed the Gun-Free Schools Act of 1994, which required local education agencies to enact policies mandating the expulsion of students found on school property with firearms.[145] Concerns about violence in schools and classrooms, especially in the aftermath of the 1999 Columbine High School shooting, led to a dramatic increase of schools across the country implementing stricter disciplinary policies intended to strengthen school safety.[146] School administrators wanted to send a "tough on violence" message to students and parents alike, thus the nation witnessed many schools adopt zero tolerance policies in schools.[147] Indiana University Professor Russell Skiba argues that:

> When disruption and disorder threaten our schools and communities, it becomes increasingly easy to accept the notion that greater authority and force are necessary in order to keep schools secure. Faced with the undeniable need to preserve the safety of our children, which of us would not engage in strong actions for their sake when left with no alternative?[148]

However, "[m]any states, [] went above and beyond the federal mandate, passing laws that required expulsion or suspension for the possession of all weapons, drugs[,] and other serious

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[142] Russell Skiba and Kimberly Knesting, "Zero tolerance, zero evidence: An analysis of school disciplinary practice," *New Directions for Youth Development*, vol. 92 (2001), http://indiana.edu/~equity/articles/Skiba_Knesting_Zero_Tolerance_2001.pdf; Contractor and Staats, *Interventions to Address Racialized Discipline Disparities and School "Push Out*," *supra* note 37.

[143] Logan Gowdey, *Disabling Discipline: Locating a Right to Representation of Students with Disabilities in the ADA*, 115 COLUM. L. REV. 2265 (2015), 2269 and 2272-73, https://columbialawreview.org/wp-content/uploads/2016/02/December-2015-9-Gowdey-CORRECTED.pdf; School-Justice Partnership, *Keeping Kids In School and Out of Courts*, National Leadership Summit on School-Justice Partnerships, 2012, ii and 7, https://www.nycourts.gov/ip/justiceforchildren/PDF/Collection-of-Reports.pdf.

[144] Russell Skiba, *Zero Tolerance: The Assumptions and the Facts*, Center for Evaluation & Education Policy, 2004, 2.

[145] Gun-Free Schools Act of 1994, Pub. L. 103–227, 108 Stat. 270, §§ 1031-32 (codified at 20 U.S.C. § 7961).

[146] Kristin Eisenbraun, "Violence in schools: Prevalence, prediction, and prevention," *Aggression and Violent Behavior*, vol. 12 (2007), 460, http://www15.uta.fi/arkisto/aktk/projects/sta/Eisenbraun_2007_Violence-In-Schools.pdf; John Sutter, "Columbine massacre changed school security," *CNN*, April 20, 2009, http://www.cnn.com/2009/LIVING/04/20/columbine.school.safety/index.html; Cheryl Lero Jonson, "Preventing School Shootings: The Effectiveness of Safety Measures," *Victims and Offenders*, 12, no.6 (2017), 956-73.

[147] Eisenbraun, "Violence in schools: Prevalence, prediction, and prevention," *supra* note 146, at 460, 465-66; Sutter, "Columbine massacre changed school security," *supra* note 146.

[148] Skiba, "The Failure of Zero Tolerance," *supra* note 2, at 28.

violations on or around school grounds."[149] For many school districts, this set of requirements seemed sensible to keep students and teachers safe at school;[150] yet, according to Advancement Project, impacted communities argue that:

> While zero tolerance once required suspension or expulsion for a specific list of serious offenses, it is now an overarching approach toward discipline for potential weapons, imaginary weapons, perceived weapons, a smart mouth, headache medicine, tardiness, and spitballs. Punishment through exclusion from the classroom has become the rapid-response to every act of misconduct or perceived misconduct.[151]

In 2001, the American Bar Association released a statement also condemning zero tolerance policies, stating they have:

> become a one-size-fits-all solution to all the problems that schools confront. It has redefined students as criminals, with unfortunate consequences. . . most current policies eliminate the common sense that comes with discretion and, at great cost to society and to children and families, do little to improve school safety.[152]

As a result, researchers have documented that, between 1974 and 2000, annual K–12 public school student suspensions increased significantly, from 1.7 million to 3.1 million (82.3 percent).[153]

Research shows that while there was an increase in youth violence in the late 1980s and early 1990s, rates leveled off in the latter part of the decade.[154] Advocates of zero tolerance policies

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[149] Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11, at 7.
[150] *See, e.g.*, Nesa Sasser, "Positive Effects of the Zero Tolerance Policy Used in Schools," The Classroom, https://www.theclassroom.com/positive-effects-zero-tolerance-policy-used-schools-17208.html (last accessed Nov., 2018); Juvenile Law Center, "Zero-Tolerance Policies: The Good, The Bad, And The Ugly," Jan. 7, 2014, https://jlc.org/news/zero-tolerance-policies-good-bad-and-ugly (last accessed Nov. 5, 2018).
[151] Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11, at 15.
[152] American Bar Association Juvenile Justice Committee, *Zero Tolerance Policy: Report*, 2001, 1, 7, https://www.americanbar.org/content/dam/aba/directories/policy/2001_my_103b.authcheckdam.pdf.
[153] Wald & Losen, "Defining and Redirecting a School-to-Prison Pipeline," *supra* note 11, at 10 (Commission staff calculated the percentage increase).
[154] Delbert S. Elliott, Beatrix A. Hamburg, & Kirk R. Williams, *Violence in American schools: A new perspective* (New York: Cambridge University Press, 1998); Office of the Surgeon General, "Chapter 2—the Magnitude of Youth Violence," in *Youth Violence: A Report of the Surgeon General*, Office of the Surgeon General, National Center for Injury Prevention and Control, National Institute of Mental Health, and the Center for Mental Health Services, 2001, https://www.ncbi.nlm.nih.gov/books/NBK44300/; U.S. Dep'ts of Education and Justice, "Annual report on school safety" 1998, https://www2.ed.gov/PDFDocs/schoolsafety.pdf; Jill F. DeVoe, Katharin Peter, Phillip Kaufman, Amanda Miller, Margaret, Thomas D. Snyder, and Katrina Baum, *Indicators of school crime and safety: 2004*, U.S. Dep'ts of Education and Justice, Nov. 2004, https://nces.ed.gov/pubs2005/2005002.pdf.

pointed to these prior increases in school violence as a rationale for tougher approaches in disciplining students.[155] But data have since refuted the presumption that school violence is rampant or increasing, as studies show that school violence has remained relatively stable for the past thirty years.[156] This steady rate suggests that punitive zero-tolerance policies have not worked to reduce rates of school violence.[157] For instance, in 1998:

> serious crimes involving gangs, weapons, or drugs constitute less than 10 percent of the problems cited by principals in their schools; where crimes against students occur, the majority of incidents appear to be theft or vandalism, rather than physical attacks or threats with a weapon. With a school homicide rate of less than one in a million, the chances of violent death among juveniles are almost 40 times as great out of school as in school.[158]

More current data from the National Center for Educational Statistics show that in the 2014–15 school year, there were a total of 47 student, staff, and nonstudent school-associated violent deaths: 28 homicides, 17 suicides, and 2 legal intervention deaths.[159] When combining instances of homicide and suicide of school-age youth while at school, there was approximately 1 student homicide or suicide at school for every 1.9 million students enrolled. Of the total of 1,168 youth homicides in 2014–15, 20 occurred at school and 1,148 occurred away from school (see figure 1).[160]

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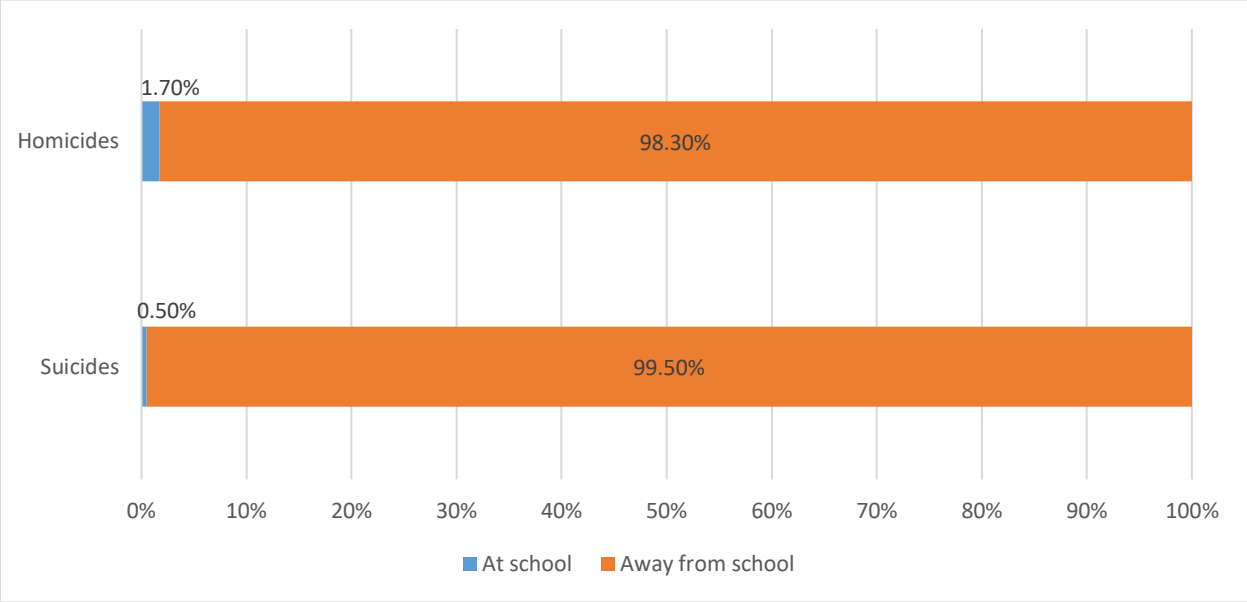
[155] Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144 at 2.
[156] Skiba, "The Failure of Zero Tolerance," *supra* note 2, at 27-33; Jill F. DeVoe, Katharin Peter, Phillip Kaufman, Amanda Miller, Margaret, Thomas D. Snyder, & Katrina Baum, *Indicators of school crime and safety: 2004*, U.S. Dep'ts of Education and Justice, Nov. 2004; Christopher Jencks, "Is Violent Crime Increasing?" *The American Prospect*, Winter 1991, https://prospect.org/article/violent-crime-increasing.
[157] DeVoe, *Indicators of School Crime and Safety: 2004*, supra note 154, at 1; Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144, at 2; U.S. Dep'ts of Education and Justice, *Annual report on school safety*, *supra* note 154, at 1.
[158] Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144, at 2; *see also*, Irwin A. Hyman, and Donna C. Perone, "The other side of school violence: Educator policies and practices that may contribute to student misbehavior," *Journal of School Psychology*, 1998, Vol. 36, No. 1, 7-27.
[159] Lauren Musu-Gillette, Anlan Zhang, Ke Wang, Jizhi Zhang, Jana Kemp, Melissa Diliberti, and Barbara Oudekirk, *Indicators of School Crime and Safety: 2017*, National Center for Education Statistics, U.S. Dep't of Education, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, 2018, 32, https://nces.ed.gov/pubs2018/2018036.pdf.
[160] Ibid., 33.

Figure 1: Percentage distribution and number of homicides and suicides of youth ages 5–18 (2014–15)

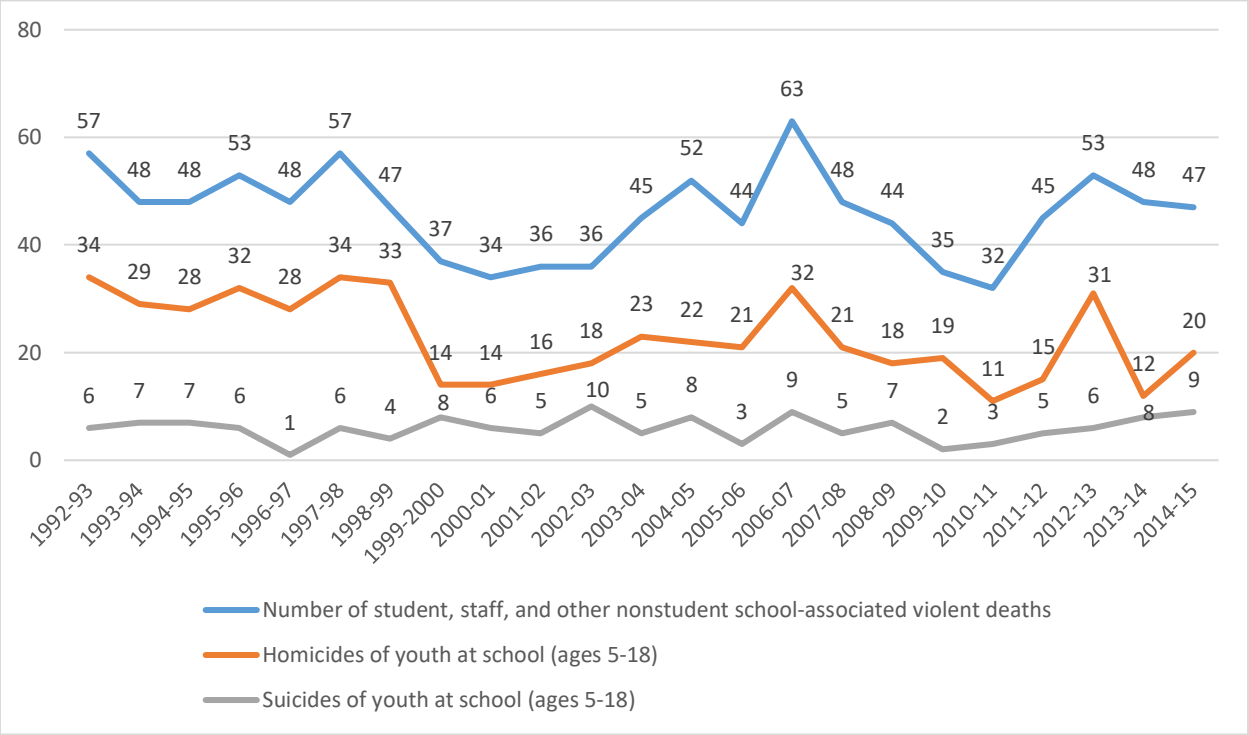


Source: Lauren Musu-Gillette, Anlan Zhang, Ke Wang, Jizhi Zhang, Jana Kemp, Melissa Diliberti, & Barbara Oudekirk, *Indicators of School Crime and Safety: 2017*. Chart recreated by USCCR staff

Overall, "between 1992–93 and 2014–15, the percentage of youth homicides occurring at school remained at less than 3 percent of the total number of youth homicides,"[161] suggesting that the need for zero tolerance policies to keep students safe at school may be misguided (see figure 2).

[161] National Center for Education Statistics, "Indicator 1: Violent Deaths at School and Away from School," 2018, https://nces.ed.gov/programs/crimeindicators/ind_01.asp (last accessed Nov. 5, 2018).

Figure 2. Number of student, staff, and other nonstudent school-associated violent deaths, and number of homicides and suicides of youth ages 5–18 at school: School years 1992–93 to 2014–15[162]



Source: National Center for Education Statistics (citing Centers for Disease Control and Prevention (CDC), 1992–2015 School-Associated Violent Death Surveillance System). Chart recreated by USCCR staff

Although supporters of zero tolerance policies have argued that exclusionary discipline is necessary to keep schools safe, data show otherwise. In fact, the majority of suspended students each year are not suspended for violent or threatening behavior. Data show that

> as many as 95 percent of out-of-school suspensions are for nonviolent misbehavior—like being disruptive, acting disrespectfully, tardiness, profanity, and dress-code violations . . . [for instance] in California, nearly half of the more than

[162] Note: A school-associated violent death is defined as "a homicide, suicide, or legal intervention death (involving law enforcement officer), in which the fatal injury occurred on the campus of a functioning elementary or secondary school in the United States," while the victim was on the way to or from regular sessions at school, or while the victim was attending or traveling to or from an official school-sponsored event. Victims include students, staff members, and others who are not students or staff members, from July 1, 1992, through June 30, 2015. "At school" includes on the property of a functioning primary or secondary school, on the way to or from regular sessions at school, and while attending or traveling to or from a school-sponsored event. In this indicator, the term "at school" is comparable in meaning to the term "school-associated." *See* National Center for Education Statistics (citing Centers for Disease Control and Prevention (CDC), "1992–2015 School-Associated Violent Death Surveillance System (SAVD-SS)" unpublished tabulation, 2017)), https://nces.ed.gov/programs/digest/d17/tables/dt17_228.10.asp.

> 700,000 suspensions statewide in the 2011–12 school year were for [] "willful defiance."[163]

The American Psychological Association commissioned a Zero Tolerance Task Force (Task Force) to study these policies and provide recommendations to school administrators and staff.[164] After reviewing extensive research and documentation, the Task Force concluded that zero tolerance policies have not helped to achieve the goals of effectively lessening the need for disciplinary actions. The Task Force also found that schools with higher suspension rates have lower parent and teacher ratings in terms of school climate and overall school governance.[165] Zero tolerance policies have not been shown to improve school climate or school safety, and the increased use of suspensions and expulsions has not proven to be an effective means of improving student behavior or reducing disruptions. In fact, these policies are "associated with negative outcomes in terms of school climate, student behavior, student achievement, and school dropout."[166] Furthermore, evidence suggests that administrators' overusing suspensions and expulsions may actually increase the likelihood of criminal activity in the future.[167] Conversely,

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[163] U.S. Dep't of Education, "Rethinking School Discipline," Remarks of U.S. Secretary of Education Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package, Frederick Douglass High School, Baltimore, Maryland, Jan. 8, 2014, https://www.ed.gov/news/speeches/rethinking-school-discipline. "Willful defiance" is defined as "disrupting school activities or otherwise willfully defying the valid authority of school staff." This broad definition includes a vast series of offenses that range from shouting obscenities at school administration or officials, talking back to a teacher, not following directions, wearing a hat to class, or simply forgetting to bring materials to class. In 2014, at the time California Assembly Bill 420 was signed, willful defiance was the most common infraction in California for out-of-school suspensions, particularly for students of color. *See* 2014 California Assembly Bill No. 420 Pupil discipline: suspensions and expulsions: willful defiance, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB420 (amending California Education Code § 48900, Sept. 27, 2014).

[164] Russell Skiba and M. Karega Rausch, "School Disciplinary Systems: Alternatives to Suspension and Expulsion," in G.G. Bear and K. M. Minke (eds), *Children's Needs III: Development, prevention, and intervention* (pp. 87-102), National Association of School Psychologists; *see also*, American Psychological Association Zero Tolerance Task Force, "Are zero tolerance policies effective in the schools? An evidentiary review and recommendations," December 2008, https://www.apa.org/pubs/info/reports/zero-tolerance.pdf.

[165] American Psychological Association Zero Tolerance Task Force, "Are zero tolerance policies effective in the schools? An evidentiary review and recommendations," supra note 164, at 854.

[166] Ibid.

[167] Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11, at 16; Wald and Losen, "Defining and Redirecting a School-to-Prison Pipeline," *supra* note 11, at 11.

studies have shown that utilizing non-exclusionary discipline measures, such as restorative practices,[168] can increase student engagement and reduce negative behaviors.[169]

Emergent and longstanding research suggests that schools may actually be safer as a result of reducing suspension rates.[170] For example, a school safety and climate survey in the Chicago Public Schools shows that despite the fact that these schools serve students in some of the highest-crime neighborhoods, they had a wide range of safety ratings.[171] For the high-scoring schools, the surveys showed that both teachers and students stated that they felt as safe as did speakers from several of the schools in low-crime neighborhoods. After controlling for student demographics, teachers and students in the Chicago schools that used exclusionary discipline less frequently reported feeling safer than speakers from the schools that ranked low on safety.[172] This finding suggests that suspensions are not an effective strategy to address the problems that schools face because people in schools with high suspension rates have lower levels of safety than people in other schools that serve students with similar backgrounds in similar neighborhoods, according to reports by teachers and students.[173] While this finding does not necessarily reflect a causal relationship, it does suggest that suspensions may actually have an adverse effect on school climate by exacerbating safety issues and "aggravating distrust between students and adults."[174] The researchers posit that school reliance on suspensions for minor infractions harms the positive relationships between teachers and students, which ultimately are crucial to foster a safe learning environment.

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[168] Restorative practices are alternative disciplinary methods that focus on bringing "together the victim, offender, and other involved community members to repair harm and restore order after an incident has occurred." There are a variety of practices that can be used to respond to student conflict and behavioral infractions. "In general, such practices fall into two main categories: 1) restorative classroom management approaches, and 2) restorative intervention practices." Barbara McMorris, Kara Beckman, Glynis Shea, Jenna Baumgartner, and Rachel Eggert, Applying Restorative Justice Practices to Minneapolis Public Schools Students Recommended for Possible Expulsion: A Pilot Program Evaluation of the Family and Youth Restorative Conference Program. School of Nursing and the Healthy Youth Development at the Prevention Research Center, Dep't of Pediatrics, University of Minnesota, Dec. 2013, at 7-8, http://www.legalrightscenter.org/uploads/2/5/7/3/25735760/lrc_umn_report-final.pdf.

[169] Ibid., 31-32.

[170] *See, e.g.*, U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," Aug. 1, 2016, at 10-11, https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf (letter summarizes several research studies conducted over the past decade); Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11; Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144.

[171] For this study, higher safety ratings were measured by the levels of involvement between teacher and students and teachers and parents. *See* Matthew Steinberg, Elaine Allensworth, and David Johnson, "What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago," 118-31, in *Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion*, ed. Daniel Losen (Teachers College Press: New York, 2015), at 128.

[172] Ibid.

[173] Ibid.

[174] Ibid., 129-30.

Furthermore, data show that zero tolerance and harsh school discipline policies are not applied equally to all students. Decades of research show that these policies tend to disproportionately affect students of color, English Language Learners, students with disabilities, and LGBT students.[175] Data from the 2015–16 U.S. Department of Education Office for Civil Rights' Civil Rights Data Collection (CRDC) reveal that black students with disabilities are nearly four times more likely to receive multiple out-of-school suspensions (OSS) and almost two times more likely to be expelled than white students with disabilities.[176] Further, black girls with disabilities received multiple suspensions at higher rates (44 percent) than girls with disabilities of any other race or ethnicity.[177] Native American and Native Alaskan students with disabilities are also disproportionately suspended and expelled: they represent less than one percent of the student population, but they are almost 3.5 times more likely to receive multiple out-of-school suspensions and three times more likely to be expelled compared to white students with disabilities.[178] Native American and Native Alaskan girls are also suspended at higher rates (7 percent) than white boys (6 percent) and white girls (2 percent).[179] LGBT youth are also much more likely than their peers to be suspended or expelled.[180] Lastly, students with disabilities (as a whole) are more than twice

[175] Catherine P. Bradshaw, Mary M. Mitchell, Lindsey M. O'Brennan, and Philip J. Leaf, "Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals," *Journal of Educational Psychology*, vol. 102, no. 2 (2010), 508-20; Daniel J. Losen and Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from Schools*, The Civil Rights Project at UCLA, 2012, https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf; Anne Gregory, Russell J. Skiba, and Pedro A. Noguera, "The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?" *Educational Researcher* vol. 39, no. 1 (2010), 59-68; Hanno Petras, Katherine Masyn, Jacquelyn Buckley, Nicholas Ialongo, Sheppard Kellam, "Who is Most at Risk for School Removal? A Multilevel Discrete-Time Survival Analysis of Individual- and Context-Level Influences," *Journal of Educational Psychology* vol. 103, no. 1 (2011), 223-37; Katherine E.W. Himmelstein and Hannah Brückner, "Criminal-Justice and School Sanctions against Nonheterosexual Youth: A National Longitudinal Study," *Pediatrics*, vol. 127, no. 1 (2011), 49-57.

[176] Since 1968, the U.S. Dep't of Education has conducted the Civil Rights Data Collection (CRDC) to collect data on key education and civil rights issues in our nation's public schools. The CRDC collects a variety of information including student enrollment and educational programs and services, most of which is disaggregated by race/ethnicity, sex, limited English proficiency, and disability. Note, the data for the 2015-16 school year are available in raw format; thus, odds ratios for these students were calculated by Commission staff. *See* U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection 2015-16*, https://ocrdata.ed.gov/.

[177] *See generally*¸ U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection 2015-16*, https://ocrdata.ed.gov/. Percentages calculated by Commission staff.

[178] Ibid.

[179] *See* U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection Report: School Climate and Safety*, *supra* note 1; *see also* U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection, A First Look*, 2016, https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf.

[180] Anti-Defamation League, *What is the School-to-Prison Pipeline?*, *supra* note 3, at 1; U.S. Dep't of Education, Office for Civil Rights, "Civil Rights Data Collection, Data Snapshot: School Discipline," *supra* note 7; National Education Association, *Report of the NEA Committee on Discipline and the School-to-Prison Pipeline*, 2016, https://ra.nea.org/wp-content/uploads/2016/05/NEA_Policy_Statement_on_Discipline_and_the_School_to_Prison_Pipeline_2016.pdf.

as likely to receive out-of-school suspensions (13 percent) compared to students with no disabilities (6 percent).[181]

Likewise, in a longitudinal study of nearly one million middle school students in Texas, researchers found that black students were more likely than white or Latinx[182] students to be disciplined for "discretionary" offenses (e.g., tardiness, leaving class early, dress code violations);[183] however, black, Latinx, and white students were removed from classes for mandatory offenses (e.g., possessing drugs or weapons) at similar rates.[184] Moreover, the researchers found that white and Latinx students were more likely than black students to commit behavioral infractions that led to mandatory expulsions.[185] These data indicate that discretion is closely correlated with higher discipline rates for students of color.

Moreover, when the Texas researchers controlled for 83 different variables to isolate the effect of race on disciplinary rates, they found that black students had a 31 percent higher likelihood of a school disciplinary action, compared to otherwise identical rates for Latinx and white students.[186] Regarding discipline actions against students with disabilities, the researchers found that out of the 122,250 students with disabilities, nearly three-quarters of the students who qualified for special education services during the study period were suspended or expelled at least once.[187]

At the Commission's briefing, Paul Morgan testified that in a nationally representative sample after controlling for individual-level behavior, black students were more likely to be suspended than white students; however, neither students with disabilities nor students of color with disabilities were more likely to be suspended compared to white students.[188] Therefore, similar to other studies, the researchers found that after controlling for poverty, prior behaviors, and school-

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[181] U.S. Dep't of Education, Office for Civil Rights, "Civil Rights Data Collection, Data Snapshot: School Discipline," *supra* note 7.
[182] Latinx is a gender-neutral or non-gender binary term referring to a person of Latin American descent. The term is often used as an alternative to Latino or Latina.
[183] Tony Fabelo, Michael Thompson, Martha Plotkin, Dottie Carmichael, Miner Marchbanks III, & Eric Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Justice Center The Council of State Governments & Public Policy Research Institute, July 2011, 41-43, https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.
[184] Ibid., Executive Summary.
[185] Ibid., 46.
[186] Ibid., 45.
[187] Ibid., 48.
[188] Paul Morgan, Professor of Education at Pennsylvania State University, *Briefing Transcript* pp. 109-10; *see also*, Paul Morgan, George Farkas, Marianne Hillemeier, Yangyang Wang, Zoe Mandel, Christopher DeJarrett, & Steve Maczuga, "Are students with disabilities suspended more frequently than otherwise similar students without disabilities?" *Journal of School Psychology*, vol. 72, Feb. 2019, https://www.sciencedirect.com/science/article/pii/S0022440518301171?via%3Dihub.

effects, there was evidence that black students were being disproportionately targeted in disciplinary actions.[189]

Data further suggest that socioeconomic factors also play a large role in determining the type of discipline a student is likely to receive. A study conducted by The Civil Rights Project at UCLA found that suspension rates in 18 urban middle school districts were double the national average, with 11 of these schools suspending more than a third of their black male students.[190] Jim St. Germain, co-founder of Preparing Leaders of Tomorrow (PLOT), argues that "Kids from suburban white America—they don't get arrested for cursing out a teacher, throwing a book . . . these are the things they go to the counselor for;" whereas, black, Latinx, and Native American students face harsh disciplinary actions for similar infractions.[191]

The School-to-Prison Pipeline

Empirical studies over the past decade have shown clear connections between school discipline policies, the rise of zero tolerance approaches, and the school-to-prison pipeline; and these connections have been especially apparent for students of color.[192] While the focus of this report centers on how school discipline affects students of color with disabilities, this section presents both intersectional data and race data to build upon the existing education research to show how these policies negatively affect students of color with disabilities' educational attainment.

Nationally, at least 73 percent of youth with emotional disabilities who drop out of school are arrested within five years of leaving school.[193] Based on federal data, in 2011–12, researchers

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[189] Ibid., 110.
[190] Daniel Losen and Russell Skiba, *Suspended Education: Urban Middle Schools in Crisis*, Southern Poverty Law Center, 2010, at 5-7, https://www.splcenter.org/sites/default/files/Suspended_Education.pdf.
[191] Tierney Sneed, "School Resource Officers: Safety Priority or Part of the Problem?" *U.S. News*, Jan. 30, 2015, https://www.usnews.com/news/articles/2015/01/30/are-school-resource-officers-part-of-the-school-to-prison-pipeline-problem.
[192] *See, e.g.*, U.S. Dep't of Education, *Civil Rights Data Collection Data Snapshot: School Discipline*, *supra* note 7; Russell Skiba, Robert Michael, Abra Carroll Nardo, & Reece Peterson, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment," 2002, vol. 34, no. 4, http://www.indiana.edu/~equity/docs/ColorofDiscipline2002.pdf; Russell Skiba, Robert Horner, Choong-Geun, M. Karega Rausch, Seth May, & Tary Tobin, "Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline," *School Psychology Review*, 2011, vol. 40, no. 1; Johanna Wald and Daniel Losen, Out of Sight: The Journey through the School-to-Prison Pipeline, Invisible Children in the Society and its Schools, 3d ed. (New York: Routledge, 2006); Edward Smith and Shaun Harper, Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States, Center for the Study of Race and Equity in Education, University of Pennsylvania, 2015, https://web-app.usc.edu/web/rossier/publications/231/Smith%20and%20Harper%20(2015)-573.pdf.
[193] *See, e.g.*, Martha Thurlow, Mary Sinclair, and David Johnson, *Students with Disabilities who Drop Out of School—Implications for Policy and Practice*, National Center on Secondary Education and Transition, Issue Brief 1, 2002, 3.

found that black students with disabilities constituted 19 percent of all students with disabilities, but were over-represented as 50 percent of students with disabilities in correctional facilities.[194] Further, studies have shown that upon release from these institutions, confinement can have ongoing serious negative consequences—academically, psychologically, and emotionally—for adolescents, their families, and their communities.[195]

In combination with increasingly harsh discipline policies that involve the criminal justice system, disparities in school discipline rates have led some scholars to describe the effect and the cumulative impact of zero tolerance policies as "the prison track" and the "school-to-prison pipeline."[196] These terms refer to how education policies implemented over the past several decades have worked to remove students from schools and funnel them onto a one-way path toward prison.[197] "[B]ehavior that once led to a trip to the principal's office and detention, such as school uniform violations, profanity and 'talking back,' now often leads to suspension, expulsion, and/or arrest."[198] These decisions by school officials have far-reaching effects. For instance, in a study by The Council of State Governments Justice Center, researchers found that after controlling for campus demographics and individual student characteristics, being suspended or expelled made a student nearly three times more likely to come into contact with the juvenile justice system within the next year.[199]

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[194] *See, e.g.*, Daniel Losen, Cheri Hodson, Jongyeon Ee, Tia Martinez, "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *Journal of Applied Research on Children: Informing Policy for Children at Risk*, vol. 5, no. 2 (2014), at 2-3.

[195] Equal Justice Initiative, "Children in Prison," 2017, https://eji.org/children-prison (last accessed Nov. 5, 2018); Child Trends, "Juvenile Incarceration," https://www.childtrends.org/indicators/juvenile-detention (last accessed Nov. 5, 2018); David Kirk and Robert Sampson, "Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood," *Sociology of Education*, vol. 86, no. 1, at 36-62. http://www.asanet.org/sites/default/files/savvy/journals/soe/Jan13SOEFeature.pdf; Libby Nelson and Dara Lind, "The school-to-prison pipeline, explained," *Vox*, Oct. 27, 2015, https://www.vox.com/2015/2/24/8101289/school-discipline-race; Sean Nicholson-Crotty, Zachary Birchmeier, David Valentine, "Exploring the Impact of School Discipline on Racial Disproportion in the Juvenile Justice System," *Social Science Quarterly*, vol. 90, no. 4 (2009), at 1003-18.

[196] Wald & Losen, "Defining and Redirecting a School-to-Prison Pipeline," *supra* note 11; NAACP Legal Defense and Educational Fund, *Dismantling the School-to-Prison Pipeline*, 2013, https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline-3.pdf; National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, June 18, 2015, https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf.

[197] NAACP Legal Defense and Educational Fund, *Dismantling the School-to-Prison Pipeline*, https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline-3.pdf; Nancy Heitzeg, "Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline," *Education to Incarceration*, 2014, https://www.hamline.edu/uploadedFiles/Hamline_WWW/HSE/Documents/criminalizing-education-zero-tolerance-police.pdf.

[198] Anti-Defamation League, *What is the School-to-Prison Pipeline?*, *supra* note 3, at 3.

[199] Tony Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, *supra* note 183, at xii.

In addition to the direct student impact resulting from exclusionary school discipline, researchers argue that strict school discipline practices have shifted public attitudes and public policies regarding juvenile misconduct over the past two decades. Since the early 1990s, states have passed laws making it easier to try juveniles as adults and increased sanctions against youths for a variety of offenses.[200] For instance, students in Missouri can be charged with felony assault (or "harassment") for engaging in a fight or bullying a fellow classmate, and due to Missouri's mandatory reporting laws, school officials have to report these incidents to the police.[201] While

[200] *See* The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey*, 2012, 6 (reporting that "[b]y the mid-1990s, every state had passed laws that either allowed or mandated that teenagers be tried as adults under certain circumstances," which caused "a steep rise in the number of teens who were sentenced to life without the possibility of parole during the mid-1990s"), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf; U.S. Dep't of Justice, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 2011, 1 ("In the 1980s and 1990s, legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts."), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf; David Osher, Mary Quinn, Jeffrey Poirier, and Robert Rutherford "Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration," *News Directions for Youth Development*, vol. 2003, issue 99 (2003), at 94, https://onlinelibrary.wiley.com/doi/pdf/10.1002/yd.56.
Since 2000, other states have expanded juvenile court jurisdiction to include juveniles aged 17 and younger, but some states still prosecute juveniles aged 16 or 17 (or both) in adult criminal courts, depending on the offense. *See* Justice Policy Institute, *Raising the Age: Shifting to a Safer and More Effective Juvenile Justice System*, 2017, 6-7, http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheage.fullreport.pdf ("[O]ver the past ten years, half of the states that once saw all 16- and/or 17-year-olds excluded from juvenile court based solely on their age changed their laws. Now, unless a young person is charged with or convicted of the most serious behavior, it is presumed that most youth who touch the justice system will fall under the jurisdiction of the juvenile justice system. Since 2007, Connecticut, Illinois, Louisiana, Massachusetts, Mississippi, New Hampshire, and South Carolina have all passed laws to "raise the age" so that most young people will be in the juvenile justice system—not the adult justice system. Two states (Louisiana and South Carolina) passed raise the age laws just in 2016. This leaves the fewest number of states—seven—in several decades that set the age of criminal responsibility lower than age 18 [and there were bills filed for changes in those states as well]. . . . During this past decade when seven states raised the age, the number of young people excluded from the juvenile justice system solely because of their age was cut in half.")

[201] MO. REV. STAT. §§ 565.090 (felony), 565.091 (misdemeanor). As of January 1, 2017, felony harassment in Missouri involves a person who "without good cause, engages in any act with the purpose to cause emotional distress to another person, and such act does cause such person to suffer emotional distress." Misdemeanor harassment is committed if a person "without good cause, engages in any act with the purpose to cause emotional distress to another person." Missouri criminal statutes define "emotional distress" as something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." MO. REV. STAT. § 565.002(7). However, under a law that will take effect on January 1, 2021, Missouri will raise the age of juvenile court jurisdiction from 16 to 17 (defining "[a]dult" as "a person eighteen years of age or older" and "[c]hild" as "any person under eighteen years of age. . . ."), unlike Michigan and Texas, where the court only has jurisdiction over a youth through age 16. *See* S.B. 793, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018), https://custom.statenet.com/public/resources.cgi?id=ID:bill:MO2018000S793&ciq=ncsl53&client_md=234eb884661872881e9cdc2abb60faec&mode=current_text. For discussion, *see, e.g.*, Carl D. Kinsky, *Fighting Words, Substantial Overbreadth and Missouri's New Harassment Crimes*, 73 J. MO. B. 252 (Sept.–Oct. 2017); *see also* Alejandra Matos, "In Missouri, students who bully could be charged with a felony," *Washington Post*, Jan. 6, 2017, https://www.washingtonpost.com/local/education/in-missouri-students-who-bully-could-be-charged-with-a-felony/2017/01/06/0e71f17e-d1e2-11e6-945a-76f69a399dd5_story.html?utm_term=.66836c558ea6; Michele Moyer, *Schoolyard Felons: Missouri's New Criminal Code and Its Impact on Schools*, 82 MO. L. REV. 1213 (2017), http://law.missouri.edu/lawreview/files/2018/03/11.-Moyer.pdf; Terra Hall, "New Missouri law makes bullying,

school officials state that incidents such as fighting, harassment, and bullying should be treated seriously, involving law enforcement for every incident is not necessarily a helpful response due to troubling connections between education policies and the criminal justice system.[202] Some of these effects can be seen in the stark increase in juvenile court cases; for instance, nationally, between 1960 and 2015, juvenile court delinquency caseloads increased by 118 percent[203] and caseloads of the juvenile justice system increased by over half a million in the last 20 years.[204] While caseloads do not necessarily reflect a youth being adjudicated delinquent (i.e., convicted), these numbers indicate a trend in increasing prosecution of youth behaviors. However, since peaking in the mid-'90s, there has been an overall decline in delinquency cases; in 2015, they dropped to 884,900.[205] Similarly, the number of youth sent to juvenile facilities has also been decreasing since the late-'90s; in 2015, that number dropped to 31,487.[206]

The demographics of the juvenile justice system and adult prison populations also suggest a strong relationship between disciplinary policies and the school-to-prison pipeline. For instance, the majority (70 percent) of inmates have not completed high school.[207] Nearly half of all students who enter residential juvenile justice facilities have academic achievement levels that are below

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fighting in school a felony," *KSHB News*, Jan. 10, 2017, https://www.kshb.com/thenow/new-missouri-law-makes-bullying-fighting-in-school-a-felony. Missouri's mandatory reporting law for schools applies to harassment, MO. REV. STAT. § 160.261(2)(24).

[202] *See, e.g.,* Carl D. Kinsky, *Fighting Words, Substantial Overbreadth and Missouri's New Harassment Crimes*, 73 J. MO. B. 252 (Sept.–Oct. 2017); Alejandra Matos, "In Missouri, students who bully could be charged with a felony," *Washington Post*, Jan. 6, 2017, https://www.washingtonpost.com/local/education/in-missouri-students-who-bully-could-be-charged-with-a-felony/2017/01/06/0e71f17e-d1e2-11e6-945a-76f69a399dd5_story.html?utm_term=.66836c558ea6; Michele Moyer, *Schoolyard Felons: Missouri's New Criminal Code and Its Impact on Schools*, 82 MO. L. REV. 1213 (2017), http://law.missouri.edu/lawreview/files/2018/03/11.-Moyer.pdf; Terra Hall, "New Missouri law makes bullying, fighting in school a felony," *KSHB News*, Jan. 10, 2017, https://www.kshb.com/thenow/new-missouri-law-makes-bullying-fighting-in-school-a-felony.

[203] Sarah Hockenberry and Charles Puzzanchera, *Juvenile Court Statistics 2015*, National Center for Juvenile Justice, 2015, 6, https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2015.pdf.

[204] Julie Furdella and Charles Puzzanchera, *Delinquency Cases in Juvenile Court, 2013*, U.S. Dep't of Justice, Office for Justice Programs, 2015, 1, https://www.ojjdp.gov/pubs/248899.pdf.

[205] Sarah Hockenberry and Charles Puzzanchera, *Juvenile Court Statistics 2015*, National Center for Juvenile Justice, 2015, 6.

[206] The Sentencing Project, "Fact Sheet: Trends in U.S. Corrections," June 2018, 6 (citing Office of Juvenile Justice and Delinquency Prevention and Bureau of Justice Statistics data), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf. It is also important to note that scholars have found that the "vast majority of youth who cycle through the juvenile justice system [] will not be placed in a detention facility. Instead, most youth are placed on probation, ordered to pay restitution, or given other consequences. As a result, it is more difficult to assess the rates of youth with disabilities who are not detained prior to court hearings and the rates of those who do not receive detention as a part of their juvenile disposition" (citations omitted). *See* Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147 (2015), 153, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1053&context=mjrl.

[207] Bruce Western and Becky Pettit, "Incarceration & Social Inequality," *Daedalus*, vol. 139, no. 3 (2010), 9, https://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019%20.

the grade equivalent for their ages.[208] Many incarcerated youth are marginally literate or illiterate and have already experienced academic failure at some point in their educational careers.[209] Seventy-five percent of youth under the age of 18 who have been sentenced to adult prisons have not completed the 10th grade.[210]

The rates are even more striking when looking at the population of youth with disabilities within the general juvenile justice population, where 70 percent have been identified as having learning disabilities and 33 percent have a reading level below the 4th grade level.[211] Youth and adolescents in the juvenile justice system are identified as eligible for special education services at three to seven times the rate of similarly aged peers outside the system.[212]

Another trend showing why the impact might be harsher for students of color with disabilities is that while the overall number of youth committed to juvenile facilities has been declining, youth of color are still disproportionately confined in juvenile facilities—and are more likely to have harsher sentences than their white peers.[213] For instance, black juveniles represent only 15 percent of the general juvenile population,[214] but about 40 percent of all confined juveniles.[215] By contrast, white juveniles represent 56 percent of the general juvenile population,[216] but only about 30 percent of all confined juveniles.[217] Overall, more than two thirds (68 percent) of juveniles placed in correctional settings are youth of color.[218]

Thousands of youth, including students of color with disabilities, are transferred into adult correctional facilities every year and forced to serve their sentences housed in adult prisons and

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[208] Andrea Sedlak and Karla McPherson, *Survey of Youth in Residential Placement: Youth's Needs and Services*, 2010, https://www.ncjrs.gov/pdffiles1/ojjdp/grants/227660.pdf.
[209] Peter Leone, Sheri Meisel, and Will Drakeford, "Special Education Programs for Youth with Disabilities in Juvenile Corrections," *Journal of Corrections Education*, vol. 53, no. 2 (2002), 46.
[210] *See, e.g.*, Coalition for Juvenile Justice, *Abandoned in the Back Row, New Lessons in Education and Delinquency Prevention*, 2001, https://archive.org/details/abandonedinbackr00coal.
[211] Ibid.; Mary Quinn, Robert Rutherford, Peter Leone, David Osher, and Jeffrey Poirer, "Youth with Disabilities in Juvenile Corrections: A National Survey," *Exceptional Children*, vol. 71, no. 3 (2005), 339-45.
[212] Peter Leone and Lois Weinberg, *Addressing the Unmet Educational Needs of Children and Youth in the Juvenile Justice and Child Welfare Systems*, Center for Juvenile Justice Reform, 2012.
[213] The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, 2018, 6, https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.
[214] National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, Office of Juvenile Delinquency and Prevention, December 2014, 2, https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.
[215] National Center for Juvenile Justice, "Easy Access to the Census of Juveniles in Residential Placement," Office of Juvenile Delinquency and Prevention, 2015, https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Age_Race.asp?state=0&topic=Age_Race&year=2015&percent=row.
[216] National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, *supra* note 214 at 2.
[217] National Center for Juvenile Justice, "Easy Access to the Census of Juveniles in Residential Placement," *supra* note 215.
[218] National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, *supra* note 214 at 196.

jails.[219] Youth constitute 1,200 of the 1.5 million people housed in federal and state prisons in the U.S. Nearly 200,000 juveniles enter the adult justice system each year, typically for non-violent crimes.[220] These youth not only lose out on the educational and psychological services available in juvenile detention facilities, but they are much more likely to suffer sexual abuse and violence by other inmates and prison staff.[221] In a 2009 report, the National Prison Rape Elimination Commission found that "more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk of sexual abuse."[222] According to a 2014 report by the National Center for Juvenile Justice and the Office of Juvenile Justice and Delinquency Prevention, 20 percent of juvenile facilities stated they were overcapacity.[223] These facilities held more than 12,000 residents, the vast majority of whom were under 21 years old.[224] Reports have found that overcrowding can lead to increased suicidal behavior, stress-related illnesses, and psychiatric problems. Even without overcrowding issues, youth in confinement have been shown to have trouble developing proper social-emotional skills, such as self-control and conflict resolution, which difficulty may increase the likelihood of recidivism after release.[225]

Policing in Schools

The implementation of zero tolerance or a "no-nonsense" approach to disruptive behavior has not only led to an increase in tougher disciplinary actions and policies, but also has led to an increased presence of law enforcement in many schools.[226] This trend may also fuel the disparate impacts on students of color with disabilities discussed above.[227]

A growing number of school districts employ full-time police officers known as school resource officers (SROs),[228] or they utilize local law enforcement to patrol schools. These officers may be

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[219] The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, *supra* note 213, at 6.
[220] Carmen Daugherty, *Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard*, Campaign for Youth Justice, 2015, http://cfyj.org/images/pdf/Zero_Tolerance_Report.pdf.
[221] Jessica Lahey, "The Steep Costs of Keeping Juveniles in Adult Prisons," *The Atlantic*, Jan. 8, 2016, https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/.
[222] National Prison Rape Elimination Commission Report, 2009, at 18-19, https://www.ncjrs.gov/pdffiles1/226680.pdf.
[223] Melissa Sickmund and Charles Puzzanchera, *Juvenile Offenders and Victims: 2014 National Report*, National Center for Juvenile Justice, 2014, 203, https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.
[224] Ibid.
[225] Justice Policy Institute, *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense*, 2009, http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf; Sedlak and McPherson, *Survey of Youth in Residential Placement: Youth's Needs and Services*, *supra* note 208.
[226] The Council of State Governments Justice Center, "Officers in Schools: A Snapshot of Legislative Action," 2014, at 1, https://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Police-Brief.pdf.
[227] *See supra* notes 86-94.
[228] Federal law defines a "school resource officer" under the Justice Dep't's grant program for the Community Oriented Policing Services (COPS), 34 U.S.C. § 10389(4). An SRO is defined as "a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department

assigned to specific public schools to help in preventing or addressing crime and disorder, or in serving as a safety expert, mentor, educator, and liaison to community resources.[229] Advocates for SROs state that these officers help build better relationships between law enforcement and the people they serve, particularly with communities of color and low-income families.[230] However, critics argue that this heightened presence adds to the tension these communities already experience.[231]

Traditionally, local police agencies provided officers' services to school districts—but over the years, assigning police officers to schools on a full-time basis has become increasingly widespread.[232] In a national survey of schools, researchers found that few (3.7 percent) school principals stated that they began their SRO program due to the level of violence in the school; rather, approximately one-quarter (24.5 percent) reported that the primary reason was due to the national media attention on school violence.[233] In fact, national data show that incidents of school violence are not typically the driver of these policies.[234] In contrast, one-quarter (23.5 percent) of

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or agency to work in collaboration with schools and community-based organizations—(A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school; (B) to develop or expand crime prevention efforts for students; (C) to educate likely school-age victims in crime prevention and safety; (D) to develop or expand community justice initiatives for students; (E) to train students in conflict resolution, restorative justice, and crime awareness; (F) to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and (G) to assist in developing school policy that addresses crime and to recommend procedural changes." *See generally* Elizabeth A. Shaver and Janet R. Decker, *Handcuffing a Third Grader? Interactions between School Resource Officers and Students with Disabilities*, 2017 UTAH L. REV. 229, 233 (2017); Nathan James and Gail McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, Congressional Research Service, 2013, https://fas.org/sgp/crs/misc/R43126.pdf.

[229] The Council of State Governments Justice Center, *Officers in Schools: A Snapshot of Legislative Action*, 2014, *supra* note 226, at 1; James and McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, *supra* note 228, at 2.

[230] U.S. Dep't of Justice, "Obama Administration Releases Resources for Schools, Colleges to Ensure Appropriate Use of School Resource Officers and Campus Police," Sept. 8, 2016, https://www.justice.gov/opa/pr/obama-administration-releases-resources-schools-colleges-ensure-appropriate-use-school; Brad Myrstol, "Police in Schools: Public Perceptions," *Alaska Justice Forum*, vol. 27, no. 3 (2010), https://scholarworks.alaska.edu/bitstream/handle/11122/2605/ajf.273.fall2010OCR.pdf?sequence=3; Toronto Police Service, Toronto District School Board, and Toronto Catholic District School Board, *School Resource Officer Program: 2008/2009 Evaluation*, 2009, http://www.torontopolice.on.ca/media/text/20091118-sro_evaluation_program.pdf.

[231] Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools*, 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf; Greg Toppo, "Civil rights groups: Cops in schools don't make students safer," *USA Today*, Oct. 28, 2015, https://www.usatoday.com/story/news/2015/10/28/school-resource-officer-civil-rights/74751574/.

[232] Barbara Raymond, *Assigning Police Officers to Schools*, U.S. Dep't of Justice, Community Oriented Policing Services Office, Problem-Oriented Guides for Police Response Guides Series No. 10, 2010, 1, https://rems.ed.gov/docs/DOJ_AssigningPoliceOfficers.pdf.

[233] Lawrence F. Travis III and Julie K. Coon, *The Role of Law Enforcement in Public School Safety: A National Survey*, 2005, 35, https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf.

[234] *See, e.g.*, Joseph McKenna, Kathy Martinez-Prather, and Scott Bowman, "The Roles of School-Based Law Enforcement Officers and How These Roles Are Established," *Criminal Justice Policy Review*, vol. 27, no. 4 (2016); Justice Policy Institute, "Education Under Arrest: The Case Against Police in Schools," *supra* note 231; Jill DeVoe, Katharin Peter, Phillip Kaufman, Amanda Miller, Margaret Noonan, Thomas Snyder, & Katrina Baum,

law enforcement stated that school disorder issues (e.g., rowdiness, vandalism) were the primary reason an SRO was assigned to a particular school.[235]

According to a 2013 Congressional Research Service report, between 1997 and 2003, the number of full-time SROs employed by local law enforcement agencies rose, then it decreased slightly in 2007.[236] Yet there were still approximately 6,700 more police officers or sheriffs' deputies assigned to work as SROs in 2007 than 1997, or approximately 800 fewer than the peak in 2003.[237] The report also found that a greater proportion of high schools, inner-city schools, and schools with 1,000 or more students reported having school resource officers.[238] According to the Anti-Defamation League (ADL), in 2009, approximately 68 percent of students reported the presence of security guards and/or police officers in their schools, compared to only one percent of principals reporting police presence in schools in 1975.[239]

During the 2015–16 school year, there were more than 82,000 SROs working full- or part-time at 43 percent of public schools nationwide.[240] According to the federal Civil Rights Data Collection, 24 percent of elementary schools (grades K–6, excluding justice facilities), 42 percent of high schools (grades 9–12, excluding justice facilities), and 51 percent of high schools with high black and Latinx student enrollment have sworn law enforcement officers.[241] Moreover, while there is only a slight but significant difference between the numbers of officers in urban compared to suburban areas, there is a great variation based on the race and socioeconomic status of the student

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Indicators of School Crime and Safety: 2004, National Center for Education Statistics, *supra* note 154, at 1; Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144, at 2; Greg Toppo, "Civil rights groups: Cops in schools don't make students safer," *supra* note 231.

[235] Travis and Coon, *The Role of Law Enforcement in Public School Safety: A National Survey*, *supra* note 233, at 58.

[236] James and McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, *supra* note 228, at 2.

[237] Ibid., 5. The researchers note that the total number of SROs and the type of schools they serve are not collected and reported regularly.

[238] Ibid., 6.

[239] Anti-Defamation League, *What is the School-to-Prison Pipeline?*, *supra* note 3, at 3.

[240] Lucinda Gray, Laurie Lewis, and John Ralph, *Public School Safety and Discipline: 2013-14*, National Center for Education Statistics, 2015, at 11, https://nces.ed.gov/pubs2015/2015051.pdf; National Center for Education Statistics, *The Condition of Education 2016*, 2016, 124, https://nces.ed.gov/pubs2016/2016144.pdf; *see also* Melissa Diliberti, Michael Jackson, Jana Kemp, and Rachel Hansen, *Crime, Violence, Discipline, and Safety in U.S. Public Schools: Findings From the School Survey on Crime and Safety: 2015-16*, 2017, 14, https://nces.ed.gov/pubs2017/2017122.pdf.

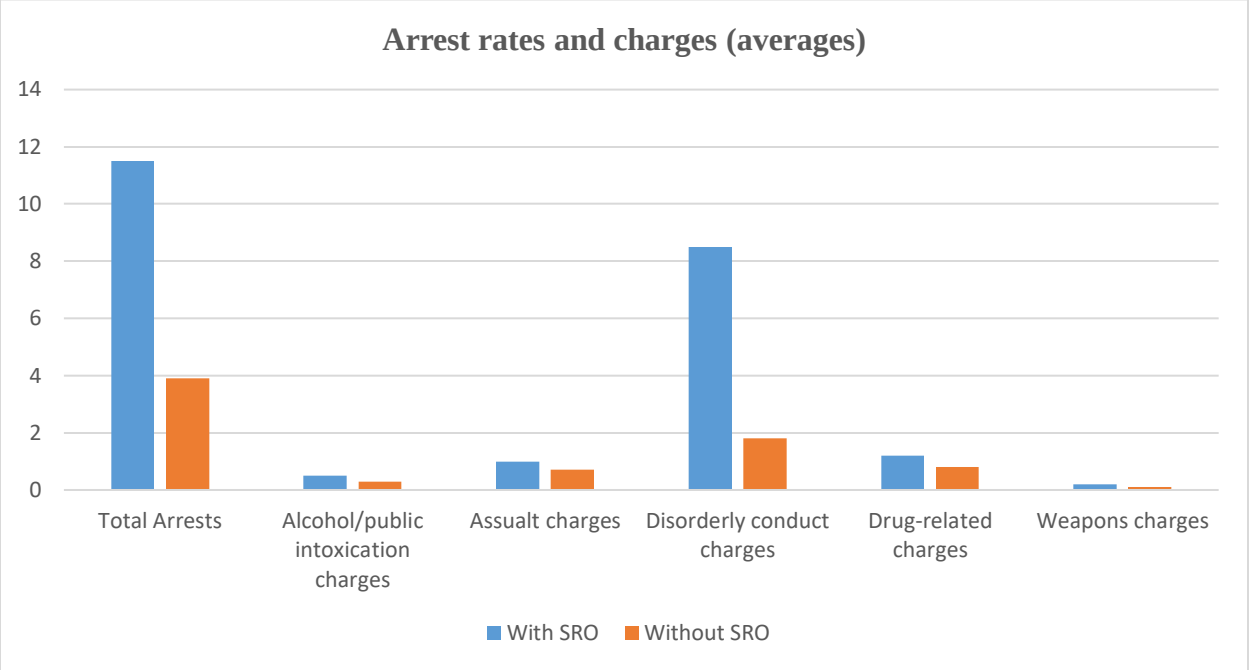
[241] "High/low black and Latino enrollment" refers to schools with more than 75 percent and less than 25 percent black and Latino student enrollment, respectively. *See* U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection Report: A First Look*, *supra* note 21. As of the timing of this report, these were the most updated numbers due to a reporting error regarding SROs for the 2015-16 school year. According to the CRDC, although the variable was required for all schools, the variable was skipped by over 69,000 of those schools for that year. *See* U.S. Dep't of Education, 2015-16 Civil Rights Data Collection.

body.[242] Schools where at least half of the student population is nonwhite, as well as high-poverty schools (i.e., where at least 75 percent of students are eligible for free or reduced-price lunches), have the highest percentages of law enforcement officers on campus.[243]

Professor Matthew Theriot found that even after controlling for socioeconomic status and poverty levels, schools with more school resource officers had higher arrest rates for subjective offenses[244] such as "disorderly conduct" than other schools, which suggests that officers may be criminalizing normal adolescent misbehavior (see figure 3).[245] Theriot found that the presence of an SRO significantly and dramatically increased the possibility of an arrest both with and without controlling for school poverty rate (by 402.3 percent and 128.2 percent per 100 students, respectively).[246] These data show that students who attended schools with at least one SRO were almost five times as likely to face a criminal charge for "disorderly conduct."[247]

[242] Simone Robers, Anlan Zhang, Rachel Morgan, and Lauren Musu-Gillette, *Indicators of School Crime and Safety: 2014*, National Center for Education Statistics, U.S. Dep't of Education and Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, 2015, 124, https://nces.ed.gov/pubs2015/2015072.pdf.
[243] Ibid., 88.
[244] Subjective offenses often refer to non-violent offenses such as the charge of disorderly conduct, talking back, etc. in comparison to objective offenses such as assault, student in possession of a weapon or drugs, etc.
[245] The study examined the effect of SROs on school-based arrest rates by comparing arrest rates at thirteen schools that had SROs and fifteen schools without SROs in the same school district over three consecutive academic years. *See* Matthew Theriot, "School resource officers and the criminalization of student behavior," *Journal of Criminal Justice*, vol. 37 (2009), 280-87.
[246] Ibid., 285.
[247] Ibid.

Figure 3: School Resource Officers and Arrests



Source: Matthew Theriot, "School resource officers and the criminalization of student behavior," *Journal of Criminal Justice*, 31, 2009, 208–287. Chart created by USCCR staff.

Research shows that schools with SROs were more likely to report that schools were patrolled, inspections were conducted, leads to possible criminal activity were investigated, and students were arrested.[248] Schools with SRO programs were also more likely to work closely with law enforcement to ensure that emergency plans were in place and that officers advised and mentored students.[249] And while some school resource officers are participating in activities that might contribute to safer schools, findings do not indicate whether these programs reduce school violence.[250]

Proponents of heightened officer presence in schools argue that efforts to reduce punitive discipline in schools (e.g., suspensions, expulsions, arrests) and to reduce the number of officers

[248] *See* James and McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, *supra* note 228, at 8-9; Gary Zhang, "The Effects of a School Policing Program on Crime, Discipline, and Disorder: A Quasi-Experimental Evaluation," *American Journal of Criminal Justice* (2018), 3, https://www.researchgate.net/publication/324653619_The_Effects_of_a_School_Policing_Program_on_Crime_Discipline_and_Disorder_A_Quasi-Experimental_Evaluation. https://www.researchgate.net/publication/324653619.
[249] Travis and Coon, *The Role of Law Enforcement in Public School Safety: A National Survey*, *supra* note 233, at 49-53.
[250] *See* Discussion and Sources cited at *infra* notes 263-71.

are making schools less safe and making teaching and learning more difficult.[251] Representative C.A. Dutch Ruppersberger, who represents Maryland's Second District in the U.S. House of Representatives, argues that SROs should be in every school across the country.[252] He contends that it is impossible to expect officers to prevent every shooting, but that they serve an important role in providing safety and supporting a safer learning environment.[253] There is not much empirical evidence to support these claims, however.

Much of the existing research on the effectiveness of SRO programs is limited and produces mixed results about whether these programs reduce school violence.[254] According to the 2013 Congressional Research Service report, there were no studies that utilized sufficient methodological rigor to conclusively determine the effect of school resource officers on school safety.[255] And researchers have struggled to determine if the decline in school violence and crime is due to the presence of SROs and other security measures—or if this trend reflects a concurrent overall decrease of crime in the U.S.[256]

Another reason that evaluating the effectiveness of SRO programs (in terms of reducing violence and increasing school safety) is difficult is because available studies show mixed results. Some studies show a reduction of crime and improvement in safety,[257] while others show no change.[258] Further, the studies that report positive changes from SRO programs too often rely solely on participants' perceptions of the effectiveness of the program rather than on objective measures.[259] Other studies struggle with methodological issues, such as failing to isolate incidents of crime and violence, thereby making it impossible to determine if positive outcomes are the result of SROs or the result of other factors occurring in schools.[260] A 2011 study by Na and Gottfredson of a

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[251] Families for Excellent Schools, *Safety Last: New York City's Public Schools Are More Dangerous than Ever*, 2016, http://www.familiesforexcellentschools.org/wp-content/uploads/2016/02/FESNY_School-Safety-Report_02_18_2016.pdf.
[252] Representative C.A. Dutch Ruppersberger, "School resource officers can help prevent shootings," *Baltimore Sun*, Feb. 16, 2018, http://www.baltimoresun.com/news/opinion/readersrespond/bs-ed-rr-police-shootings-letter-20180216-story.html.
[253] Ibid.
[254] Ibid.
[255] James and McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, *supra* note 228.
[256] Joanne Zalatoris, "Helpful or Harmful: The Role of School Resource Officers," *New America*, 2015, https://www.newamerica.org/education-policy/edcentral/school-resource-officers/; *see also* FBI: UCR, *Crime in the United States*, https://ucr.fbi.gov/ucr-publications (annual reports show that the violent crime rate fell 48 percent between 1993 and 2016); FBI, *Crime in the United States:1990-2009*, https://www2.fbi.gov/ucr/cius2009/data/table_01.html.
[257] Ida M. Johnson, "School Violence: The Effectiveness of a School Resource Officer Program in a Southern City," *Journal of Criminal Justice*, vol. 27 no. 2 (1999), at 173-92; Editorial, "The Principal's Office First," *New York Times*, Jan. 4, 2009, https://www.nytimes.com/2009/01/05/opinion/05mon3.html?_r=0.
[258] Arrick Jackson, "Police-school Resource Officers' and Students' Perception of the Police and Offending," *Policing: An International Journal of Police Strategies and Management*, vol. 25, no. 3 (2002), at 631-50.
[259] Barbara Raymond, "Assigning Police Officers to Schools," *supra* note 232 at 8.
[260] Ibid., 8.

nationally representative sample of U.S. public schools utilized reports of actual crime rather than perceptions of the effectiveness of SROs, and found that adding SROs to schools did not lower the number of reported serious violent, non-serious violent, or property crimes.[261] They also found that schools that added SROs had a higher number of reported weapon and drug offenses after increasing the presence of the SROs.[262]

Critics of the expanded use of SROs in public schools raise the concern that "the initial point of contact between a student and a police officer has the potential to define that student's social and educational future."[263] Federal data show that in the 2011–12 school year, black students with disabilities accounted for 7.8 percent of the total number of school-related arrests and 6.4 percent of student referrals to law enforcement, but accounted for 2.3 percent of the total U.S. student population.[264] In the 2015–16 academic year, among students with disabilities, black students accounted for 17.2 percent of the population, but 33.1 percent of students with disabilities who were referred to police.[265] Similarly, multiracial students accounted for 4.7 percent of students with disabilities who were referred to police, yet made up 1.3 percent of enrolled students with disabilities.

Cara McClellan, Skadden Fellow at the NAACP Legal Defense Fund, testified to the Commission's Maryland State Advisory Committee that more police officers in schools have not made Maryland schools safer, and cited evidence of stark racial disparities regarding SROs.[266] McClellan stated that Baltimore City Public Schools is the only school district in the state that employs its own school police force, and in 2017, $7 million of the school budget was spent on

[261] Chongmin Na and Denise Gottfredson, "Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors," *Justice Quarterly*, 2011, 8, https://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/COMPLIANT3%20-%20Police%20Officers%20in%20Schools.pdf.
[262] Ibid., 22.
[263] Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, *supra* note 206 at 149 (citing to similar statements in the published concurrence to *Hawker v. Sandy City Corp*., 774 F.3d 1243, 1243-44 (10th Cir. 2014) (Lucero, J., concurring) ("[The] facts [in this case] compel me to comment on the potential future consequences to the child and the . . . broader phenomenon it unfortunately represents. The criminal punishment of young schoolchildren leaves permanent scars and unresolved anger, and its far-reaching impact on the abilities of these children to lead future prosperous and productive lives should be a matter of grave concern for us all."). Judge Lucero also commented in *Hawker* on the absurdity of trends in the jurisprudence to treat children who have committed minor offenses like hardened criminals. *Hawker*, 774 F.3d at 1243-44 (Lucero, J., concurring). He wrote, "It is time for a change in our jurisprudence that would deal with petty crimes by minors in a more enlightened fashion. . . . Focusing narrowly on the legal standards applicable in this case renders it too easy to overlook the obvious question: Why are we arresting nine-year-old schoolchildren?" *Id*.
[264] *See* Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, *supra* note 206 at 157 (citing U.S. Dep't of Education, CRDC data, 2011-12).
[265] *See* U.S. Dep't of Education, CRDC 2015-16 data, percentages are based on USCCR staff calculations.
[266] Cara McClellan, Skadden Fellow at the NAACP Legal Defense Fund, Maryland State Advisory Committee to the U.S. Commission on Civil Rights, testimony, *Briefing Transcript* pp. 74.

school police compared to other programs such as counseling and guidance which received $270,000.[267] McClellan stated that:

> As of March 2017, 100 percent of students arrested during the 2016–2017 school year were black. Even though black students only comprise 81 percent of the student population. 17 of the 85 school-based arrests were for black girls. And then when you look at school-based referrals to the juvenile justice system[,] there were 156 school-based referrals, 149 of those were for black students. And girls and boys were about equally represented; 80 of the school-based referrals were for boys and 76 were for girls. [And] [a]ccording to a study by Youth Resources[,] 48 percent of students say school police use excessive force.[268]

And Baltimore is not isolated. In March 2015, when the Justice Department (DOJ) reported findings following a civil rights investigation against the police department in Ferguson, Missouri, they cited several examples of officers using excessive force against black students. The report stated that investigators found examples of "police action that is unreasonable for a school environment" among SROs.[269]

In a study examining three national surveys investigating the role of security and SROs on discipline rates, Tim Servoss and Jeremy Finn argue that in high-security schools—including those where SROs or security guards who are not affiliated with police agencies are present—punishments for misbehavior are overall harsher.[270] They posit that "a lot of people who hear about disproportionate suspensions will argue that the disparity is appropriate because misbehavior is disproportionate in the same way," while the data suggest otherwise.[271] After the researchers controlled for individual students' misbehavior and other school characteristics, they found that black students were nearly twice as likely to be suspended and Latinx students were approximately 1.5 times as likely to be suspended compared to white students.[272] Further, these data showed that disproportionate discipline rates between black and white students were even higher in schools with increased security measures, and nearly two-thirds of black students were attending schools

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[267] Ibid., 77-78.
[268] Ibid., 78-79.
[269] U.S. Dep't of Justice, Civil Rights Division, Findings Letter, *Investigation of Ferguson Police Department*, 2015, at 37, https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf.
[270] Jeremy D. Finn and Timothy J. Servoss, "Misbehavior, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences," *Journal of Applied Research on Children: Informing Policy for Children at Risk*," vol. 5, no. 2 (2014).
[271] Sneed, "School Resource Officers: Safety Priority or Part of the Problem?" *supra* note 191.
[272] Jeremy D. Finn and Timothy J. Servoss, "Misbehavior, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences," *supra* note 270.

in the highest third in terms of security levels. They concluded that: "suspension levels are worse for black kids who go to high-security schools, and most black kids go to high-security schools."[273]

Some advocates argue that one reason for a rise in student interactions with law enforcement is that many high-security schools do not have school counselors or other school guidance personnel on staff. Research suggests that disciplinary issues and infractions could be compounded when resources are diverted from guidance counselors, whose presence has been shown to help reduce disciplinary incidents and also raise overall academic achievement.[274] Over a million students attend public schools that have an on-site law enforcement officer, but not a school counselor. By the 2015–16 academic year, schools reported employing more than 27,000 SROs, compared to 23,000 social workers.[275] And students of color are roughly between 20 and 40 percent more likely to be among the students lacking basic access to a school counselor.[276]

In an investigation of the ten largest public school districts,[277] investigative journalists found that four (New York City, Chicago, Miami-Dade, and Houston) have far more SROs and police than school counselors.[278] New York City—the largest public school system—has approximately six officers and three counselors for every 1,000 students.[279] Houston provides only one counselor for every 1,175 students, compared to one security officer for every 785 students.[280] None of the largest ten school districts meet the American School Counselor Association's recommendation of one counselor for every 250 students.[281] However, six of the top ten districts had lower ratios

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[273] Sneed, "School Resource Officers: Safety Priority or Part of the Problem?" *supra* note 191.
[274] Scott Carrell and Susan Carrell, "Do Lower Student to Counselor Ratios Reduce School Disciplinary Problems?" *Contributions to Economic Analysis & Policy*, vol. 5, no. 1 (2006).
[275] ACLU, "Race, Discipline, and Safety at U.S. Public Schools," (citing CRDC statistics), https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/race-discipline-and-safety-us-public-schools?redirect=schooldiscipline (last accessed Nov. 5, 2018).
[276] U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection Report: A First Look*, *supra* note 21.
[277] The 10 largest public school districts (in order of student enrollment) are: New York City Dep't of Education, Los Angeles Unified School District, Chicago Public Schools, Clark County, Nevada School District, Miami-Dade County, Florida Public Schools, Broward County, Florida Public Schools, Houston Independent School District, Hillsborough County, Florida Public Schools, Orange County, Florida Public Schools, and Hawaii Public Schools. Matt Barnum, "Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors," *The 74*, March 27, 2016, https://www.the74million.org/article/exclusive-data-shows-3-of-the-5-biggest-school-districts-hire-more-security-officers-than-counselors/.
[278] Ibid.
[279] Carimah Townes, "There Are More Officers Than Counselors In the Largest Public School Districts," *Think Progress*, March 28, 2016 (citing data from Barnum, "Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors," *supra* note 277), https://thinkprogress.org/there-are-more-officers-than-counselors-in-the-largest-public-school-districts-57af05880c25/.
[280] Ibid.
[281] In the 2015-16 school year, nationally there was a student-to-counselor ratio of 444:1, which suggests that counselors have a student caseload that is 78 percent greater than the recommended number. *See* ACLU, "Race, Discipline, and Safety at U.S. Public Schools," *supra* note 275. *See also* National Association for College Admission Counseling and the American School Counselor Association, *State-by-State Student-to-Counselor Ratio Report*, 2014-15, at 1, https://www.schoolcounselor.org/asca/media/asca/Publications/ratioreport.pdf; Barnum,

than the national average, (which is approximately two school counselors per 1,000 students,) in the 2013–14 academic year.[282] Furthermore, students of color make up the majority of the student population in the ten largest school districts in the U.S., and many come from lower socioeconomic backgrounds; these students are the most likely to benefit from school counselors.[283] Lastly, school counselors have been shown to improve school safety and boost student achievement.[284] Dennis Parker, then-director of the ACLU's racial justice program, argued that the high ratio of SROs compared to counselors "reflect[s] an approach to school discipline and school safety that is ultimately counterproductive."[285]

Comparing the likelihood of students enrolled in schools with officers versus counselors, data show that during the 2013–14 school year compared to white students, Latinx students were 1.4 times as likely to attend a school with a Sworn Law Enforcement Officer (SLEO),[286] but not a counselor; Asian students were 1.3 times as likely; black students were 1.2 times as likely.[287] And white students are the most likely to attend schools with counselors, but not police.[288] This lack of counselors is significant because school counselors "are crucial to helping students—particularly low-income students—develop social-emotional skills, secure financial aid, and gain access to higher education."[289]

"Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors," *supra* note 277.

[282] The national average for that year was 2 counselors per 1,000 students (.002). New York, New York; Chicago, Illinois; Clark County, Nevada; Miami-Dade, Florida; Hillsborough County, Florida; and Hawaii Public Schools all had lower student to counselor ratios than the national average for that year. New York: 2,850/984,130 (.0029), Chicago: 733/336,138 (.0022); Clark: 659/320,400 (.0021); Miami: 743/290,902 (.0026); Hillsborough: 445/194,317 (.0023); Hawaii: 621/169,987 (.0037). *See* Barnum, "Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors," *supra* note 277.

[283] American Counseling Association, "Effectiveness of School Counseling," 2007, 1-2, https://wvde.state.wv.us/counselors/administrators/Effectiveness+of+School+Counseling.pdf; Barnum, "Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers than Counselors," *supra* note 277.

[284] Scott Carrell and Susan Carrell, "Do Lower Student to Counselor Ratios Reduce School Disciplinary Problems?" *supra* note 274 at 1.

[285] Barnum, "Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers than Counselors," *supra* note 277.

[286] According to the U.S. Dep't of Education a SLEO is a "career law enforcement officer, with arrest authority. A sworn law enforcement officer may be considered a school resource officer (who is assigned to work at a school in collaboration with school and community-based organizations). A sworn law enforcement officer may be employed by any entity (e.g., police department, school district or school)." *See* U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection, A First Look*, *supra* note 21, at 12.

[287] *See* U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection, A First Look*, *supra* note 21, at 9.

[288] Sandra Black, Laura Giuliano, Ayushi Narayan, "Civil Rights Data Show More Work is Needed to Reduce Inequities in K-12 Schools," *White House Blog*, Oct. 9, 2016.

[289] Evie Blad, "Schools with Police but No School Counselors: A Closer Look," *Education Week*, Dec. 9, 2016, http://blogs.edweek.org/edweek/rulesforengagement/2016/12/black_hispanic_students_more_likely_to_attend_schools_with_police_but_no_counselors.html.

Much of the research suggests that increased security personnel does little to improve overall school climate.[290] Unsurprisingly, students attending schools with SRO programs had significantly more interactions with law enforcement compared to schools without assigned officers.[291] Research shows that there is a growing trend among school districts across the U.S. toward using law enforcement and arrests for students' misbehavior that previously would have been referred to school administrators. For instance, in Philadelphia County, Pennsylvania, school arrests rose 34 percent, from 1,632 during the 1999–2000 academic year to 2,194 three years later.[292] And during a single year in Houston, Texas, school police arrested 4,002 students; nearly half of these arrests were for minor offenses, such as "disruption" or "disorderly conduct."[293] According to a report by the Justice Policy Institute, SROs and other police presences in educational institutions exaggerated how student misbehavior was interpreted by teachers and school officials and led to more arrests for minor offenses.[294] Reason Magazine's associate editor Robby Soave argues that a heightened police presence in schools may actually lead to "serious infringements of students' Fourth and Fifth Amendment rights, and [] has increased the likelihood that minor disputes between students will escalate into criminal justice issues."[295]

At the Commission's December 2017 briefing, Former Deputy Assistant Attorney General at the Civil Rights Division at the Justice Department, Eve Hill, testified that:

> [A]dministrators and teachers will take conduct that used to be a reason for a trip to the principal's office or a note home to your parents and turn it over to the school resource officer, because that person is there, [and] that person has a higher level of authority than it appears the teacher may have. And the teacher has other things to do and may not have had the training to effectively deal with the behavior in an educational way, in a positive way, in a way that keeps the student in the class.[296]

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[290] Christopher Schreck, J. Mitchell Miller, and Chris Gibson, "Trouble in the School Yard: a Study of the Risk Factors of Victimization at School," *Crime & Delinquency*, vol. 49, no. 3 (2003); Melinda Anderson, "When Schooling Meets Policing," *The Atlantic*, Sept. 21, 2015, https://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/; Justice Policy Institute, "Education Under Arrest," *supra* note 231; Simone Robers, Anlan Zhang, Rachel Morgan, and Lauren Musu-Gillette, *Indicators of School Crime and Safety: 2014*, *supra* note 242.
[291] Travis and Coon, *The Role of Law Enforcement in Public School Safety: A National Survey*, *supra* note 233, at 47.
[292] Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11.
[293] Ibid.
[294] Justice Policy Institute, "Education Under Arrest," *supra* note 231, at 4-5.
[295] Robby Soave, "More Cops in Schools Is the Wrong Answer to Mass Shootings," *Reason Magazine*, Feb. 15, 2018, https://reason.com/blog/2018/02/15/parkland-florida-shooting-cops-schools. Mr. Soave also serves on the District of Columbia Advisory Committee to the Commission.
[296] Eve Hill Testimony, partner at Brown, Goldstein, & Levy and former Deputy Assistant Attorney General at the U.S. Justice Dep't, testimony, *Briefing Transcript*, pp. 74.

While some disciplinary infractions and the subsequent consequences may be clear cut (e.g., a student brings a weapon or drugs to school), other infractions may be more subjective and may not need the harsh disciplinary actions that zero tolerance policies call for, such as relying upon SROs. Jim St. Germain, co-Founder of Preparing Leaders of Tomorrow (PLOT), a nonprofit mentoring group in New York, stated that one of the issues is that "what teachers do now is call on officers and ask them to handle things,"[297] rather than handling the disruptive behavior themselves or referring the student to an administrator.

Former New York police detective and CNN analyst Harry Houck argues that officers should be at schools in the event that a crime has been committed, but "too often, [] teachers in these schools are calling on the cops because they have a disruptive student in the classroom. This is not a cop's job."[298] Data support Houck's statement. In a report released by Advancement Project, researchers found that student arrests have vastly increased over the past several decades and the majority of these arrests were in response to non-violent offenses such as "disruptive conduct" or "disturbance of the peace."[299]

Public attention on the role of police in schools has also increased with the release of several viral videos that showed incidents of officers using excessive force in disciplining students. For instance, in Columbia, South Carolina at Spring Valley High School, cell phone videos of an SRO throwing a young black female student onto the ground and dragging her because she would not leave the classroom went viral.[300] While the video showed some disturbing footage, former New York police detective and CNN analyst Harry Houck explained that:

> [I]f an officer decides to make an arrest, he or she can use whatever force is necessary . . . so if you don't comply with my wishes . . . then I can do whatever it takes to get you out of that seat and put handcuffs on you.[301]

Increasing student arrests have also caused concerns for juvenile court judges, leading some to speak out against the heightened presence of officers in schools. For instance, Chief Judge Steven Teske of Clayton County Juvenile Court in Georgia testified before Congress that not only had referrals to courts increased over 1,000 percent between 1996 and 2004, but also, 80 percent of all

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[297] Sneed, "School Resource Officers: Safety Priority or Part of the Problem?" *supra* note 191.
[298] Ibid.
[299] Advancement Project, et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 11, at 15.
[300] Dana Ford, Greg Botelho, and Kevin Conlon, "Spring Valley High School officer suspended after violent classroom arrest," *CNN*, Oct. 27, 2015, http://www.cnn.com/2015/10/27/us/south-carolina-school-arrest-video/index.html.
[301] Ibid.

school referrals involved black students.[302] He stated that: "The racial disparity in school arrests was appalling and I felt I was contributing to this system of racial bias by not doing something."[303] Further, he also testified that the increase of student arrests caused issues to the entire court system:

> It was also frustrating to me as a judge to see the effectiveness of the prosecutor and probation officer weakened by my court system being inundated with low risk cases that consumed the court docket. . . the prosecutor's attention was taken from the more difficult evidentiary and "scary" cases—burglary, robberies, car thefts, aggravated assaults with weapons—to prosecuting kids that are not "scary," but made an adult mad.[304]

Eve Hill argues that schools need to reevaluate the role of SROs and how disciplinary actions are enforced. She testified that:

> [T]he same students who were previously explicitly banned from public education, are now [] the students who are more disproportionately taken out of the public education system in the discipline process. And it's interesting to me that one of the ways that some schools are doing this is by implementing law enforcement in the schools and calling them school resource officers. Which don't [*sic*] have to be [] negative. They don't have to be a way of getting students out of school.[305]

Policing Students of Color with Disabilities

Students with disabilities who are served by the Individuals with Disabilities Education Act (IDEA)[306] constitute 12 percent of the overall student population, yet represent 28 percent of

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[302] *Ending the School to Prison Pipeline*, *Hearing Before the S. Subcomm. on The Constitution, Civil Rights, and Human Rights*, 112th Cong. 1-2 (2012) (testimony of the Honorable Steven C. Teske, Chief Judge, Clayton County Juvenile Court, Georgia), https://www.judiciary.senate.gov/imo/media/doc/12-12-12TeskeTestimony.pdf.
[303] *Id*. at 2.
[304] *Id.*
[305] Hill testimony, *Briefing Transcript*, p. 73.
[306] Not all students with a disability are served by the Individuals with Disabilities Education Act (IDEA). The Act generally defines a "child with a disability" as a child with a statutorily defined disability or developmental delay "who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401 (3)(A)-(B). *See also* 34 C.F.R. § 300.8 (further defining "child with a disability"), *but see* The Arc's National Center on Criminal Justice and Disability (NCCJD), *Justice-Involved Youth with Intellectual and Development Disabilities: A Call to Action for the Juvenile Justice Community*, 2016, at 2-3 ("Members of this group could have disabilities ranging anywhere from physical, to specific learning, to social-emotional, to mental health, to [intellectual and developmental disabilities]. Youth with disabilities are ill-served by the breadth of this term because the appropriate interventions and supports will vary as widely as the groups and diagnoses."), https://www.thearc.org/document.doc?id=5343. *See* U.S. Dep't of Education, "About IDEA," https://sites.ed.gov/idea/about-idea/ (last accessed Nov. 5, 2018).

students arrested or referred to law enforcement.[307] Breaking these numbers out by race or ethnicity, with the exception of Latinx and Asian American students, all other students of color with disabilities were more likely to be referred to law enforcement compared to white students with disabilities.[308] Multiracial students with disabilities were over 5 times more likely, Native Hawaiian/Pacific Islander students with disabilities were about 4 percent more likely, Native American/Alaska Native students with disabilities were over 3.5 percent more likely, and black students with disabilities were over 2.5 times more likely to be referred to law enforcement compared to white students with disabilities.[309]

Moreover, an SRO's decision about how to handle a student's behavioral infraction may be influenced by conscious or unconscious racial bias[310] or disability-related biases[311] or being untrained in how to properly handle disability-related behaviors, and these may affect the outcome of the punishment a student receives (e.g., a warning, detention, suspension, expulsion, or arrest). The 2014 guidance issued by the Justice and Education Departments reminded school districts that schools are liable for SRO disciplinary decisions.[312] This means that if an SRO takes action against a student that discriminates against the student on the basis of race (and, by corollary, on the basis of disability), the school is liable. Ultimately, this liability should incentivize schools to ensure that SROs receive the proper training necessary to mitigate any biased decision making. However, several cases involving SROs and students may show that these officers may not be getting the training that is needed.

In recent years, the public has witnessed issues with SROs and officers using excessive force on students with disabilities. For instance, in Kansas City, Missouri, a lawsuit alleges a seven-year-old black student with a disability was handcuffed with his arms restrained behind his back for 15 minutes by an SRO for "crying, yelling, and walking away from the officer."[313] Another case in Flint, Michigan involves allegations that an SRO handcuffed a seven-year-old black child who had

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[307] U.S. Dep't of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection Report: School Climate and Safety*, *supra* note 1.
[308] *See generally*, U.S. Dep't of Education, *Civil Rights Data Collection 2015-16*, odds ratios calculated by USCCR staff. Note: students with disabilities referred to here is limited to students who are covered under IDEA.
[309] Ibid.
[310] L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. R. 2035, 2039 (2011).
[311] Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of Americans with Disabilities Act*, 56 UCLA L. REV. 451, 472-75 (2008).
[312] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23.
[313] Complaint for Damages and Declaratory and Injunction Relief, *K.W.P. v. Kansas City Pub. Sch.*, No. 16-974, ¶¶ 18, 24, 29, 34, 45 (W.D. Mo. Sept. 8, 2016), https://www.aclu-mo.org/sites/default/files/primmvkcps_complaint.pdf. In October 2017, the federal court denied the defendants' motion for summary judgment. *See K.W.P. v. Kansas City Pub. Sch.*, 296 F. Supp. 3d 1111 (W.D. Mo. 2017), https://www.leagle.com/decision/296181246fsupp3d111185; *see also* ACLU of Missouri, *ACLU of Missouri Sues K.C. Public Schools for Handcuffing Second Grader* (Sept. 8, 2016), https://www.aclu-mo.org/en/node/341.

misbehaved during an after-school program.[314] In a lawsuit, the child's family claims that as a result of the handcuffing, the student "suffered from crippling fear and anxiety"[315] and that the student was subsequently placed in a poorly supervised program where he was "frequently hit, kicked, and pushed down by the other boys in the classroom."[316] In Nashville, Tennessee, a 12-year-old black student was handcuffed and taken to a juvenile justice center after having an outburst over refusing to go to class, despite having an individualized education program (IEP) in place.[317] Beth Cruz, a public defender in Nashville explained how these actions affect students in the long term:

> When a child is arrested at school—taken, in front of their peers, out of the school building, sometimes in zip ties because cuffs are too big—they are usually not told what's going on. They are put in a police car by themselves. [] They enter through the sally port in the back and are brought up to booking where they are put on a bench and wait sometimes for hours. . . . You have to think there is an alternative option.[318]

In another case that received national attention, a sheriff's deputy in a school district in Kentucky handcuffed two students with disabilities, an eight-year-old Latino boy and a nine-year-old black girl, above their elbows, which their resulting lawsuit alleges caused them physical pain.[319]

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[314] *See* Class Action Complaint, *D.R. v. Mich. Dep't of Educ.*, No. 2:16-CV-13694-AJT-APP, 58 ¶ 140 (E.D. Mich. Oct. 18, 2016), ¶¶ 135-55, http://www.aclumich.org/sites/default/files/Flint_Schools_Final_Complaint.pdf.

[315] *Id*, 58-59 ¶ 142. *See also* ACLU, "The School-to-Prison Pipeline: Intersections of Students of Color with Disabilities," Written Statement to the U.S. Commission on Civil Rights, Jan. 16, 2018, at 11, https://www.aclu.org/letter/aclu-comments-us-commission-civil-rights-re-students-color-disabilities-and-school-prison; ACLU of Michigan, *Seven-Year-Old Handcuffed at School* (Mar. 4, 2016), http://www.aclumich.org/article/seven-year-old-handcuffed-school.

[316] Class Action Complaint, *D.R. v. Mich. Dep't of Educ.*, *supra* note 314, at 59 ¶ 144. According to the ACLU, negotiations with Flint to reform school policies were unsuccessful, and in July 2018 the group filed a federal lawsuit against the city and the local chamber of commerce that operated the after-school program. *See* ACLU of Michigan, *Legal Docket: Fall 2018*, 25 (on file with authors); Complaint, *McFadden v. City of Flint*, No. 4:18-CV-12377-DPH-MKM (E.D. Mich. July 31, 2018), https://www.aclumich.org/sites/default/files/field_documents/mccadden_lawsuit.pdf.

[317] Jessica Bliss, "A mother's saga: School, police, arrests and a son with a mental illness," *Tennessean*, Sept. 10, 2018, https://www.tennessean.com/story/news/2018/09/10/mental-illness-child-arrests-metro-nashville-public-school-police-passage/1012290002/.

[318] Ibid.

[319] *S.R. v. Kenton Cty. Sheriff's Office*, No. 215-CV-143-WOBJGW, 2015 WL 9462973, *1-2 (E.D. Ky. Dec. 28, 2015), https://www.aclu.org/legal-document/sr-et-al-v-kenton-county-sheriffs-office-et-al-complaint?redirect=legal-document/sr-v-kcsd-complaint; *see also*, ACLU, "Kentucky Case Spotlights Problem of Untrained Law Enforcement Disciplining Students with Disabilities," Aug. 3, 2015, https://www.aclu.org/news/federal-lawsuit-targets-shackling-children-disabilities-classroom; Valarie Honeycutt Spears, "Lawsuit: Kenton County deputy sheriff shackled two elementary students who had disabilities," *Lexington Herald-Leader*, Aug. 4, 2015, https://www.kentucky.com/news/local/education/article44613594.html..

According to court documents, the officer handcuffed the students for misbehavior such as "severe temper tantrum," "relatively minor misconduct," and being "defiant and noncompliant."[320]

A lawsuit on the students' behalf claims that the officer had violated the children's constitutional rights and a federal judge agreed, stating that the officer's actions were unreasonable, especially since the children posed no imminent threat to the officer.[321] The court found that the school's policy prohibiting school staff from handcuffing students was immaterial in this case, because the type of handcuffing employed constituted excessive force even absent this policy.[322] The deputy's supervisor testified that the officer "did what he is sworn to do" and conformed with "all constitutional and law enforcement standards."[323] But the court disagreed and viewed the officer's actions as unlawful seizure and excessive force in violation of the students' civil rights.[324]

The two students who were handcuffed had previously been diagnosed with attention-deficit/hyperactivity disorder (ADHD), which makes it difficult for them to remain focused, control their behavior, and follow instructions.[325] Critics of school police officers point to these types of cases to illustrate how some officers resort to using severe tactics to deal with common school discipline infractions, which ultimately criminalizes routine—albeit disruptive—behavior.[326] Moreover, national data show that students with disabilities are more likely than their peers to be restrained in school.[327] According to federal data, school personnel or police officers physically or mechanically restrained almost 86,000 students in the 2015–16 school year. Of these, students with disabilities made up 71 percent of the students who were restrained, despite representing 12 percent of total enrollment.[328]

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[320] *S.R. v. Kenton Cty. Sheriff's Office*, No. 215-CV-143-WOBJGW, 2015 WL 9462973,*4-5.
[321] *S.R. v. Kenton Cty. Sheriff's Office*, 302 F. Supp. 3d 821, 833-34 (E.D. Ky. 2017).
[322] *Id.* at 832-34.
[323] *Id.* at 830-31.
[324] *Id.* at 834.
[325] Moriah Balingit, "'Excessive force': Judge rules in favor of children who were handcuffed at school," *Washington Post*, Oct. 17, 2017, https://www.washingtonpost.com/news/education/wp/2017/10/17/excessive-force-judge-rules-in-favor-of-children-who-were-handcuffed-at-school/?utm_term=.04125bb2b41a. Because of the students' ADHD diagnoses, the plaintiffs argued that the officer's actions also violated the ADA. But the court found that because the officer did not know that the students had disabilities, his actions could not have been discriminatory. Under the ADA, the court asserted, the plaintiff must show that the challenged actions would not have occurred "but for" the disability, and no such showing was made here. *See S.R. v. Kenton Cty. Sheriff's Office*, 302 F. Supp. 3d at 836–37.
[326] Balingit, "'Excessive force': Judge Rules in favor of children who were handcuffed at school," *supra* note 325; Justice Policy Institute, "Education Under Arrest," *supra* note 231.
[327] U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1, at 11-12.
[328] Ibid.

Susan Mizner, disability counsel for the ACLU, stated:

> [S]hackling children is not okay. Using law enforcement to discipline students with disabilities only serves to traumatize children. It makes behavioral issues worse and interferes with the school's role in developing appropriate educational and behavioral plans for them.[329]

Further, other studies have suggested that officers may hold biases against students of color with disabilities that can lead to these types of incidents. For example, in a survey of 130 SROs in Kentucky, researchers found that over 50 percent of the respondents at least somewhat agreed that students with disabilities were responsible for a "disproportionate amount of problem behaviors at school…" and the majority (84.8 percent) "at least somewhat agreed that some students receiving special education services used their special education status as an excuse for their problem behavior to avoid accountability for their actions."[330]

Lisa Thurau, executive director of Strategies for Youth, posits that another reason incidents like these may happen is because officers should be using different approaches with youth than they utilize with adults. Thurau argues that these issues are further compounded because "[t]hese officers are not trained in normative child development, much less special-needs child development."[331] In October 2015, the Justice Department issued a Statement of Interest in the Kentucky case highlighting the need for proper training for SROs in order for them to be able

> to recognize and respond appropriately to youth behavior that may be a manifestation of disability . . . [and] appropriate training can help law enforcement agencies avoid interactions that violate children's rights under federal civil rights laws, including the ADA [Americans with Disabilities Act].[332]

The executive director of the National Association of School Resource Officers, an organization that offers specialized training to SROs, stated that when stories come out about an officer using excessive force against a student "the first thing I do is search our database to see 'did this person

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[329] Emma Brown, "ACLU files suit against sheriff who allegedly handcuffed disabled children at school," *Washington Post*, Aug. 3, 2015, https://www.washingtonpost.com/news/local/wp/2015/08/03/aclu-files-suit-against-sheriff-who-allegedly-handcuffed-disabled-children-at-school/?utm_term=.8f063d75c4f0.
[330] Amanda Merkwae, Schooling the Police: Race, Disability, and the Conduct of School Resource Officers, *supra* note 206 at 170.
[331] Sneed, "School Resource Officers: Safety Priority or Part of the Problem?" *supra* note 191.
[332] Statement of Interest of the United States, U.S. Dep't of Justice, *S.R. v. Kenton Cty. Sheriff's Office*, Case No. 2:15-CV-00143, at 15 (E.D. Ky. Oct. 2, 2015), https://www.justice.gov/opa/file/780346/download.

come through our training?' And the answer is consistently, 'no.'"[333] The ACLU argues that "with little to no training in working with youth, these officers approach youth as they would adult 'perps' on the street, rather than children at school."[334] Many states and school districts do not have specific training requirements for school officers; fewer than half of states have laws that specifically mention training requirements for officers in schools.[335] However, some states only focus on training officers how to respond to an active shooter, and even fewer focus on the proper way to handle children, much less children with disabilities.[336]

Kerri Williamson, Training Director for the National Association of School Resource Officers, also testified at the Commission's briefing that her organization focuses on making sure they select the right officers for the job, who genuinely want to work with students and to make sure they receive proper training.[337] Williamson stated that:

> [W]e need some national standards as far as training requirements for school resource officers. . . [because] [w]ithout proper training, we do recognize that SROs can make serious mistakes that may cause short-term difficulties or jeopardize the entire [] SRO program. We teach that there's a triad concept to school-based policing which is the officer serves as both a guest speaker in the classroom, informal counselor or mentor, and of course there's their law enforcement duties… It has to be a collaborative effort with the stakeholders and the community, especially with the school, mental health agencies, and others. There needs to be an MOU [Memorandum of Understanding] or written agreement in place between the school district and the law enforcement agency that provides proper guidelines.[338]

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[333] Kerri Williamson, Training Director for the National Association of School Resource Officers, *Briefing Transcript* pp. 182; *see also*, Mark Keierleber, "Why So Few School Cops are Trained to Work with Kids," *The Atlantic*, Nov. 5, 2015, https://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/.

[334] American Civil Liberties Union, *Talking Points: The School-To-Prison Pipeline*, n.d., https://www.aclu.org/files/assets/stpp_talkingpoints.pdf.

[335] Some of the states with laws that specify training requirements for officers in schools include Alabama, California, Indiana, Texas, and Virginia. *See, e.g.*, ALA. CODE § 16-1-44.1; CAL. PENAL CODE §§ 832.2, 832.3; IND. CODE ANN. §§ 20-26-16-4, 20-26-16-5, 20-26-18.2-1; TEX. EDUC. CODE ANN. § 37.0812, TEX. OCC. CODE ANN. § 1701.263; VA. CODE ANN. §§ 9.1-101, 9.1-102, 22.1-280.2:1. *See generally* Nat'l Ctr. on Safe Supportive Learning Environments, "School Discipline Laws & Regulations by Category," https://safesupportivelearning.ed.gov/discipline-compendium/choose-state?field_sub_category_value=Certification+or+training; U.S. Dep't of Education, Nat'l Ctr. on Safe Supportive Learning Environments, *Compendium of School Discipline Laws and Regulations for the 50 States, District of Columbia and the U.S. Territories*, 2018, https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf.

[336] *See* Keierleber, *supra* note 333.

[337] Kerri Williamson, Training Director for the National Association of School Resource Officers, *Briefing Transcript*, pp. 181.

[338] Ibid., 181-82.

Nina Salomon, a senior policy analyst at the Council of State Governments Justice Center, stated that:

> [a]ll officers are getting a certain level of training that they're required to get as police officers. . . [but] the additional training that we're talking about—on youth development, on working with youth, on prevention and de-escalation—hasn't typically been received by the majority of law enforcement that work with youth inside a school building, or that are called to campus.[339]

As a way to more effectively work with SROs, some school officials and state organizations have chosen to enter into MOUs with police departments. For instance, in 2016 The Rivendell Academy and the Orford, New Hampshire Police Department entered into an agreement stating that the police department will help to ensure that schools are safe for students, teachers, and staff.[340] Also, statewide associations such as the Illinois Association of School Boards (IASB), in response to state legislation encouraging schools to enter into MOUs with law enforcement, shared a model MOU with law enforcement in order to define the role of officers in public schools.[341] The IASB stated that the model MOU's purpose is "to prevent confusion, decrease conflict, and promote school safety."[342]

State authorities have also shared model MOUs with law enforcement agencies. For example, in September 2018, the Massachusetts Attorney General issued a model MOU governing school resource officer roles, developed together with the Massachusetts Executive Office of Public Safety and Security, and the Massachusetts Department of Elementary and Secondary Education.[343] This model MOU states that SROs are not to "take the place of appointed school disciplinarians, enforcers of school regulations, or school-based mental health providers."[344] This MOU follows a new criminal justice reform law the State enacted in April 2018[345] providing that

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[339] Ibid.
[340] Memorandum of Understanding between The Rivendell Academy & The Orford, NH Police Dep't, 2016-2017, http://www.rivendellschool.org/images/stories/academy/16-17_docs/Memo%20of%20Agrmt%20w%20Orford%20Police%202016-2017.pdf.
[341] 105 Ill. Comp. Stat. Ann. 5/10-20.14, 5/10-22.6, 5/27A-5, 5/34-19; *see also* Public Act 099-0456, Ill. Gen. Assem. (2015), http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0456.
[342] Illinois Association of School Boards, Sample Memorandum of Understanding for School District & Local Law Enforcement Agency, 2016, https://www.iasb.com/law/understanding.cfm.
[343] Massachusetts Att'y Gen. Maura Healy, [Model] Memorandum of Understanding, Sept. 5, 2018, https://www.mass.gov/doc/sro-mou-final-9-5-18. *See also* Office of the Att'y Gen., Mass. Exec. Office of Public Safety and Security, and Mass. Dep't of Elementary and Secondary Education, "State Agencies Release Model Memorandum of Understanding for Massachusetts School Resource Officers,," Sept. 5, 2018, https://www.mass.gov/news/state-agencies-release-model-memorandum-of-understanding-for-massachusetts-school-resource.
[344] Ibid.
[345] S. 2371, 190th Leg. (Mass. 2018), https://malegislature.gov/Bills/190/S2371, (enacted as Chapter 69 of the Massachusetts Acts of 2018), https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter69.

SROs cannot utilize policing strategies to address traditional school discipline issues and restricting law enforcement action in response to certain school-based disciplinary offenses.[346] Attorney General Healey stated:

> As we begin a new school year, I'm committed to helping every student learn and thrive in a safe and supportive environment. We believe this guidance will help local law enforcement leaders work together to keep all students safe, in school, and treated fairly.[347]

As of April 2018, thirty-nine states had introduced 200 bills or resolutions addressing school safety; nineteen states had introduced 34 bills regarding SROs specifically. [348] Some of the proposed legislation appears to be responsive to the civil rights concerns discussed above; the legislative proposals include provisions to establish training and safety protocols. Other proposals also include putting policies in place to establish "bias-free policing" and report quarterly data on disciplinary interactions between officers and students.[349]

Federal investigations

Over the past several years, the Justice and Education Departments have entered into several settlement agreements with districts over schools' allegedly discriminatory discipline practices. In November 2017, the Education Department's Office for Civil Rights (OCR) entered into a resolution agreement with the Loleta Union Elementary School District, in California, over alleged verbal and physical harassment and discriminatory discipline of Native American students, including students with disabilities.[350] Students and their families reported that harassment by school administrators and staff was part of a pattern of racial discrimination that included discriminatory discipline practices and a failure to provide special education services to Native American students with disabilities. OCR found repeated cases of "unwelcome physical behaviors

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[346] MASS. GEN. LAWS ch. 71 § 37P.
[347] Office of the Att'y Gen., Mass. Exec. Office of Public Safety and Security, and Mass. Dep't of Elementary and Secondary Education, *supra* note 343.
[348] National Conference of State Legislatures, "How States are Addressing School Safety," April 5, 2018, http://www.ncsl.org/blog/2018/04/05/how-states-are-addressing-school-safety.aspx. *See, e.g.*, S.B. 470, 2017-2018 Reg. Sess. (Ga. 2018) (requiring the state commissioner of public safety to post at least one member of the Georgia State Patrol at each public school); S.B. 3471, 90th Leg., 2017-2018 Sess. (Minn. 2018) (authorizing public schools to spend "long-term facilities maintenance revenue" on physical renovations "related to violence prevention and facility security").
[349] *See, e.g.*, S. 2371, 190th Leg. (Mass. 2018), https://malegislature.gov/Bills/190/S2371, enacted as Chapter 69 of the Massachusetts Acts of 2018, https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter69.
[350] *See* U.S. Dep't of Education, Office for Civil Rights, *Letter to Superintendent John Sutter for the Loleta Union Elementary School District*, *supra* note 24. Resolution Agreement, U.S. Dep't of Education, Office for Civil Rights, Loleta Union Elementary School District, Case No. 09-14-1111, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf.

and derogatory statements made by the former principal, and/or staff members to Native American students."[351] The investigation found many incidents of disparate treatment to students. For example, a Native American student was suspended six times in a single school year without a disability evaluation even though his student file included a note from a teacher saying his "behavior is keeping him from learning" and a staff member had recommended evaluation and testing.[352] The letter also described a fourth-grade Native American student who had 43 behavioral incidents in a single school year, 38 of which the school described as "major" but whom the school did not evaluate for a disability even though her teacher noted the student had problems focusing and repeated behavioral issues ranging from tantrums to breaking down in tears in class.[353] OCR investigators also found that there was a statistically significant difference in the number of discipline referrals to school officials, the number of in-school and out-of-school suspensions, and Native students were overrepresented in the number of referrals to law enforcement—these students made up 30 percent of the student body in 2011–12 and 8 percent in 2012–13, but 100 percent of the referrals from 2011–2013.[354]

Also in 2017, the Justice Department entered into a settlement agreement with Wicomico County, Maryland due to the district's discriminatory discipline actions towards students of color and students with disabilities.[355] For example, the director of legal advocacy for Disability Rights Maryland, Alyssa Fieo stated that her organization was concerned over the number of arrests of students, specifically that the arrests were alleging happening "due to behavior that was related to a disability."[356] The agreement instructed the district, among other things, to submit discipline and behavior data to the Justice Department semi-annually until the agreement's expiration in June 2019.[357] Other changes include revising the district's code of conduct and implementing alternatives to exclusionary discipline practices, establishing crisis intervention teams in each school in the district, and establishing mental health services for students.[358] Superintendent of Schools Donna Hamlin stated that since the agreement in 2017, the district has rolled out several behavior initiatives, such as implementing Positive Behavioral Interventions and Restorative Practices programs and revised their codes of conduct.[359] Hamlin stated that these new codes

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[351] U.S. Dep't of Education, Office for Civil Rights, *Letter to Superintendent John Sutter for the Loleta Union Elementary School District*, *supra* note 24, at 8.
[352] Ibid., 26-27.
[353] Ibid., 27.
[354] Ibid., 12 (enrollment), 13 (disciplinary referrals), 13-15 (suspensions), 17 (law enforcement referrals).
[355] Settlement Agreement, U.S. Dep't of Justice, *United States of America and Wicomico County Public Schools*, Jan. 23, 2017, https://www.justice.gov/crt/case-document/file/930511/download.
[356] Tim Prudente, "Wicomico schools settle with feds after complaints of discrimination," *The Baltimore Sun*, Feb. 1, 2017, https://www.baltimoresun.com/news/maryland/education/bs-md-wicomico-doj-agreement-20170201-story.html.
[357] Settlement Agreement, U.S. Dep't of Justice, *United States of America and Wicomico County Public Schools*, ¶¶ 41, 77 and § IV.K, Jan. 23, 2017, https://www.justice.gov/crt/case-document/file/930511/download.
[358] *Id*. (passim).
[359] Meg Ryan, "Wicomico schools superintendent reflects on DOJ settlement one year later," *Delmarva now*, May 11, 2018, https://www.delmarvanow.com/story/news/local/maryland/2018/05/11/wicomico-superintendent-doj-

categorize infractions based on the "level of infraction" rather than by grade level as they were categorized previously. Moreover, the district has also sent out two rounds of school climate surveys to parents and students and has reportedly received positive feedback from the surveys.[360]

These cases involving students of color with disabilities illustrate the overall negative impact of racial discrimination in the school-to-prison-pipeline system. Cases of racial discrimination alone are also enforced by OCR and DOJ. For example, in 2015, the Justice Department entered into a settlement agreement with the city of Meridian and the state of Mississippi, to address the appropriate role of police in schools following an investigation that police were arresting students for non-criminal offenses and without due process.[361] U.S. Attorney Gregory Davis of the Southern District of Mississippi explained that "these agreements will help protect the children of Meridian from deprivations of educational opportunity as well as due process."[362]

Exclusionary Discipline Practices

The harsh disciplinary policies that can trigger the school-to-prison pipeline are detrimental to the educational attainment of students of color with disabilities. Of the approximately 6 million enrolled K–12 students with disabilities served under IDEA during the 2015–16 school year, almost 400,000 of these students with disabilities received at least one out-of-school suspension that year.[363] Students of color with disabilities (as a whole) represented over 61 percent of the students with disabilities to be suspended at least once. Similar to previous years, CRDC data showed that black students with disabilities disproportionately received one or more out-of-school suspensions for the 2015–16 school year.[364]

Examining suspension rates by race and disability for the 6 million students with disabilities served by IDEA,[365] data show that black, multiracial, Native American/Alaska Native and Native

settlement-year-later/558982002/; Tim Prudente, "Wicomico schools settle with feds after complaints of discrimination," *supra* note 356.
[360] Meg Ryan, "Wicomico schools superintendent reflects on DOJ settlement one year later," *supra* note 359.
[361] *See* U.S. Dep't of Justice, Office of Public Affairs, "Justice Dep't Reaches Settlement Agreements to Address Unconstitutional Youth Arrest and Probation Practices in Meridian, Mississippi," June 19, 2015, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-agreements-address-unconstitutional-youth-arrest-and; Meridian Settlement Agreement, https://www.justice.gov/opa/file/479421/download, at III.A.1.a.(iii) and III.A.1.b.
[362] Ibid.
[363] *See* U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection*, https://ocrdata.ed.gov/. For the 2015-16 school year, there were 6,035,732 enrolled students with disabilities served by IDEA. Statistics calculated by Commission staff. Ibid.
[364] U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1, at 13.
[365] Not all students with a disability are served by the Individuals with Disabilities Education Act (IDEA). *See* Sources and Discussion in *supra* note 70. However, because it serves millions of students with disabilities, the Commission relies on IDEA for relevant data.

Hawaiian/Pacific Islander students with disabilities disproportionately received one or more out of school suspensions for the 2015–16 school year.[366] For instance, black students with disabilities made up approximately 17 percent of the total enrolled students with disabilities population, yet represented 39 percent of students with disabilities who received one or more out-of-school suspensions.[367] While multiracial students only make up 1.3 percent of the enrolled students, they constituted over 5 percent of those students with disabilities who received one or more out-of-school suspensions. Multiracial students with disabilities were over seven times more likely than white students with disabilities to receive one or more out-of-school suspensions in the 2015–16 academic year. [368]

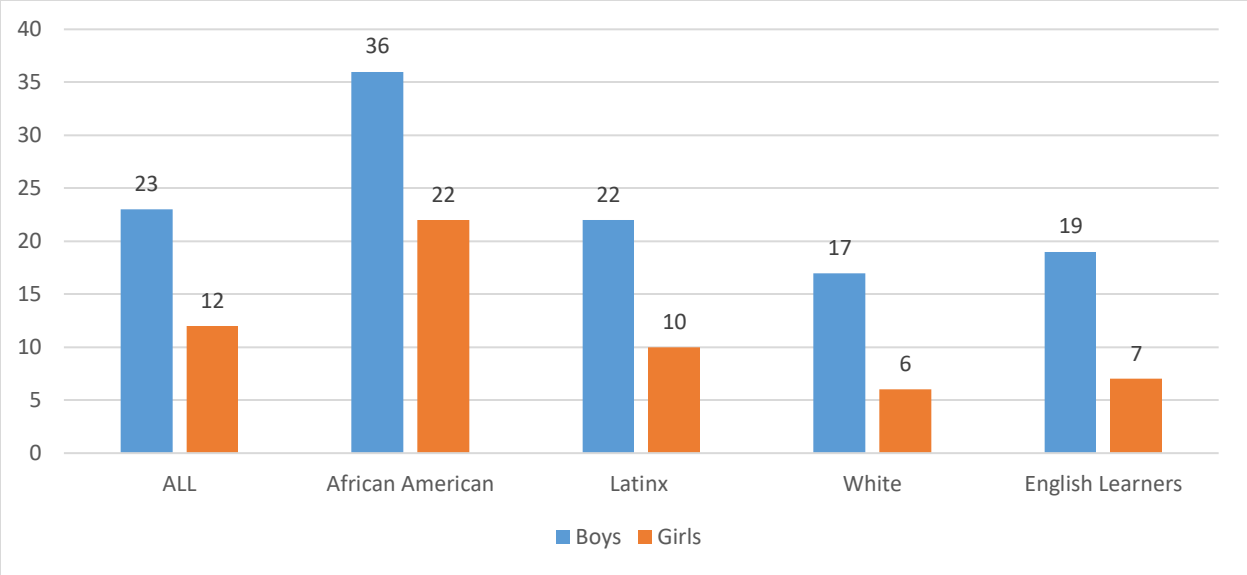
Suspensions and Expulsions

Exclusionary discipline policies have been shown to have an effect on students of color with disabilities throughout their entire academic career. For example, students with disabilities are approximately twice as likely to be suspended throughout each school level (i.e., elementary, middle, and high school) compared to students without disabilities, and the 2-percentage point gap in elementary school increases fivefold at the middle school level to a 10-percentage point gap.[369] Further, examining the risk of suspensions for these students at different school levels shows that in elementary school, students with disabilities' risk of being suspended is 4.1 percent, which increases to 19.3 percent as they enter middle school.[370]

Breaking these numbers out by race, disability, and gender at the middle school level reveal the most striking disparities. The researchers found that one out of every three (36 percent) black middle school boys with disabilities were suspended from school in 2009–2010, which was 14-percentage points higher than the next group, middle school Latino boys with disabilities (22 percent) (see figure 4).[371]

Figure 4: Middle School Students with Disabilities by Gender (percentages)

[366] *See* U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection*. Percentages were calculated by Commission staff.
[367] Ibid.
[368] Ibid.
[369] Ibid.
[370] Losen, et al. "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 1.
[371] Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2. Daniel Losen and Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, The Civil Rights Project, University of California, Los Angeles, 2013, 11, https://files.eric.ed.gov/fulltext/ED541735.pdf.



Source: Daniel Losen and Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*. Chart recreated by USCCR staff.

Despite these high disparities, researchers also note that these national averages underrepresent the suspension rates for students of color with disabilities. For example, using national school district level data from the 2011–12 school year, of the districts with at least 1,000 students and at least 50 black students with disabilities enrolled, approximately 400 districts had a black-white racial gap among students with disabilities of at least 20 percentage points.[372] It is important to note that this gap is well above the national average for that year. This means that for the 2011–12 school year, for every 100 students with disabilities, 20 more black students with disabilities were suspended at least once compared to their white peers.[373]

Federal data for the 2015–16 school year show that with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were also more likely to be expelled without educational services compared to white students with disabilities.[374] Compared to white students with disabilities, multiracial students with disabilities were 5 times more likely, Native American/Alaskan Native students were almost 3 percent more likely, and Native

[372] Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2; *see also*, Daniel Losen, responses to Commission following the Dec. 8, 2017 briefing The School-to-Prison Pipeline: Intersections on Students of Color with Disabilities.
[373] The authors note that while this disparity is large, these data underreport the full extent of the racial disparity of that year. These data are based on the unduplicated counts of students who were suspended at least once during that year from the CRDC, but if the total number of suspensions were counted, these disparities would be much larger. Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2.
[374] *See generally*, U.S. Dep't of Education, *Civil Rights Data Collection 2015-16*. Odds ratios were calculated by Commission staff.

Hawaiian/Pacific Islander students with disabilities were almost 2 percent more likely to be expelled without educational services.[375]

Data on racial disparities indicate that despite the lack of differences in student behavior, in some schools, suspensions are routine for black male students. For example, according to an analysis of suspension records by the Independent Budget Office in New York, reviewers found that black students, including black students with disabilities, were more likely to receive longer suspensions on average for 8 of the 10 most common behavioral infractions, with the exception of possessing drugs or insubordination.[376] Black students were also suspended approximately twice the number of days compared to Latinx or white students for some infractions, such as bullying, reckless behavior, and altercations. In contrast, Latinx and white students, including students with disabilities, were on average more likely to receive longer suspensions for possession of drugs.[377] That is, more than white or Latinx students with disabilities, black students were suspended for behaviors that are more subjective, and thus more subject to the risk of implicit bias.[378]

Black students in Atlanta were also more likely to be removed (e.g., out-of-school suspension, expelled, arrested) for more subjective infractions.[379] Other examples include two middle schools in Atlanta, Georgia, in which more than 60 percent of black males were suspended in a single year.[380] Moreover, white students in Atlanta schools generally had to commit not only more disciplinary infractions, but also more serious offenses than black students in order to be removed from school.[381] Racial disparities were also seen in Tennessee. For instance, in the Alamo City School District, black students accounted for 100 percent of the suspensions during the 2011–12 year, yet made up only 11.6 percent of student enrollment, making them over 8.6 times more likely to be suspended than their peers.[382] Statewide, almost 45,000 black students were suspended from

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[375] Ibid.

[376] The 10 most common behavioral infractions that resulted in suspensions are: group violence, reckless behavior, weapons possession, coercion, possession of drugs, bullying, sexual suggestion, altercation, minor altercation, and insubordination. Liza Pappas, "When Students of Different Ethnicities Are Suspended For the Same Infraction Is the Average Length of Their Suspensions the Same?" New York Independent Budget Office, Oct. 2018, https://ibo.nyc.ny.us/iboreports/print-nycbtn-suspensions-october-2018.pdf.

[377] Ibid.

[378] *See, e.g.*, Johanna Wald and Daniel Losen, *Out of Sight: The Journey through the School-to-Prison Pipeline*, *Invisible Children in the Society and its Schools*, *supra* note 192; Guy A. Boysen and David L. Vogel, "Bias in the Classroom: Types, Frequencies, and Responses," Teaching of Psychology, vol. 36, no.1 (2009), 12-17; Cheryl Staats, Kelly Capatosto, Lena Tenney, and Sarah Mamo, "State of Science: Implicit Bias Review," Kirwan Institute for the Study of Race and Ethnicity at Ohio State University, 2017; Jason Nance, "Over-Disciplining Students, Racial Bias, and The School-to-Prison Pipeline," 50 U. RICH. L. REV. 1063 (2016).

[379] Johanna Wald and Daniel Losen, *Out of Sight: The Journey through the School-to-Prison Pipeline*, *Invisible Children in the Society and its Schools*, *supra* note 192 at 26.

[380] Ibid., 26

[381] Ibid.

[382] Edward Smith and Shaun Harper, *Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States*, Center for the Study of Race and Equity in Education, University of Pennsylvania, 2015, at 44, https://web-app.usc.edu/web/rossier/publications/231/Smith%20and%20Harper%20(2015)-573.pdf.

Tennessee K–12 public schools in a single academic year. These students made up 23 percent of the enrolled students, but accounted for 58 percent of the suspensions and 71 percent of expulsions statewide.[383]

While racial disparities in discipline rates are well documented,[384] data further show that these issues are compounded for students of color with disabilities. During the 2015–16 school year, 32 percent of black students with disabilities were suspended once, and almost 40 percent were suspended repeatedly, which mean these students were almost three times more likely to be suspended compared to white students with disabilities.[385] Further, multiracial boys with disabilities were also found to be seven times more likely to receive at least one out of school suspension compared to white students with disabilities.[386]

During the 2009–10 school year, in the largest school districts, when suspension rates were disaggregated by gender, race, and disability, researchers found that the suspension rate for male students of color with disabilities sometimes exceeded 33 percent.[387] In several states during the 2011–12 school year, there was a ten-percentage-point or higher gap in out-of-school suspension rates between students with disabilities served by IDEA, and students without disabilities.[388] For the 2014–15 academic year, The Center for Civil Rights Remedies at UCLA found a racial gap of 41.5 more disciplinary removals (per 100 students enrolled) for black students with disabilities than for white students with disabilities (see figure 5).[389]

Figure 5: Disciplinary Removals for Students with Disabilities by Race in 2014–15

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[383] Ibid.

[384] *See, e.g.*, Johanna Wald and Daniel Losen, *Out of Sight: The Journey through the School-to-Prison Pipeline, Invisible Children in the Society and its Schools*, *supra* note 192; Edward Smith and Shaun Harper, Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States, Center for the Study of Race and Equity in Education, University of Pennsylvania, 2015, https://web-app.usc.edu/web/rossier/publications/231/Smith%20and%20Harper%20(2015)-573.pdf; Russell Skiba and Natasha Williams, "Are Black Kids Worse? Myths and Facts about Racial Differences in Behavior," The Equity Project at Indiana University, March 2014 (paper offers a summary of the literature and research on racial disparities in school discipline rates), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf.

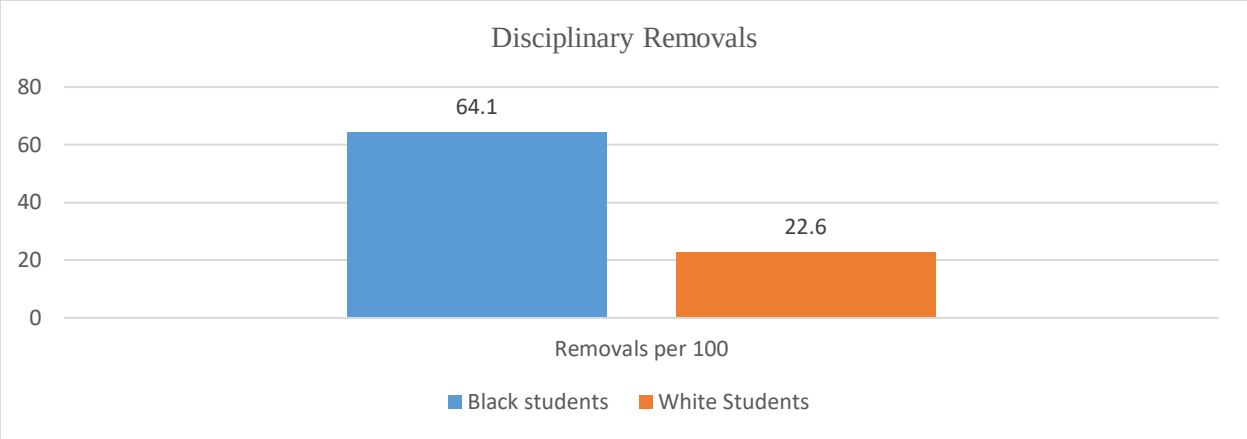
[385] *See generally,* U.S. Dep't of Education, *Civil Rights Data Collection 2015-16*, *supra* note 1. Percentages were calculated by Commission staff.

[386] *See generally,* U.S. Dep't of Education, *Civil Rights Data Collection 2015-16*, *supra* note 1. Percentages were calculated by Commission staff.

[387] Losen and Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, *supra* note 175.

[388] U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline*, *supra* note 7. These states include Florida, Nevada, Wisconsin, Louisiana, and the District of Columbia. The Commission notes that IDEA does not cover all students with disabilities; however, it provides helpful data about the approximately 6 million students served under the Act. *See* Discussion and Sources cited at *supra* note 70.

[389] Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2.

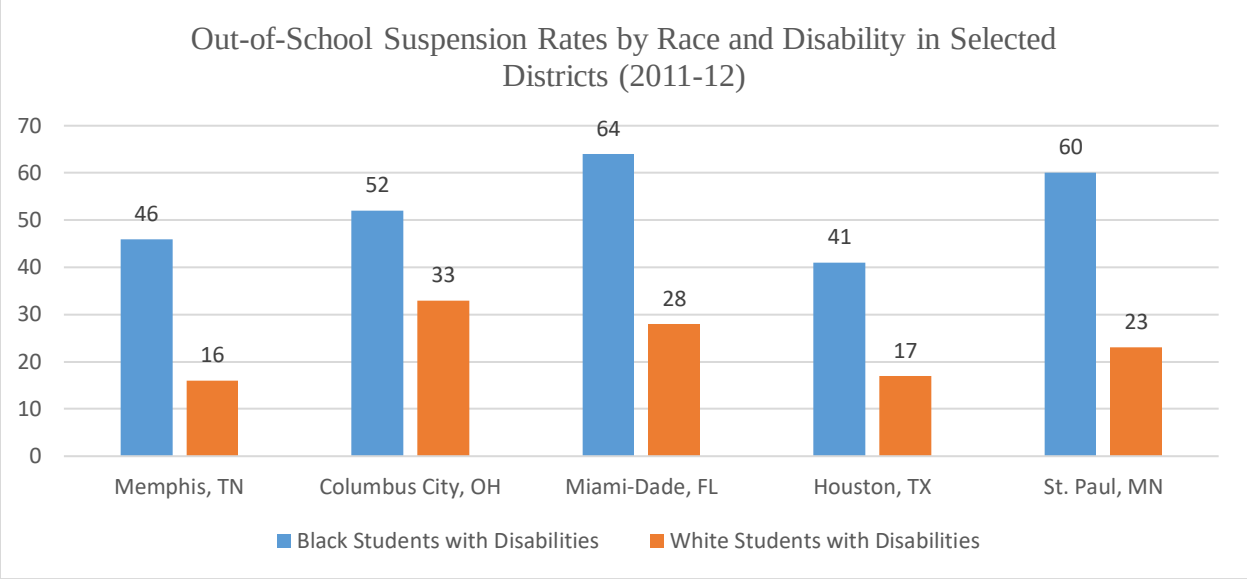


Source: Data from U.S. Department of Education. Chart created by The Center for Civil Rights Remedies at UCLA

Further, Losen and colleagues show that there are numerous school districts with substantial racial differences in discipline among students with disabilities at the district-wide level.[390] For example, in Memphis, Tennessee, researchers found that 46 percent of black secondary students with disabilities were given out-of-school suspensions at least once versus 16 percent of white students with disabilities.[391] These results mean that the Memphis school districts had a racial gap of 30 percentage points, which is nearly double the national racial gap between these two groups.[392] However, the Memphis students' experience is far from isolated. The chart in Figure 6 below demonstrates data from four other districts the researchers identified as "high suspending districts," which also had high racial disparities.[393]

[390] Ibid.
[391] Ibid., 8.
[392] Ibid., 8 (national racial gap is 17 percentage points).
[393] Ibid.

Figure 6: School District Disparities by Race and Disability



Source: Daniel Losen, Cheri Hodson, Michael Keith II, Katrina Morrison, and Shakti Belway, "Are We Closing the School Discipline Gap?" The Center for Civil Rights Remedies, University of California, Los Angeles, February 2015.

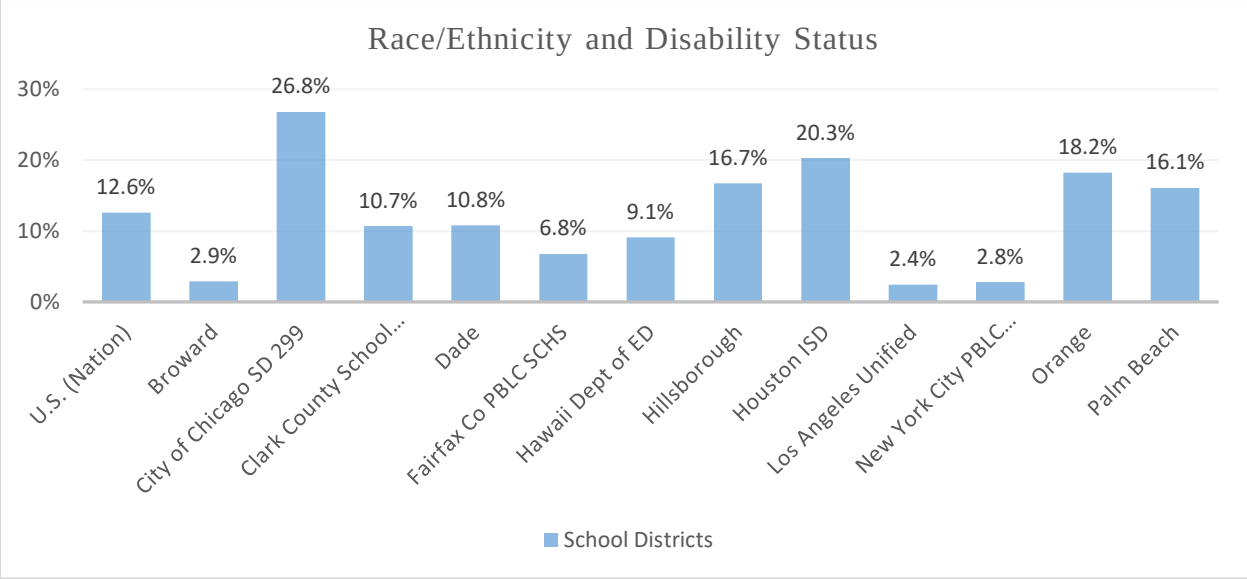
According to CRDC data for the 2015–16 school year, on a national level, students with disabilities served by IDEA (as a whole) represented 12 percent of the student population, yet they were 26 percent of students who received one or more out-of-school suspensions, compared to other students (who were 88 percent of the student body, yet only 74 percent of students suspended).[394] However, breaking these numbers down by race exposes even more striking disparities. For instance, black students with disabilities represent 17 percent of the enrolled students with disabilities, yet 39 percent of those students who received multiple out-of-school suspensions that academic year.[395] And Native Hawaiian and Pacific Islander students with disabilities represent fewer than 1 percent (0.13) of the enrolled students with disabilities, yet were over 4 times more likely to receive multiple out-of-school suspensions compared to white students with disabilities.[396]

Additionally, these disparities were worse in certain school districts. In the 2013–14 school year, five of the top 12 largest school districts in the country suspended students of color with disabilities more than the national average (12.6 percent) (see figure 7).[397] For instance, the City of Chicago's

[394] U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1.
[395] Ibid.
[396] Ibid.
[397] U.S. Dep't of Education, Office for Civil Rights, "Civil Rights Data," https://ocrdata.ed.gov/ (last accessed Nov. 5, 2018).

suspension rate for students of color with disabilities was over twice (26.8 percent) the national average.

Figure 7. Suspension Rates for Students of Color with Disabilities (2015–16)[398]



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection. Chart created by USCCR staff

As previously noted, civil rights law protects students with disabilities' rights to equal educational opportunities.[399] As a condition of receiving federal funds, schools must individually assess each student suspected of having a disability, meet the educational needs of both disabled and non-disabled students, and follow procedures to prevent racial discrimination in special education.[400] The Department of Education has often issued guidance to schools to stress the urgency of following civil rights law and ensuring that students of color with disabilities receive a free and appropriate education (FAPE) without experiencing discrimination.[401] As one example, in August 2016, the Education Department issued guidance reminding schools that their authority to suspend and expel students "does not negate their obligation to consider the implications of the child's behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE."[402]

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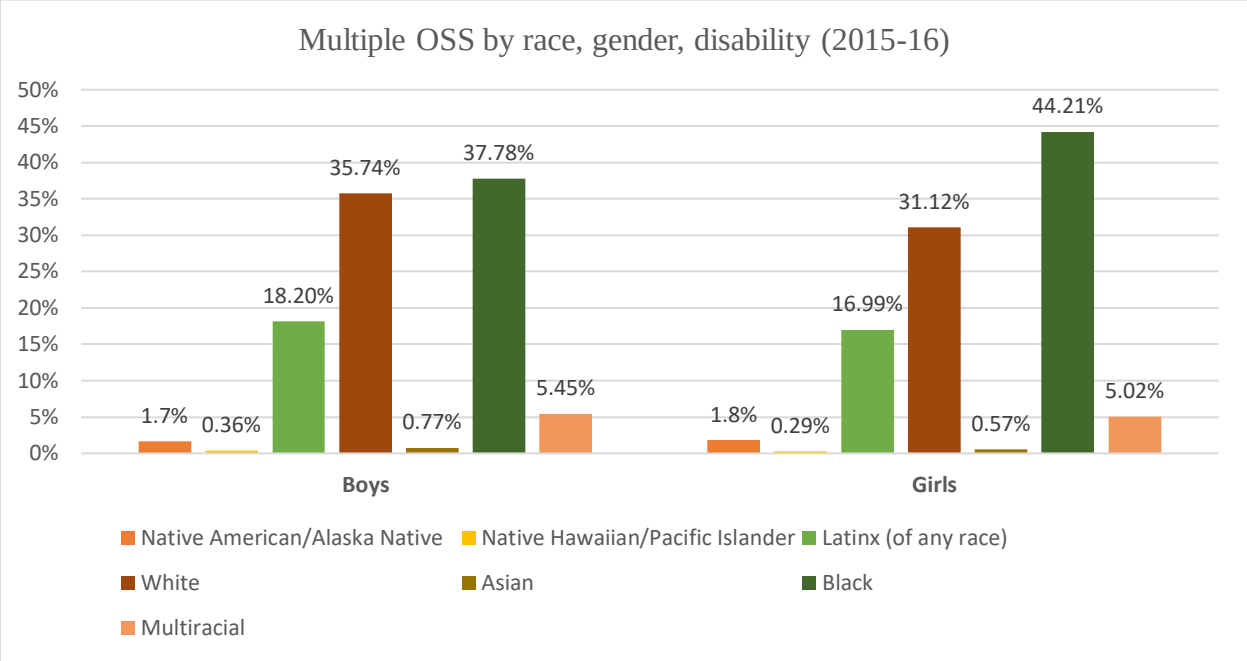
[398] USCCR staff used the data element: at least one out-of-school suspension for comparison point (which combines one and multiple suspensions); *see* https://ocrdata.ed.gov/. At the timing of this writing, 2013 data were the most recent data available in the CRDC school district comparison report.
[399] *See* Introduction: Relevant Civil Rights Law, *supra* notes 56-76.
[400] Ibid.
[401] Ibid. *See, e.g.*, U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23.
[402] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," *supra* note 170, at 2.

In the 2013–14 academic year, 10 percent of all children with disabilities (ages 3–21) faced disciplinary removal of 10 school days or fewer, and students of color with disabilities faced much higher rates of removal.[403] For example, approximately one-quarter of students of color, black, Latino, Native American/Alaskan native, and multi-racial boys with disabilities experienced at least one out-of-school suspension in the 2013–14 academic year.[404] In light of these disparities, the August 2016 OSERS Dear Colleague letter clarified the federal mandate that public schools, charter schools, and educational programs located in juvenile detention facilities must provide needed behavioral supports to children with disabilities to ensure that these students receive FAPE and are placed in the least restrictive learning environment (LRE).[405]

Despite this clear guidance, the data on suspensions demonstrate that students with disabilities consistently face double the risk of getting suspended compared to their peers (see Figure 8). Data also show that students of color with disabilities face a significantly higher risk—year after year—for suspensions compared to white students with disabilities.

[403] *See id.* at 2 (citing data from U.S. Dep't of Education, EDFacts Data Warehouse (EDW), OMB #1875-0240: "IDEA Part B Discipline Collection," 2014).
[404] Kristen Harper, Senior Policy Specialist at Child Trends, former advisor in the U.S. Dep't of Education, Office of Special Education and Rehabilitative Services, written testimony (citing 2013-2014 CRDC data), 1.
[405] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," *supra* note 170, at 2.

Figure 8: Students with disabilities receiving out-of-school suspensions, by race and gender



*Note: Chart totals are students with disabilities served by IDEA. Totals include: approximately 363,000 black female students with disabilities and 759,000 male students with disabilities, 493,000 Latina students with disabilities and 1 million Latino students with disabilities, 19,000 Native American/Alaskan Native female students with disabilities and 41,000 male students with disabilities, 30,000 Asian female students with disabilities and 86,000 male students with disabilities, 3,000 Native Hawaiian/Pacific Islander female students with disabilities and 7,600 male students with disabilities, 42,000 multiracial female students with disabilities and 112,000 male students with disabilities, and 1.1 million white female students with disabilities and 2.1 million male students with disabilities.

Source: U.S. Department of Education, Civil Rights Data Collection, 2015–16. Percentages calculated and chart created by USCCR staff.

Dan Losen, director for the Center for Civil Rights Remedies at UCLA argues that:

> These are sobering disparities, given that federal law expressly requires schools to provide a behavioral assessment and behavioral improvement plan for students with disabilities who exhibit behavioral problems to ensure that they receive the supports and services they need. In light of these essential supports and services, and procedural safeguards, one would expect the rates among students with disabilities to be equal to or less than students without disabilities.[406]

[406] Losen and Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, *supra* note 175.

Previous studies have well documented the negative effects of students missing multiple days of school.[407] Thus, for students of color with disabilities who are suspended multiple times throughout the academic year, their education severely suffers and puts them at greater risk of dropping out. Isolating the risk factor of being a student of color with a disability shows that all racial/ethnic groups (except Asian American and Pacific Islander students) are at higher risk of getting suspended two or more times, compared to white students with disabilities.[408]

Black students with disabilities experience the greatest risk of being suspended multiple times during a school year.[409] For instance, a 2017 study found that among girls with disabilities served under IDEA, black girls were four times as likely as white girls to experience one or more out-of-school suspensions and nearly three times as likely to experience one or more in-school suspensions.[410] Black girls with disabilities were 2.5 times more likely than white girls with disabilities to be referred to law enforcement and approximately four times as likely as white girls with disabilities to be arrested while on campus.[411] Monique Morris, co-founder, and president of the National Black Women's Justice Institute, reported to the Commission that:

> these data reveal a narrative of exclusion—African American girls with disabilities are removed from school and criminalized via suspension, arrest, and referral to law enforcement at disproportionately high rates. These disparities are important because they signal the potential for differential treatment. Black girls with disabilities are the most likely to be removed from school or be in contact with the juvenile court system as a result of behaviors deemed problematic or negative, rather than offered appropriate interventions that repair harm and relationships important to re-establishing their identities as learners. Historically, Black children with diagnosed disabilities experience a greater degree of classroom exclusion than white children with disabilities.[412]

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[407] Ibid.; Daniel Losen and Amir Whitaker, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California*, *supra* note 4.
[408] Losen and Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, *supra* note 175.
[409] U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection, Data Snapshot: School Discipline*, *supra* note 7; Losen and Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, *supra* note 175; Government Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, Report to Congressional Requesters, 2018.
[410] Misha Inniss-Thompson, *Analysis of U.S. Department of Education Office for Civil Rights Data, 2013-14*, National Black Women's Justice Institute, 2017, at 5, https://docs.wixstatic.com/ugd/0c71ee_56ca58a75f8840908dca5decbf6701f6.pdf; Monique Morris, co-founder and president of the National Black Women's Justice Institute, Written Statement for "The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities" Briefing before the U.S. Commission on Civil Rights, Dec. 8, 2017, at 3 [hereinafter Morris Statement].
[411] Morris Statement at 3.
[412] Morris Statement at 3.

Moreover, comparing within racial/ethnic groups and examining the factor of disability, black students had the greatest increase in classroom exclusion, when comparing students with disabilities and those without.[413] National data show that for the 2009–10 school year, there was a 16-point percentage gap between black and white students with disabilities, which was four points greater than the discipline gap between black and white students without disabilities.[414] Researchers concluded that, "In other words, of all the racial disparities we observed, the disparities for Black students with disabilities were the most profound."[415]

Effects of Exclusionary Discipline

Anurima Bhargava, former Chief of the Educational Opportunities Section in the Civil Rights Division of the U.S. Department of Justice, testified that data show that

> the excessive use of exclusionary discipline is bad for students, resulting in missed class time, a decline in classroom engagement and cohesion, and the increased likelihood that students who are suspended or expelled will be retained in grade, drop-out, or be placed into the juvenile justice system.[416]

According to a 2014 study examining the connections between exclusionary discipline and the school-to-prison pipeline, students who are suspended or expelled from school were more than twice as likely to be arrested during the same month of their suspension or expulsion from school.[417] Moreover, this effect was stronger among students who did not have previous behavioral issues.[418]

Professor Tary Tobin and colleagues at the University of Oregon found that students who exhibited behavioral problems in late elementary school and were referred to an administrator and/or suspended were more likely to receive office referrals or suspensions in subsequent grades.[419] They

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[413] Losen and Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, *supra* note 175.
[414] Ibid.
[415] Ibid., 20.
[416] Anurima Bhargava, Leadership and Government Fellow at the Open Society Foundation and former Chief for the Educational Opportunities Section in the CRT division at the Justice Dep't, testimony, *Briefing Transcript*, p. 22.
[417] Kathryn Monahan, Susan VanDerhei, Jordan Bechtold, & Elizabeth Cauffman, "From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest," *Journal of Youth and Adolescence*, vol. 43, no. 7 (2014), 1110-22.
[418] Ibid.
[419] Tary Tobin, George Sugai, & Geoff Colvin, "Patterns in middle school discipline records," *Journal of Emotional & Behavioral Disorders*, vol. 4, no. 2 (1996), 82-95 (data are in comparison to students who had never been suspended); *see also*, Larry Irvin, Tary Tobin, Jeffrey Sprague, George Sugai, and Claudia Vincent, "Validity of Office Discipline Referral Measures as Indices of School-Wide Behavioral Status and Effects of School-Wide Behavioral Interventions," *Journal of Positive Behavior Interventions*, vol. 6, no. 3 (2004), 137, https://www.iirp.edu/wp-content/uploads/2015/06/Validity-of-Office-Discipline-Referral-Measures.pdf.

believe that this evidence suggests that suspension and other disciplinary actions may not correct problematic behavior, but instead have the opposite effect.[420] Furthermore, studies suggest that removing students from school may also be an "ineffective deterrent and, in fact, for some students, it acts as a reinforcer."[421]

In 2011, the Council of State Governments Justice Center found that of all students who were suspended or expelled, 31 percent repeated their grade at least once.[422] In comparison, only 5 percent of students with no disciplinary infractions were held back a grade.[423] The research team found that:

> [A] student who was suspended or expelled for a discretionary violation was twice as likely to repeat his or her grade compared to a student with the same characteristics, attending a similar school, who had not been suspended or expelled.[424]

Approximately 59 percent of students disciplined 11 times or more did not graduate from high school during the study period; and about 10 percent of students suspended or expelled between seventh and twelfth grade dropped out.[425]

Research also suggests that some exclusionary disciplinary actions may be used by administrators as a strategy to remove students who are perceived as "disruptive" or "troublemakers" or those who are not deemed likely to succeed, in order to not decrease a school's overall graduation rates.[426] Some studies suggest that exclusionary discipline practices not only affect the individual student, but also affect their peers and the entire school environment. Removing disruptive students appears to negatively impact all student outcomes and the learning climate of the classroom.[427] Studies have continued to show that "schools with higher suspension and expulsion rates [] have lower outcomes on state-wide test scores, regardless of student demographics."[428] For instance, in

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[420] Tary Tobin, George Sugai, and Geoff Colvin, "Patterns in middle school discipline records," *supra* note 419 at 85.
[421] Skiba, *Zero Tolerance: The Assumptions and the Facts*, *supra* note 144, at 3.
[422] Tony Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, *supra* note 183, at 55.
[423] Ibid., 55.
[424] Ibid., Executive Summary.
[425] Ibid.
[426] Skiba, "The Failure of Zero Tolerance," *supra* note 2, at 27-33.
[427] Brea Perry and Edward Morris, "Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools," *American Sociological Review*, vol. 79, no. 6 (2014).
[428] James Earl Davis and Will J. Jordan, "The Effects of School Context, Structure, and Experiences on African American Males in Middle and High School," *Journal of Negro Education*, vol. 63, no. 4 (1994), 570-87; Office of the State Superintendent of Education (OSSE), *Reducing Out-of-School Suspensions and Expulsions in District of Columbia Public and Public Charter Schools*, 2013,

a 2014 longitudinal study tracking approximately 17,000 students over three years, researchers found that high rates of school suspensions harmed math and reading scores for non-suspended students.[429] Isolating the scores of non-suspended students, the researchers found an inverse relationship between suspension rates and test scores, meaning higher numbers of suspensions resulted in lower reading and math scores on end-of-semester evaluations. These findings suggest that high levels of suspensions "can have a very negative effect on those so-called 'good apples,' or rule-abiding students."[430] The researchers found that in schools with low or average rates of suspensions, exclusionary discipline did not appear to have an effect on non-suspended students' test scores, but the negative results appeared when schools were above average in their use of suspensions.[431] University of Kentucky Professor Edward Morris posited this inverse relationship may be due to non-suspended students experiencing higher levels of anxiety and feeling disconnected from their peers who are suspended frequently, often for minor issues such as dress code violations or insubordination.[432] These findings were consistent, even after controlling for the level of violence at the school, school funding, and student-teacher ratios. Morris stated, "When you are in a very punitive environment, you're getting the message that the school is focusing on crime control and behavior control. Schools should really be about relationships."[433]

Cristina Benz, a veteran teacher, testified at the Commission's briefing that in her previous school:

> if students were not in class on time the doors were locked, [] they were swept up by hall monitors who brought them into the in-school suspension room. I always thought this was wrong. What if a student was sick in the bathroom, or taking a little brother or sister to school and came late? How is it helpful for student learning to keep them out of class? I'm not condoning disregard for rules, but I want my students in class and learning directly from me rather than suspended and falling farther and farther behind. Furthermore, this type of discipline sends the message that they aren't welcome in the classroom. And it can confer a stigma that reinforces pre-existing stereotypes.[434]

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https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/OSSE_REPORT_DISCIPLINARY_G_PAGES.pdf; Russell Skiba and M. Karega Rausch, "School Disciplinary Systems: Alternatives to Suspension and Expulsion," in G.G. Bear and K. M. Minke (eds), *Children's Needs III: Development, prevention, and intervention*, (pp. 87-102), National Association of School Psychologists.

[429] Jane Meredith Adams, "Study: Suspensions harm 'well-behaved' kids," *EdSource*, Jan. 8, 2015, https://edsource.org/2015/study-suspensions-harm-well-behaved-kids/72501.

[430] Ibid.

[431] Brea Perry and Edward Morris, "Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools," *supra* note 427.

[432] Ibid.

[433] Adams, "Study: Suspensions harm 'well-behaved' kids," *supra* note 429.

[434] Cristina Benz, Educators for Excellence, *Briefing Transcript*, p. 160.

Further, Kristen Harper, senior policy specialist for Child Trends and former advisor at the Education Department, Office for Special Education and Rehabilitative Services, cautions against framing the debate on school discipline to be between "disruptive" students versus "non-disruptive" students.[435]

> On any given day, a child could walk into a classroom on Monday, after having suffered some form of trauma out of, you know, in their home or out in their community…any number of things could happen, which means that on any given day, coming into school, a child may have a behavioral incident that is due to trauma or due to the circumstances that life may throw at them. What we are asking here is that schools do not simply throw away, exclude children that come to school with those difficulties but are prepared to handle children that are coming to school with the highs and lows of emotion, the trials and tribulations of approaching adolescence. And I think we do ourselves a disservice and really sort of steer the conversation in the wrong direction when we try to say, [] what is the impact of the disruptive students on the non-disruptive students? Instead, our conversation really should focus on how we support educators and support schools in utilizing evidence-based practices that help schools to identify quickly when a child is having an emotional breakdown or having an emotional issue and seek to address it.[436]

Some of these disparities could be the result of school officials perceiving black children as more "adult" compared to their white peers. Contemporary research suggests that black children are perceived by society as older, less innocent, and therefore more responsible for their actions than their same-age white peers.[437] Also, these implicit biases may lead to actual racial disparities and increased violence when dealing with authorities (e.g., teachers, school administrators, school resource officers, law enforcement).[438]

Moreover, research suggests that gender may also have a compounding effect when it comes to disparities in school discipline rates. A Georgetown Law Center on Poverty and Inequality study found that black girls are consistently viewed by society as "less innocent" and more "adult-like" than their similarly aged white female peers.[439] This perception can then contribute to "more

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[435] Kristen Harper, senior policy specialist for Child Trends and former advisor at the Education Dep't, Office for Special Education and Rehabilitative Services, testimony, *Briefing Transcript*, p. 55.
[436] Ibid., 55-56.
[437] Phillip Atiba Goff, Matthew Jackson, Brook Lewis, Di Leone, Carmen Culotta, and Natalie DiTomasso, "The Essence of Innocence: Consequences of Dehumanizing Black Children," *Journal of Personality and Social Psychology*, vol. 106, no. 4 (2014), at 539-540.
[438] Ibid.
[439] Rebecca Epstein, Jamilia Blake, and Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Center on Poverty and Inequality, Georgetown Law, 2012, at 1

punitive exercise of discretion by those in positions of authority, greater use of force, and harsher penalties."[440]

At the Commission's briefing, Monique Morris, Co-Founder and President of the National Black Women's Justice Institute, testified to differential treatment of black girls in schools. She stated that:

> [B]ehaviors, particularly of black girls, are misinterpreted as defiant and violent and disruptive, and sometimes those are just expressions of their critical thinking. But based upon some of the ways in which we have portrayed black femininity in our society, the way those words come out or the very act of dissent is perceived as an act of defiance.[441]

Rebecca Cokley, Senior Fellow for Disability Policy at the Center for American Progress and former Executive Director of the National Council on Disability testified that research shows that:

> [E]ducators believe that black girls are more independent, need less comfort, need less support than their white peers. Because of this, we need comprehensive bias training across the schools, across youth-serving professionals, starting with the daycare all the way up to the adult education classes.[442]

Skiba, et al. posited that out-of-school suspension rates are not driven by student behavior, rather, these rates may reflect the school environment, demographics, and administration.[443] The researchers found that black students were significantly more likely to receive an out-of-school suspension versus an in-school suspension regardless of the type of infraction or poverty status. They found that a school's percentage of black student enrollment is consistently a strong predictor of school suspensions. The data showed that if a school has a higher percentage of black students compared to white students, the school is more likely to have more suspensions:

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https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf.

[440] Ibid.

[441] Monique Morris, co-founder and president of the National Black Women's Justice Institute, testimony, *Briefing Transcript*, p. 134.

[442] Rebecca Cokley, Senior Fellow for Disability Policy at the Center for American Progress and former Executive Director of the National Council on Disability, testimony, *Briefing Transcript*, p. 44.

[443] Russell Skiba, et al., *Where Should We Intervene? Contributions to Behavior, Student, and School Characteristics to Suspension and Expulsion*, *supra* note 4; *see also* U.S. Commission on Civil Rights, *School Discipline and Disparate Impact*, *supra* note 6, at 74.

> It is somewhat striking that attending a school with more Black students increases one's risk of out-of-school suspension nearly as much as possessing or using drugs or weapons. It is even more startling to realize that this relationship holds *even after* controlling for student demographics or behavior. In rich and poor schools alike, regardless of the severity of one's behavior, one's gender, or one's school achievement level, simply attending a school with more Black students greatly increases one's risk for receiving an out-of-school suspension.[444]

In a statewide study of Indiana schools, Rausch and Skiba found that a principal's attitude toward students' misbehavior and discipline affected suspension rates.[445] They found that principals who believed that repeated and frequent punishments improved student behavior (e.g., zero tolerance) and blamed behavioral issues on poor parenting and poverty tended to suspend more students. Comparatively, principals who favored preventive alternatives and viewed suspension as a punishment to be used sparingly, but also believed in the importance of enforcing school rules and policies were found to suspend fewer students.[446] In a more recent study of data from a Midwestern state, Skiba and colleagues found that after controlling for race and socioeconomic status among other significant factors, principals' attitudes towards the use of harsh disciplinary actions was the strongest predictor of both suspension rates overall, as well as the racial disparities in those rates.[447]

Other school-level factors have also been found to greatly impact disparate discipline rates, such as teacher experience, school policies and rules, and school leadership.[448] Researchers have found that the same student may behave very differently in different classrooms depending on the teacher. A teacher's skill in classroom management and providing engaging instruction has been found to be a correlating factor when looking at rates of classroom disruption.[449] Data suggest that as teacher-student engagement increases, misbehavior and suspensions tend to decrease.[450] Studies

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[444] Ibid., 16 (emphasis in original).
[445] M. Karega Rausch and Russell Skiba, "The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement," Center for Evaluation and Education Policy, Indiana University, 2005.
[446] Ibid.
[447] Skiba, et al., *Where Should We Intervene? Contributions to Behavior, Student, and School Characteristics to Suspension and Expulsion*, *supra* note 4.
[448] *See, e.g.,* David Osher, George G. Bear, Jeffrey R. Sprague, and Walter Doyle, "How can we improve school discipline?" *Educational Researcher*, vol. 39, no. 1, 2010, 48-58; Regina Oliver, Joseph Wehby, and Daniel Reschly, *Teacher classroom management practices: effects on disruptive or aggressive student behavior*, Campbell Systematic Reviews, 2011, https://campbellcollaboration.org/media/k2/attachments/Oliver_Classroom_Management_Review.pdf; Tim Walker, "Does Teaching Experience Matter? Let's Count the Ways," National Education Association, June 6, 2016, http://neatoday.org/2016/06/06/does-teaching-experience-matter/; Rausch and Skiba, "The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement," *supra* note 15.
[449] Osher, et al., "How can we improve school discipline?" *supra* note 448 at 48-58; Oliver, et al., "Teacher classroom management practices: effects on disruptive or aggressive student behavior," *supra* note 448.
[450] Osher, et al., "How can we improve school discipline?" *supra* note 448 at 48-58.

reflect that teachers having less classroom management and instructional skills contributes to higher risks of students—as a whole—being suspended from school.[451] A study conducted by the National Research Council concluded that "the school experience itself contributes to racial disproportion in academic outcomes and behavioral problems that lead to placement in special and gifted education…" at least in part because "schools with higher concentrations of low-income, minority children are less likely to have experienced, well-trained teachers."[452] Losen and colleagues found that the risk of suspension increased for students in all K–12 grade levels when they were taught by less-experienced and novice (i.e., new) teachers. The researchers found that after controlling for a variety of other factors (e.g., percentage of enrollment, risk of disability identification) there was a weak, yet statistically significant increase in suspension rates for all students.[453]

These findings show that structural factors are more significant in determining the overrepresentation and disproportion of students of color in out-of-school suspension rates than any behavioral or individual student characteristic.[454] Thus, the data suggest that closing racial disparities in discipline rates would require structural changes such as focusing on responding to behavioral infractions in more productive ways for all students.

Restraint and Seclusion

Data reveal that generally, students of color with disabilities are disproportionately impacted by seclusion and involuntary confinement practices, and black students with disabilities experience the most severe disparities. Nationally, over the 2011–12 school year, 75 percent of students who were subjected to physical restraint were students with disabilities served by IDEA; and 25 states had higher percentages of restraint use than the national average.[455] And specifically black students with disabilities are subjected to mechanical restraints at much higher rates than their peers: they represent 19 percent of students with disabilities served by IDEA, but 36 percent of those students who were restrained.[456] In 2015–16, students with disabilities (as a whole) served

[451] Gale Morrison, Suzanne Anthony, Meri Storino, Joanna Cheng, Michael Furlong, Richard Morrison, "School expulsion as a process and an event: before and after effects on children at risk for school discipline," *New Directions for Youth Development*, vol. 92 (2002), 45-71.
[452] National Research Council, *Minority Students in Special and Gifted Education* (Washington, DC: The National Academies Press, 2002).
[453] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194.
[454] Ibid., 14.
[455] U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline*, *supra* note 7.
[456] Ibid.

by IDEA represent 12 percent of all students, but 71 percent and 66 percent of students subject to restraint or seclusion, respectively.[457]

Data show that students with disabilities (as a whole) are also more likely than their peers to be restrained or secluded in schools, especially if officers and school administrators are not trained in how to properly and safely deal with a disruptive student.[458] The Department of Education generally categorizes restraint into either *physical restraint* or *mechanical restraint* when it comes to the disciplining of students.[459] Mechanical restraint typically refers to

> the use of any device or equipment to restrict a student's freedom of movement. The term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.[460]

For instance, if a school resource officer or a law enforcement officer handcuffed a student in order to obtain compliance, but not for the sole purpose of arrest, this case would fall under OCR's definition that the student was "subjected to mechanical restraint."[461]
Physical restraint is defined as a "personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely." [462] This definition does not include physical escort, which refers to the "temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe

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[457] U.S. Dep't of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection, School Climate and Safety*, *supra* note 1.
[458] For instance, in the 2015-16 school year, "most students restrained or secluded were students with disabilities (IDEA), who comprised of 12 percent of all students enrolled." *See* U.S. Dep't of Education, *2015-16 Civil Rights Data Collection, School Climate and Safety*, *supra* note 1, at 12. In 2016, OCR also released a Dear Colleague guidance informing school districts "how the use of restraint and seclusion may result in discrimination against students with disabilities, thereby violating Section 504 [] and Title II [] of the" ADA. U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities," Dec. 28, 2016, at 1-2, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf. However, it is important to note that data on school discipline practices should be interrupted with caution, because data can represent a disparity that is not necessarily a result of discriminatory practices.
[459] U.S. Dep't of Education, *Restraint and Seclusion: Resource Document*, 2012, 10, https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.
[460] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities," *supra* note 458 at 6. For instance, if devices are used for adaptive devices or mechanical supports that are used to aid in a student's body position, balance or alignment that increases greater freedoms, vehicle safety restraints, orthopedic prescribed devices, and restraints for medical immobilization. *Ibid.*
[461] *See* OCR, *2015-16 CRDC School Form*, Section X, https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16-all-schools-form.pdf.
[462] *See* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities," *supra* note 458, at 6.

location."[463] In three states, students with disabilities served by IDEA represented fewer than 15 percent of enrolled students, but more than 90 percent of those subjected to physical restraint.[464] Reports have shown that students with behavioral disorders have been subjected to a variety of mechanical and physical restraints, such as tape, straps, tie downs, ropes, weights, and weighted blankets by school administrators and educators in an attempt to control students' behavior.[465]

Seclusion is also another strategy that school officials and educators may use to control a student's behavior. OCR defines seclusion as the "involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving."[466] This definition does not include using a "timeout," which is a behavioral management technique that is part of an approved program.[467]

CRDC data show that more than 100,000 students were placed in seclusion or involuntary confinement or were physically restrained at school to immobilize them or reduce their ability to move freely—including almost 69,000 students with disabilities served by IDEA.[468] CRDC data also indicate that students with disabilities are subjected to both mechanical and physical restraints and seclusion at higher rates than other students. Despite only representing 12 percent of all students, students with disabilities accounted for 67 percent of students who were either restrained or secluded in the 2013–14 academic year. [469]

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[463] Ibid..
[464] Nevada (96 percent), Florida (95 percent), and Wyoming (93 percent) reported the highest percentages of physically restraining students with disabilities by IDEA. U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection*, Data Snapshot: School Discipline, *supra* note 7 at 11.
[465] *See* Council for Children with Behavioral Disorders, Council for Exceptional Children, "The Use of Physical Restraint Procedures in School," July 2, 2009, http://casecec.org/pdf/seclusion/Accepted,%20CCBD%20on%20Use%20of%20Restraint,%207-8-09.pdf.
[466] Ibid.; *see also*, OCR, *2015-16 CRDC School Form*, Section X, https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16-all-schools-form.pdf.
[467] Ibid.
[468] Ibid.
[469] U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection Report: A First Look*, *supra* note 21.

Civil Rights Impacts

The use of restraints or seclusion to control a student's behavior may have a discriminatory effect on students of color with disabilities that is in violation of Title VI of the Civil Rights Act.[470] As discussed above, Title VI regulations prohibit schools from using "criteria or methods of administration" that have an illegal racially discriminatory effect.[471] Such methods may include policies, practices, or procedures that are neutral in language and applied evenly across all student populations, but nonetheless have the effect of discriminating against students of color on the basis of their race or national origin.[472] If the school cannot show that the policy or practice is "necessary to advance a legitimate, nondiscriminatory educational goal, then OCR would find a Title VI violation."[473] In discussing disparate impact cases, the Supreme Court has summarized that:

> [B]efore rejecting a business justification—or . . . a governmental entity['s] analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs."[474]

Considering the available alternative disciplinary approaches discussed in the following section, strict school discipline methods with discriminatory impacts may not be necessary to address all incidents of student misbehavior.

Alternative Disciplinary Approaches

While data on system-wide reform efforts are still emerging, several schools and districts around the nation have been implementing reforms to their discipline policies in the hope of making schools safer and more equitable for all students. Some of these alternative practices include using Positive Behavior Intervention and Support (PBIS), which is a set of strategies and techniques that work to create a standard of behavioral expectations for all students and these desired behaviors

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[470] *See* Introduction: Relevant Civil Rights Law at *supra* notes 56-76.
[471] 34 C.F.R. § 100.3(b)(2).
[472] *See* Introduction: Relevant Civil Rights Law at *supra* notes 56-76; U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 7-8; *see also* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities," *supra* note 458.
[473] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 9. *See. e.g.*, *Elston*, 997 F.2d at 1412 (discussing the school district's obligation to show that a policy challenged as discriminatory under Title VI is "demonstrably necessary to meeting an important educational goal."); *Larry P.*, 793 F.2d at 982 (concluding that once a plaintiff has proven disproportionate impact under Title VI, the defendant must "demonstrate that the requirement which caused the disproportionate impact was required by educational necessity.").
[474] *Texas Dept. of Housing v. Inclusive Communities*, 135 U.S. at 2518 (citations omitted).

are explicitly taught and continuously encouraged by teachers and school administrators.[475] Some research has shown PBIS to have positive effects on the school environment and student behaviors. For instance, in Tallapoosa Primary in Georgia, teachers and administrators have successfully implemented PBIS to address school infractions. Teachers at Tallapoosa Primary stated that while PBIS does take considerable work and buy-in from school staff and teachers, they have successfully implemented a system where they can immediately provide students with feedback about expected behavior, and negative behavior is addressed with "a positive statement or correction (re-teaching of expectation)" instead of utilizing punitive methods.[476] As a part of this process, they developed specific guides for teachers and school staff to help manage the behavior of students throughout the school and found that these steps have made their school a more positive and productive learning environment.[477]

Since 1997, IDEA has explicitly required schools to consider PBIS methods when considering disciplinary actions for both special and regular educational settings.[478] Federal legislation urges educators to consider "positive behavioral interventions, strategies, and supports" and "positive academic and social learning opportunities" to contend with student behavior when it "impedes his or her learning or that of others."[479]

Some initial evaluation data found that implementing approaches like school-wide positive behavioral supports was associated with a reduction in the number of instances where "intensive interventions" (e.g., seclusion and/or restraint) were used or perceived as necessary.[480] The National Autism Center found that approaches like PBIS produced beneficial behavioral outcomes

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[475] Jenni Owen, Jane Wettach, and Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family Policy and Duke Law School, 2015, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

[476] Walker, et al., "Real Life Account of PBIS at the Primary/Elementary Level," *supra* note 16.

[477] Ibid.

[478] U.S. Dep't of Education, Office of Special Education Programs and the Office of Elementary and Secondary Education, "PBIS and the Law," Positive Behavioral Interventions & Supports, https://www.pbis.org/school/pbis-and-the-law (citing 20 U.S.C. § 1401(c)(5)(F): "almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral inventions and supports, and early intervening services. . ."), https://www.pbis.org/school/pbis-and-the-law. *See also* 20 U.S.C. § 1414(d)(3)(B)(i) (specifically requiring IEP Teams to "consider the use of positive behavioral interventions and supports, and other strategies, to address [the] behavior" of any child with a disability whose "behavior impedes the child's learning or that of others."). This requirement applies to all IEP Teams, regardless of the child's specific disability, and to the development, review, and revision of IEPs. *See* 34 CFR § 300.324(a)(2) and (b)(2).

[479] *See* Safe & Civil Schools, "PBIS—What You Need to Know," (citing Individuals with Disabilities Education Act of 1997, Pub. L. 94-142, §§ 614, 672), 2018, https://www.safeandcivilschools.com/research/papers/pbs-pbis.php; Report of the Committee on Education and the Workforce, *Individuals with Disabilities Education Act of 1997*, H.R. REPORT NO. 105-95, at 34 (1997), https://www.congress.gov/105/crpt/hrpt95/CRPT-105hrpt95.pdf.

[480] Horner Sugai, *Effective Implementation of School-wide Positive Behavior Supports: Reducing the Need for Seclusion and Restraint*, *supra* note 16; *see also* Joseph Durlak et al., "The impact of enhancing students' social and emotional learning: A meta-analysis of school-based universal interventions," *supra* note 16 at 405-32.

and were found to be effective for individuals on the autism spectrum.[481] Skiba and colleagues also found that positive behavior supports and social-emotional learning strategies show promise and have resulted in positive behavioral outcomes for teachers and students.[482] Other studies have shown that schools which utilize PBIS have increased their safety ratings and reading test scores, and decreased their number of discipline referrals and reduced student aggression.[483] Moreover, in a statewide survey of California school districts, PBIS was found to be the most popular behavioral management system among school administrators and teachers and had been adopted by almost 40 percent of the public school districts in the survey.[484] And the popularity of PBIS has expanded: as of June 2018, it has been implemented in over 25,000 schools nationwide.[485]

Another promising alternative to exclusionary discipline is the practice of restorative justice, which has been implemented by schools, districts, and communities in over 27 states.[486] Restorative justice is considered an alternative method to discipline that focuses on repairing harm between the victim and the accused. These practices focus on the victim and the accused working together to come to a solution, rather than administrators simply punishing the student. As a practice, it also shifts the focus of discipline from punishment to learning, and from the individual to the community. Proponents of restorative justice state that it seeks to fix the problem, impose fair punishment, foster understanding, and adjust student behavior.[487] Restorative justice practitioners argue that this practice is meant to shift the culture from discipline to accountability and problem-solving.[488] For instance, when researchers inquired about implementation of restorative justice in

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[481] National Autism Center, *National Standards Report*, 2009.
[482] Russell Skiba, Lauren Shure, Laura Middelberg, Timberly Baker, "Reforming School Discipline and Reducing Disproportionality in Suspension and Expulsion," in *Handbook of school violence and school safety* (New York: Routledge, 2012), 516-29.
[483] Catherine Bradshaw, Tracy Waasdorp, and Philip Leaf, "Effects of School-Wide Positive Behavioral Interventions and Supports on Child Behavior Problems," *Pediatrics*, vol. 130, no. 5 (2012), 1136-45; Catherine Bradshaw, Mary Mitchell, and Philip Leaf, "Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools," *Journal of Positive Behavior Interventions*, 2010, vol. 12, no. 3, 133-48.
[484] *See* Louis Freedburg and Lisa Chavez, *Understanding School Discipline in California: Perceptions and Practice*, EdSource, 2012, at 18, https://edsource.org/wp-content/publications/edsource_discipline_survey_09-10_v6.pdf.
[485] Elizabeth Pufall Jones, Max Margolius, Miriam Rollock, Catalina Tang Yan, Marissa Cole, and Jonathan Zaff, *Disciplined and Disconnected*, Center for Promise, 2018, at 15; *see also*, Positive Behavioral Preventions & Support, https://www.pbis.org/.
[486] *See* Thalia Gonzalez, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 HOW. L.J. 101 (2016); Anne Gregory, Kathleen Clawson, Alycia Davis, and Jennifer Gerewitz, "The Promise of Restorative Practices to Transform Teacher-Student Relationship and Achieve Equity in School Discipline," *Journal of Educational and Psychological Consultation*, 2016, vol. 26, no. 4, http://www.antoniocasella.eu/restorative/Gregory_RJ_2015.pdf; Greta Colombi and David Osher, *Advancing School Discipline Reform*, National Association of State Boards of Education, 2015, https://www.air.org/sites/default/files/downloads/report/Advancing-School-Discipline-Reform-Sept-2015.pdf.
[487] *See* Education Week Teacher, "Response: How to Practice Restorative Justice in Schools," Feb. 6, 2016, http://blogs.edweek.org/teachers/classroom_qa_with_larry_ferlazzo/2016/02/response_how_to_practice_restorative_justice_in_schools.html.
[488] Anne Gregory, Russi Soffer, Easton Gaines, Aria Hurley, Neela Karikehalli, *Implementing Restorative Justice in Schools: Lessons Learned from Restorative Justice Practitioners in Four Brooklyn Schools*, Rutgers University,

an interview, a teacher stated that "restorative justice is figuring out what's going on elsewhere that's causing (students) to behave this way, instead of just disciplining them and thinking that it's going to solve the problem."[489]

As alternative discipline methods continue to spread, many school districts and entire states are witnessing a decrease in student suspension rates. For example, California school districts witnessed a 46 percent decrease in suspensions from the 2011–12 to the 2016–17 school year.[490] Another example comes from the Dekalb County School District in Georgia, which reported a 47 percent decrease in the districts' disciplinary rates from utilizing restorative justice methods.[491] The district's deputy superintendent for student support and intervention, Vasanne Tinsley, stated that these practices are effective because they focus on what may be causing the disruptive behavior versus instantly jumping to a punitive response. Tinsley explained how restorative methods work in practice:

> Some of the disciplinary infractions are because of students having frustration because of maybe home situations, academic difficulties, and things of that sort. So, the conversation allows the student to actually express what's going on so that we can provide support for them as needed.[492]

Ten schools in this district have piloted these restorative practices programs, and some of these schools also have implemented PBIS methods to further aid in addressing students' behavior. And statewide, more than 1,200 schools in Georgia have adopted PBIS.[493]

Baltimore City public schools have also started implementing restorative practices[494] and cultivating programs that focus on the social-emotional learning of students. Sarah Warren,

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2016, http://www.brooklyncommunityfoundation.org/sites/default/files/lessons_learned_about_early_implementation_of_restorative_justice_in_schools_for_distribution.pdf.

[489] Ibid., 5.

[490] Tom Torlakson, "State Schools Chief Tom Torlakson Announces Fifth Year in a Row of Declining Student Suspensions and Expulsions," California Dep't of Education, Nov. 1, 2017, https://www.cde.ca.gov/nr/ne/yr17/yr17rel80.asp.

[491] Martha Dalton, "DeKalb Sees Drop in Discipline Incidents After Adopting 'Restorative Practices,' *WABE*, May 1, 2018, https://www.wabe.org/dekalb-sees-drop-discipline-incidents-adopting-restorative-practices/. Note: Dekalb County School District is Georgia's third largest school system. The District enrolls nearly 102,000 students which are racially and ethnically diverse. Black students represent 63.9 percent, Latinx students represent 16.7 percent, White students represent 11 percent, Asian/Pacific Islander students represent 6.4 percent, and "Other" students represent 2 percent of the total enrolled student population. *See* Dekalb County School District, 2018, http://www.dekalbschoolsga.org/about/.

[492] Ibid.

[493] Ibid.

[494] Broadly defined, restorative practices encompass several different strategies (e.g., restorative justice) that aid in developing positive teacher-student relationships and build a "sense of community to prevent and address conflict and wrongdoing" in schools. *See, e.g.*, Advancement Project, American Federation of Teachers, National Education Association, National Opportunity to Learn Campaign, "Restorative Practices: Fostering Healthy Relationships &

Executive Director for Whole Child Services and Support in the Baltimore Public School System testified to the Maryland State Advisory Committee to the U.S. Commission on Civil Rights that the district is actively working with school officials to not only shift the mindset of administrators away from solely relying on exclusionary discipline practices, but also shift the school culture as well.[495] Warren stated that Baltimore City public schools have implemented a three-year strategic plan to focus on

> cultivating social and emotional learning among students and cultivating [the] capacity to do restorative practices throughout the district. [This means] there's a heavy focus on relationship building, on building social and emotional competencies and on building community. There's essentially [] a shift from thinking about behavior management to thinking about building competency among students to regulating their own behavior as well as building social-emotional competencies among adults which is key to this work.[496]

Another example of the potential advantages of restorative practices was seen in a North Philadelphia middle school that was known for years as "Jones Jail."[497] The school was known for its unruly students and violent behavior, and police officers were stationed outside of the school during daily dismissal. However, when the school transitioned to become a charter school and also began using restorative justice practices, the number of violent incidents dropped by 90 percent in a single year.[498] The CEO of the newly named Memphis Street Academy states that it was the school's dedication to restorative practices that have brought such a drastic change. Not only did they reform the school's disciplinary procedures by implementing non-exclusionary restorative practices, but the school also removed all of the metal detectors and window gratings and got rid of the security guards.[499]

Promoting Positive Discipline in Schools: A Guide for Educators," Schott Foundation for Public Education, March 2014, 2, http://schottfoundation.org/sites/default/files/restorative-practices-guide.pdf.

[495] Sarah Warren, Executive Director for Whole Child Services and Support in the Baltimore Public School System, Maryland State Advisory Committee to the U.S. Commission on Civil Rights, testimony, *Briefing Transcript*, p. 52.

[496] Ibid., 42-43.

[497] Jeff Deeney, "How to Discipline Students Without Turning School Into a Prison," *The Atlantic*, Jan. 9, 2014, https://www.theatlantic.com/education/archive/2014/01/how-to-discipline-students-without-turning-school-into-a-prison/282944/.

[498] Ibid.

[499] Ibid. Note: The Memphis Street Academy has an enrollment cap of 880 students. Of these, Latinx students represent 56 percent, Black students represent 30 percent, Multiracial students represent 7 percent, White students represent 6 percent, Asian/Pacific Islander students represent 2 percent, and students with disabilities represent 21 percent of the total enrolled student population. *See* Charter Schools Office: The School District of Philadelphia, (last updated Sept. 26, 2018), https://www.philasd.org/charterschools/directory/memphis-street-academy-charter-school-at-j.p.-jones/.

Professor Shaun Harper, executive director of the University of Southern California's Race and Equity Center, argues that:

> Environment matters. . . If a school promotes academic rigor and going to college, that shapes student behavior. If a school's environment feels unsafe and looks like a prison, then that does, also.[500]

A school climate survey seemed to confirm that the school environment had indeed changed. The survey documented that when the Memphis Street Academy polled their students just a year after implementing restorative justice principles, they found that 73 percent of students said they now felt safe at school, 100 percent said they felt that there was an adult at school who cares about them, and 95 percent said they hope to graduate from college one day. And when asked, one fifth grader said: "[t]here are no more fights. There are no more police. That's better for the community."[501]

As with PBIS, restorative justice is most effective when all relevant stakeholders (e.g., students, teachers, administrators, and school staff) are invested in success and reforming the culture of a school. One practitioner stated that:

> [A] key part to starting restorative justice in the school is making sure that it's not just me or a lone person trying to push this initiative but it's a collective of people who see it and understand it and believe in it and want to get the word out and make it something that is really tangible within the school culture.[502]

Minnesota teacher and a member of Educators for Excellence, Stephen Shephard Jr., testified at the Commission's briefing that teachers have begun to implement strategies like Positive Behavior Intervention and Support, restorative practice, and trauma-training in their schools, and these practices have helped to support both teachers and students in the district.[503]

According to a 2018 national survey released by the teacher-led Educators for Excellence, approximately 31 percent of teachers reported fearing for their own physical safety at least

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[500] Jeff Deeney, "A Philadelphia School's Big Bet on Nonviolence," *The Atlantic*, July 13, 2013, https://www.theatlantic.com/national/archive/2013/07/a-philadelphia-schools-big-bet-on-nonviolence/277893/.
[501] Deeney, "How to Discipline Students Without Turning School Into a Prison," *supra* note 497. Note: While the school administrators at the Memphis Street Academy have chosen to utilize the practice of restorative justice as an alternative to exclusionary discipline, this does not mean that all charter schools utilize alternative discipline practices.
[502] Gregory, et al., *Implementing Restorative Justice in Schools: Lessons Learned from Restorative Justice Practitioners in Four Brooklyn Schools*, *supra* note 488, at 9.
[503] Stephen Shephard Jr., *Briefing Transcript*, p. 203.

sometimes or often at their school.[504] The survey also found that a larger percentage of teachers reported rarely feeling afraid at school (43 percent) compared to teachers who reported often feeling afraid at school (7 percent).[505] However, teachers also stated that they want more training on how best to address school violence and improve student behavior using non-punitive strategies:

> To manage discipline and make schools safer, teachers believe positive behavioral reinforcement (74 percent) and restorative practices (64 percent) are most effective, greatly preferring them to punitive and exclusionary measures, such as out-of-school suspensions (39 percent) and expulsions (39 percent).[506]

Some critics of reforming discipline policies and limiting the use of exclusionary discipline argue that methods such as PBIS and restorative justice may have an adverse effect on the school environment. For instance, Max Eden, senior fellow at the Manhattan Institute, contends that his analysis of student surveys from several large school districts suggests that students have a very low sense of safety while at school. He testified that truancy in cities like Los Angeles, Oakland, and Philadelphia has risen by 16 percent because students are afraid to come to school. He believes that this is because violent students are no longer getting suspended, due to the Education Department's guidance instructing schools to re-evaluate their usage of exclusionary discipline.[507] Furthermore, Eden stated that he was not aware of any district that had administered consistent school climate surveys and implemented the Education Department's reforms that had not experienced "a deterioration in student safety or respect."[508]

However, federal data contradicts Eden's claims. According to CRDC data for the 2015–16 school year, students are still being suspended for disciplinary violations: in Los Angeles, CA, 3,818 students;[509] in Oakland, CA, 1,987 students;[510] and in Philadelphia, PA, 15,036 students[511] received at least one or more out-of-school suspensions. Moreover, as discussed previously, school

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[504] Press Release: Educators for Excellence, "Educators for Excellence Releases Nationwide Survey of Teachers on Education Issues," Aug. 1, 2018, https://e4e.org/blog-news/press-release/educators-excellence-releases-nationwide-survey-teachers-education-issues-5.
[505] Educators for Excellence, *Voices from the Classroom: A Survey of America's Educators*, 2018, 27, https://e4e.org/sites/default/files/2018_voices_from_the_classroom_teacher_survey.pdf.
[506] Press Release: Educators for Excellence, "Educators for Excellence Releases Nationwide Survey of Teachers on Education Issues," Aug. 1, 2018, https://e4e.org/blog-news/press-release/educators-excellence-releases-nationwide-survey-teachers-education-issues-5.
[507] Max Eden, senior fellow at the Manhattan Institute, testimony, *Briefing Transcript*, p. 89.
[508] Ibid. at 90. However, there are student and school climate surveys that invalidate Eden's claim. *See supra* notes 171-174; 360.
[509] U.S. Dep't of Education, "Civil Rights Data Collection, Discipline Report," https://ocrdata.ed.gov/Page?t=d&eid=30388&syk=8&pid=2001&Report=6 (last accessed Nov. 5, 2018).
[510] Ibid.
[511] Ibid.

climate surveys[512] have shown that discipline reform procedures have resulted in a positive effect for teachers and students.[513] Lastly, Eden's conclusions are based on a limited sample. He testified at the Commission's briefing that he had not researched or examined school climate survey responses that had been collected as a standard component of any OCR agreement with school districts that examine perceptions on school safety.[514]

Research also shows that overall school climate can also improve with implementing positive discipline reforms. For instance, the Amherst County, Virginia public schools entered into a resolution agreement with the Education Department in 2015,[515] and in their 2016 school climate survey, they found that 30 of the 35 items measuring student perception reflected increases in students' feeling of safety since the previous year.[516] Pamela McFaden, an expert in non-discriminatory discipline practices who is working with the school district, stated that items such as "I feel safe at school" increased by 6 percent, "my school is a friendly place" increased by 5 percent, and bullying decreased by 7 percent.[517] McFaden stated that the word "respect" was used frequently in the survey, which was practically non-existent in the previous year's survey. However, the survey did show different perceptions based on the race of the students. Overall, white students felt that the school was a friendlier place than the black students; students who identified as two or more races and other underrepresented groups' responses fell in between the black and white students' responses.[518]

While PBIS and restorative justice have had some positive effects on the behaviors of students with disabilities, Monique Morris testified at the Commission's briefing that these strategies alone are not enough, because teachers and school officials need to be more responsive to the trauma that students bring with them. Morris argued that schools need to develop strategies to address

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[512] The Education Dep't has developed model—and widely available—school climate surveys that schools can administer at no cost to aid in more effective school policies and practices. Schools nationwide have "access to survey instruments and a survey platform that allows for the collection and reporting of school climate data across stakeholders at the local level. The surveys can be used to produce school-, district-, and state-level scores on various indicators of school climate from the perspectives of students, teachers, non-instructional school staff, principals, and parents/guardians." *See* National Center for Education Statistics, https://nces.ed.gov/surveys/edscls/index.asp.

[513] *See, e.g.,* Steinberg, et al., "What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago," *supra* note 171, at 118-131; Ryan, "Wicomico schools superintendent reflects on DOJ settlement one year later," *supra* note 359.

[514] Eden testimony, *Briefing Transcript*, p. 90.

[515] U.S. Dep't of Education, OCR Complaint No. 11-14-1224, Resolution Letter, Sept. 21, 2015, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141224-a.pdf.

[516] Nicole Steenburgh, "Report: strides gained in schools as part of OCR agreement," *Amherst, New Era-Progress*, May 3, 2017, http://www.newsadvance.com/new_era_progress/news/report-strides-gained-in-schools-as-part-of-ocr-agreement/article_441c4ab8-e508-5cf4-b037-df38f4a5d79f.html.

[517] Ibid.

[518] Ibid.

> the institutional harms that trigger feelings of distrust and lack of safety. . . Safer schools are those with a robust continuum of evidence-based and innovative practices that include restorative practices, counseling, mindfulness, yoga, training and practical tools that emphasize empathetic responses to student misbehavior.[519]

Research suggests that alternatives to exclusionary discipline may reduce the disproportionate use of harsh school discipline policies on students of color.[520] For example, some teacher training programs have shown some initial promising results. One study conducted by Anne Gregory and colleagues found that teachers who participated in the My Teacher Partner Secondary (MTP-S) program[521] were less likely to have racial disparities in their discipline referrals compared to teachers who did not participate in the program. In other words, for the teachers who went through the program, there were no significant differences in discipline referrals across racial groups.[522] Further, even after the program was completed, the results continued. The researchers state that the program is "a proactive, prevention-oriented approach to discipline, therefore, is a means to reduce racial disproportionality in exclusionary discipline."

Alternative practices such as PBIS, restorative justice, and other strategies that focus on teaching students social-emotional skills have also been found to be more beneficial than exclusionary disciplinary measures in creating schools where all students have the opportunity to learn and receive the supports they need to succeed.[523] For example, in a review of more than 200 school-

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[519] Morris testimony, *Briefing Transcript*, p. 101.

[520] *See, e.g.*, Jessica Cardichon and Linda Darling-Hammond, "Understanding the Federal Role in Protecting Student Civil Rights," Learning Policy Institute, 2018; Matthew Steinberg and Johanna Lacoe, "What do we know about school discipline reform?" *Education Next*, vol. 17, no. 1 (2017), 44-52, https://www.educationnext.org/files/ednext_xvii_1_steinberg.pdf.

[521] The My Teaching Partner (MTP) program is "an intensive, year-long program which consists of a collaborative intervention process that increases teachers' knowledge and skills related to effective teacher-student interactions through application in their actual classroom." Initially developed for preschool and early elementary school (MTP Pre-K), it has now been expanded for secondary school teachers (i.e., middle and high school teachers) (MTP-S). *See* Anne Gregory, Erik Ruzek, Christopher A. Hafen, Amori Yee Mikami, Joseph P. Allen, and Robert C. Pianta, "My Teaching Partner-Secondary: A video-based coaching model," *Theory into Practice*, vol. 56, no.1, 2017, 38-45, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571870/.

[522] Anne Gregory, Christopher A. Hafen, Erik Ruzek, Amori Yee Mikami, Joseph P. Allen, and Robert C. Pianta, "Closing the Racial Discipline Gap in Classrooms by Changing Teacher Practice," *School Psychology Review*, vol. 45, No. 2, 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5302858/.

[523] *See, e.g.*, Cardichon Darling-Hammond, "Understanding the Federal Role in Protecting Student Civil Rights," *supra* note 520 at 10; Jenni Owen, Jane Wettach, and Katie Claire Hoffman, "Instead of Suspension: Alternative Strategies for Effective School Discipline," Duke Center for Child and Family Policy and Duke Law School, 2015, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf; Walker, et al., "Real Life Account of PBIS at the Primary/Elementary Level," *supra* note 16; Catherine Bradshaw, Tracy Waasdorp, and Philip Leaf, "Effects of School-Wide Positive Behavioral Interventions and Supports on Child Behavior Problems," *Pediatrics*, vol. 130, no. 5 (2012), 1136-45; Catherine Bradshaw, Mary Mitchell, and Philip Leaf, "Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools," *Journal of Positive Behavior Interventions*, 2010, vol. 12, no. 3, 133-48.

based, social and emotional learning programs that involved over 270,000 K–12 students, researchers found that these programs have demonstrated significant positive effects on student attitudes and

> enhanced students' behavioral adjustment in the form of increased prosocial behaviors and reduced conduct and internalizing problems, and improved academic performance on achievement tests and grades.[524]

By comparison, data indicate that zero tolerance policies and the practice of exclusionary discipline in schools—in the absence of consideration and application of alternatives to exclusionary discipline—are ineffective in creating safe and healthy learning environments for students, teachers, and staff.[525] Thus, the next chapter will discuss the connection between exclusionary discipline procedures and the school to prison pipeline for students of color with disabilities.

[524] Durlak, et al., "The impact of enhancing students' social and emotional learning: A meta-analysis of school-based universal interventions." *supra* note 16.
[525] Ibid.; Robert Balfanz, Vaughn Brynes, and Joanna Fox, "Sent home and put off-track: The antecedents, disproportionalities, and consequences of being suspended in the ninth grade," *Journal of Applied Research on Children: Informing Policy for Children at Risk*, vol. 5 (2014), http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1217&context=childrenatrisk; Anti-Defamation League, *What is the School-to-Prison Pipeline?*, *supra* note 3; Steinberg, et al., "What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago," *supra* note 171.

CHAPTER 2: CONTRIBUTING FACTORS TO THE SCHOOL-TO-PRISON PIPELINE

There are many factors that may lead to a student receiving discipline from teachers, school administrators, or SROs and police officers, but as discussed above, data show that students of color with disabilities are subject to potentially discriminatory practices.[526] As the previous chapter discussed, exclusionary school discipline policies have also proven to have negative consequences for students' success and educational attainment.[527] Overuse of exclusionary discipline policies have led many education reform advocates to call for alternative practices to be explored, especially in light of national statistics, research, and student experiences that show discipline policies may not be applied equally across all student populations. It is crucial that school discipline policies balance the rights of students and teachers to be safe while in school and on campus, and the rights of students to receive fair and equal access to education consistent with the constitutionally and statutorily guaranteed rights of each student under federal civil rights law.[528] Therefore, this chapter will discuss some of the most prominent themes in the education literature to examine possible reasons for disparate discipline rates negatively impacting students of color with disabilities, as well as experimental practices that may reduce these disparities.

Inside the classroom

Examination of the topic of discipline of students of color with disabilities necessarily includes evaluating what is occurring in classrooms between teachers and students that may lead to disciplinary actions and procedures that can exclude students from their learning communities and result in interaction with the criminal justice system. Therefore, the question arises: what is occurring in the classroom between teachers and students that may lead to disciplinary actions and procedures that can exclude students from their learning communities and result in the interaction with the criminal justice system? Some believe that the data showing that some groups of students are suspended and expelled more often and face stricter disciplinary actions mean these students are misbehaving more often than their peers.[529] But as discussed below, the weight of the empirical

[526] *See, e.g., supra* notes 378-80, 385-98.
[527] *See, e.g., supra* notes 10, 202-204.
[528] *See Goss v. Lopez*, 419 U.S. at 580-81 (explaining the states' competing interest in providing a safe environment conducive to education while ensuring that due process protections are preserved); *Seal v. Morgan*, 229 F.3d at 574, 579-81 (discussing that a court must weigh a school's powerful interest in maintaining the safety of its campuses and preserving its ability to educate against the importance of avoiding unfair, mistaken, or irrational student exclusion from the classroom in determining what procedural and substantive process is due in school discipline). *See also* Introduction: Relevant Civil Rights Law, *supra*, at notes 40-136 (discussing civil rights law protections against discrimination for K-12 students of color and students with disabilities, under the 14th Amendment, Title VI of the Civil Rights Act, Title II of the ADA, and Section 504 of the Rehabilitation Act).
[529] John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver, and J.C. Barnes, "Prior problem behavior accounts for the racial gap in school suspensions," *Journal of Criminal Justice*, vol. 42, no.3 (2014), 257-

evidence does not show that students of color or students of color with disabilities misbehave more frequently or severely than other students.[530]

Classroom management and teacher-student interactions

The debate about discipline reform often frames the issue as a false choice: teachers are expected to choose between instituting nondiscriminatory school discipline practices and having a disruptive classroom or continue using practices that can push certain students into the school-to-prison pipeline. Some proponents of the latter argue that attempting to implement alternative disciplinary practices makes teaching more challenging for educators and that there have not been enough studies to prove that these alternatives work.

Max Eden, senior fellow at the Manhattan Institute, testified at the Commission's briefing that many teachers believe exclusionary discipline (e.g., in-school suspension and/or out-of-school suspension) works to curb disruptive student behavior. And if schools take away this ability to punitively discipline students, he argues that this move would be "quite negative."[531] Further, Eden stated that a recent study by the Center for Policy Research in Education examining public schools in Philadelphia found that:

> 70 percent of teachers said that they had received a consistent message from their school administrators that suspensions do not work, [but] 80 percent of teachers said they do. [Also,] sixty-five percent of teachers said that [suspensions] deter future misbehavior[.][532]

Conversely, Monique Morris, Co-Founder and President of the National Black Women's Justice Institute, argues that:

66; Katherine Kersten, "The school safety debate: Mollycoddle no more," *Minneapolis Star-Tribune*, March 18, 2016, http://www.startribune.com/the-school-safety-debate-mollycoddle-no-more/372619741/; Ann Coulter, "Secret Debate Tip for GOP," *Breitbart*, March 14, 2018, http://www.breitbart.com/big-government/2018/03/14/ann-coulter-secret-debate-tip-gop/.

[530] Pamela Fenning and Jennifer Rose, "Overrepresentation of African American Students in Exclusionary Discipline," *Urban Education*, vol. 42, no.6 (2007), 536-59; Sean Kelly, "A Crisis of Authority in Predominately Black Schools?" *Teachers College Record*, vol. 112, no.5 (2010), 1247-74; U.S. Dep't of Education, Office for Civil Rights, Interrogatory responses to Commission, Feb. 9, 2018; Skiba and Williams, *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior*, *supra* note 6, at 2-5; Nathan Barrett, Andrew McEachin, Jonathan Mills, Jon Valant, *What are the sources of school discipline disparities by student race and family income?* Education Research Alliance for New Orleans, 2017, 8-11, https://educationresearchalliancenola.org/files/publications/010418-Barrett-McEachin-Mills-Valant-Disparities-in-Student-Discipline-by-Race-and-Family-Income.pdf.

[531] Max Eden, Senior Fellow at the Manhattan Institute, *Briefing Transcript*, p. 135.

[532] Ibid., 136.

> Every intervention requires teacher buy-in. Every intervention requires student buy-in. So, we can't use that [teachers believing suspensions work] as the measure of understanding our success, we have to understand that [teacher buy-in] is a critical core component of intervention.[533]

In her testimony to the Commission's Maryland State Advisory Committee, Robin McNair, a school administrator and veteran teacher for over 27 years, testified to how her understanding of discipline evolved from zero tolerance punitive measures to alternative approaches to student misbehavior and how this shift changed her relationship to her students and her profession.

> What the teacher is is more important than what the teacher teaches. . . [being an educator] in the late '80s and early '90s, I became acclimated to the zero tolerance policies and practices. So when a policy was put in place to have a zero tolerance towards any type of behavior that disrupted the learning in my classroom I was ready. . . [But] in 2013–14 I found something called restorative justice practices in education which says that all people are relational and worthy of respect, dignity, and mutual concern. . . And when I took the time to take this training. . . I started taking the time to be in relation with my young students. My young developing students, these are not children that we are trying to make become adults. They are going to become adults whether we help them or not… but it was my job to educate them. In school we are taught how to be an amazing teacher… but we're not taught in our teacher preparation programs how to differentiate behavior, to look at the needs of the student to see how this student behaves and what you need to do to educate that student, not punish. . . [W]e have taken the word discipline and have equated it to punishment. And that is not what discipline is. Discipline means disciple, a disciple means to teach or be taught. And as an educator that is what we are supposed to do. So for me I had to look at myself, had to look at my bias, I had to look at the policy and practices that I was holding on to which was contributing to these young people being pushed out of my classroom. . . I come to you [] as an educator who has basically been transformed because restorative justice helps us to create just and equitable learning environments, nurture those relationships, and repair harm and transform conflict.[534]

Ultimately, teachers benefit from support and training to implement alternatives to exclusionary discipline practice, which have been found to be effective and are critically important to reforming

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[533] Monique Morris, Co-Founder and President of the National Black Women's Justice Institute, testimony, *Briefing Transcript*, p. 137.
[534] Robin McNair, Restorative Practices Coordinator, Maryland State Advisory Committee to the U.S. Commission on Civil Rights testimony, *Briefing Transcript*, pp. 115-121.

school discipline practices.[535] For instance, one of the most widely used non-punitive approaches is School-Wide Positive Behavioral Interventions and Supports (SWPBIS), which has been found to be an effective approach in reducing school violence and student misbehavior.[536] Nationally, SWPBIS has been implemented in over 13,000 schools and studies have found that this approach to student misbehavior has led to increased academic performance, better social behavior, and reductions in referrals to the principal's office for discipline problems.[537]

Dan Losen, director of the Center for Civil Rights Remedies at UCLA and an educator for ten years, also testified at the Commission's briefing about the importance of teacher training and support. He argued that effective classroom management can be achieved through alternatives to exclusionary discipline, stating:

> I have a lot of empathy for teachers who kick kids out of the classroom because I was that teacher. I was kicking kids out of my classroom right and left. I thought I had to demand respect from day one. And it was very frustrating. And I also would say my classroom bordered on chaos most days . . . My principal came back to me and said, Dan, you have a classroom management problem. And fortunately, I was in a district where they had training and support for young teachers like myself, who were really dedicated to improving our practice. And by my tenth year, I never sent a single student to the principal's office. I didn't need to because I found other ways, through training and support, to be an effective teacher without kicking kids out. So, there's a lot that schools can do. . . [e]verything from restorative practices, social and emotional learning, threat assessment . . . and so on.[538]

Eleven-year teaching veteran Cristina Benz testified at the Commission's briefing that schools need to find ways "to turn rule-breaking into a positive teaching moment" and find ways to help teachers to recognize their biases, increase relationship building skills, and adopt tools for effective

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[535] Existing data suggest promising results, from enhancing training and support for teachers, improving student performance, and decreasing disruptive behaviors and infractions. *See, e.g.*, Steenburgh, "Report: strides gained in schools as part of OCR agreement," *supra* note 516; Horner Sugai, *Effective Implementation of School-wide Positive Behavior Supports: Reducing the Need for Seclusion and Restraint*, *supra* note 16; Skiba, et al., "Reforming School Discipline and Reducing Disproportionality in Suspension and Expulsion," *supra* note 482, at 516-29; Deeney, "How to Discipline Students Without Turning School Into a Prison," *supra* note 497.

[536] Christopher Boccanfuso and Megan Kuhfeld, "Multiple Responses, Promising Results: Evidence-Based, Nonpunitive Alternatives to Zero Tolerance," Child Trends, March 2011, 8 (research brief summarizes a variety of empirical research and literature on reducing punitive measures in discipline policies), https://www.childtrends.org/wp-content/uploads/2011/03/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf.

[537] Ibid.

[538] Dan Losen, Director of the Center for Civil Rights Remedies, University of California-Los Angeles, testimony, *Briefing Transcript*, pp. 92-93.

classroom management.[539] Similarly, another veteran teacher of 13 years, Tianitha Alston testified before the Commission stating that:

> Punitive discipline creates a poisonous culture in which students become habituated to punishment even from the earliest age. This is especially true in districts with large populations of students of color and students with special needs. The culture of over-correction and the students' misbehavior it reinforces often worsens in junior high school with society looking to lock them up by the time they get to high school.[540]

She also argued that restorative practices not only help build better teacher-student relationships, but these types of practices also hold students to higher levels of accountability than punitive discipline practices.[541] Gage Salicki of Educators for Excellence also testified that restorative practices help students take ownership of their behavior and aid in establishing positive teacher-student relationships.[542] For example, after an incident occurs in his classroom, he asks his students questions

> to not only determine why they acted out, but to help them take ownership of their behavior and understand how their behavior affects themselves and others… [and] through these strategies, we have forged meaningful relationships, and my students have begun to learn the skills necessary to identify their misbehaviors and self-correct.[543]

In addition to this testimony, research has also found that changing teacher-student interactions and promoting a more positive classroom has been beneficial in reducing behavioral issues that result in students getting caught up in the school-to-prison pipeline.[544] Christine Christle, professor of education studies at the University of South Carolina, and colleagues investigated possible school characteristics that have been shown to be associated with delinquency (e.g., academic failure, suspension, and dropout).[545] Their case study found a strong relationship between the

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[539] Cristina Benz, Educators for Excellence, *Briefing Transcript,* pp. 160-61.
[540] Tianitha Alston, Educators for Excellence, *Briefing Transcript*, p. 162.
[541] Ibid., 164.
[542] Gage Salicki, Educators for Excellence, *Briefing Transcript*, p. 185.
[543] Ibid.
[544] Christine A. Christle, Kristine Jolivette, & C. Michael Nelson, "Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency," *Exceptionality*, vol. 13, no. 2 (2005), 69-88; Carl Liaupsin, John Umbreit, Jolenea Ferro, Annmarie Urso, and Gita Upreti, "Improving academic engagement through systematic, function-based intervention," *Education and Treatment of Children*, vol. 29, no.4 (2006), 573-91; Robert Putnam, Robert Horner, and Robert Algozzine, "Academic achievement and the implementation of school-wide behavior support," *Positive Behavioral Interventions and Supports Newsletter*, vol. 3, no.1 (2006), 1-6.
[545] Christle, et al., "Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency," *supra* note 544, at 83.

number of student board violations reported by a school and a school's lower academic scores, higher suspension rates, and more student dropouts.[546] The researchers found a similar theme in terms of student behavior and discipline procedures, across all three schools: the need for better and more effective training in behavior management skills.[547] The research team found that staff often utilized "ineffective strategies" to promote student compliance in the schools that were low-achieving, high suspending, and had high dropout rates.[548] The researchers found that teacher-student interactions and specifically teacher behaviors and characteristics were highly influential on student outcomes. The researchers posited that

> [A] school that employs teachers who lack effective behavior management and instructional skills has a diminished chance of affecting positive student outcomes. On the other hand, high-quality teachers and effective, engaging instruction may counteract the negative effects of a high-poverty student population…[L]ow-risk schools were consistent in their focus on positive, proactive disciplinary measures rather than reactive, punitive strategies. Observers described a discernable tension in several of the high-risk schools, resulting from uncoordinated attempts to maintain order through punitive and exclusionary disciplinary practices.[549]

The researchers argue that to break the connections between education and the criminal justice system, school officials need to look beyond why a student is potentially failing, is suspended, or drops out of school and look at what type of school the student attends.[550] Schools that are considered "low-risk" in terms of student achievement and student delinquency actively utilize teaching strategies recommended by the Office of Special Education Programs that are proven to improve academic performance and student behavior.[551] Further, low-risk schools employ many alternatives to out-of-school suspensions, such as receiving counseling and working in a private

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[546] Ibid.
[547] Ibid.
[548] Ibid.
[549] Ibid., 84.
[550] Ibid.
[551] Brandi Simonsen, Jennifer Freeman, Steve Goodman, Barbara Mitchell, Jessica Swain-Bradway, Brigid Flannery, George Sugai, Heather George, & Bob Putman, "Supporting and Responding to Behavior," Office of Special Education Programs, 2015, https://osepideasthatwork.org/sites/default/files/ClassroomPBIS_508.pdf; Office of Special Education Programs, Technical Assistance Center on Positive Behavioral Interventions and Supports, "Implementation Blueprint and Self-Assessment," Oct. 19, 2015, https://www.pbis.org/blueprint/implementation-blueprint.

and quiet setting.[552] Other strategies also include before- or after-school detention and Saturday school.[553]

Over-Identification and Under-Identification of Students of Color with Disabilities

Another significant issue between school discipline policies and the school to prison pipeline is related to the possibility of students to be over- or underrepresented in special education programs and therefore not being properly identified as having or not having a disability. While seemingly similar, there is an important distinction between identification and representation.

> [O]verrepresentation occurs when a high percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district.[554]

Similarly, under-identification does not suggest the same thing as underrepresentation.

> [U]nderrepresentation occurs when a low percentage of students of a certain race have been identified as students with disabilities, as compared to the overall enrollment of students of that race in the district.[555]

When examining the issues of identification and representation, the results can seem contradictory. Many students of color with disabilities are enrolled in general education with unmet and unidentified academic, behavioral, or mental health needs, which can lead to these students being

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[552] Christle, et al., "Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency," *supra* note 544, at 86; Hill Walker, Elizabeth Ramsey, and Frank Gresham, "Heading Off Disruptive Behavior: How Early Intervention Can Reduce Defiant Behavior–and Win Back Teaching Time," American Federation of Teachers, https://www.aft.org/periodical/american-educator/winter-2003-2004/heading-disruptive-behavior (last accessed Nov. 7, 2018); Education World, "'Recovery Rooms' Put Disruptive Students on the Road to Recovery," https://www.educationworld.com/a_admin/admin/admin457.shtml (last accessed Nov. 7, 2018); Tim Grothaus, "School Counselors Serving Students with Disruptive Behavior Disorders," *American School Counselors Association*, vol. 16, no. 4 (2012), https://www.schoolcounselor.org/asca/media/asca/ASCAU/Mental-Health-Specialist/Grothaus.pdf.

[553] Alexandra Dufresne, Annemarie Hillman, Cari Carson, and Tamara Kramer, *Teaching Discipline: A Toolkit for Educators on Positive Alternatives to Out-of-School Suspensions*, Connecticut Voices for Children, 2010, 23, http://www.ctvoices.org/sites/default/files/edu10discipline.pdf; Jenni Owen, Jane Wettach, and Katie Claire Hoffman, "Instead of Suspension: Alternative Strategies for Effective School Discipline," Duke Center for Child and Family Policy and Duke Law School, 2015, 40, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

[554] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 2, note 5.

[555] Ibid.

unfairly disciplined.[556] However, students of color are also often overrepresented in special education and tend to experience more segregation, more disciplinary actions, and worse academic outcomes than their white peers. Researchers at the National Council on Disability found that even when students of color with disabilities receive special education services, they too often face harsh disciplinary practices and are repeatedly suspended or expelled compared to their peers.[557] And when misidentification (either over- or under-identification) occurs on a systemic level, this can represent a possible civil rights violation.[558]

Over-Identification of Students of Color with Disabilities

Through investigations, OCR has found that students of color may be over-identified as having disabilities.[559] Kristen Harper, senior policy specialist for Child Trends and former advisor in the Education Department, Office of Special Education and Rehabilitative Services, testified that once black children enter school, they are 40 percent more likely to be identified with a disability than their peers and twice as likely to be identified with having an emotional disorder.[560] Nationally, federal data show that black students are 40 percent more likely, and Native American or Alaska Native students are 70 percent more likely to be identified as having a disability compared to white students.[561] Some argue that this disproportionality may be the effect of cultural or linguistic differences that may be "misinterpreted as symptoms of a learning disability"[562] or, if the diagnoses

[556] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196; Paul Morgan, George Farkas, Michael Cook, Natasha Strassfeld, Marianne Hillemeier, Wik Hung Pun, Deborah Schussler, "Are Black Children Disproportionately Overrepresented in Special Education? A Best-Evidence Synthesis," *Exceptional Children*, vol. 83, no. 2 (2017).
[557] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196.
[558] *See supra* notes 132-136.
[559] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 2; Alfredo Artiles, Elizabeth Kozleski, Stanley Trent, David Osher, & Alba Ortiz, "Justifying and Explaining Disproportionality, 1968-2008: A Critique of Underlying Views of Culture," *Exceptional Children*, vol. 76, no.3 (2010). Artiles, et al. found that aggregated data disability rates—with no adjustments for family income or other student characteristics—are higher for black students (1.4 times) and Native American students (1.7 times), and lower for white students (0.9) and Asian students (0.5), and that Latino students are about as likely to be identified as the rest of the population.
[560] Kristen Harper, Senior Policy Specialist for Child Trends and former advisor in the Education Dep't, Office of Special Education and Rehabilitative Services, testimony, *Briefing Transcript*, p. 33.
[561] Kristen Harper, "5 things to know about racial and ethnic disparities in special education" Child Trends, Jan. 12, 2017, https://www.childtrends.org/child-trends-5/5-things-know-racial-ethnic-disparities-special-education (last accessed Nov. 7, 2018) (citing U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., *38th Annual Report to Congress on the Implementation of the Individuals With Disabilities Education Act*, https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf).
[562] Dara Shifrer, Chandra Muller, and Rebecca Callahan, "Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language," *Journal of Learning Disabilities*, vol. 44, no. 3 (2011), 247.

are valid, they may symptomatic of "'early experiences [that] influenc[ed] brain development' related to low socioeconomic status."[563]

Education researchers Paul Morgan, Professor of Education at Penn State University, and colleagues argue that the over-identification of students of color as having a disability may be due to external factors (e.g., greater exposure to poverty, differences in academic achievement) rather than discrimination.[564] Data suggest that individual-level models (in comparison to aggregate models)[565] that only control for race and gender, show black students are more likely to be identified for special education. However, when adding in other variables, such as family socioeconomic status, this effect was eliminated for black students, and Latinx and Asian students became significantly less likely to be in special education.[566]

According to national data, the type or category of disability a student is identified with may be another contributing factor to the disparate discipline rates of students of color with disabilities.[567] For instance, studies have shown that black students with emotional disturbance have received less and lower quality care than their white peers.[568] For the 2009–2010 school year and across all grade levels, Losen, et al. found that as the percentage of black students identified as having emotional disturbance increased, so did their suspension rates.[569] Further, they found that for black students—regardless of disability status—in elementary school, a 1-point increase in black students' being identified as having an emotional disturbance predicted a 2.3 percent increase in the suspension rate for all black students at the elementary school level. It is important to note that a similar association was found in the suspension rates for white students that year.[570] Moreover, this association (for both black and white students) was also found when comparing specific

[563] Ibid., 248; *see also* Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, *supra* note 206 at 156.
[564] Morgan, et al., "Are Black Children Disproportionately Overrepresented in Special Education?" *supra* note 556, at 82-83; *see also* Donald MacMillian and Daniel Reschly, "Overrepresentation of Minority Students: The Case for Greater Specificity or Reconsideration of the Variables Examined," *The Journal of Special Education*, vol. 32, no.1 (1998), 15-16.
[565] Individual-level models focus more on individual factors such as student characteristics and backgrounds, compared to aggregate-level models that focus on district-wide wide factors (e.g., CRDC data).
[566] Paul Morgan, George Farkas, Marianne Hillemeier, Richard Mattison, Steve Maczuga, Hui Li, and Michael Cook, "Minorities are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions," *Educational Researcher*, vol. 44, no. 5 (2015), ¶ 20, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4950880/.
[567] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 13-14; Michael Krezmien, Peter Leone, Georgianna Achilles, "Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting," *Journal of Emotional and Behavioral Disorders*, vol. 14, no. 4 (2006), 221-23.
[568] D. Osher, A.E. Sims, and D. Woodruff, "Schools Make a Difference: The Overrepresentation of African-American Youth in Special Education and the Juvenile Justice System," *Racial Inequality in Special Education*, Losen and Orfields, eds. (Cambridge: Harvard Education Press, 2002).
[569] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 3.
[570] Ibid., 11.

learning disability (SLD) with suspension rates.[571] These findings suggest that on a school-wide level, there may be potential bias against students with disabilities that is driving these disparities. However, unlike with emotional disturbance and SLD, researchers found a negative association with autism identification and suspension rates, as there was a decrease in the association between the risk for suspension and autism for both black and white students.[572] This is significant because black students (regardless of gender) are more likely to be over-identified in the two disability categories that are related to a higher risk of suspension, and more likely to be under-identified for autism—the category that consistently predicts lower risks for suspension. Thus, it may be this combination of over- and under-identification that partially explains why black students with disabilities have higher suspension rates than their white student counterparts.[573]

With regard to over-identification, the Department of Education issued the following guidance in 2016:

> Racial discrimination that leads to inappropriate identification in special education, and the provision of unnecessary special education services and inappropriate placement in more restrictive special education settings, not only unlawfully limits the educational opportunities of individual students who are subject to inappropriate identification or inappropriate placement, but also deprives all students in that school, who are thereby consigned to learn in a discriminatory and more racially segregated environment. [574]

Under-Identification of Students of Color with Disabilities

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[571] IDEA regulations define a specific learning disability as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R. § 300.8(c)(10)(i). According to the National Dissemination Center for Children with Disabilities, specific learning disabilities commonly affect skills in the areas such as reading (i.e., dyslexia), writing (i.e., dysgraphia), listening, math (i.e., dyscalculia), reasoning, or speaking. *See* Center for Parent Information & Resources, "Disabilities," June 14, 2017, https://www.parentcenterhub.org/disability-landing/. Specific learning disabilities, or SLD, is the largest category of disability in the IDEA, and they account for about half of all disabilities diagnoses. *See* Special Education Guide, "Specific Learning Disabilities," https://www.specialeducationguide.com/disability-profiles/specific-learning-disabilities/.

[572] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 13.

[573] Ibid., 14-15.

[574] U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 5. For an explanation of "Dear Colleague" letters, *see* Introduction: Relevant Civil Rights Law, *supra* note 83. *See also* Discussion and Sources cited therein *supra* notes 44-55 (discussing the Supreme Court's conclusion that racial diversity in schools enriches the education of all students).

Proper identification of or failure to identify a student's disability may be another component to the disparate discipline rates. The lack of disability identification can lead to increased disciplinary action if a student has unmet behavioral, emotional, or social needs. A behavior may be interpreted as being disruptive, when it may, in fact, be a manifestation of a disability. In such a situation, disciplining the student for his or her behavior may be unlawful if the school did not provide necessary supports.[575]

Students of color with disabilities continue to be under-identified as having a disability, which can lead to unlawful delays in evaluating students of color for a disability and evaluating their need for special education services.[576] Research has found that in several school districts and across some disability categories, students of color may be under-identified for having a disability and are in need of disability services.[577] Moreover, black students who do receive a diagnosis or are identified as having a disability are still less likely than white students to receive help. For example, black children are more likely to exhibit symptoms of Attention-Deficit/Hyperactivity Disorder (ADHD), yet less likely to be given a diagnosis and less likely to receive medication to treat the symptoms than white children.[578] This disparity could mean that students of color with disabilities are not receiving the educational and social services they need compared to otherwise identical white students.

When it comes to under-identification, research has shown there are a number of negative consequences for a student such as preventing or delaying provision of needed services to assist the student in school appropriate behaviors, preventing the student from learning in an environment appropriate to the student's needs, thereby frustrating the student and promoting

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[575] *See* 20 U.S.C. § 1415(k) (outlining procedures for imposing appropriate alternative educational placement when a student with a disability "violates a code of student conduct" due to behavior deemed a manifestation of that disability). When a student with a disability violates the code of conduct, school personnel may suspend or relocate the student to an alternative educational setting for no more than 10 days while they determine whether the misbehavior was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(B). If the parent and school authorities determine that the misbehavior was a manifestation of the student's disability, the IEP team must "conduct a functional behavioral assessment, and implement a behavioral intervention plan," review any existing plan and modify it appropriately, and return the student to the prior educational placement "unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan." 20 U.S.C. § 1415(k)(1)(F). *See also* U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., *Q and A: Questions and Answers on Discipline Procedures*, 2009, https://www2.ed.gov/policy/speced/guid/idea/discipline-q-a.pdf.

[576] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196, at 8.

[577] *See generally* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," Dec. 12, 2016, *supra* note 23; *see also* Paul Morgan, et al., "Minorities are Disproportionately Underrepresented in Special Education," *supra* note 566.

[578] Paul Morgan and George Farkas, "Is Special Education Racist?" *New York Times*, June 24, 2015, https://www.nytimes.com/2015/06/24/opinion/is-special-education-racist.html. *See also*, Paul Morgan, Jeremy Staff, Marianne Hillemeier, George Farkas, and Steven Maczuga, "Racial and Ethnic Disparities in ADHD Diagnosis From Kindergarten to Eighth Grade," *Pediatrics* (2013), 90-91, http://pediatrics.aappublications.org/content/pediatrics/early/2013/06/19/peds.2012-2390.full.pdf.

antisocial school behaviors, which may make the student more likely to be funneled into the school to prison pipeline. For example, studies show that a disproportionate amount of youth in the juvenile justice system have unidentified disabilities. Studies have found that as many as 85 percent of incarcerated youth have learning and/or emotional disabilities, but fewer than half (37 percent) received special education in school.[579] This disparity is likely due to a number of factors, such as the disability being undiagnosed by health care providers, or the student not having been properly evaluated in school.[580] More specifically, black students with disabilities, who have some of the highest rates of involvement in the juvenile justice system, represent 18.7 percent of the IDEA population, but half (49.9 percent) of IDEA students in correctional facilities.[581] Rebecca Cokley, Senior Fellow for Disability Policy at the Center for American Progress and former Executive Director of the National Council on Disability testified at the Commission's briefing that:

> We need to look at the intersection of racism and ableism and see how these two impressions dance in such a way that create, perpetuate, and reinforce each other. So many young people with disabilities are not diagnosed until they enter the carceral system. . . But the very fact that students of color are predominantly undiagnosed when they enter, makes disability part of punishment, instead of part of a community. So while you're not just here because you're bad, you're here, because you're bad and you're broken.[582]

Advocates argue that more attention and resources into school-based interventions (e.g., increased teacher training in identifying disabilities, cultural differences, and language difficulties) could assist teachers to recognize and offer support for students with disabilities. These interventions, especially if provided early in the students' educational career, could help prevent students from incarceration.[583] For instance, in schools and school districts that have higher family incomes and higher percentages of white students, disruptive behaviors are often viewed as indicative of an unidentified disability; and these students are more likely to be provided with services and

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[579] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196, at 5.
[580] Joseph Tulman, "Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-related Disabilities leads to their Disproportionate Representation in the Delinquency System," *Whittier Journal of Child and Family Advocacy*, vol. 3, no. 1 (2003).
[581] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196, at 11 (citing IDEA Data Center, *IDEA Part B Child Count and Educational Environments, 2012)*.
[582] Rebecca Cokley, senior Fellow at the Center for American Progress and former Executive Director of the National Council on Disability, testimony, *Briefing Transcript* p. 43.
[583] Kapil Sayal, Heatha Hornsey, Stephen Warren, Fiona MacDiarmid, & Eric Taylor, "Identification of children at risk of Attention Deficit/Hyperactivity Disorder," *Social Psychiatry and Psychiatric Epidemiology*, vol. 41, no. 10 (2006), 806-13; Paul Morgan, Written Remarks to the U.S. Commission on Civil Rights, Response to Questions from Commissioners.

treatments through IDEA and the ADA.[584] In contrast, schools that have greater attendance by low-income students and/or black students are more likely to criminalize disruptive behaviors rather than view them as symptoms of an underlying disability; and thus, address these behaviors with exclusionary discipline practices rather than through appropriate provision of effective services.[585] Therefore, this lack of early access to disability services and treatments may in part explain why students of color with disabilities are more likely to be affected by the school-to-prison pipeline.[586]

Implicit Bias

Implicit bias and stereotyping have been found to be possible reasons why students of color are under- or over-represented in special education. During his nomination hearing for Assistant Secretary for Civil Rights at the Education Department, Kenneth Marcus, then president of the Brandeis Center and former Staff Director at the Commission, stated that implicit biases of decision-makers may be one of the many contributing factors to the disparate impact of school discipline policies.[587] For instance, when evaluating students of color, school psychologists often find them ineligible for special education because their behavior is believed to be "willful" or "purposeful" and not related to a disability.[588] Instead, these students are more likely to be

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[584] David Ramey, "The Social Structure of Criminalized and Medicalized School Discipline," *Sociology of Education*, 2015, 15-17.
[585] Ibid.
[586] David Ramey, "The Social Control of Childhood Behavior via Criminalization or Medicalization: Why Race Matters," (Ph.D. Dissertation, Ohio State University, 2014), 92-95.
[587] Senator Patty Murray, "Questions for the Record, 'Kenneth Marcus to be Assistant Secretary for Civil Rights at the Dep't of Education,'" Hearing Date: Dec. 5, 2017, https://www.insidehighered.com/sites/default/server_files/media/Marcus%20PM%20QFR%20Responses.pdf.
[588] This diagnosis is significant because a student can be labeled with having a "social maladjustment," which means that a student is purposefully misbehaving and willfully disregarding the rules, and the misbehavior is not related to a disability versus being diagnosed with a disability like emotional disturbance where a student is unable to control their behaviors and is not purposefully violating school rules. *See, e.g.,* National Association for Special Education Teachers, "Eligibility Criteria Checklist for a Classification of an Emotional Disturbance," https://www.naset.org/fileadmin/user_upload/Forms_Checklist_Etc/IEP_Committee/Eligibility_Criteria_Chklt_Emot-Disturb.pdf; Rebecca Heaton Hall, "Emotional Disturbance vs. Social Maladjustment: An Examination of the Distinction from a Lawyer's Perspective," 2017, https://tristate.pitt.edu/wordpress/wp-content/uploads/2015/08/Handout-for-2.23.17-Tri-State-ED-v-SM.pdf.
IDEA established a social maladjustment exception in order to differentiate between "socially maladjusted" students (who would not be eligible for services under IDEA) and "emotionally disturbed" students (who are eligible for services under IDEA). While IDEA does not have a definition of social maladjustment, "courts have interpreted the IDEA social maladjustment exception as a distinction between deliberate, purposeful behavior and disability-related behavior." *See Torrance Unified Sch. Dist. v. E.M.,* No. CV 07-2164 CAS, 21 n.9 (C.D. Cal. Aug. 21, 2008) ("[A] student is socially maladjusted, when the student acts in deliberate noncompliance with known social demands or expectations . . . or when the student's behavior is controlled, predictable, and purposeful") (internal citations omitted), https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Services/-/media/Divisions/OAH/Special-Education/SEHO_Decisions/2012/5/2005110591--USDC-Order-uphloding-ALJs-decision.ashx; *E.S. v. Fairfax County Sch. Bd.,* 134 F.3d 659, 664 (4th Cir. 1998) (quoting *In re Sequoia Union High Sch. Dist.,* 1987-88 ELHR Dec. 559:133, 135 (N.D. Cal. 1987) ("[S]ocially maladjusted [is] a persistent pattern of violating societal norms with lots of truancy, substance . . . abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and

diagnosed with other conditions that do not qualify for IDEA, such as oppositional defiant disorder (ODD) and conduct disorder (CD) when compared to white students.[589] Research also suggests that under-identification could reflect a bias by education professionals who tend to be more responsive to white parents, or professionals may hold lower expectations of black students' academic abilities which may lead them to ignore a possible disability and "problem" behavior.[590]

In the education context, implicit biases can take many forms such as acting on subtle, often subconscious, stereotypes that teachers hold about students of color, students with disabilities, or both. In 2010, Catherine Bradshaw, Professor and Associate Dean for Research and Faculty Development at the University of Virginia, and colleagues studied nearly 7,000 students at 21 elementary schools and found that after controlling for the students' level of teacher-rated behavior problems, teacher ethnicity, and other classroom factors, black students were significantly more likely than white students to receive office disciplinary referrals.[591] This study and numerous other studies suggest that black students are receiving discriminatory punishments when it comes to non-mandatory violations.[592] Studies have also shown that biases can lead to overall lower expectations for black students;[593] fewer black, Latinx, and Native students being in gifted programs;[594] over- or under-identification for special education; and increased disciplinary procedures.[595]

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manipulative")). *See also* National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196, at 48.

[589] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196, at 48. *See also*, National Council on Disability responses to Commission's interrogatory responses, at 1.

[590] Paul Morgan, et al., "Minorities are Disproportionately Underrepresented in Special Education," *supra* note 566, at ¶ 32.

[591] Bradshaw, et al., "Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals," *supra* note 175 at 508-20.

[592] *See, e.g.*, Skiba, et al., "Race is not neutral: A national investigation of African American and Latino disproportionality in school discipline," *supra* note 192 at 85-107; Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, *supra* note 183; Barrett, et al., *What are the sources of school discipline disparities by student race and family income?*, *supra* note 530; Christopher Scott, "Black Students Endure Harsher Punishments in School," Open Society Foundations, April 2, 2012, https://www.opensocietyfoundations.org/voices/black-students-endure-harsher-punishments-school; Travis Riddle, Stacey Sinclair, "Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias," *Proceedings of the National Academy of Sciences*, 2019, https://www.pnas.org/content/early/2019/03/27/1808307116.

[593] Hua-Yu Sebastian Cherng, "If they think I can: Teacher bias and youth of color expectations and achievement," *Social Science Research*, vol. 55 (2017), 170-186; Seth Gershenson, Stephen Holt, and Nicholas Papageorge, "Who believes in me? The effect of student-teacher demographic match on teacher expectations," *Economics of Education Review*, vol. 52 (2016), 209-24.

[594] Anne Gregory, Russell Skiba, and Pedro Noguera, "The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?" *Educational Researcher*, vol. 39, no.1 (2010), 59-68, https://pdfs.semanticscholar.org/5e29/3a4598fece049e2e33b1254dd46d73106780.pdf; Jason Grissom and Christopher Redding, "Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs," *AERA Open*, Jan. 18, 2016; Ingrid Wickelgren, "Where Are the Gifted Minorities?" *Scientific American*, Nov. 2, 2012, https://blogs.scientificamerican.com/streams-of-consciousness/where-are-the-gifted-minorities/.

[595] National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, *supra* note 196.

Additionally, studies have shown that teachers may hold implicit and explicit biases against students of color with disabilities that can effect teacher-student interactions and also impact the students' overall educational attainment.[596] As discussed previously, teachers' biases may affect the under- or over-identification of a student for a disability,[597] but also, cause them to have lower expectations of students with disabilities.[598]

Studies have found that primary school teachers may hold negative or neutral attitudes towards the inclusion of students with disabilities in general education classes,[599] and these attitudes may be dependent upon factors such as years in the profession,[600] school resources, or support from administrators on inclusive classroom practices.[601] Other studies have found that teachers with over 20 years of experience reported more negative attitudes, despite having experience with inclusive teaching, compared to newer teachers with no experience in inclusive classrooms.[602] Further, additional studies suggest that the type of disability a student has may influence teacher biases. For example, these studies reflect that teachers held positive attitudes toward the inclusion

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[596] *See, e.g.,* Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 3; Maria Markova, Ineke Pit-ten Cate, Sabine Krolak-Schwerdt, and Sabine Glock, "Preservice Teachers' Attitudes Toward Inclusion and Toward Students with Special Educational Needs from Different Ethnic Backgrounds," *Journal of Experimental Education*, 2016, vol. 84, no. 3, 554-578, 559.

[597] *See, e.g.,* Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 3; Anna McFadden, George Marsh II, Barrie Jo Price, and Yunhan Hwang, "A Study of Race and Gender Bias in the Punishment of Handicapped School Children," *The Urban Review*, vol. 24, no. 4 (1992); Georgios D. Sideridis, Faye Antoniou, and Susana Padeliadu, "Teacher Biases in the Identification of Learning Disabilities: An Application of the Logistic Multilevel Model," *Learning Disability Quarterly*, vol. 31, Fall 2008, https://www.researchgate.net/publication/215757771_Teacher_Biases_in_the_Identification_of_Learning_Disabilities_An_Application_of_the_Logistic_Multilevel_Model.

[598] Margarita Bianco, "The Effects of Disability Labels on Special Education and General Education Teachers' Referrals for Gifted Programs," *Learning Disability Quarterly*, vol. 28, Fall 2005, 287, https://files.eric.ed.gov/fulltext/EJ725680.pdf.

[599] Anke De Boer, Sip Jan Pijl, and Alexander Minnaert, "Regular primary schoolteachers' attitudes towards inclusive education: A review of the literature," *International Journal of Inclusive Education*, 2011, vol. 15, no. 3, https://www.tandfonline.com/doi/abs/10.1080/13603110903030089; Sabine Glock and Carrie Kovas, "Educational Psychology: Using Insights from Implicit Attitude Measures," *Educational Psychology Review*, 2013, vol. 25, no. 4, 503-522.

[600] *See, e.g.,* Karen Burke and Candra Sutherland, "Attitudes toward inclusion: Knowledge vs. experience," *Education*, 2004, vol. 125, no. 2.

[601] Elias Avramidis and Brahm Norwich, "Teachers' attitudes towards integration/inclusion: A review of the literature," *European Journal of Special Needs Education*, vol. 17, no. 2, https://www.tandfonline.com/doi/abs/10.1080/08856250210129056; Maria Markova, Ineke Pit-ten Cate, Sabine Krolak-Schwerdt, and Sabine Glock, "Preservice Teachers' Attitudes Toward Inclusion and Toward Students with Special Educational Needs from Different Ethnic Backgrounds," *Journal of Experimental Education*, 2016, vol. 84, no. 3, 554-578, at 559.

[602] Markova, et al., "Preservice Teachers' Attitudes Toward Inclusion and Toward Students with Special Educational Needs from Different Ethnic Backgrounds," *supra* note 601 at 559.

of students with learning disabilities compared to negative attitudes toward students with behavioral disorders.[603]

In a recent study by the Yale Child Study Center, researchers found that not only are implicit biases prevalent, but they are directed at much younger children than previously believed, and biased behaviors were witnessed from both black and white teachers.[604] To determine how implicit biases may play out in the classroom, the research team devised an experiment in which teachers watched video segments of preschool children engaging in various behaviors and the teachers were instructed to indicate every time they noticed a behavior that could potentially become disruptive. Each video included four children: a black girl and boy, and a white girl and boy. The teachers were instructed to watch for any problematic behavior they observed in the video clips to test the idea of implicit bias, while in fact there was no problematic behavior present in the video clips at all.[605]

The researchers found that teachers watched the black students more and for longer durations than the white students, and specifically they looked at the black boys more than the other children.[606] The lead researcher of the study, Walter Gilliam, Professor of Psychology and Director of the Edward Zigler Center in Child Development and Social Policy at Yale University argued that:

> What we found was exactly what we expected based on the rates at which children are expelled from preschool programs. . . If you look for something in one place, that's the only place you can typically find it.[607]

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[603] Therese Levins, Laurel Bornholt, and Brook Lennon, "Teachers' experience, attitudes, feelings and behavioural intentions towards children with special educational needs," *Social Psychology of Education*, vol. 8, no. 3, https://link.springer.com/article/10.1007/s11218-005-3020-z; Elias Avramidis, Phil Bayliss, and Robert Burden, "A survey into mainstream teachers' attitudes towards the inclusion of children with special educational needs in the ordinary school in one local education authority," *Educational Psychology*, 2000, vol. 20, no. 2, https://www.researchgate.net/publication/242428200_A_Survey_into_Mainstream_Teachers'_Attitudes_Towards_the_Inclusion_of_Children_with_Special_Educational_Needs_in_the_Ordinary_School_in_one_Local_Education_Authority.

[604] Walter Gilliam, Angela Maupin, Chin Reyes, Maria Accavitti, Frederick Shic, "Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?" Yale University Child Study Center, 2016, 11, https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf.

[605] Ibid., 5-6.

[606] Ibid., 7.

[607] Cory Turner, "Bias Isn't Just a Police Problem, It's a Preschool Problem," *NPR*, Sept. 28, 2016, https://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem.

According to CRDC data, black preschool students are 3.6 times more likely to be suspended from school than white preschool students.[608] The point of the Yale Child Study Center study was not to disparage teachers, but to show how biases can play an important role in disciplinary policies and decisions. Gilliam explained in an NPR interview that "implicit biases are a natural process by which we take information, and we judge people on the basis of generalizations regarding that information. We all do it."[609]

Concerns regarding the over-identification of black students in special education programs due to biased assessment procedures and exclusionary placement procedures has been a central focus for education scholars since the 1970s.[610] Moreover, education officials and policymakers have also recognized this problem and addressed it through amendments made to IDEA in 1990, 1997, and 2004.[611] In the 1997 IDEA Amendment, Congress stated that "greater efforts are needed to prevent the intensification of problems connected to mislabeling… among minority children with disabilities."[612] As discussed previously, black students have consistently been over-identified for the disability categories that are most often associated with exclusionary discipline practices (e.g., emotional disturbances, learning disabilities), and these students are 2.2 times more likely to be identified as having an intellectual disability and 2.08 times more likely to be identified as having an emotional disturbance compared to other students.[613]

Wendy Cavendish, professor at the University of Miami, and colleagues argue that:

> Equal educational opportunities for African American students have not been fully realized, and IDEA's compliance monitoring protocols designed to address overrepresentation of youth of color in special education have not been able to reduce disproportionality. Equity-based legislation such as *Brown* and IDEA has provided the legal framework that prohibits exclusion of students of color and students with disabilities from public education but in no way does it provide the method by which we will achieve educational equity in social institutions with

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[608] U.S. Dep't of Education, Office for Civil Rights, *2013-2014 Civil Rights Data Collection Report: A First Look*, *supra* note 21.
[609] Turner, "Bias Isn't Just a Police Problem, It's a Preschool Problem," *supra* note 607.
[610] *See, e.g.,* Wendy Cavendish, Alfredo Artiles, and Beth Harry, "Tracking Inequality 60 Years After Brown: Does Policy Legitimize the Racialization of Disability?" *Multiple Voices for Ethnically Diverse Exceptional Learners*, vol. 14, no. 2 (2015), 1.
[611] *See* Individuals with Disabilities Education Act Amendments of 1990, Pub. L. No. 101–476, 104 Stat 1103 (Oct. 30, 1990); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat 37 (June 4, 1997); Individuals with Disabilities Education Act Amendments of 2004, Pub. L. No. 108–446, 118 Stat. 2647 (Dec. 3, 2004).
[612] Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat 37 (codified as amended at 20 U.S.C § 1400(c)(12)(A)).
[613] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016*, *supra* note 561, at xxvi.

> deeply embedded 'structured power relationships designed to serve the dominant social and economic classes.'[614]

According to federal data, in 2014, among students aged 6 through 21, Native American or Alaska Native students, black students, and Native Hawaiian or Other Pacific Islander students were more likely to be served under IDEA, than were students of those ages in all other racial or ethnic groups combined (1.68, 1.41, and 1.59, respectively).[615] Asian students, white students, and students with two or more races were less likely to be served under IDEA (0.47, 0.90, and 0.87, respectively); and Latinx students were about as likely to be served compared to all other racial or ethnic groups combined (1.01).[616] Moreover, Native American and Alaska Native students were 4.09 times more likely to be served for developmental delay compared to students in all other racial or ethnic groups combined.[617]

Researchers have found that teacher biases relating to the under- and over-identification of students of color and students of color with disabilities not being identified for gifted programs in school is also a prominent issue, which has overall effects on their educational success. For example, in Lawrence, Kansas investigators found that of 500 students who were identified as gifted, only 8 were black students; and that black students in the district were more likely to be identified as having a learning disability, rather than being gifted.[618] In 2016, black students made up 6.5 percent of the entire student population in that district, yet they represented 13 percent of those identified as having a learning disability and 17 percent of those given out-of-school suspensions. The School Board President Marcel Harmon stated that:

> I'm sure aspects of racism probably play a part of it, unconscious biases I'm sure play a role in it, all of those do. But teasing out what the specifics are and how we address them, we have to investigate further, I think.[619]

For students with disabilities, Margarita Bianco, associate professor at Colorado State University found that students with disabilities are rarely referred by teachers for gifted programs due to stereotypical beliefs about the aptitude of these students, and that overall, teachers often hold lower

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[614] Wendy Cavendish, Alfredo Artiles, and Beth Harry, "Tracking Inequality 60 Years After Brown: Does Policy Legitimize the Racialization of Disability?" *Multiple Voices for Ethnically Diverse Exceptional Learners*, vol. 14, no. 2 (2015), 8.
[615] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016*, *supra* note 561, at xxvi.
[616] Ibid., 44-45.
[617] Ibid.
[618] Rochelle Valverde, "Students of color in Lawrence school district face uneven odds," *Lawrence Journal World*, Jan. 29, 2017, http://www2.ljworld.com/news/2017/jan/29/students-color-lawrence-school-district-face-uneve/.
[619] Ibid.

expectations for students with disabilities.[620] Bianco found that teachers (both special education and general education teachers) were biased against students labeled with learning disabilities or emotional and behavioral disorders when making referrals for gifted programs and were much more likely to refer students with no disability label for gifted programs.[621] Bianco also found that, similar to other studies, these biases may be further compounded by teachers holding gender biases against female students when it came to referrals to gifted programs, which has additional implications for girls with disabilities.[622]

Issues of implicit bias may also be exacerbated in school environments that are more stressful and difficult because they can lead teachers and school officials to experience higher levels of mental burnout and fatigue.[623] This burnout can make them more susceptible to acting on implicit biases, due to the pressure to make snap judgements when trying to control students' behavior.[624] Given the high-stress environment that may be present in schools with high rates of disciplinary issues, interactions among students and teachers may become tense.[625] This tension may cause implicit biases to surface, especially given that teachers often have incomplete information about a situation and a time constraint within which to respond.[626] In her written testimony to the Indiana State Advisory Committee to the Commission, Dr. Laura McNeal, Associate Professor of Law and Analyst for the Charles Hamilton Houston Institute for Race and Justice, stated, "[t]he majority of school disciplinary sanctions are the product of split second decisions, which as implicit bias research reveal, is the context in which our unconscious biases have the greatest influence...the stark reality is race still matters, especially in the school disciplinary context."[627]

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[620] Margarita Bianco, "The Effects of Disability Labels on Special Education and General Education Teachers' Referrals for Gifted Programs," *Learning Disability Quarterly*, vol. 28, Fall 2005, 287.
[621] Ibid., 290.
[622] Ibid., 291.
[623] Oklahoma State Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and the School to Prison Pipeline in Oklahoma*, 2016, 13-14, https://www.usccr.gov/pubs/docs/Oklahoma_SchooltoPrisonPipeline_May2016.pdf.
[624] Cheryl Staats, Kelly Capatosto, Robin Wright, and Danya Contractor, *State of Science: Implicit Bias Review 2015*, The Kirwan Institute at Ohio State University, 2015, 21, http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf; Marianne Bertrand, Dolly Chugh, and Sendhil Mullainathan, "Implicit Discrimination," *American Economic Review*, vol. 95, no. 2 (2005), 96, http://pages.stern.nyu.edu/~dchugh/articles/2005_AER.pdf.
[625] Cheryl Staats, "Understanding Implicit Bias: What Educators Should Know," *American Educator*, 2015-2016, 30, https://files.eric.ed.gov/fulltext/EJ1086492.pdf.
[626] Ibid., 30-31.
[627] *See* Laura McNeal, Written Testimony to Indiana State Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and the School-to-Prison Pipeline in Indiana*, 2016, Appendix B.3, at 6.

Many factors contribute to disparate disciplinary rates, such as teachers' experiences and school resources, issues of unconscious or implicit bias,[628] and disability identification[629] that put students of color with disabilities at an increased risk for disciplinary actions.[630] By law, students with disabilities are to be placed in general education classrooms to the maximum extent appropriate and receive an appropriate education.[631] Studies have shown that while teachers may generally support ideas of inclusion, in practice, some teachers have found it difficult and some even hold negative attitudes towards inclusive classrooms.[632] Studies have also found that teachers who teach general education classes tend to hold less positive attitudes towards students with disabilities compared to special education teachers.[633] Researchers have found that the inclusion of children with social, emotional, intellectual, and behavioral difficulties has consistently been reported as particularly problematic for teachers, and is accompanied by negative attitudes towards teaching and may manifest in harsher disciplinary actions.[634] MacFarlane and Woolfson found that when teachers held more positive attitudes towards working with students with disabilities, they tended to engage in more inclusive practices.[635] They argue that given the fact that more positive attitudes lead to more positive results, teacher bias may indeed play a role in the classroom, and their research shows that

> school principals have an important role in communicating clear expectations of an inclusive ethos to staff, providing them with appropriate support and training, and promoting a collective sense of efficacy.[636]

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[628] Guy A. Boysen and David L. Vogel, "Bias in the Classroom: Types, Frequencies, and Responses," *Teaching of Psychology*, vol. 36, no.1 (2009), 12-17; Staats, et al., "State of Science: Implicit Bias Review," *supra* note 378; Jason Nance, "Over-Disciplining Students, Racial Bias, and The School-to-Prison Pipeline," 50 U. RICH. L. REV. 1063 (2016).

[629] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194; Losen, et al., *Are We Closing the School Discipline Gap?*, *supra* note 2.

[630] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194.

[631] 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). *See also Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (discussing the Individuals with Disabilities Act requirement for states receiving federal funds to provide a "free appropriate public education" "to all eligible children").

[632] Elias Avramidis and Brahm Norwich, "Teachers' attitudes towards integration/inclusion: a review of the literature," *European Journal of Special Needs Education*, vol. 17, no. 2 (2002), 129-47; *see also* Brenda Lyons Greene, "Teachers' Attitudes toward Inclusive Classrooms," Dissertation, College of Education at Walden University, 2017, https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=4548&context=dissertations.

[633] Anke de Boer, Sip Jan Pijl, Alexander Minnaert, "Regular primary schoolteachers' attitudes towards inclusive education: a review of the literature," *International Journal of Inclusive Education*, vol. 15, no. 3 (2011).

[634] Bryan Cook, David Cameron, Melody Tankersley, "Inclusive Teachers' Attitudinal Ratings of Their Students with Disabilities," *Journal of Special Education*, vol. 40, no. 4 (2007), 230-38, https://files.eric.ed.gov/fulltext/EJ758193.pdf; Richard Hastings and Suzanna Oakford, "Student Teachers' Attitudes Towards the Inclusion of Children with Special Needs," *Educational Psychology*, vol. 23, no. 1 (2003), 87-94.

[635] Kate MacFarlane and Lisa Marks Woolfson, "Teacher attitudes and behavior towards the inclusion of children with social, emotional, and behavioral difficulties in mainstream schools: An application of the theory of planned behavior," *Teaching and Teacher Education*, vol. 29 (2013), 46-52.

[636] Ibid., 51.

Research has also shown that the type of disability may also be a contributing issue to disparate discipline rates. A longitudinal Texas study analyzing millions of school and juvenile justice records found the level of disciplinary involvement varied significantly depending on the specific type of disability.[637] For instance, students who were labelled as having an emotional disturbance or a learning disability were especially likely to be suspended or expelled. In contrast, students with autism or an intellectual disability[638] were considerably less likely than otherwise identical students without disabilities to experience a discretionary or mandatory school disciplinary action.[639] The National Center for Learning Disabilities found that in 2011, one in every two students with a learning disability faced a suspension, expulsion, or other school disciplinary actions; and only students identified with emotional disturbance received more disciplinary actions.[640] Moreover, while there has been a general decline in the number of students identified as having a learning disability, this category remains the largest category of students with disabilities (42 percent) served by special education programs.[641] These students continue to be majority male students, disproportionately poor, and often students of color—and they continue to receive disciplinary actions that may lead to arrest at much higher rates compared to students without learning disabilities.[642]

Some critics argue that these findings do not suggest that bias by teachers or administrators is occurring, and the association between disability category and suspension rates are merely an outcome of these students misbehaving more often because of their disability.[643] However, these arguments run counter to the many studies and federal data from the Education Department that show that disparities in discipline rates among students of color are not due to the students simply misbehaving or being more disruptive compared to other students.[644] Wallace and colleagues

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[637] Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, *supra* note 183.

[638] The study used the term "mental retardation" and since this term is outdated and many in the disability community find this term offensive, staff chose to use the more appropriate term.

[639] Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, *supra* note 183.

[640] Candace Cortiella and Sheldon Horowitz, *The State of Learning Disabilities Facts, Trends and Emerging Issues*, National Center for Learning Disabilities, 2014, 16, https://www.ncld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf.

[641] Ibid., 41.

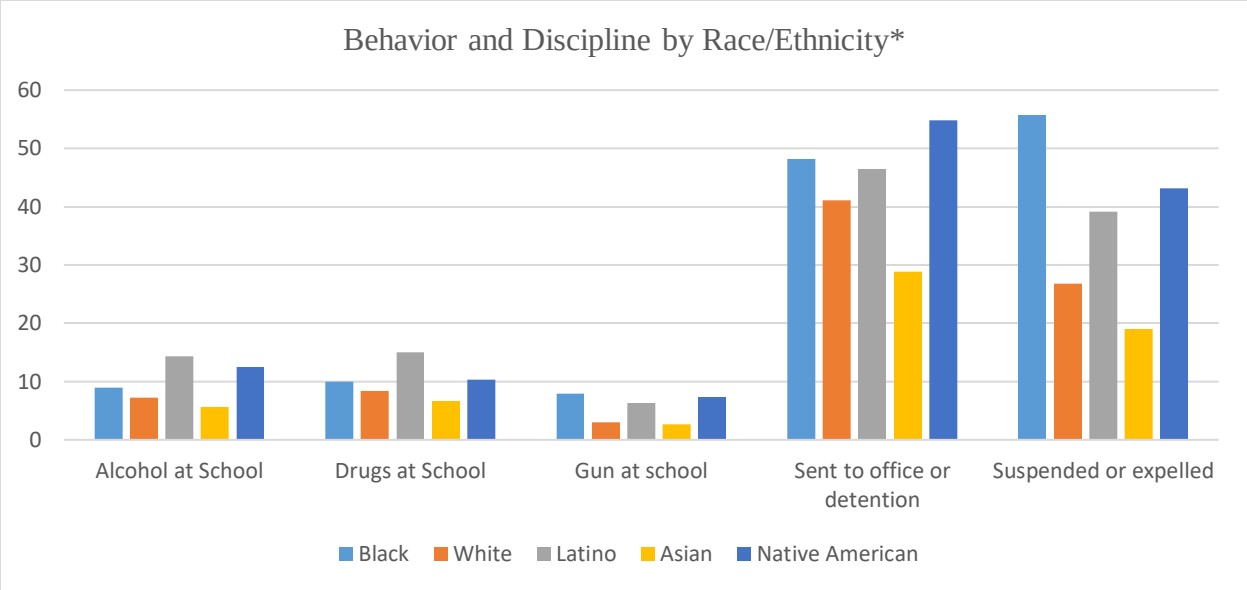
[642] Ibid., 40-42.

[643] Heather MacDonald, "Undisciplined," *City Journal*, Summer 2012, https://www.city-journal.org/html/undisciplined-13485.html.

[644] "…OCR has not investigated or identified any information or evidence suggesting, one way or another, that students of color with disabilities engage in excludable or disruptive behaviors more often and/or more severely..." U.S. Dep't of Education, Office for Civil Rights, Interrogatory Responses to Commission, at 9; *see also* John Wallace Jr., Sara Goodkind, Cynthia Wallace, and Jerald Bachman, "Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005," *Negro Educational Review*, vol. 59, no. 1-2 (2008), 47-62; Jason Okonofua and Jennifer Eberhardt, "Two Strikes: Race and Disciplining of Young Students," *Psychological Science*, vol. 26, no. 5 (2015).

found despite generally similar rates in breaking school rules that are in clear violation of school policies (i.e., possession of drugs, alcohol, or a gun on campus) black, Latinx, and Native American students are slightly more likely than white and Asian American students to be sent to the principal's office or given detention, but are two to five times more likely to be suspended or expelled (see figure 9).[645] Furthermore, the researchers found that while school discipline rates decreased over time for most students, rates increased for black students between 1991 and 2005.

Figure 9: Zero Tolerance and Discipline Disparities by Race and Ethnicity



*Note: research consistently shows that male students (regardless of race or ethnicity) are more likely to break school rules and more likely to be disciplined, therefore, for the sake of clarity, this chart represents data from a nationally representative sample of male, 10th grade students.

Source: John Wallace Jr., Sara Goodkind, Cynthia Wallace, and Jerald Bachman, "Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991–2005," *Negro Educational Review*, 59(1-2), 2008, 47-62. Chart created by USCCR staff.

The chart above demonstrates that—while there are not large racial or ethnic differences in the prevalence of behaviors—there are significant differences when it comes to how these different groups of students are being disciplined for the same infractions. For instance, black, Latino, and Native American students are consistently more likely than white students to be disciplined, and Asian students are consistently less likely than all other groups to be disciplined in school.[646] The data further demonstrate that there are less differences between the groups for minor disciplinary measures (e.g., being sent to the principal's office); however, for the harsher forms of discipline

[645] The data show that while there were some variations in behaviors across racial groups, racial and ethnic differences in the percentages of students who engage in these behaviors are relatively small. Further, the data represented in the chart only focus on the behavior and disciplinary effects of 10th grade students in order to "avoid the loss of dropouts (who tend to leave in the final two years of high school) yet captures more substance use behavior than would be available from the 8th graders." *See* Wallace Jr., et al., "Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005," *supra* note 644, at 51.
[646] Ibid.

(e.g., suspension or expulsion) the disparities become more pronounced. These differences become the most evident when comparing black students to their peers. Despite the fact that black students' rates of being sent to the office or given detention are generally comparable to their peers (especially compared to Latinx and Native American students), they are significantly more likely than any other racial or ethnic group to be suspended or expelled. For instance, approximately 56 percent of black boys have been suspended or expelled compared to only 19 percent to 43 percent of boys in the other groups.[647] For girls, approximately 43 percent of black girls have been suspended or expelled compared to only 7 percent to 26 percent of girls in the other racial or ethnic groups.[648]

Natalie Chap, national coordinator for The Dignity in Schools Campaign, stated that:

> Research shows that there is no evidence that students of color misbehave more than their white peers. However, students of color are often disproportionately disciplined for minor, subjective offenses. . . which are left up to the discretion of school staff, administrators, and school police who may be more likely to negatively interpret the behavior of certain racial and ethnic groups based on their own conscious or unconscious bias.[649]

In fact, as early as middle school, black and Latinx students report feeling they are treated unfairly when it comes to school discipline compared to Asian and white students.[650]

Further, federal guidance from the Education Department recognizes that:

> Children with disabilities are at a greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily. These risks are increased for children of color with disabilities. In many cases, we have reason to believe these removals are due to minor

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[647] While the chart does not reflect rates for girls, the researchers did find significant differences when adding in gender. All boys, with the exception of Asian American boys, were sent to the office or given detention at higher rates than all girls and across all grade levels. However, examining suspensions and expulsions, Wallace et al. found that black boys had the highest rates, followed by Latino and Native American boys, and then black girls. White boys had a similar rate of exclusionary discipline as Latina and Native American girls, but had a lower rate than black girls. Asian American boys had the lowest rates of any of the boys, followed by white girls and then Asian American girls. *See* Wallace Jr., et al., "Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005," *supra* note 644, at 54.

[648] Ibid.

[649] Natalie Chap, The Dignity in Schools Campaign, Public Testimony Written Statement for The School-to-Prison Pipeline: Intersections of Students of Color with Disabilities Briefing before the U.S. Commission on Civil Rights, December 8, 2017, at 3 [hereinafter Chap Statement].

[650] Adam Voight, *The Racial School-Climate Gap*, Region IX Equity Assistance Center at WestEd Health & Human Development Program, 2013, http://www.rcoe.us/leadership-institute/files/2014/09/RacialSchoolClimateGapSynopsis-v2.pdf.

> instances of misbehavior that are unrelated to issues of child or school safety, and can and should be addressed through supports and guidance.[651]

Thus, schools may be singling out students with disabilities for exclusionary discipline due to disability-related behaviors, which are contributing to these disparities. However, federal mandates protect students with disabilities from being unlawfully excluded from general classrooms:[652]

> [S]chools are obligated to determine whether the disability is causing the misbehavior, therefore, this possible explanation is connected to a factor schools control, namely their legal responsibility not to suspend children because of their disability.[653]

These laws do not mean that a student with a disability may behave in a disruptive manner and does not have to follow school rules. The regulations implementing IDEA state that if a student is behaving inappropriately or being disruptive, it is the school's responsibility to establish a behavioral improvement plan, or if the school's special education team determines it is appropriate based on an individualized evaluation plan, the student can be placed in a more restrictive educational setting.[654] The Department of Education explained in its guidance that:

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[651] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," Aug. 1, 2016, *supra* note 170, at 14.

[652] Students who pose a serious physical threat to themselves, other students, or teachers may be excluded from class and school. *See* U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Q and A: Questions and Answers on Discipline Procedures," *supra* note 575, at 918. This guidance discusses federal law and regulations outlining the circumstances when school personnel may remove a student for misbehavior regardless of whether a disability caused the misbehavior, including if a student carried a weapon or "inflicted serious bodily injury upon another person" on the school premises. *See* 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g). *See also* 34 C.F.R. § 104.36 (explaining Section 504's due process protections for students who are or may be disabled).

[653] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 14. Under the ADA, a student with a disability cannot be "excluded from participation in or be denied the benefits of" a public education because of the disability. 42 U.S.C. § 12132. Federal law specifies that, to the best extent possible, students with disabilities "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). If a student with a disability is suspended or expelled from school, the student is still entitled to a "free appropriate public education" under federal law. *See* 20 U.S.C. § 1412(a)(1)(A). Federal regulations specify the procedures that schools must follow to ensure that students who may be disabled are not denied an education, but instead are properly evaluated and placed in the most appropriate educational setting. *See* 34 C.F.R. § 104.33; *see also* 34 C.F.R. § 104.35 (requiring schools to individually evaluate each student who may benefit from special education because of a disability before removing the student from the regular curriculum).

[654] *See* 34 C.F.R. § 300.530(d) (specifying that a student with a disability who is removed from their current placement because of misbehavior must "[r]eceive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.").

> [T]he use of exclusionary disciplinary measures may indicate that a child's IEP [Individualized Education Plan] [required under federal law],[655] or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP Teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE, include or revise needed behavioral supports in the child's IEP. Such behavioral supports also may include supports for school personnel, so that teaching staff are trained in best uses of such behavioral supports.[656]

Furthermore, if a student with a disability is suspended for more than 10 days in a single school year, federal law requires the local educational agency, parent, and IEP team to determine if the student's misconduct was symptomatic of the student's disability, or due to a failure to effectively implement the IEP.[657] If the offending behavior is determined to be a manifestation of the student's disability, the school is prohibited from removing the student from the classroom unless the parent and local educational agency agree to a change of placement.[658] Nevertheless, the disparities in suspension rates and the higher likelihood of suspension for students with certain disabilities suggest that schools may not be appropriately evaluating disability-related behaviors, and instead may be unfairly punishing students with disabilities.[659]

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[655] *See* 34 C.F.R. § 104.33 (stating that an Individualized Education Plan is one means of providing the federally mandated "free appropriate public education" to which each student is entitled under Section 504). The Dep't of Education IEP policy guide states that every public school student who receives special education services and resources must have an IEP. "The IEP creates an opportunity for teachers, parents, school administrators, related services personnel, and students (when appropriate) to work together to improve educational results for children with disabilities. The IEP is the cornerstone of a quality education for each child with a disability." U.S. Dep't of Education, "A Guide to the Individualized Education Program" (last modified March 23, 2007), at Introduction, https://www2.ed.gov/parents/needs/speced/iepguide/index.html.

[656] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," *supra* note 170, at 14; *see also id.*, at 3 ("[T]he failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE [Least Restrictive Environment].")

[657] 20 U.S.C. § 1415(k)(1)(E). Federal law refers to this as the "manifestation determination." *Id.* A parent who disagrees with the manifestation determination, or any decision about the placement of the child, may request a hearing. 20 U.S.C. § 1415(k)(3)(A).

[658] 20 U.S.C. § 1415(k)(1)(F)(iii). The only exception is if a student poses a serious physical threat to themselves, other students, or teachers. *See* 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g). *See also* U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Q and A: Questions and Answers on Discipline Procedures," *supra* note 575.

[659] Losen, et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline," *supra* note 194, at 9.

Despite the aforementioned federal protections, Rausch and Skiba found that while students in most disability categories were infrequently—often below 1 percent—punished, students with emotional disabilities were at high risk of being removed from school under IDEA disciplinary provisions.[660] And as discussed previously, black students are most likely to be over-identified as having an emotional disorder when compared to all other students.[661]

UCLA Center for Civil Rights Remedies' Dan Losen argues that exclusionary discipline policies end up having a disparate impact on students with disabilities. In his testimony to the Commission, he argued that "disparate impact is not just about who is being removed from school, but what happens, [and] what did they miss?"[662] And because students with disabilities may receive more educational services than their non-disabled peers, removing them from school has an even greater effect on their educational success. Losen stated that:

> [I]f you remove two students for a dress code violation, one with disabilities and one without, the impact is going to be greater on the student with disabilities, if it's for the same length of time, because they're getting more when you're in the school. They're also losing more when they're out of school.[663]

Lost Instruction

On a national level, for students of color with disabilities, for both the 2014–15 and 2015–16 school years, black students with disabilities lost approximately 77 more days of instruction compared to white students with disabilities.[664] In some states, the disparities are even more striking (see Figure 10). For example, in Nevada, during the 2015–16 school year, "Black students with disabilities lost 209 days of instruction per 100 enrolled, which was 153 more than the number lost by White students with disabilities."[665] According to 2015–16 federal data, the racial discipline gap among students with disabilities increased between black and white students in at least 28 states.[666]

Figure 10. The Five States with the Largest Racial Disparity in Lost Instruction Time for Students with Disabilities in 2015–16

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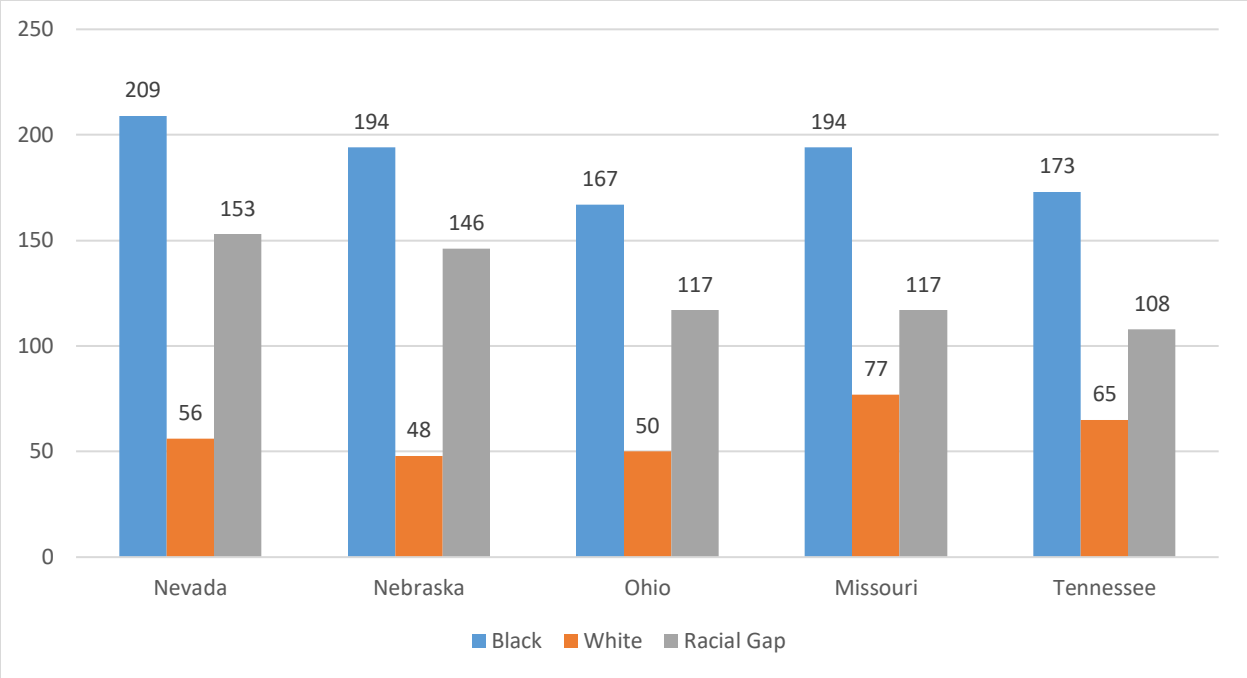
[660] M. Karega Rausch and Russell Skiba, "Discipline, Disability, and Race: Disproportionality in Indiana Schools," Center for Evaluation and Education Policy, vol. 4, no. 10 (2006), 4-5, https://files.eric.ed.gov/fulltext/ED495751.pdf.
[661] Ibid.; *see also*, Kristen Harper, testimony, *Briefing Transcript* p. 33.
[662] Dan Losen, Director of the Center for Civil Rights Remedies at University of California-Los Angeles, testimony, *Briefing Transcript* pp. 94-95.
[663] Ibid., 95.
[664] Daniel Losen, *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*, The Center for Civil Rights Remedies, 2018, 2 https://today.law.harvard.edu/wp-content/uploads/2018/04/disabling-punishment-report-.pdf.
[665] Ibid., 2.
[666] Ibid., 4.



Source: Daniel Losen, "Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities," The Center for Civil Rights Remedies, April 2018 (citing CRDC data, U.S. Department of Education). Chart recreated by USCCR staff

Data indicate that race continues to be a significant factor in explaining why students of color with disabilities disproportionately lose instruction time. In the 2015–16 school year, on a national level, black students lost 66 days of instruction time per 100 students enrolled due to exclusionary discipline practices, which is five times as many days lost by white students.[667] Black girls specifically lost 45 days per 100 enrolled, which is almost twice the national average for all students.[668] Many states had large disparities among students of color compared to white students. North Carolina had some of the overall highest rates of missed instruction time for students of color; for instance Native American students in North Carolina lost 77 days.[669] In New Hampshire, Latinx students lost 55 days of instruction per 100 enrolled and in three states (Oklahoma, Michigan, and Ohio) Latinx students lost more than twice the national average of 17 days, missing a total of 34 days of instruction time.[670] Asian and Hawaiian/Pacific Islander students lost the most instruction time in Hawaii where they lost 24 and 75 days per 100 respectively. Moreover, Hawaii also proved to be the worst state for students with disabilities, who lost 95 days per 100 enrolled,

[667] Daniel Losen and Amir Whitaker, *11 Million Days Lost: Race Discipline, and Safety at U.S. Public Schools Part 1*, Center for Civil Rights Remedies at UCLA's Civil Rights Project and the ACLU of Southern California, 2018, 5, https://www.aclu.org/report/11-million-days-lost-race-discipline-and-safety-us-public-schools-part-1.
[668] Ibid., 6.
[669] Ibid., 6.
[670] Ibid.

which was 53 more days lost per 100 enrolled, compared to students without disabilities (42 days per 100 enrolled).[671]

According to a study conducted by the ACLU, the state of California "enrolls four times as many white students than Black students. Yet the total number of lost instruction days by Black students due to suspension was nearly the same as the number of days lost by whites (141,000 for Blacks compared with 151,000 for whites)."[672] Disparities were also prevalent for Native American students and students with disabilities, who lost 2.5 and 2.6 times as many days, compared to white students and non-disabled students, respectively.[673] For California's Latinx student population compared to white students, the gap was smaller, 12 days versus 10 days lost per 100 students.[674] The researchers found that Asian American students were the least affected group, having lost only three days of instruction per 100 students enrolled.[675]

However, data from the Council of the Great City Schools (CGCS) reveal that some public-school districts have been successful in reducing the number of days of lost instruction time. For instance, the CGCS found that nationally the median number of lost days for black male students decreased by 14 days between the 2014–15 and 2016–17 academic year.[676]

In total, the use of exclusionary discipline and harsher punishment of students of color with disabilities restricts their access to an equal education and increases their risk of being funneled into the school-to-prison pipeline. These data further imply that some schools may be in violation of not only Title VI, but also Section 504 and the ADA, which prohibit discriminatory treatment of students with disabilities.[677] When imposing discipline, schools must also adhere to federal regulations protecting students' due process rights, which are designed to guarantee that no student is punished unfairly or in a discriminatory fashion.[678] These practices may violate Title VI and

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[671] Ibid. Note: Hawaii public schools enrollment data for the 2013-14 school year consisted of: Native American/Alaska Native students (0.4%), Asian (30.1%), Hawaiian/Pacific Islander (30.4%), Black (2.0%), Latinz (12.0%), White (12.8%), Multiracial (12.3%), Students with Disabilities (IDEA) (10.3%). *See generally* CRDC 2013-14 enrollment data, https://ocrdata.ed.gov.

[672] ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 275.

[673] David Washburn, "The price of punishment—new report shows students nationwide lost 11 million school days due to suspensions," *EdSource*, Aug. 31, 2018, https://edsource.org/2018/the-price-of-punishment-new-report-shows-students-nationwide-lost-11-million-school-days-due-to-suspensions/601889; *see also* Losen and Whitaker, *11 Million Days Lost: Race Discipline, and Safety at U.S. Public Schools Part 1*, *supra* note 667.

[674] David Washburn, "The price of punishment—new report shows students nationwide lost 11 million school days due to suspensions," *EdSource*, Aug. 31, 2018, https://edsource.org/2018/the-price-of-punishment-new-report-shows-students-nationwide-lost-11-million-school-days-due-to-suspensions/601889.

[675] Ibid.

[676] Moses Palacios, Eric Vignola, Natalia Cooper, Renata Lyons, Ashley Ison, Ray Hart, & Michael Casserly, *Academic Key Performance Indicators*, Council of the Great City Schools, Oct. 2018, 134-35, https://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/35/Academic%20KPI%20Indicators%202018.pdf.

[677] *See* 42 U.S.C. § 2000d; 29 U.S.C. § 701 *et seq*.; 42 U.S.C. § 12131 et seq.; *see also* Introduction: Relevant Civil Rights Law, *supra*, at notes 87-94, 112-130.

[678] *See* 34 C.F.R. § 300.530(d); *see also* 34 C.F.R. §§ 104.33, 104.35; 20 U.S.C. § 1412(a)(1).

Section 504 and the ADA, respectively, and deny children of color their constitutional right to equal protection under the law.[679] In sum, the data discussed in this chapter demonstrate a clear need for stronger enforcement of civil rights law in elementary and secondary schools.

[679] *Brown*, 347 U.S. at 493, 495; *see also* Introduction: Relevant Civil Rights Law, *supra*, at notes 35, 42-50.

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CHAPTER 3: EVALUTION OF FEDERAL GOVERNMENT POLICIES AND THE INTERSECTION OF RACE AND DISABILITY

This chapter examines the role of the federal government in addressing discrimination in school discipline. As discussed in previous chapters, data on school discipline show that students of color with disabilities tend to be disciplined and punished more harshly than their peers, in ways that often appear to be unnecessary when the facts surrounding the impositions of discipline are evaluated. Millions of students of color and students with disabilities are suspended or expelled each year, and often for minor misconduct or infractions.[680] Many researchers, advocacy organizations, student and parent groups, and professional associations have brought these facts to the forefront, calling on school districts across the country to rethink their discipline policies and ensure that all students are being treated equitably. As discussed herein, the federal government has adopted a series of policies and practices regarding these issues; however, the Trump administration may be seeking to change some of them.

If a student commits a serious offense or poses a threat to other students, school staff, or to the student him- or herself, the student may need to be removed from the school. Although statistics clearly show that violent incidents are relatively rare, and schools remain one of the safest places for students,[681] in a nationally representative sample of high school students (grades 9–12) data show that in 2015 approximately 7.8 percent of students reported being in a physical fight in the prior 12 months before the survey was conducted.[682] Further, 4.8 percent of students reported having a weapon (i.e., gun, knife, or club) at school for one or more days in the 30 days prior to the survey. In 2014, there were approximately 486,400 nonfatal violent victimizations among students at school; and in the 2011–12 academic year, about 9 percent of teachers reported being threatened with injury and 5 percent reported being physically attacked by a student.[683] These statistics are troubling. However, Anurima Bhargava, fellow at the Open Society Foundation and former Chief for the Educational Opportunities Section at DOJ, testified at the Commission's

[680] *See, e.g.,* Losen and Skiba, *Suspended Education: Urban Middle Schools in Crisis*, *supra* note 190; Losen and Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, *supra* note 371.
[681] *See* Matthew Mayer and Michael Furlong, "How Safe Are Our Schools?" *Educational Researcher* vol. 39, no.1, 2010; Simone Robers, Jijun Zhang, Jennifer Truman, Thomas Snyder, "Indicators of School Crime and Safety: 2011," National Center for Education Statistics, 2012; U.S. Dep't of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection: School Climate and Safety*, *supra* note 1.
[682] The sample size consisted of 15,624 student surveys. Center for Disease Control and Prevention, "Understanding School Violence," Fact Sheet 2016, https://www.cdc.gov/violenceprevention/pdf/School_Violence_Fact_Sheet-a.pdf (citing Laura Kann, Tim McManus, William Harris, et al., "Youth Risk Behavior Surveillance," Centers for Disease and Prevention, Morbidity and Mortality Weekly Report, Vol. 65, No. 6, June 10, 2016, https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6506.pdf).
[683] Ibid. (The sample size consisted of 352,900 and 209,800, respectively; citing Anlan Zhang, Lauren Musu-Gillette, and Barbara Oudekerk, *Indicators of School Crime and Safety: 2015*, National Center for Education Statistics, U.S. Dep't of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, May 2016, at 38 and sample size denoted on 136, https://nces.ed.gov/pubs2016/2016079.pdf).

briefing that (perhaps counter-intuitively) simply suspending or expelling these students does not make the school safer.[684] She argues that while teachers should have these disciplinary options available, automatically utilizing these practices may not actually address the violent behavior. As Bhargava explained, once a student is suspended or expelled the student is not given the tools necessary to work through the issues that are causing the violent behavior in the first place.[685] Bhargava explained that

> the exclusion of students from schools is not allowing them the opportunity to learn how to behave in classrooms. To be able to behave and engage academically is something that students need to learn, and they need to learn it together. And if you kick them out of class, they don't have a chance to be able to do that. And secondly, when we think about what makes schools more safe, it is that opportunity to give tools and resources to teachers, and to administrators, to figure out how it is that they can most effectively manage their classrooms.[686]

Research has also shown that exclusionary discipline practices do not enhance learning, safety, or the overall school climate; and in many cases, the effects are quite the opposite.[687] For instance, sociology professors Brea Perry and Edward Morris found that schools with high rates of suspensions and expulsions, but low levels of violence, had the greatest adverse effects from exclusionary discipline for non-suspended students.[688] These negative effects on non-suspended students were found in the most violent and disorganized schools as well.[689] The researchers therefore argue that focusing on strategies of social integration instead of exclusionary punishment will result in safer and better performing schools.[690] Citing Perry and Morris' research, Bhargava also testified that:

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[684] Anurima Bhargava, Leadership and Government Fellow at the Open Society Foundation and the former Chief for the Educational Opportunities Section in the Civil Rights Division of the U.S. Dep't of Justice, testimony, *Briefing Transcript* p. 57.
[685] Ibid.
[686] Ibid.
[687] American Psychological Association Zero Tolerance Task Force, "Are Zero Tolerance Policies Effective in Schools?" *American Psychologist*, vol. 63, no. 9 (2008), 852-62; Jenni Owen, Jane Wettach, and Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family Policy and Duke Law School, 2015, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf; Losen and Skiba, *Suspended Education: Urban Middle Schools in Crisis*, *supra* note 190; Skiba, "The Failure of Zero Tolerance," *supra* note 2; Elizabeth Pufall Jones, Max Margolius, Miriam Rollock, Catalina Tang Yan, Marissa L. Cole, and Jonathan F. Zaff, *Discipline and Disconnected*, Center for Promise, 2018, http://gradnation.americaspromise.org/report/disciplined-and-disconnected; U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," *supra* note 170, at 10-11, 14.
[688] Brea Perry and Edward Morris, "Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools," *American Sociological Review*, vol. 79, no. 6 (2014).
[689] Ibid.
[690] Ibid.

> The reason for [those negative effects] is that kind of classroom environment is not one in which students are learning how to engage with one another, and the degree of anxiety, [and] the degree of concern about that kind of control [] breaks down cohesion in classrooms.[691]

Due to findings such as these, many schools, districts, and states have implemented alternative approaches to address misbehavior that work with students to hold them accountable, address both victim's and accused's needs, and effectively improve student behavior and school officials' responses.[692] Not only have these approaches helped to enhance the collective experience of student learning, but also they have helped to keep students in classrooms and out of courtrooms and from becoming a part of the juvenile justice system.[693]

The Commission heard policy disagreements about how the federal government should use its power regarding local school district and state implementation of federal laws governing the discipline of students of color with disabilities. But the law clearly prohibits schools from treating students differently because of their race and from denying students with disabilities a fair and appropriate education.[694] These laws are enforced by the Department of Education and the Department of Justice.[695]

Eve Hill, partner at Brown, Goldstein and Levy and former Deputy Assistant Attorney General for the Civil Rights Division at DOJ, testified at the Commission's briefing that in order to end the negative effects and discriminatory application of exclusionary discipline practices, schools must stop

> writing off children with disabilities and children of color as being born bad, and have to teach them and support them to meet the expectations that we have. We have to eliminate the discrimination underlying disproportion, reduce the unnecessary use of discipline and for as long as those discriminatory attitudes exist, reduce the use of exclusionary discipline.[696]

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[691] Anurima Bhargava, testimony, *Briefing Transcript* p. 59.
[692] Steinberg, et al., "What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago," *supra* note 171; Steenburgh, "Report: strides gained in schools as part of OCR agreement," *supra* note 516.
[693] Thalia Gonzalez, "Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline," *Journal of Law & Education* vol. 41, no. 2 (2012), 281-335; Russell Skiba, Mariella Arrendondo, and Natasha Williams, "More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline," *Equity & Excellence in Education*, vol. 47 (2014), 546-64.
[694] *See* Introduction: Relevant Civil Rights Law, *supra* notes 76-91, 113-136 (discussing federal protections under Title VI, Section 504, and the ADA).
[695] *See* Introduction: Relevant Civil Rights Laws, *supra* notes 83-85.
[696] Eve Hill, testimony, *Briefing Transcript* pp. 32-33.

As the data in previous chapters of this report illustrate, there are significant nationwide and district-specific disparities in the ways students of color with disabilities experience discipline in schools compared to their peers, and these disparities may lead to and reflect discrimination in school discipline practices.[697] However, disproportionality is not always an indicator of discrimination,[698] and discrimination (e.g., treating a student differently based on race or disability status or both) can occur when disciplinary rates are proportional.[699] This section discusses the policy debates about whether and how the issues of school discipline and nondiscrimination with respect to race, national origin, and disability status should be addressed according to federal civil rights law.

The DOJ's Civil Rights Division and the Department of Education's OCR enforce Title VI in K–12 public schools.[700] As previously noted, both DOJ and OCR also enforce the ADA and Section 504, again with OCR leading that work in schools.[701]

Most studies no longer challenge the fact that there are racial disparities when analyzing school discipline data due to the CRDC database released by the Education Department. Therefore, the dispute often centers on the interpretation about why these disparities exist, and if there is evidence of discrimination (even unintentional discrimination) by teachers and school officials.[702] These disparities are often difficult to parse out in empirical studies because researchers typically cannot observe the actual behaviors that are occurring within the classroom, biases can be difficult to

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[697] *See, e.g.*, Discussion and Sources, *supra* notes 364-375, 384-399.

[698] *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 256-57, 294, 301 (3d Cir. 2014) (holding that despite evidence showing that black students were disproportionately placed in special education classes, school personnel had not intentionally discriminated on the basis of race); *Bussey v. Phillips*, 419 F. Supp. 2d 569, 583 (S.D.N.Y. 2006) (finding that "[s]tatistical evidence can be used to demonstrate disparate impact" but "in an individual disparate treatment case. . . statistics alone do not suffice to establish discriminatory intent.").

[699] *See, e.g.*, Barrett, et al., *What are the sources of school discipline disparities by student race and family income?*, *supra* note 530, at 5 (reporting that even when black and white students had "similar discipline records," black students received stricter punishments, which, when controlling for other factors, "suggested at least some degree of intentional discrimination towards black students.").

[700] 34 C.F.R. § 100.1; *see also* Introduction: Relevant Civil Rights Law, *supra*, at notes 75-76. The Dep't of Justice enforces Title VI with respect to schools, law enforcement agencies, and other recipients of Federal financial assistance from DOJ. The Justice Dep't's Office for Civil Rights at the Office of Justice Programs (OJP OCR) is the principal DOJ office that enforces Title VI though its administrative process. *See* U.S. Dep't of Justice, Office for Civil Rights, "Title VI of the Civil Rights Act of 1964," http://www.ojp.usdoj.gov/about/ocr/pdfs/OCR_TitleVI.pdf. DOJ also enforces Title VI upon referral from another federal funding agency, or through intervention in an existing lawsuit. DOJ further coordinates the enforcement of Title VI government-wide. *See* Executive Order 12250 § 1 201(a), https://www.justice.gov/crt/executive-order-12250.

[701] 28 C.F.R. § 35.190(b)(2); 28 C.F.R. § 35.190(b)(6); 34 C.F.R. § 104.3. Note that the Dep't of Education's Office of Special Education Programs, a component of the Dep't's Office of Special Educ. and Rehabilitative Servs., administers the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400 *et seq.* The IDEA is a federal law that provides funding to states and local school districts to assist with special education and related services to children with disabilities.

[702] Paul Morgan, testimony, *Briefing Transcript*, p. 144.

determine, and there is little data on student infractions and punishments.[703] However, Anurima Bhargava argued that when it comes to disciplining students, "this is not a numbers game. This is a game about how it is that we actually provide a more effective way in which to manage misbehavior in schools and to make sure that everybody in a school building is safe."[704]

Eve Hill testified that one strategy to ensure that neither intentional discrimination nor unlawful disparate impact is occurring in schools takes a systemic approach to investigating racial disparities and looks for systemic remedies, rather than a case-by-case approach.[705] She stated that:

> An incident-by-incident approach to investigation enforcement will end up hiding racial discrimination. Intentional discrimination is often not explicit in a given incident. Non-intentional discrimination, such as the implicit biases that some people have and have not been trained how to address, is often almost invisible in an individual incident. Parents have little or no ability to see that their individual child is being treated differently than another child of another race, or without a disability. In the big picture, we [at the Civil Rights Division at DOJ] looked beyond the individual incident for the systemic impact and addressed the systemic impact through systemic remedies. And this is an important approach, because although the federal laws recognize disparate impact as a form of discrimination and a way of proving discrimination, only the federal government can take that enforcement approach. Individuals can only deal with the individual, often only [in cases of] explicit discrimination.[706]

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[703] Andrew McEachin, "Discipline Disparities and Discrimination in Schools," RAND, Nov. 21, 2017, https://www.rand.org/blog/2017/11/discipline-disparities-and-discrimination-in-schools.html. It is worth noting that while these issues are difficult to determine at the research level, these issues are not as difficult to parse in federal investigations, since investigators can examine student-specific data and files and interview parties and witnesses. The investigations by DOJ and OCR often can yield important information on these issues. *See, e.g.*, U.S. Dep't of Education, Office for Civil Rights, Letter to Dr. Gearl Loden, Superintendent, Tupelo Public School District, Sept. 25, 2014, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06115002-a.pdf; U.S. Dep't of Education, Office for Civil Rights, Letter to Dr. Bernadeia H. Johnson, Superintendent, Minneapolis Public Schools, Nov. 20, 2014, https://www2.ed.gov/documents/press-releases/minneapolis-letter.pdf. Further, one reason these agencies have federal investigators is that they have developed expertise needed to analyze an incident to determine what, if any, prospective relief is necessary.

[704] Anurima Bhargava, testimony, *Briefing Transcript*, p. 64.

[705] Eve Hill, testimony, *Briefing Transcript* p. 28.

[706] Ibid., 28-29. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court ruled that Title VI of the Civil Rights Act of 1964 did not grant a private right of action to allow private lawsuits based on evidence of disparate impact. Therefore, only the federal government can take up a disparate impact enforcement approach. DOJ explained that, "[f]ollowing *Sandoval*, the Civil Rights Division issued a memorandum on October 26, 2001, for 'Heads of Departments and Agencies, General Counsels and Civil Rights Directors' that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although *Sandoval* foreclosed private judicial enforcement of Title VI, the regulations remained valid and funding agencies retained their authority and responsibility to enforce them." U.S. Dep't of Justice, Civil Rights Division, *Title VI Legal Manual, Section VII*, updated Mar. 18, 2019, https://www.justice.gov/crt/fcs/T6Manual7#B (on file).

Debates regarding school discipline had already gained national attention in 2014 when then-Secretary of Education Arne Duncan stated that discipline disparities were potentially due to biases against students of color, and if so, these policies would be in violation of Title VI protections.[707] However, Max Eden, senior fellow at the Manhattan Institute, argued that the disparities we currently see are not due to discrimination, since, he claims, most disparities are between schools and districts rather than within schools or school districts.[708] In Eden's testimony to the Commission, he cited several studies finding more frequent suspensions among black students collectively; however, the disparities were largely *between* schools rather than *within* schools, which he argued shows a lack of discrimination. According to Eden, these statistics may suggest a systemic racial bias, but he argued that "schools can't be biased, only people can be biased, only teachers can be biased, only principals can be biased. And that bias does not play a substantial part in these between school differences."[709]

On the other hand, Monique Morris, co-founder and president of the National Black Women's Justice Institute, during her testimony to the Commission argues that

> Oppression manifests structurally, individually, culturally, and in internalized ways. Knowing that, we cannot say that schools, as institutions, cannot be biased. Knowing that, we know that there are tools, that there are ways for us to support the capacity of educators, of districts, of institutions and their partners to respond the way that we think that they should be responding based upon the data and research that we have been engaged in. . .[710]

In fact, resolution information following ED investigations regarding school discipline practices offer ample evidence of the existence of disparities on the basis of race and disability in the

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[707] U.S. Dep't of Education, "Rethinking School Discipline," Remarks of U.S. Secretary of Education Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package, Jan. 8, 2014, https://www.ed.gov/news/speeches/rethinking-school-discipline. *See also* Press Release: U.S. Dep't of Justice, Office of Public Affairs, "Attorney General Holder, Secretary Duncan Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices," July 21, 2011, https://www.justice.gov/opa/pr/attorney-general-holder-secretary-duncan-announce-effort-respond-school-prison-pipeline; Max Eden, senior fellow at the Manhattan Institute, testimony, *Briefing Transcript* p. 85. *See also Barnett v. Baldwin Cty. Bd. of Educ.*, 60 F. Supp. 3d 1216 (S.D. Ala. 2014), 1231–32 (finding potential unlawful and unconstitutional disciplinary practices that allegedly "systematically target[ed] African–American, Hispanic, bi-racial, students whose parents were or are in inter-racial relationships, or Caucasian students with close friendships with student [sic.] of color" by placing them in "black boxes" or "locked closets."); *Clark v. Board of Educ.* (D.N.J. 2009), Case No. CIV.A. 06-2736 (FLW), 2009 WL 1586940, at *3, *9-11 (finding potential unlawful and unconstitutional disciplinary action where a teacher suspended an African-American preschooler with disabilities for nine days and never inflicted such punishment on a white preschooler).

[708] Eden testimony, *Briefing Transcript*, p. 86.

[709] Ibid.

[710] Monique Morris, co-founder and president of the National Black Women's Justice Institute, testimony, *Briefing Transcript*, p. 129.

imposition of school discipline, including within schools. For example, OCR found evidence of unequal treatment against students of color with disabilities in the Loleta Union Elementary School District in California. An investigation revealed that Native American students were being punished more frequently and more severely than their peers, they were exposed to harassment and derogatory comments from school officials, and some Native students with disabilities were also not being properly evaluated for a disability.[711] For instance, a teacher reported to OCR that she had requested an evaluation for several students, but the district failed to conduct them.[712] Another teacher reported that there was "a 'bottle neck' of students at the School who needed to be evaluated for IEPs, including one Native American student who had waited nearly an entire school year for an evaluation."[713] One example caused by this under-identification includes a student who after his evaluation, during the following school year, had "at least 68 behavioral incidents…of which 39 were identified as 'major.'"[714] OCR found that the school psychologist did not thoroughly evaluate the student initially and did not conduct the necessary steps to determine "the cause of the student's processing speed, communication, or socio-emotional functioning difficulties, which had been identified in school records."[715]

Another OCR investigation that also resulted in a subsequent Resolution Agreement with ED involved the Tupelo Public School District after investigators found evidence of racial discrimination against black students. OCR found many examples of school officials unequally punishing students of color, such as the district only issuing out-of-school suspensions to black students for their first infraction of using profanity, whereas white students received warnings and/or detentions for substantially similar behavior.[716]

Similarly, the Oklahoma City Public Schools entered into a Resolution Agreement with the Education Department in 2016 when an internal audit found (among other violations) that:

> the District as an entity is inconsistent in its discipline practices; there are inconsistencies within individual schools themselves; there are inconsistencies in information provided to parents when their children were suspended; and []

[711] U.S. Dep't of Education, Office for Civil Rights, Letter to John Sutter, Superintendent, Loleta Union School District, *supra* note 24 (unequally punished at 8-10, 22; harassment and derogatory comments at 5-9; misidentification of disability at 25-28).
[712] Ibid., 25.
[713] Ibid.
[714] Ibid., 27.
[715] Ibid.
[716] U.S. Dep't of Education, Office for Civil Rights, OCR Docket 06-11-5002, September 25, 2014, at 17, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06115002-a.pdf.

> parameters of certain disciplinary sanctions are unclear, such as "defiance of authority" and "disrespect" among others.[717]

Further, in the OCR investigation of the Minneapolis Public Schools, investigators found within-school differences in the ways black and white students were being disciplined for similar infractions.[718] For instance, in one school,

> an 8th grade white student left class without permission and was given a detention, while an 8th grade black student received a 3-day out-of-school suspension for skipping a class…The administrator responsible for the discipline of both students said the black student had skipped class a lot, but said a 3-day suspension seemed 'a bit much.' Records provided by the District indicated that despite the assertion of the administrator, the black student had not had previous offenses of skipping school or of any other types of misconduct during the 2011–2012 school year.[719]

In the 2011–12 school year, black students made up 39.4 percent of the total Minneapolis student enrollment, yet 78.5 percent of the students who received out-of-school suspensions that year.[720] In the compliance review resolution letter, investigators found that in more than 25 percent of the infractions investigated at 11 district schools, administrators could not explain the racial differences in imposition of discipline.[721]

Similarly, in Louisiana, the Education Research Alliance for New Orleans based at Tulane University released a study on disciplinary disparities based on race and socioeconomic status for the 2000–01 through 2013–14 school years.[722] This study included over 10 million student observations and collected nearly all the student records from every school and district in the state. They found:

- Disparities in suspension rates were evident *within* schools (black and low-income students are suspended at higher rates than their same-school peers) and *across* schools (black and low-income students disproportionately attend schools with high suspension rates). While across-district differences accounted for a small portion of the disparities, within-school

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[717] U.S. Dep't of Education, Office for Civil Rights, OCR Docket 07141149, April 19, 2016, at 6-7, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07141149-a.pdf.
[718] U.S. Dep't of Education, Office for Civil Rights, Compliance Rev. #05-12-5001, November 20, 2014, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05125001-a.pdf.
[719] Ibid., 12.
[720] Ibid., 11.
[721] Ibid., 12-13
[722] Barrett, et al., *What are the sources of school discipline disparities by student race and family income?*, *supra* note 530.

and across-school-within-district differences each accounted for a sizable share of the disparities.

- Black students were nearly twice as likely to be suspended as white students. Low-income students were 1.75 times as likely to be suspended as white students.
- Black students and low-income students were more likely to receive longer suspensions for similar behavioral infractions than their peers.
- When fights occurred between a black student and a white student (even after controlling for previous disciplinary records, background characteristics, and the school attended) black students received longer suspensions than white students that equated to one extra day for every 20 fights.[723]

These trends are also apparent in national data showing that students of color with disabilities, especially black students with disabilities, were punished more severely (e.g., longer suspensions, expulsions, or arrested by police) than other students with disabilities when they committed the same school rule violation.[724]

Federal Approaches to Reduce Exclusionary Discipline

In 2011, the U.S. Department of Education and the U.S. Department of Justice launched a collaborative project called the Supportive School Discipline Initiative (Initiative) that was established to "support the use of school discipline practices that foster safe, supportive, and productive learning environments while keeping students in school."[725] Both of these federal agencies enforce relevant federal civil rights law. As a part of the Initiative, the agencies issued a joint guidance in January 2014 to assist public schools in meeting their obligations under federal law to administer student discipline without discriminating on the basis of race, color, or national origin.[726] While the guidance specifically focused on race discrimination, research has shown

[723] Ibid., 3-4.
[724] McFadden, et al., "A Study of Race and Gender Bias in the Punishment of Handicapped School Children," *supra* note 597 (researchers analyzed 4,391 discipline files from nine public schools in Florida for students in kindergarten to 12th grade and found that racial bias was prevalent in the administration of school discipline practices. For instance, black students represented 22 percent of the enrolled students and 36.7 percent of disciplinary referrals.); *see also*, Matt Cregor and Damon Hewitt, "Dismantling the School-to-Prison Pipeline," *Poverty & Race*, vol. 20, no. 1, 2011 (in the review of national discipline research, the authors found that racial disparities not only persist, but also continue to widen); Daniel Losen, *Discipline Policies, Successful Schools, and Racial Justice*, National Education Policy Center, 2011 (researchers found, e.g., that many states "suspended more than one in five black students with disabilities, and three states (Nebraska, Wisconsin, and Nevada) suspended more than 30 percent of all black students with disabilities" in the 2008-09 school year), http://nepc.colorado.edu/publication/discipline-policies.
[725] U.S. Dep't of Education, School Climate and Discipline: Federal Efforts, last modified Dec. 8, 2015, https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html.
[726] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," Jan. 8, 2014, *supra* note 23.

significant disparities in the use of discipline against students with disabilities, and the Department of Education also released other guidance documents addressing that topic.[727]

In the joint race discipline guidance, the Education Department and the Justice Department stated that they encouraged schools to work towards creating safe and productive learning environments, while also maintaining school safety and necessary behavioral protocols that would protect both teachers and students.[728] As discussed above, the agencies based their guidance upon federal civil rights law and applicable case law.[729]

The Departments stated that many schools across the nation have worked diligently to create comprehensive, appropriate, and effective programs demonstrated to: "(1) reduce disruption and misconduct; (2) support and reinforce positive behavior and character development; and (3) help students succeed."[730] Many schools have utilized a variety of strategies to reduce disruption and misbehavior without sacrificing safety, such as conflict resolution, restorative practices, counseling, and positive behavioral intervention and supports.[731] Regardless of the strategies a school district adopts, federal law prohibits public school districts from discriminating based on some demographic characteristics (e.g., race, national origin, sex, and disability) when administering punishment.

In her testimony to the Commission, former Chief for the Educational Opportunities Section in the Civil Rights Division of the Department of Justice Anurima Bhargava stated that:

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[727] *See, e.g.,* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," Dec. 12, 2016, *supra* note 23; U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter," Aug. 1, 2016, *supra* note 170; U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter and Resource Guide on Students with ADHD," July 26, 2016; U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities," *supra* note 458.

[728] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23.

[729] *See* Introduction: Relevant Civil Rights Law, *supra,* at notes 83-85; *see also* U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter: Preventing Racial Discrimination in Special Education," *supra* note 23, at 1-2; U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23, at 1-13.

[730] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23, at 1.

[731] Ibid. (The National Technical Assistance Center on Positive Behavioral Interventions and Supports (PBIS), focuses on providing resources to improve school behavior and reduce time away from instruction. Preventing the development of new problem behaviors and reducing intensity, complexity and frequency of existing problem behaviors must be reflected in all alternatives. *See, e.g.,* good prevention-based practices included at www.pbis.org, which include Supporting and Responding to Behavior and the IES What Works Clearinghouse classroom practice guide: "Reducing Behavior Problems in the Elementary School Classroom.") U.S. Dep't of Education, Office of Special Education and Rehabilitative Services (OSERS) in response to Commission's interrogatory responses, Feb. 9, 2018.

> It is the job of the Departments of Justice and Education to investigate complaints of disproportionate discipline of students with disabilities. There is near universal consensus that disparities should be grounds for investigation… Federal investigations have explored several areas of concern related to disproportionate discipline of students with disabilities, including the use of exclusionary discipline to unnecessarily segregate students, the use of disciplinary practices that are harmful and unsafe for students, and the unnecessary treatment of students of color with disabilities differently on the basis of race.[732]

Similarly, Kenneth Marcus told a Senate Committee during his nomination process in 2018 for Assistant Secretary for Civil Rights at the U.S. Department of Education that it was the federal government's role to ensure that all students are treated equitably. At the hearing, when Senator Christopher Murphy asked Marcus if disparate discipline rates of black students compared to white students were a basis for investigation, Marcus stated that "…in general, the answer is yes."[733] Senator Murphy argued that looking at the disparities in discipline rates for students of color and students with disabilities suggests that "we have a school discipline crisis in this country when it comes to the treatment of groups of students that are offered protection by the [Office for Civil Rights]."[734] Murphy cited data stating that 16 percent of black students were suspended compared to 5 percent of white students and 25 percent of students with disabilities were referred to law enforcement, yet account for 12 percent of the enrolled student population for the 2013–14 school year.[735] Notably, Kenneth Marcus admitted that if the disparities are as significant as these findings suggest, he stated, "I would consider that the grounds for asking some very tough questions."[736]

Department of Education Guidance Regarding School Discipline

Max Eden, senior fellow at the Manhattan Institute, argues that in light of the 2014 "Dear Colleague" letter and federal guidance, as of March 2017, over 50 school districts—serving 6.35 million students—had implemented reforms and 27 states had revised their laws regarding school discipline.[737] On the contrary, AASA—The School Superintendents Association—stated that

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[732] Bhargava, testimony, *Briefing Transcript* p. 25.
[733] *Hearing Before the S. Comm. on Health, Education, Labor, & Pensions*, 115th Cong., Dec. 5, 2017, https://www.help.senate.gov/hearings/department-of-education-and-department-of-labor-nominations. At the timing of this report, a transcript was not available. Responses cited in report at [1:00:30].
[734] *Id. at* 1:01:36-48.
[735] *Id. at* 1:01:15.
[736] *Id. at* 1:02:33.
[737] Max Eden, "Obama admin made schools more dangerous," *USA Today*, March 27, 2017, https://www.usatoday.com/story/opinion/2017/03/27/obama-education-trump-students-color-discipline-schools-column/99501366/; *see also* Max Eden, *School Discipline Reform and Disorder*, Manhattan Institute, 2017, https://www.manhattan-institute.org/html/school-discipline-reform-and-disorder-evidence-nyc-schools-10103.html; Anya Kamenetz, "School Suspensions Have Plunged: We Don't Yet Know If That's Good News," *NPR Ed*, March

public school districts generally have not changed their practices due to the guidance, but chose to implement discipline reforms because it was necessary. "After surveying more than 850 school leaders in 47 states over the past two weeks, it is clear the 2014 discipline guidance has not been transformative in changing discipline policies and practices for districts. The claim that it, alone, has transformed districts from safe school environments to unsafe ones is hard to justify."[738] Moreover, critics of the guidance ignore a fundamental point: the guidance is not mandatory, nor does it establish or set law; rather, it describes what the law already is and how school officials should apply it.[739] Thus, as reflected in the AASA statement above, the guidance does not cause change in schools and does not apply set requirements to school policies or procedures; whether schools utilize it or not, that choice does not change what the law actually states.

Critics of this guidance argue that students are being disruptive and breaking school rules, and, therefore, suspensions are necessary to curb these behaviors. Critics incorrectly assert that the guidance instructs teachers and administrators not to suspend students who are misbehaving, which not only takes the power away from teachers to manage their classrooms, but also causes some serious issues. For instance, in St. Paul, Minnesota, attorney John Choi stated that there has been an extreme uptick in violence in the public schools (where rates nearly tripled from 2014 to 2015); he attributes this uptick largely to federal pressure to reduce suspension rates, which he believes has now become a "public health crisis" in Minnesota.[740] Skeptics of the 2014 guidance argue that the Education Department has made it too difficult to remove disruptive and sometimes dangerous students from schools, which overall makes schools less safe.[741] Thus, some argued that U.S. Secretary of Education, Betsy DeVos, needed to rescind the Obama-era guidance. These opponents stated that the guidance was a clear sign of federal overreach and that these policies actually place students of color at risk for the most harm, due to the guidelines being applied most stringently in largely minority schools.[742]

23, 2017, https://www.npr.org/sections/ed/2017/03/23/521070924/school-suspensions-have-plunged-we-don-t-yet-know-if-that-s-good-news.

[738] Press Release: "AASA Issues Statement On School Discipline Guidance," April 4, 2018, http://www.aasa.org/content.aspx?id=42386.

[739] *See, e.g.*, U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23 at 1.

[740] Brian Lambert, "Violence in St. Paul schools called 'public health crisis,'" *Minnesota Post*, Dec. 9, 2015, https://www.minnpost.com/glean/2015/12/violence-st-paul-schools-called-public-health-crisis.

[741] Andrew Ujifusa, "DeVos' Team Hears Criticisms of Obama-Era Guidance on Student Discipline," *Education Week*, Nov. 17, 2017, http://blogs.edweek.org/edweek/campaign-k-12/2017/11/devos_criticisms_obama_student_discipline_guidance.html?r=14320560.

[742] Mark Keierleber, "Is DeVos Near Ending School Discipline Reform After Talks on Race, Safety?" *The 74* Million, Nov. 20, 2017, https://www.the74million.org/article/is-devos-near-ending-school-discipline-reform-after-talks-on-race-safety/; Rachel Cohen, "Rethinking School Discipline," *American Prospect*, Nov. 2, 2016, http://prospect.org/article/rethinking-school-discipline; Adrienne Green, "When Schools Are Forced to Practice Race-Based Discipline," *The Atlantic*, Aug. 26, 2015, https://www.theatlantic.com/education/archive/2015/08/teachers-say-no-disparate-impact-discipline/402144/; Joshua Dunn, "Disparate distortions: Obama administration doublespeak undermines school discipline," Thomas

As of December 21, 2018, in a joint "Dear Colleague" letter from the Justice and Education Departments, the 2014 guidance was rescinded.[743] Additionally, the Departments rescinded the Supportive School Discipline Initiative and several other supporting documents.[744] The rescission letter states that based off the recommendations from the Federal Commission on School Safety, the Departments chose to rescind the guidance and give states and local school districts the "primary role in establishing educational policy, including how to handle specific instances of student misconduct and discipline, and in ensuring that classroom teachers have the support they need to implement appropriate discipline policies."[745]

The Federal Commission on School Safety recommended the 2014 guidance be rescinded due to the use of the "disparate impact" standard for proving discrimination.[746] As discussed previously, applying the disparate impact standard means that even if schools have facially neutral discipline policies, schools could still be investigated if its policies were shown to have an adverse effect on some populations of students over others.[747] The Commission concluded that "disparities in discipline that fall along racial lines may be due to societal factors other than race" for instance, students being from disadvantaged communities and those who "face significant trauma;" therefore, challenging the legality of the guidance.[748]

Conversely, in a 2019 study Professor of Education at Pennsylvania State University Paul Morgan and colleagues posit that racial disparities in discipline rates cannot be explained by societal factors, even after controlling for socioeconomic status, or previous academic or behavioral problems.[749] The researchers found that in a nationally representative and longitudinal sample of

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Fordham Institute, 2014, https://edexcellence.net/commentary/education-gadfly-daily/flypaper/disparate-distortions-obama-administration-doublespeak.

[743] U.S. Dep't of Justice, Civil Rights Division, & U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague" Dec. 21, 2018, 2, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[744] Guiding Principles: A Resource Guide for Improving School Climate and Discipline, dated January 8, 2014; Appendix 1: U.S. Dep't of Education Directory of Federal School Climate and Discipline Resources, dated January 8, 2014; Appendix 2: Compendium of School Discipline Laws and Regulations for the 50 States, Washington D.C., and Puerto Rico, dated January 8, 2014; and School Discipline Guidance Package FAQs, dated January 8, 2014. Ibid.

[745] U.S. Dep't of Justice, Civil Rights Division, & U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague" *supra* note 743 at 2.

[746] Federal Commission on School Safety, *Final Report of the Federal Commission on School Safety*, Dec. 18, 2018, 70-71, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

[747] *See supra* notes 88-92.

[748] Federal Commission on School Safety, *Final Report of the Federal Commission on School Safety*, Dec. 18, 2018, 68-71, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

[749] Paul Morgan, George Farkas, Marianne Hillemeier, Yangyang Wang, Zoe Mandel, Christopher DeJarnett, and Steve Maczuga, "Are students with disabilities suspended more frequently than otherwise similar students without disabilities?" *Journal of School Psychology*, vol. 72, 1-13, https://reader.elsevier.com/reader/sd/pii/S0022440518301171?token=A421E233F077D8C9830F4FBC28A14752AFF5C28AB33816C84974E48DAD7566A5251098171DBFD2D1F64AE56C13ED6924.

K–8 students, students of color received 1.6 times as many suspensions by the end of eighth grade as white students with similar behavioral and academic records and from similar socioeconomic backgrounds.[750] Thus, the researchers contend that schools discipline students in racially discriminatory ways that are "beyond a mere statistical disparity," at least when controlling for factors such as prior behavior, socioeconomic status, and economics of the school.[751] As such, Morgan suggests that the Trump Administration should not have rescinded the guidance entirely, but instead should have offered guidance to schools and districts on how to properly monitor for racially discriminatory discipline practices.[752]

Max Eden stated that the guidance was a "pretty clear-cut case of the federal government overstepping its bounds to call the judgment of teachers into question, and in some ways impugn their motives, in order to satisfy civil rights groups."[753] Some teachers and parents agree, stating that this focus on reducing suspensions can keep dangerous students in the school and they pose a threat to their peers and school staff. For instance, some of the teachers stated they were assaulted by students and the Obama-era guidance caused them to lose their jobs. Contrary to these criticisms, the federal government is mandated to enforce nondiscrimination law that Congress enacts and the guidance is within its jurisdictional bounds to explain the letter of the law for school officials.[754]

Critics also argued that the guidance made schools less safe due to the push to reduce suspension rates, meaning that violent and disruptive students are allowed to remain in school, rather than being removed.[755] Joshua Dunn, Associate Professor of Political Science at the University of Colorado, argues that the Education Department's 2014 guidance encouraged "schools to tolerate disruptive and dangerous behavior lest they have too many students of one race being punished. . . And the disruptive [students] will certainly learn, and learn quickly, that their schools are now tolerating even more disruptive behavior."[756] At the Commission's briefing, Deborah York, a teacher from Minnesota, testified that she was assaulted in her classroom when she tried to intervene when a student became violent. She stated that

> [the] assault required three major surgeries, ending my 30-year career. And that troubled little guy, the 85-pound student, is now in his fourth school for special

[750] Ibid., 8.
[751] Paul Morgan, "Was Rescinding the School Discipline Guidance a Mistake?" *Psychology Today*, Jan. 5, 2019, https://www.psychologytoday.com/us/blog/children-who-struggle/201901/was-rescinding-the-school-discipline-guidance-mistake.
[752] Ibid.
[753] Keierleber, "Is DeVos Near Ending School Discipline Reform After Talks on Race, Safety?" *supra* note 742.
[754] *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336 (1990).
[755] Dunn, "Disparate distortions: Obama administration doublespeak undermines school discipline," *supra* note 742; Green, "When Schools Are Forced to Practice Race-Based Discipline," *supra* note 742.
[756] Dunn, "Disparate distortions: Obama administration doublespeak undermines school discipline," *supra* note 742.

> needs, emotionally and behaviorally disturbed kids. We failed him, and I think we failed all the other kids in the class too. We all know teachers can't teach and students can't learn when they don't feel safe. But [due to] the Dear Colleague letter, too many schools are not safe. Most teachers across the country have not heard about the Dear Colleague letter. But I can assure you, many have experienced the impact of the letter by the increase in abusive behavior… School districts in Minnesota have had an increase in violent behavior with harm to teachers and students because of fear of federal investigations and defunding.[757]

In response, some states proposed their own legislation to counter-act the federal guidance. In April 2016, Minnesota House of Representative, Jennifer Loon proposed a bill that "affirms a teacher's right to remove students from class for disruptive behavior and requires teachers to be notified when kids with violent pasts are placed in their classrooms."[758] While both of these requirements are already part of Minnesota law, the new bill is meant to strengthen these protections. This bill was proposed also in part due to a series of teachers alleging that their students assaulted them in the classroom and that teachers were afraid to speak out about disruptive behavior for fear of retaliation.[759]

However, Jocelyn Samuels, former Acting Assistant Attorney General for Civil Rights at the Department of Justice and a co-signer of the 2014 guidance, stated that its purpose was not to end the use of suspensions, but to "arm schools with the tools and information to get out in front of discipline problems before they needed to rely on suspensions or referrals to the criminal justice system."[760] Samuels stated that the guidance directed schools to examine practices and policies that lead to suspensions and to pursue "more limited discipline" measures that do not necessarily rely so heavily on removing students from school.[761]

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[757] Deborah York, Minnesota Teacher Protection Law, *Briefing Transcript* pp. 178-79.
[758] Anthony Lonetree, "Minnesota bill would bolster teachers in discipline matters," *Star Tribune*, April 5, 2016, http://www.startribune.com/minnesota-bill-would-bolster-teachers-in-discipline-matters/374669351/.
[759] Ibid.; H.F. 3679, 89th Leg., Reg. Sess. (Minn. 2016), https://www.revisor.mn.gov/bills/text.php?number=HF3679&version=latest&session=89&session_number=0&session_year=2015. *See also* MINN. STAT. ANN. § 121A.53 (Minnesota statute requiring school board to report "each exclusion or expulsion and each physical assault of a district employee by a student"); MINN. STAT. ANN. § 121A.64 (Minnesota statute requiring teachers to be notified when a student with "a history of violent behavior, including any documented physical assault of a district employee by the student" is placed in their classrooms); MINN. STAT. ANN. § 122A.42 (authorizing teachers to remove a student from the classroom "for violent or disruptive conduct").
[760] Greg Toppo, "DeVos commission eyes Obama school discipline rules," *USA Today*, March 13, 2018, https://www.usatoday.com/story/news/2018/03/12/devos-commission-eyes-obama-school-discipline-rules/418147002/.
[761] Ibid.

Attention to the guidance was further heightened in the wake of the shooting at Marjory Stoneman Douglas High School in Parkland, Florida in February 2018.[762] Florida Republicans, including Senator Marco Rubio, issued a letter calling on the Education Department to rethink the Obama Era guidance. The letter stated that the guidance has "discouraged schools from referring students to local law enforcement," thus schools are less likely to report violent and dangerous students to local law enforcement which jeopardizes the safety of all students.[763] In the letter, Rubio claimed that the 2014 guidance "may have contributed to systemic failures" in reporting problem students.[764] For instance, the Parkland shooter, Nikolas Cruz, had a long list of disciplinary infractions on his school records that included profanity, disobedience, insubordination, and disruption.[765] Social and political commentator Ann Coulter made similar arguments stating that "Cruz's criminal acts were intentionally ignored by law enforcement on account of Broward's much-celebrated 'school-to-prison pipeline' reforms.'"[766]

However, evidence emerged that in fact school officials did take many disciplinary actions that removed Cruz from school due to his behavioral issues. He was transferred and then expelled from several different schools in Florida where issues reportedly continued, but were not extreme enough to warrant his arrest.[767] Cruz had also been referred to the county's alternative-to-exclusionary discipline program known as PROMISE (Preventing Recidivism through Opportunities, Mentoring, Interventions, Support & Education).[768] While critics have claimed that this program and other alternatives to exclusionary discipline policies failed Cruz and failed to prevent the shooting, the Marjory Stoneman Douglas High School Public Safety Commission ruled in July 2018 that the PROMISE program was not related to the mass shooting. The Public Safety Commission ruled that "[i]t's completely irrelevant, it's a rabbit hole, it's a red herring, it's

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[762] Erica L. Green, "Trump Finds Unlikely Culprit in School Shootings: Obama Discipline Policies," *New York Times*, Mar. 13, 2018, https://www.nytimes.com/2018/03/13/us/politics/trump-school-shootings-obama-discipline-policies.html?module=inline; *see also* Press Release, Rubio Urges Justice, Education Depts to Revise School Guidelines for Reporting Threats to Local Law Enforcement, Marco Rubio U.S. Senator for Florida, Mar. 5, 2018, https://www.rubio.senate.gov/public/index.cfm/press-releases?ContentRecord_id=70A6D80E-6F0C-432B-A07B-DD77E1C8C70C.

[763] Toppo, "DeVos commission eyes Obama school discipline rules," *supra* note 760.

[764] *See* Press Release, "Rubio Urges Justice, Education Dep'ts to Revise School Guidelines for Reporting Threats to Local Law Enforcement," *supra* note 762. *See also* Michelle Goldberg, "Will Betsy DeVos Expand the School-to-Prison Pipeline?" *New York Times*, Mar. 12, 2018, https://www.nytimes.com/2018/03/12/opinion/devos-school-prison-pipeline.html.

[765] Carol Marbin Miller and Kyra Gurney, "Parkland shooter always in trouble, never expelled. Could school system have done more?" *Miami Herald*, Feb. 20, 2018, http://www.miamiherald.com/news/local/article201216104.html.

[766] Goldberg, "Will Betsy DeVos Expand the School-to-Prison Pipeline?" *supra* note 764.

[767] Toppo, "DeVos commission eyes Obama school discipline rules," *supra* note 760; Green, "Trump Finds Unlikely Culprit in School Shootings: Obama Discipline Policies," *supra* note 762.

[768] The PROMISE program is "an initiative designed to address the unique needs of students who have committed a behavioral infraction that would normally lead to a juvenile delinquency arrest and, therefore, entry into the juvenile justice system. In addition, it serves students who have committed infractions related to bullying and harassment." *See* Pine Ridge Education Center, "Promise Program," Broward County Public Schools, https://www.browardschools.com/Page/19571 (last accessed Nov. 7, 2018).

immaterial, and . . . has nothing to do with what happened at Marjory Stoneman Douglas High School on February 14."[769]

Further, as more information emerged about Cruz's disciplinary record, Rubio began rolling back some of his initial claims. He stated: "The more we learn, the more it appears the problem is not the program or the DOE [Department of Education] guidance itself, but the way it is being applied. It may have created a culture [that] discourages referral to law enforcement even in egregious cases like the #Parkland shooter."[770]

Conversely, several civil rights groups argue that a heightened police presence and reinvesting in tough zero tolerance policies are not going to keep students or faculty safe on campus. Researchers with Advancement Project argue that these policies only exacerbate issues, create hostile school environments, and fuel the school-to-prison pipeline.[771] They argue that "[p]olice do not contribute to positive, nurturing learning environments for students."[772] As discussed in Chapter 1 of this report, an increased presence of officers in schools is correlated with an increase in school-based arrests for minor infractions that might otherwise be handled by school staff. And these punitive measures negatively affect all students and the overall school climate.[773] Further, Curt Decker, executive director of the National Disability Rights Network, stated that while it is critical to keep students safe, there are concerns about possible security upgrades that schools may implement without considering how they could infringe upon the ability for students with disabilities to maneuver around school.[774] Decker stated that any new security measures need to be compliant with the ADA and argues that "[t]here's no debate that we must do all we can to keep our schools safe. But we can't let fear drive policy decisions that make matters worse."[775]

Hans Bader, who served briefly as an attorney advisor in the office of General Counsel at the Education Department during the Trump Administration, argued in 2017 that the Education

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[769] Colleen Wright, "Broward's PROMISE program 'irrelevant' to Nikolas Cruz's massacre, commission says," *Miami Herald*, July 10, 2018, https://www.miamiherald.com/news/local/education/article214615740.html.
[770] Green, "Trump Finds Unlikely Culprit in School Shootings: Obama Discipline Policies," *supra* note 762.
[771] Advancement Project, Alliance for Educational Justice, Dignity in Schools Campaign, NAACP Legal Defense and Educational Fund, Inc., *Police in Schools Are Not the Answer to School Shootings*, 2018, https://advancementproject.org/resources/police-schools-not-answer-school-shootings/.
[772] Ibid., 3.
[773] *See, e.g.*, Discussion and Sources cited at notes 138-45; *See also* Jason Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. R. 919 (2016), University of Florida Levin College of Law Research Paper, No. 15-20, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577333; American Civil Liberties Union, *Bullies in Blue: The Origins and Consequences of School Policing*, 2017, https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf.
[774] Evie Blad, "Civil Rights Groups Sound the Alarm About Safety Plans After Parkland Shooting," *Education Week*, March 19, 2018, http://blogs.edweek.org/edweek/rulesforengagement/2018/03/civil_rights_groups_sound_the_alarm_about_school_safety_plans_after_parkland_shooting.html.
[775] Ibid.

Department's guidance "pressured schools to reduce suspensions, in the name of fighting racial disparities. Teachers in affected school districts complain of increased disorder and physical attacks by students as a result."[776] Further, Bader argues that the disparities in discipline rates are due to black students misbehaving more than their white peers and the administration's attempt to reduce these numbers have pressured school districts "to adopt racial quotas."[777]

Proponents of the Obama-era guidance argue that the guidance does not mandate or implement racial quotas, nor does it state that exclusionary discipline is never appropriate. Neither the Department of Justice nor the Department of Education require schools to establish racial or disability-related quotas, and the implementation of the DOJ and ED resolution agreements include federal oversight to ensure that discrimination (including in the form of quotas) does not take place. Eve Hill, former Deputy Assistant Attorney General at the Civil Rights Division at the Justice Department, testified at the Commission's briefing that

> it's important to point out that the DOJ did not require schools to adopt discipline quotas or to get rid of any particular type of discipline. Rather, the systemic remedies of root cause analysis, data analysis, training, and policies and procedures were designed to change the discrimination that underlies the disparity.[778]

While there could be a potential for some school districts to adopt unlawful quotas (e.g., if schools lack the financial resources to implement alternative methods and/or do not invest in alternative training), all OCR resolution agreements (at the time of this report) include language stating that OCR will monitor implementation until OCR is satisfied that relevant civil rights laws are not being violated.[779] Further, OCR examines whether districts take discriminatory steps and requires districts to make corrections in the course of its monitoring.[780]

Many critics opposed the 2014 guidance because they interpret it as a mandate that was meant to prohibit administrators from suspending or expelling disruptive students, a policy that many would not support. According to a 2015 nationwide poll by the journal *Education Next*, when asked: "Do you support or oppose federal policies that prevent schools from expelling or suspending black and Latino students at higher rates than other students?" a majority of the general public and

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[776] Hans Bader, "Race-Conscious Curbs on Suspensions in School Lead to Violence," *CNSnews.com*, March 16, 2017, https://www.cnsnews.com/commentary/hans-bader/race-conscious-curbs-suspensions-school-lead-violence.
[777] Hans Bader, "Legal Reformers Call for Repeal of Race-Based School Discipline Guidance," Competitive Enterprise Institute, 2017, https://cei.org/blog/legal-reformers-call-repeal-race-based-school-discipline-guidance.
[778] Eve Hill, testimony, *Briefing Transcript* p. 28.
[779] U.S. Dep't of Education, Office for Civil Rights, "Complaint Processing Procedures," last updated Nov. 2018, at 3, https://www2.ed.gov/about/offices/list/ocr/complaints-how.html?exp=.
[780] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23, at 21-22.

teachers stated that they generally oppose federal policies that prevent schools from expelling or suspending black and Latino students at higher rates than other students (see table 1).[781]

Table 1: School Discipline Reform Opinion Poll

	Public	Parents	Teachers	African Americans	Latinos	Whites
Completely Support	10%	11%	7%	29%	15%	5%
Somewhat Support	11%	12%	16%	13%	17%	9%
Somewhat Oppose	20%	18%	25%	8%	19%	22%
Completely Oppose	31%	35%	34%	15%	25%	36%
Neither Support nor Oppose	20%	24%	18%	36%	25%	29%

Source: Michael B. Henderson, Paul E. Peterson, and Martin R. West, http://educationnext.org/files/2015ednextpoll.pdf

As noted in the table above, teachers and members of the public who responded to the poll generally opposed the guidance. However, there are notable differences depending on the respondent's race or ethnicity. The highest level of support was noted among black respondents (41 percent in favor) compared to 31 percent of Latino respondents, and only 14 percent of white respondents.[782]

Other critics of the 2014 guidance argued that it has exerted undue pressure on school administrators to reduce suspensions and expulsions, sometimes, by any means necessary. Several school districts nationally have been successful in lowering their suspension and expulsion rates, which appears to demonstrate positive reforms in disciplinary policies to ensure that all students are being treated equitably. However, there is evidence to suggest that some schools may be falsifying their suspension records or pushing students into alternative schools to falsely lower their discipline rates.[783]

The District of Columbia Public School (DCPS) system reported a decrease in suspensions from 11,078 in 2013–14 to 6,695 in 2015–16, which is a 40 percent reduction.[784] School officials claim this reduction is due to schools adopting alternative disciplinary policies to suspensions, such as restorative justice practices. However, when reporters investigated these numbers and records more closely, they found that at least seven of the city's 18 high schools had removed disruptive

[781] Michael Henderson, Paul Peterson, and Martin West, "The 2015 ED Next Poll on School Reform," 2016, http://educationnext.org/files/ednext_XVI_1_2015poll.pdf.
[782] Ibid.
[783] Alejandra Matos and Emma Brown, "Some D.C. high schools are reporting only a fraction of suspensions," *Washington Post*, July 17, 2017, https://www.washingtonpost.com/local/education/some-dc-high-schools-reported-only-a-small-fraction-of-suspensions/2017/07/17/045c387e-5762-11e7-ba90-f5875b7d1876_story.html?utm_term=.e34923bce327.
[784] Ibid.

students from schools, but not recorded it as a suspension. In several cases, students who had been barred from entering the school were marked as present, others were marked as attending an "in-school activity," or absent without an excuse.[785] Dunbar High School had the most underreported suspensions compared to any other high school in January 2017, according to *Washington Post* investigators. In data obtained by reporters, only 7 percent of the days that students were kept out of school for misbehavior were actually correctly reported as suspensions.[786] Reporters found that these "informal" suspensions may have been occurring as far back as 2010, according to documents obtained under the Freedom of Information Act (FOIA).[787] In 2010, Tameria Lewis, then-head of the D.C. Office of the State Superintendent of Education's (OSSE) special education division, wrote to DCPS that issuing these "informal" suspensions to students with disabilities "blatantly disregards" protections afforded under federal law and ordered DCPS to "immediately cease" these suspensions and to accurately track student attendance and suspensions.[788] Amy Maisterra, head of OSSE's special education in 2013, stated that repeatedly sending students home is "unacceptable" on multiple fronts, but especially for students with disabilities who may miss out on needed educational services that they are legally entitled to.[789]

At the Commission's briefing, Max Eden, senior fellow at the Manhattan Institute, argued that the shift from exclusionary discipline practices that the ED guidance recommended has not had positive effects on schools.[790] He argued that only a small percentage of schools have rolled out district-supported and district-funded positive behavioral support programs and there are not rigorous studies to either confirm or deny their success. Eden testified that a teacher's ability to use suspensions as a disciplinary tool was

> taken away across the board, and a replacement tool [i.e., positive behavioral intervention and supports] is given to ten [] percent or fewer schools within that district. And we do not have great studies on what happens in those schools. [But] [a] study in Philadelphia that just came out a few weeks ago does not paint a nice picture.[791]

However, Dan Losen, director of the Center for Civil Rights Remedies at UCLA, testified that there is evidence out of Los Angeles—the second largest school district in the country—that after

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[785] Ibid.
[786] Emma Brown and Alejandra Matos, "Undocumented suspensions persisted in D.C. schools despite repeated alerts," *Washington Post*, July 24, 2017, https://www.washingtonpost.com/local/education/undocumented-suspensions-persisted-in-dc-schools-despite-repeated-alerts/2017/07/24/4a88ebc2-707f-11e7-8839-ec48ec4cae25_story.html?utm_term=.328a8fca663a.
[787] Ibid.
[788] Ibid.
[789] Ibid.
[790] Max Eden testimony, *Briefing Transcript* pp. 122-23.
[791] Ibid., 123.

disciplinary policies were changed, many schools witnessed positive changes for teachers and students.[792] "They have the highest sense of safety rating that they've ever had. They have higher graduation rates, achievement improved across the board, and if we look at multiple indicators rather than cherry-pick one or two that went down for one year, if we really look at the whole set of indicators, we get a very different picture, one of mostly success."[793]

Many schools and districts across the country have found alternatives to exclusionary discipline to be effective in reducing behavioral infractions and promoting more positive learning environments for teachers and students.[794] For example, in New York City, the district made several changes to discipline policies such as no longer suspending students for low-level infractions (e.g., cursing, talking back), alongside making it more difficult to suspend students with "catchall violations" such as "defying or disobeying the lawful authority."[795] After implementing these changes, the district's suspension rate dropped by 32 percent from July to December 2015, compared to the same period the previous year.[796] In one school, Leadership and Public Service High School, after actively working to integrate restorative practices instead of solely relying on punitive discipline, the school's suspension rate dropped from 230 in 2013 to 64 in 2015, which was a 60 percent decrease from the previous year and is on record as one of New York City's most significant changes.[797]

Several school districts have witnessed substantial progress in reforming discipline policies. The Oakland Unified School District in California, piloted a restorative justice program in 2005 at a local middle school and witnessed an 87 percent decrease in suspensions in three years.[798] The program has expanded throughout the district and is now in 24 schools, and the goal is to expand it further into every K–12 school in the district by 2020.[799] For the schools that have already

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[792] Dan Losen, testimony, *Briefing Transcript* p. 123.
[793] Ibid.
[794] *See, e.g.*, Susan Dominus, "An Effective but Exhausting Alternative to High-School Suspensions," *New York Times Magazine*, Sept. 11, 2016, https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html; American Educator, *Seeding Change in School Discipline,* American Federation of Teachers, vol. 39, no. 4 (2015-16), at 10, https://www.aft.org/sites/default/files/ae_winter2015.pdf; Brianna Calix, "Merced schools use new practices to cut suspensions," *Merced Sun-Star*, Dec. 23, 2015, https://www.mercedsunstar.com/news/article51420155.html; Alyssa Rafa, "Alternative School Discipline Strategies: Policy Snapshot," Education Commission of the States, 2018, at 2, https://www.ecs.org/wp-content/uploads/Alternative_School_Discipline_Strategies.pdf; Linda Darling-Hammond, Soung Bae, Channa M. CookHarvey, Livia Lam, Charmaine Mercer, Anne Podolsky, and Elizabeth Leisy Stosich, *Pathways to New Accountability Through the Every Student Succeeds Act*, Learning Policy Institute, 2016, https://learningpolicyinstitute.org/sites/default/files/product-files/Pathways_New-Accountability_Through_Every_Student_Succeeds_Act_04202016.pdf.
[795] Dominus, "An Effective but Exhausting Alternative to High-School Suspensions," *supra* note 794.
[796] Ibid.
[797] Ibid.
[798] American Educator, "Seeding Change in School Discipline," *American Federation of Teachers*, *supra* note 794 at 10.
[799] Ibid.

implemented the program, they have reported cutting suspension rates by half since 2011–12; and high schools in the district report a 56 percent decrease in overall dropouts.[800] Other school districts in California have also had success in reducing suspensions and expulsions by moving away from punitive disciplinary measures.[801] Schools have integrated policies such as sending a student to a school counselor or entering a mediation process instead of suspending the student for behavioral infractions.[802] In the schools that have implemented restorative justice programs, such as the Le Grand Union High School District, they have halved suspension rates and have almost eliminated expulsions entirely, and the Merced Union High School District has lowered suspension rates by about 25 percent.[803]

In January 2019, the Education Commission of the States issued a report analyzing school discipline across state policies.[804] The researcher noted there was an overall trend away from utilizing exclusionary policies and towards implementing alternative disciplinary strategies. The analysis found that:

> About seven bills expanding suspension or expulsion have been enacted in state legislatures in the last five years. In that same time frame, state legislatures have enacted at least 36 bills restricting the use of suspension or expulsion or encouraging the use of alternative school discipline strategies—demonstrating a movement away from zero tolerance and towards less-punitive strategies. Generally, these bills place limitations on the length of suspension or expulsion, disallow the use of suspension or expulsion in the early grades, require consideration of student circumstances and context[,] and/or encourage the use of alternative strategies. . .[805]

However, during the 2017 legislative session, the researcher noted that state lawmakers proposed at least "35 bills related to suspension and expulsion and 26 bills related to alternative school discipline strategies. Of those, 14 were enacted." Further, in 2018, the report notes that "at least 11 states and the District of Columbia enacted 15 bills broadly related to suspension, expulsion[,] or alternatives to discipline."[806]

The researcher also found that at least 30 states and the District of Columbia encourage districts and schools to use alternative school discipline strategies; 22 of those states mention specific

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[800] Ibid.
[801] Calix, "Merced schools use new practices to cut suspensions," *supra* note 794.
[802] Ibid.
[803] Ibid.
[804] Rafa, "Alternative School Discipline Strategies: Policy Snapshot," *supra* note 794.
[805] Ibid., 4.
[806] Ibid.

interventions.[807] Further, at least 16 states and the District of Columbia limit suspension and expulsion by grade level, and several states also limit their use by violation.[808] At least 17 states and the District of Columbia prohibit suspension or expulsion solely for a student's attendance or truancy issues.[809] In addition, at least 33 states and the District of Columbia require some level of reporting about school discipline, enabling public access to more data on school discipline.[810]

Other state bills include Colorado's H.B. 1211[811] passed in 2017, which created a Discipline Strategies Pilot Program intended to provide financial assistance to school districts, boards of cooperative services, and charter schools for teacher and principal professional development on how to use culturally responsive practices to inform discipline procedures and how to construct developmentally appropriate responses to the behavioral issues of students in preschool through third grade, including students with disabilities.[812] In Virginia, the state legislature passed two companion bills, H.B. 1924[813] and S.B. 829[814], requiring the state board of education to establish guidelines regarding alternatives to both short-term and long-term suspensions. These alternatives include such practices as positive behavior incentives, mediation, peer-to-peer counseling, and community service.[815]

In 2018, Delaware S.B. 85-1[816] and Indiana H.B. 1421[817] both required state education departments to compile and release greater information about school disciplinary use and type. Georgia H.B. 740[818] required local school systems to employ multi-tiered systems of supports and reviews prior to suspending or expelling children up to third grade for five or more days each year. Michigan, in contrast, expanded the list of violations for mandatory expulsion in 2018 through H.B. 5531.[819]

Despite these developments, some critics of the federal guidance on school discipline argued that the guidance was flawed on a statistical level regarding how racial disproportionality is measured. James Scanlan, attorney at law, testified at the Commission's briefing that federal policies, such as the 2014 guidance, are flawed because they are often based

[807] Ibid., 6.
[808] Ibid.
[809] Ibid.
[810] Ibid.
[811] H.B. 17-2011, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017), codified at § 22-2-143 (2019).
[812] Rafa, "Alternative School Discipline Strategies: Policy Snapshot," *supra* note 794, at 3.
[813] 2017 Va. Acts ch. 231 (H.B. 1924, 2017 Va. Laws, Reg. Sess.), codified at VA. CODE ANN. § 22.1-16.6 (2019).
[814] 2017 Va. Acts ch. 303 (S.B. 829, 2017 Va. Laws, Reg. Sess.), codified at VA. CODE ANN. § 22.1-16.6 (2019).
[815] VA. CODE ANN. § 22.1-16.6 (2019).
[816] S.B. 85, 149th Gen. Assemb., 2d Reg. Sess. (Del. 2018), codified at 14 DEL. CODE ANN. 14, §§ 701, -03 (2018).
[817] H.E.A. 1421, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018), codified at IND. CODE ANN. § 20-26-5-32 (partially expiring January 1, 2019).
[818] H.B. 740, 154th Gen. Assemb., 2017-2018 Reg. Sess. (Ga. 2018), codified at GA. CODE ANN. § 20-2-742 (2018).
[819] 2018 Mich. Pub. Acts 145 (H.B. 5531, 99th Leg., Reg. Sess.), codified at MICH. COMP. LAWS ANN. § 380.1311 (2018).

> on the premise that generally reducing adverse discipline outcomes will tend to reduce relative differences, relative racial differences and discipline rates, and the proportion racial minorities makeup of students who are disciplined. [Where] [i]n fact, exactly the opposite is the case.[820]

He argues that interventions by the federal government have helped to lower black students' suspension rates much more compared to white students' suspension rates; and this result can make it appear that racial disproportionality has expanded where it actually has not.[821] Therefore, Scanlan argues that the guidance is unnecessary and flawed to encourage schools and districts to reduce their discipline practices because the risk ratios show conflicting signals of racial disproportionality.[822]

Counter to Scanlan's analysis, Daniel Losen argues that to understand the full effect of discipline rates and their disparities it is better to analyze the "absolute difference" or the "absolute value" rather than focusing on relative risk ratios.[823] By analyzing the absolute value of the decline in suspension rates, Losen found that the decline is greatest for the highest suspended group (i.e., black students), and the non-suspension ratio invariably improves—meaning that it gets smaller, not wider—and this is consistent with a narrowing of the racial gap in absolute terms. Therefore, Losen posits that relying upon the absolute difference will allow researchers and policy experts to assess racial progress in discipline over time.[824]

Critics of the 2014 guidance also argued that the federal government implemented these changes without offering teachers and districts the support or training they need.[825] However, the Commission's research shows that the Education Department has offered various resources for districts and schools to aid them in these reforms. For instance, there are dedicated federal grant funds provided by several national and federal agencies, including the Department of Education, that offer financial support to school districts to aid in reforming discipline practices and policies.[826] Other agencies, such as the National Association of School Psychologists, also provide

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[820] James Scanlan, attorney at law, *Briefing Transcript*, p. 45.
[821] He found this effect by utilizing relative risk ratios. The outcome appears to be counter-intuitive because when two values are both declining, the relative ratio of the amount of decline must exceed the starting ratio. Therefore, if the ratio of the decline is smaller, the new risk ratio will always be larger than the beginning ratio. Scanlan argues that ED policies to reduce suspensions are "based on the belief that relaxing discipline standards and otherwise reducing adverse discipline outcomes will tend to reduce (a) relative (percentage) racial differences in rates of experiencing the outcomes, and (b) the proportions African Americans and other racial minorities make up of persons experiencing the outcomes." *See* Scanlan, written testimony to the Commission, at 1.
[822] James Scanlan, testimony, *Briefing Transcript* pp. 48-49.
[823] Daniel Losen, additional written testimony, submitted to the Commission on January 16, 2018, at 9.
[824] Ibid.
[825] *See, e.g.,* Max Eden, testimony, *Briefing Transcript* pp. 135-36.
[826] *See* Children's Defense Fund and the AASA, "Funding School Discipline Reform," 2014, https://www.childrensdefense.org/wp-content/uploads/2018/06/funding-school-discipline.pdf; *see also* Council of

numerous resources to teachers and school administrators on how to effectively implement the new changes.[827] And districts can utilize federal funds to help offset some of the financial costs of these improvement efforts and to increase teacher support.[828]

Proponents also argue that the concern about the need for training and district support is unrelated to whether the federal guidance is a good policy to aid in reforming discipline policies. In addition, the December 2014 guidance does in fact include information about the need for training and support for teachers and called on states and school districts to provide it, and explicitly stated that classroom disruptions are unacceptable.[829] Furthermore, the Education Department also released an extensive list of resources for school districts alongside that legal guidance.[830]
In the August 2016 guidance, the Office of Special Education and Rehabilitative Services (OSERS) stated that:

> The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children. Rather, the letter is a part of the Department's broader work to encourage school environments that are safe, supportive, and conducive to teaching and learning, where educators actively prevent the need for short-term disciplinary removals by effectively supporting and responding to behavior.[831]

Further, Anurima Bhargava, leadership and government fellow at the Open Society Foundation and the former Chief for the Educational Opportunities Section in the Civil Rights Division of the U.S. Department of Justice, testified that the

> goal was not to take away from schools and teachers the kinds of tools and resources they may have to address misbehavior in classrooms. [The guidance] is really to give a range of ways in which they could provide a positive school climate for all children, in accordance to federal law. . . that does not mean that the use of

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State Governments Justice Center, "Federal Funding Opportunities to Support School Discipline, Climate, and Safety Improvements," 2014, https://csgjusticecenter.org/wp-content/uploads/2014/05/FederalGrantProgramsChart.pdf.

[827] National Association of School Psychologists, "The Every Student Succeeds Act: Details of the New Law," 2017, https://www.nasponline.org/research-and-policy/current-law-and-policy-priorities/policy-priorities/the-every-student-succeeds-act/details-of-essa. *See also*, Every Student Succeeds Act, Pub. L. 114–95, 129 Stat. 1802 (2015) (codified as amended at 20 U.S.C. § 6301 et seq.).

[828] National Association of School Psychologists, *supra* note 827.

[829] U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," *supra* note 23, *passim*.

[830] U.S. Dep't of Education, *Directory of Federal School Climate and Discipline Resources*, 2014, https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf.

[831] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Dear Colleague Letter,"*supra* note 170, at 2.

> suspensions and expulsions, and even arrests in schools is something that is banned entirely. There are instances in which those kinds of practices may well be necessary. And particularly in a case where there's an imminent threat to the safety and security of students and school employees. The goal really was to make sure that when discipline is imposed in school, it's not done in a discriminatory manner.[832]

At the Commission's briefing, Dan Losen stated that "the bottom line is that the guidance prompts educators to do the right thing by kids, to do what works. And if something is unproductive, counterproductive, educationally unsound, and it has a disparate impact based on disability and race, they have to change those practices."[833] Supporters of the guidance maintain that it is not meant to make students or teachers feel unsafe in the classroom. Rather, its intended purpose is to ensure that students are being treated by school staff equitably and ensuring that students with disabilities are not being disciplined for disability-related behavior.[834] Skiba argues that the Departments' guidance is "not just saying 'don't suspend' [rather] it's providing quite a bit of guidance to schools on what they should do instead. I think the guidance has been very helpful, it's based on the best of what we know, and I would hate to see it dismantled [by the Trump administration]."[835] For instance, there was an approximately 20 percent drop in out-of-school suspensions between the 2011–12 and the 2013–14 school year; however, racial disparities still remained where black K–12 students were 3.8 times as likely to receive an out-of-school suspension as white students during the 2013–14 school year.[836]

Christopher Fers, a special education teacher in New York City, stated that the school discipline guidance has been beneficial in his school. In his public statement to the Commission, he stated that:

> Like many teachers, I face the challenge of motivating and inspiring students with destabilized home lives. These are students who come to school hungry and fear going home on Friday because they are unsure if they'll have any food over the weekend. Many of the children rely on the school to provide them with the only structure and stability they have in their lives. So I ask: what should that place of structure and stability look and feel like? Should it be inspiring, with supportive teachers who cultivate a student's interests and passions with culturally and

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[832] Anurima Bhargava, testimony, *Briefing Transcript* p. 69.
[833] Dan Losen, testimony, *Briefing Transcript* p. 153.
[834] Benjamin Wermund, "Obama's school discipline guidelines next to go?" *Politico*, Nov. 17, 2017, https://www.politico.com/newsletters/morning-education/2017/11/17/obamas-school-discipline-guidelines-next-to-go-027074.
[835] Keierleber, "Is DeVos Near Ending School Discipline Reform After Talks on Race, Safety?" *supra* note 742.
[836] Ibid.

> emotionally responsive instruction? Or should it look like a place of homogenized discipline and work, where a child is a number with some data to track their reading levels? By supporting initiatives that help create safe and supportive schools, teachers like me are given the opportunity to help change schools into places that nurture the whole child. With this guidance, schools like mine can become fully equipped to make our schools welcoming, loving places for each individual child.[837]

Federal Enforcement

One of the debates regarding the 2014 guidance centers on when and how the Education Department or Department of Justice should intervene and investigate allegations of discrimination. Critics of the guidance argue that OCR under the Obama Administration was too involved in school districts and their disciplinary procedures. However, in response to the interrogatory requests sent by Commission staff, OCR stated that when there is an allegation of discrimination, OCR staff determines whether the office has personal and subject matter jurisdiction over the allegation(s) and whether the allegation(s) is timely filed, or merits a waiver of OCR's timeliness requirement. Specifically, OCR staff determines whether the allegation

> on its face or as clarified in consultation with the complainant: (1) fails to state a violation of one of the laws OCR enforces; (2) lacks sufficient detail for OCR to infer that discrimination may have occurred; or (3) is so speculative, conclusory, or incoherent that it is not sufficiently grounded in fact for OCR to infer that discrimination may have occurred.[838]

In response to the interrogatory requests sent by the Commission, OCR stated that it "has not analyzed Civil Rights Data Collection (CRDC) data to identify states, school districts, or schools that have disproportionately disciplined students of color with disabilities in a manner that violates the students' Individualized Education Programs (IEP)."[839] Further, in a letter to Senator McCaskill regarding OCR's investigative process, the agency explained: "when OCR receives a complaint of discrimination in discipline, OCR's investigations determine whether a district's administration of its discipline policies and practices results in unlawful discrimination. OCR examines the district-wide CRDC data of exclusionary discipline to determine the scope of its

[837] Christopher Fers, Educators for Excellence, written statement for The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities Briefing before the U.S. Commission on Civil Rights, Dec. 8, 2017, at 3.
[838] U.S. Dep't of Education, Office for Civil Rights, in response to Commission interrogatories request at 5.
[839] Ibid., 7.

investigation (either school-wide or district-wide)."[840] According to the 2014–15 ED yearly monitoring report, there were 20 states that reported at least one flagged district for racial disparities in discipline rates, for a total of 269 districts that year.[841] For the 2015–16 school year, there were 236 districts flagged for racial disparities in discipline rates.[842]

Moreover, CRDC data show that some states do have higher disciplinary rates compared to the national average which may suggest that some populations of students are being disproportionately disciplined. For instance, when examining disparities based on race or ethnicity, five states (Florida, Indiana, North Carolina, Rhode Island, and South Carolina) reported higher rates for every racial/ethnic group for the 2011–12 school year.[843] Eleven states and the District of Columbia reported higher gaps than the national average between the suspension rates of black and white students, for both boys and girls (Arkansas, D.C., Illinois, Indiana, Michigan, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee, and Wisconsin).

Analyzing disciplinary rates by disability, CRDC data showed that five states (including D.C) reported a 10-percentage point or higher gap in OSS suspension rates between students with disabilities served by IDEA and students without disabilities: Florida (15%), Nevada (14%), District of Columbia (13%), Wisconsin (11%), and Louisiana (10%). In Nevada, Florida, and Wyoming, students with disabilities served by IDEA represent less than 15 percent of students enrolled in the state, but more than 90 percent of the students who were physically restrained in the state. Nevada (96%), Florida (95%), and Wyoming (93%) reported the highest percentages of physically retrained students with disabilities by IDEA.[844]

Moreover, OSERS stated that "while the data collection categories have changed over the years, there appears to be a consistent pattern where Black students with disabilities were suspended or expelled at greater rates than their percentage in the population of students with disabilities."[845] Despite the fact that these statistics suggest some disproportionality in the disciplinary rates of

[840] U.S. Dep't of Education, Office for Civil Rights, Letter to Senator Claire McCaskill, Jan. 17, 2017, at 14.
[841] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "IDEA Section 618 Data Products: State Level Data Files," under heading: "Maintenance of Effort Reduction and Coordinated Early Intervening Services," https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html; *see also* Losen, *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*, *supra* note 664, at 5.
[842] Losen, *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*, *supra* note 664, at 5.
[843] U.S. Dep't of Education, Office for Civil Rights, *Civil Rights Data Collection, Data Snapshot: School Discipline*, *supra* note 7, at 11.
[844] Ibid.
[845] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs. in response to Commission's interrogatories, Feb. 9, 2018, at 6.

students of color with disabilities, OCR stated that they have not sought to identify, and OCR has not identified, causes of, or reasons for, discipline disparities between states.[846]

Current Federal Responses

The Education Department during the Obama administration made the issue of school discipline and concerns over the school-to-prison pipeline a priority. Between 2011 and 2017, ED received about 1,500 complaints alleging racial discrimination related to school disciplinary policies and procedures.[847] During the Obama administration OCR chose to investigate allegations of discrimination in school discipline systemically (as distinct from narrowly, through the lens only of an individual student's experience), in an attempt to determine if systemic discrimination was occurring in the schools under investigation.[848]

OCR under the Trump administration has changed its investigation approach, generally to more narrowly investigate allegations of race discrimination in school discipline.[849] At the Commission's Briefing, Eve Hill testified that

> the current federal response appears to be changing. The Department of Education has already announced that it will not look beyond the individual incident, to look for the systemic practices and policies. As a result of that, each parent of each child subjected to discriminatory discipline will have to challenge it themselves. . . And ironically, this may result in more litigation because systemic solutions will not be on the table to stop future incidents.[850]

In June 2017, ProPublica received an internal memo leaked from the Education Department that stated one of Secretary DeVos' top officials had ordered investigators "to limit proactive civil rights probes rather than expanding them to identify systemic patterns, as the Obama

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[846] U.S. Dep't of Education, Office for Civil Rights, in response to Commission's interrogatories request, at 8.
[847] Government Accountability Office, "K-12 Education: Discipline Disparities for Black students, Boys, and Students with Disabilities," Report to Congressional Requesters, 2018, https://www.gao.gov/assets/700/690828.pdf.
[848] U.S. Dep't of Education, Office for Civil Rights, Letter to Senator Claire McCaskill, *supra* note 840 ("because OCR must determine whether a district's discipline policies and practices are administered in a nondiscriminatory manner, the investigation is necessarily systemic in nature, even where a complaint alleges only an individual instance of discrimination."), at 14.
[849] *See, e.g.,* Toppo, "DeVos commission eyes Obama school discipline rules," *supra* note 760; Erica Green, "Government Watchdog Finds Racial Bias in School Discipline," *New York Times*, April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/racial-bias-school-discipline-policies.html; Erica Green, "DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency," *New York Times*, April 20, 2018, https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html.
[850] Eve Hill, *Briefing Transcript* p. 30.

administration had often done in school discipline cases."[851] According to ProPublica, since the release of the memo in June 2017, the Education Department has closed at least 65 school discipline investigations that were opened under the previous administration and did not issue any mandated reforms. In at least 50 of these cases, the department stated that they closed the cases due to "moot" allegations or insufficient evidence or details.[852]

While critics of the Obama administration's approach want DeVos to rescind the Obama-era guidelines on disparate impact and school discipline, and further limit OCR's investigations in schools,[853] many advocacy and teacher organizations are concerned that this new direction will result in further harming students of color with disabilities.[854] For instance, the Dignity in Schools Campaign (DSC) stated its opposition to Kenneth Marcus' nomination to serve as the Assistant Secretary for Civil Rights for the U.S. Department of Education due to his written and spoken desire to limit the use of "disparate impact" claims,[855] despite the fact that these claims are considered an essential method for identifying and addressing discipline policies that appear "neutral" but have a discriminatory impact on students of color.[856] In March 2019, a federal court held that the Department of Education could not delay implementation of 2016 Title VI regulations regarding "significant disparities" in the impact of school discipline policies on children of color with disabilities.[857]

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[851] Annie Waldman, "Shutdown of Texas Schools Probe Shows Trump Administration Pullback on Civil Rights," *ProPublica*, April 23, 2018, https://www.propublica.org/article/shutdown-of-bryan-texas-schools-probe-shows-trump-administration-pullback-on-civil-rights. *See* U.S. Dep't of Education, Office for Civil Rights, "OCR Instructions to the Field re Scope of Complaints," June 8, 2017, https://assets.documentcloud.org/documents/3863019/doc00742420170609111824.pdf.

[852] Waldman, "Shutdown of Texas Schools Probe Shows Trump Administration Pullback on Civil Rights," *supra* note 851.

[853] Ibid.; Jon Kamp and Michelle Hackman, "Lawmakers Focus on Obama-Era Discipline Policies After Florida School Shooting," *Wall Street Journal*, March 26, 2018, https://www.wsj.com/articles/lawmakers-focus-on-obama-era-discipline-policies-after-florida-school-shooting-1522069200; Josh Verges, "Sworn testimony reveals what St. Paul school leaders knew about dangers to staff," *Twin Cities Pioneer Press*, June 23, 2017, https://www.twincities.com/2017/06/23/st-paul-central-safety-meetings-foreshadowed-violent-attack-on-teacher/; Max Eden, *Briefing Transcript* p. 151.

[854] Scott E. Carrell and Mark L. Hoekstra, "Domino Effect," *Education Next*, vol. 9, no. 3 (2009); Katherine Kersten, "The school safety debate: Mollycoddle no more," *Star Tribune*, March 18, 2016, http://www.startribune.com/the-school-safety-debate-mollycoddle-no-more/372619741/; Matthew Steinberg and Johanna Lacoe, "What Do We Know About School Discipline Reform?" *Education Next*, vol. 17, no.1 (2017), http://educationnext.org/what-do-we-know-about-school-discipline-reform-suspensions-expulsions/; Robert Woodson, Sr., "School Discipline Is Not Racist," *National Review*, Sept. 20, 2017, https://www.nationalreview.com/2017/09/school-discipline-racial-disparities-obama-administration-solution-mentorship-not-less-discipline/.

[855] *See* Kenneth L. Marcus, "The War Between Disparate Impact and Equal Protection," *Cato Supreme Court Review*, vol. 2008-2009 (2009): *Cf. supra* notes 79-82 (discussing that "disparate impact" is a misnomer as more than statistical disparities is needed to successfully prove a disparate impact claim).

[856] Dignity in Schools Campaign, "DSC Opposes Kenneth Marcus nomination to serve as Assistant Secretary for Civil Rights for the U.S. Department of Education," Jan. 18, 2018, http://dignityinschools.org/917-2/.

[857] *See infra* notes 886–890 (discussion of D.C. federal court's holding) and 891–92 (delay regulation vacated)].

Equity in IDEA

Furthermore, teacher and student advocacy groups have expressed frustration at Secretary DeVos' decision to implement a two-year delay to the proposed 2016 "Equity in IDEA" or "significant disproportionality" rule,[858] intended to require investigating and addressing racial disparities in special education, including with respect to school discipline issues.[859] Then-U.S. Secretary of Education, John King Jr. stated in December 2016 that:

> Children with disabilities are often disproportionately and unfairly suspended and expelled from school and educated in classrooms separate from their peers. Children of color with disabilities are overrepresented within the special education population, and the contrast in how frequently they are disciplined is even starker. Today's new regulations and supporting documents provide the necessary guidance and support to school districts and build upon the work from public education advocates and local leaders who believe, like we do, that we need to address racial and ethnic disparities in special education. This important step forward is about ensuring the right services get to the right students in the right way.[860]

This regulation was developed after a 2013 GAO report found large discrepancies in how states defined and determined significant disproportionality, which left disparities without any oversight or correction.[861] For example, in some states, students of color with disabilities were being disciplined at rates of six or seven times greater than white students with disabilities, but their school districts were not identified as having significant disproportionality.[862] The report showed widespread noncompliance by states with 20 U.S.C. Section 1418(d) of the IDEA that required

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[858] *See* U.S. Dep't of Education, "Fact Sheet: Equity in IDEA," Dec. 12, 2016, https://www.ed.gov/news/press-releases/fact-sheet-equity-idea. *See also* 34 C.F.R. § 300.1 *et seq.* (implementing regulations for IDEA), including the substantially revised disproportionality and calculation methodology regulations, 34 C.F.R. §§ 300.646-47, as published in 81 FED. REG. 92376 (Dec. 19, 2016), and implementation delayed by two years in 83 FED. REG. 31306 (July 3, 2018).

[859] *See, e.g.,* Denise Marshal, "COPAA Challenges Secretary Devos's decision to delay implementation of Equity in IDEA regulation," Council of Parent Attorneys and Advocates, July 12, 2018, https://www.copaa.org/news/408919/COPAA-CHALLENGES-SECRETARY-DEVOSS-DECISION-TO-DELAY-IMPLEMENTATION-OF-EQUITY-IN-IDEA-REGULATION.htm; Mike Garvey, "For Students of Color with Disabilities, Equity Delayed Is Equity Denied," ACLU, May 15, 2018, https://www.aclu.org/blog/disability-rights/disability-rights-and-education/students-color-disabilities-equity-delayed; NCLD Policy Team, "USED Delays the Equity in IDEA Regulation," National Center for Learning Disabilities, https://www.ncld.org/archives/action-center/what-we-ve-done/used-delays-the-equity-in-idea-regulation.

[860] *See* U.S. Dep't of Education, "Fact Sheet: Equity in IDEA," Dec. 12, 2016, https://www.ed.gov/news/press-releases/fact-sheet-equity-idea.

[861] Government Accountability Office, *Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, 2013, https://www.gao.gov/assets/660/652437.pdf.

[862] Robert C. "Bobby" Scott, then-Ranking Member (now Chairman) of the of the House Committee on Education and Labor, Written Statement for The School-to-Prison Pipeline Briefing for the U.S. Commission on Civil Rights Briefing, Dec. 8, 2017at 3 (hereafter Scott Written Statement).

states to identify LEAs (local education agencies) with significant disproportionality when it came to the identification and disciplining of students with disabilities.[863] But many states had threshold levels that were set so high, it would be very difficult for districts to exceed them; thus, no districts were identified despite the fact that many districts had large disparities in their discipline rates.[864]

As one way to address these disparities, ED stated that states are required to identify districts with "significant disproportionality" in special education—meaning when districts identify and place students in more restrictive educational settings or discipline students from any racial or ethnic group at markedly higher rates compared to their peers.[865] While IDEA is not a civil rights law, it is important legislation that offers protections to students of color with disabilities. And this new "Equity in IDEA" policy was intended to better utilize Section 618(d) of IDEA, which has historically been extremely limited. [866] Kristen Harper, senior policy specialist for Child Trends and former advisor in the Education Department, including in the Office of Special Education and Rehabilitative Services, testified before the Commission that: "For many years states were allowed broad authority to define significant disproportionality and to utilize criteria that kept district citations to a minimum."[867]

Under the Equity in IDEA regulations, states are required to identify and report districts that show evidence of significant disproportionality, and identify racial and ethnic disparities in the identification, placement, or discipline of children with disabilities.[868] Once a district is found to have significant disproportionality, it is "required to undergo a review of their policies, practices, and procedures, and set aside 15 percent of their federal IDEA Part B formula dollars to implement services to address the disparity."[869] Dan Losen adds that the actions that a district takes could include a variety of measures such as teacher training to improve student engagement or address problems between schools to ensure that schools with higher percentages of black students have sufficient behavioral supports for students with IEPs.[870]

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[863] Government Accountability Office, *Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, *supra* note 861. *See also* 20 U.S.C. § 1418(d) (requiring states to report "significant disproportionality based on race and ethnicity" and revise policies and practices as needed).
[864] Government Accountability Office, *Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, *supra* note 861, at 1.
[865] U.S. Dep't of Education, "Fact Sheet: Equity in IDEA," *supra* note 860; *See also* 34 C.F.R. §§ 300.646-47.
[866] Kristen Harper, testimony, *Briefing Transcript* p. 35.
[867] Ibid., 34.
[868] Ibid., 34.
[869] Ibid.
[870] Dan Losen, Written Responses and Additional Testimony for the School-to-Prison Pipeline: Intersections of Students of Color with Disabilities Briefing before the U.S. Commission on Civil Rights, Dec. 8, 2017, pp. 2-3.

States were expected to begin complying with this requirement by July 2018; however, Secretary DeVos delayed the rule until July 2020, stating concerns about federal overreach.[871] The Education Department also delayed the date that preschool students (ages 3–5) must be included in any significant disproportionality analysis from July 1, 2020 to July 1, 2022.[872] According to the statement released in the Federal Register, one reason for postponing the compliance deadline was that:

> [the] delay will give the Department, the States, and the public additional time to evaluate the questions involved and determine how best to serve children with disabilities without increasing the risk that children with disabilities are denied FAPE [a free appropriate public education].[873]

At the Commission's briefing in December 2017, many teacher and advocacy organizations disapproved of the delay and stated their support for the "Equity in IDEA" regulations. In a written statement to the Commission, Legal Services of Eastern Missouri asserted that these regulations are a necessary role to ensure that districts:

> (1) identify significant disproportionality in representation of students within special education, segregated school settings, and in receipt of disciplinary actions; and,
> (2) where disproportionality is found carefully review their policies and practices to determine root causes and whether changes are needed.[874]

Similarly, The Autistic Self Advocacy Network wrote to the Commission that the organization supported the regulations because it:

> provides the means for appropriately assessing and identifying racial/ethnic disproportionality in the identification and placement of students with disabilities [and] the Rule ensures that the data that LEAs collect on these disparities is

[871] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., "Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities," 83 FED. REG. 31306, July 3, 2018, https://www.federalregister.gov/documents/2018/07/03/2018-14374/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children.
[872] *Id.*
[873] U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs, "Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities," *supra* note 871.
[874] Legal Services of Eastern Missouri, Written Statement to the U.S. Commission on Civil Rights for The School-to-Prison Pipeline Briefing, Dec. 8, 2017, at 2.

> accurate, thereby providing the information necessary for the state, Department of Education, and LEA to take steps to reduce disproportionality.[875]

In May 2018, the Council of Parent Attorneys, and Advocates (COPAA), along with the National Federation of the Blind (NFB), and the National Association for the Advancement of Colored People (NAACP) filed a lawsuit against the Education Department alleging that by delaying the implementation of the "Equity in IDEA" regulations, the agency is not fulfilling its obligation under IDEA to ensure that students with disabilities receive the appropriate educational services, regardless of racial or ethnic background.[876] Denise Marshall, executive director of COPAA, stated "we are highly dismayed at the delay in the department tackling an issue that has literally been occurring for over a decade. We see no new information, no new reason to deny students of color with an equitable access to their education."[877]

In March 2019, the U.S. District Court for the District of Columbia, which has jurisdiction over federal agencies, ruled in favor of COPAA and found that the Secretary of Education, the Assistant Secretary for Special Education, and the Department of Education "engaged in an 'illegal delay' of the 2016 Equity in IDEA regulations."[878] The federal court reasoned that Congress had found that significant disparities in school discipline negatively impacted students of color with disabilities, the GAO had found the method of enforcing the rights of such students was not effective, and in issuing the regulations, the Department of Education had assuaged concerns about over-reach with the following language:

> "[N]othing in these regulations establishes or authorizes the use of racial or ethnic quotas limiting a child's access to special education and related services" and that "use of racial or ethnic quotas . . . would almost certainly conflict with the LEA's obligations to comply with other Federal statutes, including civil rights laws governing equal access to education" and "would almost certainly result in legal

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[875] The Autistic Self Advocacy Network, Written Statement to the U.S. Commission on Civil Rights for The School-to-Prison Pipeline Briefing, Dec. 8, 2017, at 2-3.

[876] *Nat'l Federation of the Blind v. U.S. Dep't of Educ.*, No. 1:18-CV-01568-TDC (N.D. Md. May 31, 2018), https://www.copaa.org/resource/resmgr/docs/2018_documents/nfb_et_al_v_dept_of_educatio.pdf. *See also* Press Release: *Civil Rights Groups Sue Department of Education Over Process of Dismissing Discrimination Claims*, Council of Parent Attorneys and Advocates, May 31, 2018, https://www.copaa.org/news/403085/Civil-Rights-Groups-Sue-Department-of-Education-Over-Process-of-Dismissing-Discrimination-Claims.htm.

[877] Michelle Diament, "Ed Department Sued Over Delay Of Special Education Rule," *Disability Scoop*, July 13, 2018, https://www.disabilityscoop.com/2018/07/13/ed-department-sued-sped-rule/25280/.

[878] Memorandum Op., *Council of Parent Attorneys and Advocates v. U.S. Dep't of Educ*., No. 18-cv-1636-TSC, 42 (D. D.C., Mar. 7, 2019), at 42, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1636-31; *see also* Council of Parent Attorneys and Advocates, "COPAA Victorious in Lawsuit Against Secretary DeVos, ED," March 7, 2019, https://www.copaa.org/news/441156/COPAA-Victorious-in-Lawsuit-Against-Secretary-DeVos-ED.htm.

> liability under Federal civil rights laws, including title VI of the Civil Rights Act of 1964 and the Constitution."[879]

The court found that the Department of Education violated the Administrative Procedures Act, by failing to provide "a reasoned explanation" for delaying the 2016 regulations, and by failing to consider the costs of delay to students and parents, "rendering the Delay Regulation arbitrary and capricious."[880] It reasoned that in 2018, the government rejected its 2016 position that the regulations "adequately protected against the use of racial quotas," without sufficient findings to indicate that the new regulations would in fact do that.[881] The 2016 regulations had included various safeguards against the use of racial quotas.[882] Moreover, the Supreme Court has held that when the federal government changes its prior policy "if the 'new policy rests upon factual findings that contradict those which underlay its prior policy,' the agency must 'provide a more detailed justification than what would suffice for a new policy created on a blank slate' by providing 'a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"[883] In the case of the delayed regulations intended to protect the rights of students of color with disabilities facing significant disparities in school discipline, the federal court found that: "The inconsistency in the government's argument only serves to show that there was no need for the delay at all, and it renders the Delay Regulation arbitrary and capricious."[884]

This was a victory for advocates representing the interests of these students and their parents. On the date of the decision, COPAA's Marshall stated that:

> Today is a victory for children, especially children of color and others who are at-risk for being inappropriately identified for special education. COPAA, with the support of parents whose children who have been harmed by unlawful suspensions, assignments to segregated and restrictive classrooms, and improper decisions of both under and over identification for special education, took legal steps to fight the Department. The court has sided with the children whom the Department had

[879] Memorandum Op., *Council of Parent Attorneys and Advocates v. U.S. Dep't of Educ*., at 5 (quoting Final Regulation Regarding Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 81 Fed. Reg. 92376, 92385 (Dec. 19, 2016)).
[880] *Id.* at 28.
[881] *Id.* at 31.
[882] *Id.* at 32.
[883] *Id.* at 33 (quoting *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009)).
[884] *Id.* at 36.

> deemed unimportant through its actions to delay implementation of the Equity in IDEA regulations.[885]

Not all teaching and educator groups were against the delay. For instance, AASA—The School Superintendents Association and the Council of the Great City Schools, both submitted public comments in support of DeVos' decision. AASA stated that they do not believe that the Education Department had the legal authority to issue the regulatory provisions in 2016. They argued that the 2016 regulations "vary considerably from prior regulation and the underlying statute [and] after careful review we support a delay and reconsideration of the 2016 significant disproportionality regulations by the Trump Administration."[886] Of the many concerns the organization laid out, they stated that their chief concern was the costs that implementing these regulations would mean for districts.[887] The Council of the Great City Schools stated that they supported the delay because they felt that the Department's disproportionality regulations released in 2016 were based on "inadequate analytical justifications" and provided an "ambiguous regulatory response."[888]

Despite the initial delay, at least 15 states had already stated that they planned to still move forward with the new rule requiring states to identify districts that have evidence of significant disproportionality and racial disparities in special education programs.[889] Some state officials stated that they are moving forward with the Obama-era rule because they have already started implementing the required changes and the delay would stymie progress.[890] Teri Chapman, director of special education for the Michigan Department of Education stated that DeVos' delay

> presents a huge, huge step backwards in ensuring that our systems are designed to support the civil rights of our kids . . . if people aren't required to have systems in place that force them to have these conversations then it will probably fall to the wayside.[891]

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[885] Council of Parent Attorneys and Advocates, "COPAA Victorious in Lawsuit Against Secretary DeVos, ED," March 7, 2019, https://www.copaa.org/news/441156/COPAA-Victorious-in-Lawsuit-Against-Secretary-DeVos-ED.htm.
[886] Sasha Pudelski, Advocacy Director, AASA, The School Superintendents Association, May 10, 2018, https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0262.
[887] Ibid.
[888] Jeffrey A. Simering, Director of Legislative Services, Council of the Great City Schools, May 8, 2018, https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0142.
[889] These states are: Alaska, Arizona, Connecticut, Indiana, Maryland, Michigan, Nevada, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Washington and Wisconsin. Caitlin Emma, "Some states spurn possible delay of Obama special education rule," *Politico*, May 16, 2018, https://www.politico.com/newsletters/morning-education/2018/05/16/some-states-spurn-possible-delay-of-obama-special-education-rule-220181.
[890] Ibid.
[891] Ibid.

Furthermore, reform advocates argue that the studies show that certain states and school districts have not been successful.[892] For instance, in a 2013 GAO report, researchers found that out of the 356 districts that were identified as having significant racial disproportionalities in school discipline rates, "half of these districts were clustered in five states and 73 were in Louisiana alone."[893] Further, the report found that how "some states defined overrepresentation made it unlikely that any districts would be identified" within their state.[894]

In her testimony at the Commission's briefing, Kristen Harper expressed her support of the 2016 "Equity in IDEA" rules. She stated that the regulations require all states to

> utilize a standard approach to identify significant disproportionality among school districts. While the regulations still afford states some flexibility to determine when to cite districts, it fosters public transparency by helping communities compare state definitions of significant disproportionality.[895]

Harper argued that a delay was not necessary because states would have enough time (until Spring 2019) to standardize their approaches to fit the guideline. However, with this delay, she maintains that "this means that children of color who already are experiencing massive inequities already have to wait two years for relief. They should not be made to wait longer."[896]

Proponents of efforts to reform exclusionary discipline practices assert that the 2016 "Equity in IDEA" regulation is a significant component in closing the school-to-prison pipeline for students of color with disabilities. In a written submission to the Commission, Chairman of the of the House Committee on Education and Labor, Robert C. "Bobby" Scott, asserts that the "Equity in IDEA" regulations are a meaningful step toward fully implementing IDEA and "fulfill the bipartisan intent of Congress and legal obligation of states and school districts to provide students with disabilities a free, appropriate public education without discrimination."[897] Similarly, in a written statement to the Commission, the ACLU stated not only the importance of the 2014 guidance and the 2016 regulations, but also, that these policies do not strip districts and states of their authority. Rather, they stated, the "Equity in IDEA" regulation should be seen as a component of a "comprehensive

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[892] Susan Fread Albrecht, Russell Skiba, Daniel Losen, Choong-Geun Chung, and Laura Middelberg, "Federal Policy on Disproportionality in Special Education: Is it Moving us Forward?" *Journal of Disability Policy Studies*, vol. 23, no.1 (2011), 14-25.
[893] United States Government Accountability Office, *Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, Report to the Chairman, Committee on Health, Education, Labor, and Pensions, U.S. Senate, 2013, 1, https://www.gao.gov/assets/660/652437.pdf.
[894] Ibid.
[895] Kristen Harper, *Briefing Transcript* p. 35.
[896] Ibid., 36.
[897] Scott Written Statement at 3.

and coordinated" early intervention service that empowers districts to address the underlying causes of disparities in discipline rates for students of color with disabilities.[898]

> The Equity in IDEA regulations, together with the 2014 and 2016 guidance materials[,] play a crucial role in directing and supporting states and local school districts in their efforts to address the severe consequences of the school to prison pipeline for students of color, students with disabilities, and students of color with disabilities. It is essential that these authorities and resources be retained.[899]

As of the time of this writing, the March 2019 federal court decision finding the delay of regulations to be "arbitrary and capricious" resulted in in the court vacating the Delay Regulations, effectively leaving the 2016 Equity in IDEA regulations in place.[900]

Regardless of whether and how federal agencies enforce applicable civil rights law, the law remains clear. Schools are legally obligated to comply with Title VI, Section 504, and the ADA, in addition to the IDEA, by treating students equally regardless of race or disability.[901] This report has summarized troubling statistical data evincing that students of color with disabilities are disproportionately disciplined and incarcerated compared to their peers. These stark disparities, together with the research and federal investigation results showing that discrimination often follows from those disparities, underscore the need for compliance with core civil rights law and constitutional principles guaranteeing the right of all students to "equal educational opportunities."[902]

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[898] ACLU, Written Statement for The School-to-Prison Pipeline Briefing for the U.S. Commission on Civil Rights Briefing, Dec. 8, 2017, at 7.
[899] Ibid.
[900] Memorandum Op., *Council of Parent Attorneys and Advocates v. U.S. Dep't of Educ*., at 43.
[901] *See* Introduction: Relevant Civil Rights Law, *supra*, at notes 73-82, 104-110.
[902] *Id.*; *see also Brown*, 347 U.S. at 493, 495.

CHAPTER 4: FINDINGS AND RECOMMENDATIONS

Findings:

I. School Discipline Practices

A. The Intersectional Impact of School Discipline

- Researchers and advocates have long recognized disparate discipline rates for students of color and students with disabilities. Not many empirical studies, however, have focused on the intersection of race and disability.

1. Discipline and Race

- Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers—but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.

- High rates of exclusionary school discipline, defined to include suspension and expulsion, negatively impact all student outcomes, including those of non-excluded students. Research over time consistently shows that students at schools with high suspension and expulsion rates have lower test scores than students at schools with average and low exclusionary discipline rates.

- Black girls are suspended and expelled from school at rates that exceed other girls and all other boys, except black boys.

- Implicit biases against black children may contribute to actual racial disparities in school discipline. Contemporary research suggests that black children are perceived by society as older, less innocent, and therefore more responsible for their actions than their same-age white peers. It also suggests educators believe that black girls are more independent and need less comfort and support than their white peers.

2. Discipline and Disability

- Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities. Five states (including the District of Columbia) reported a ten percentage point or higher gap in suspension rates between students with disabilities and students without disabilities.

- The type of disability a student has may also affect disparate discipline rates. Having a learning disability remains the largest category of students with disabilities (42 percent) served by special education. These students are majority male students, disproportionately poor, and often students of color. These students continue to receive disciplinary actions at much higher rates compared to students without learning disabilities.

3. The Intersectional Impact of School Discipline

- The U.S. Department of Education recognizes that since it began collecting state-level data on suspensions and expulsions in the 1998–1999 school year, "there appears to be a consistent pattern where Black students with disabilities were suspended or expelled at greater rates than their percentage in the population of students with disabilities."

- Black girls with disabilities are substantially more likely than white girls with disabilities to experience school discipline; recent data reflects that black girls with disabilities are four times more likely than white girls with disabilities to experience one or more out of school suspensions.

- The most recent CRDC data reflects that, with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were more likely than white students with disabilities to be expelled without educational services.

B. The School-to-Prison Pipeline

- The overuse of suspensions and expulsions is counterproductive and may actually increase the likelihood of a student's involvement in the criminal justice system. Once a student is suspended or expelled the student often is not given the tools necessary to work through the issues that are causing the behavior in the first place. Alternatives to exclusionary discipline can both support students to behave differently and more appropriately and maintain classroom order and safety.

- In addition to missed class time, excessive exclusionary discipline negatively impacts classroom engagement and cohesion and increases the likelihood excluded students will be retained in grade, drop out of school, or placed in the juvenile justice system. Nationally on average, due to out of school suspensions, black students lost 66 days of instruction per 100 students enrolled, which is five times as many days lost by white students. Similar stark disparities in lost days of instruction were also observed in many individual states between students of color and white students. Intersectional data reveals similarly stark disparities: Black students with disabilities lost approximately 77 more days of instruction compared to white students with disabilities.

- Training, guidance, and support are essential elements to ensure nondiscriminatory discipline practices in schools.

C. Needed Reforms to School Discipline

- Data show the large majority of out-of-school suspensions are for non-violent behavior. Zero tolerance policies and the practice of exclusionary discipline in schools in the absence of consideration and application of alternatives to exclusionary discipline are ineffective in creating safe and healthy learning environments for students, teachers, and staff.

- Violence and bullying should always be treated seriously. There are often better alternatives to involving law enforcement for disciplinary incidents. These alternatives can safeguard student safety, promote learning, and protect classroom order.

- Use of positive behavior intervention supports, restorative justice principles, and similar disciplinary practices that support alternatives to exclusionary school discipline generally result in improved student and staff perceptions of school safety, as reflected in school climate surveys. When teachers receive training and supports to implement these practices effectively, the use of these alternatives generally result in effective classroom management. Congress has required consideration of these supports and principles for students with disabilities since the Individuals with Disabilities Act (IDEA) reauthorization of 1997.

- Evidence indicates that after disciplinary policies were changed in response to the 2014 guidance on school discipline issued jointly by the Departments of Justice and

Education, many schools witnessed positive change, including higher sense of safety ratings, higher graduation rates, and overall greater achievement.

II. Policing in Schools and the Lack of Counselors

A. Growing Use of Police in Schools

- The use of school resource officers (SROs) or local law enforcement to patrol schools is growing. Very few principals began SRO programs because of the level of violence in their schools, and research results are mixed whether SROs reduce school violence.

- School survey data show the interest in SRO programs was primarily driven by the prevention of school shootings, but much of the research on SROs does not address whether SROs deter school shootings.

- Research indicates some school districts use law enforcement and arrests for students' non-criminal behavior that, prior to the introduction of SROs, would have been referred to school administrators.

- According to the most recent CRDC data, black students represent 16 percent of the student population, yet 27 percent of students referred to law enforcement and 31 percent of students subjected to a school-related arrest, while white students represent 51 percent of student enrollment, 41 percent of referrals to law enforcement, and 39 percent of students arrested in that year. Native American or Alaska Native students, Native Hawaiian or Other Pacific Islander students, and students of two or more races were referred to law enforcement or arrested at rates approaching or slightly over their overall student enrollment.

- Students with disabilities who are served by the Individuals with Disabilities Education Act (IDEA) constitute 12 percent of the overall student population, yet represent 28 percent of students arrested or referred to law enforcement. Black, Native American/Alaska Native, Native Hawaiian/Pacific Islander, and multiracial students with disabilities were more likely to be referred to law enforcement compared to white students with disabilities.

- Many SROs receive little to no training in working with youth, much less with students with disabilities, which can lead to law enforcement violating the civil rights of students with disabilities.

- There have been examples of students with disabilities being handcuffed or restrained, when other approaches would have been more appropriate. According to federal data, sworn law enforcement officers (SLEOs) physically or mechanically restrained 86,000 students in the 2015–16 school year, and 71 percent of those restrained were students with disabilities, despite making up 12 percent of the student population.

B. The Lack of School Counselors

- According to CRDC data 1.6 million students attend a school with an SLEO but not a school counselor and by the 2015–16 academic year, schools reported having more than 27,000 SROs, compared to 23,000 social workers. Latinx, Asian, and black students were all more likely than white students to attend a school with an SLEO but not a counselor. Schools with high poverty rates also had the highest percentages of SLEOs on campus.

- Research indicates students who attend a school with at least one SRO were almost five times more likely to face a criminal charge for "disorderly conduct" than were students who attend a school with no SRO. In contrast, school counselors have been shown to improve school safety and increase student achievement.

- Students who are facing crisis or emotional distress incidents have mental health needs that generally would be better served by school counselors and mental health professionals, rather than law enforcement.

III. Identifying Students with Disabilities

- Bias can affect whether to identify a student with a disability. For example, students of color are more often found ineligible for special education compared to white students because their behavior is believed to be "willful" or "purposeful" and not related to a disability.

- In schools and school districts that have higher family incomes and higher percentages of white students, disruptive behaviors are often viewed as indicative

of an unidentified disability; these students are more likely to be provided with services and treatments through IDEA and the ADA. Schools that have greater attendance by low-income students and/or black students are more likely to criminalize disruptive behaviors rather than view them as symptoms of an underlying disability; these schools often address the behaviors with exclusionary discipline practices rather than through appropriate provision of effective services.

- Research has shown a number of negative consequences to under-identifying students with disabilities, such as preventing or delaying provision of needed services to assist the student in school appropriate behaviors. This delay prevents the student from learning in an environment appropriate to the student's needs, thereby frustrating the student and promoting antisocial school behaviors, which may make the student more likely to be funneled into the school to prison pipeline.

- Studies have found that as many as 85 percent of incarcerated youth have learning and/or emotional disabilities, but fewer than half (37 percent) received special education in school.

IV. Federal Enforcement

- Federal guidance does not compel schools to take any particular action; rather, guidance provides the regulated community detailed information about what the law is.

- The 2014 guidance on school discipline issued jointly by the Departments of Justice and Education provided schools with important information about what the law is and how to address school discipline problems in a nondiscriminatory way.

- Some critics of the 2014 school discipline guidance have erroneously argued the guidance prevented schools from suspending black and Latino students at higher rates of other students. In fact, the guidance did not, as some critics have charged, call to end the use of suspensions, mandate or implement quotas, or state that exclusionary discipline is never appropriate.

- The 2014 school discipline guidance, along with the Equity in IDEA regulations, played an important part in supporting states and local school districts to ensure their school discipline policies respect the civil rights of students of color, students with disabilities, and students of color with disabilities.

- OCR does not systematically review CRDC and other federal data to evaluate whether disparities on the basis of race or disability indicate a need for federal investigation of nondiscrimination and does not systematically evaluate comparative state data in order to determine whether investigation or technical assistance and outreach may be beneficial to ensure satisfaction of students' rights to nondiscrimination.

- The Trump Administration has utilized an approach that narrows their investigations of allegations of race discrimination in school discipline, including limiting proactive identification of systemic patterns.

- Under the Trump Administration, OCR closed at least 65 school discipline investigations that were opened under the previous administration, without issuing any mandated reforms.

Recommendations:

- Training and Resources

    - OCR should continue offering guidance to school communities regarding how to comply with federal nondiscrimination laws related to race and disability in the imposition of school discipline.

    - The Department of Justice should collect and disseminate best practices schools can use to implement reforms to school discipline such as Positive Behavior Intervention and Support (PBIS) and restorative justice.

    - It is critical that all teachers are provided with resources, guidance, training, and support to ensure nondiscriminatory discipline in schools. Congress should continue to provide funding to help states and school districts provide training and support and, with Congressional appropriation support, DOJ and ED should continue and expand their grant funding for these important goals.

    - Congress should provide funding as needed and incentivize states to provide funding to ensure all schools have adequate counselors and social workers.

    - The use of school resource officers or similar law enforcement personnel to regulate noncriminal activity is inappropriate; because school resource officers'

primary responsibility is not to educate students, their actions therefore carry the risk of not furthering education as a primary goal. The use of school resource officers or similar law enforcement personnel is therefore oftentimes incompatible with and exacerbates violations of a school's responsibility to administer school discipline in a nondiscriminatory way. To the extent such personnel are present in schools:

- The Department of Justice should provide legal guidance and training on the appropriate and nondiscriminatory use of school resource officers.

- The Department of Education, Office of Elementary and Secondary Education should provide resources summarizing nondiscriminatory policies and practices for the use of school resource officers.

- Enforcement

  - OCR should use a systemic approach to investigating school discipline discrimination allegations, and OCR should undertake the appropriate analysis to determine whether discrimination on the basis both of disability and race take place when OCR evaluates possible discrimination in discipline affecting students of color who have disabilities.

  - OCR should systematically review CRDC and other federal data to evaluate whether disparities on the basis of race or disability indicate a need for federal investigation of nondiscrimination. OCR should also systematically evaluate comparative state data in order to determine whether investigation or other Department of Education technical assistance and outreach may be beneficial to ensure satisfaction of students' rights to nondiscrimination.

  - OCR should rigorously enforce the civil rights laws under its jurisdiction to address allegations of discrimination in school discipline policies.

  - A school's reliance on school resource officers or similar law enforcement personnel does not negate a school's responsibility to administer school discipline in a nondiscriminatory way, and schools may be held accountable for the discriminatory actions taken by these parties. OCR should work aggressively to ensure the reliance on and actions of such personnel are in accordance with the civil rights laws under its jurisdiction.

COMMISSIONERS' STATEMENTS AND REBUTTALS

Statement of Chair Catherine E. Lhamon

One of my few regrets following my time as Assistant Secretary for Civil Rights at the U.S. Department of Education in the second term of the Obama Administration is that I did not succeed in publicly producing guidance, sharing the law and describing our enforcement practices, focused on discipline of students with disabilities. Such guidance would have been a companion to the 2014 joint guidance we issued together with the U.S. Department of Justice, focused on race-based discrimination in school discipline. I am especially grateful, therefore, that my Commission colleagues here have focused our attention on the civil rights issues related to discipline of students of color with disabilities, because this population of students experiences significant rates of discipline in schools.

The discipline investigations I led as Assistant Secretary pain me to this day.[903] I expect I will be forever haunted by memory of the mother who, while still in the school parking lot in her car, heard her nine-year-old child's screams from well within a school building, while the school subjected her child to unlawful and life-threatening prone restraint in school.[904] And I cannot forget the five-year-old child whose school subjected him to manual restraint at least 37 times in a single school year without ever discussing the use of restraints with his IEP team or reflecting the use of restraints in his behavior intervention plan. The school ultimately threatened his mother and grandmother that if one of them did not arrive to school to pick him up within 45 minutes of a call from the school about his behavior, then the school would report the family to social services or to the police.[905] Similarly, I remain stunned that school district staff needed the federal government to redirect school focus to correction of disability-based harassment when a school disciplined a student rather than a teacher – in circumstances where a teacher told a student with multiple mental health diagnoses that the student should kill herself and proceeded to taunt her, in a crowded hallway and on videotape, that the teacher knew the student had attempted suicide in the past and thought the student should succeed this time.[906]

These students' experiences represent the humanity that data can only partially describe. Their educators' challenge to impart classroom instruction while maintaining order and responding in real time to the many vagaries of human interaction that occupy any school day impose significant

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[903] I cannot report with certainty the race of these students because, at least in the time that I was Assistant Secretary for Civil Rights, ED did not uniformly record other demographic data on students who raise claims on the basis of one identity characteristic. While the Civil Rights Data Collection makes it possible to analyze the experience of students of color with disabilities (as this report does), the same cannot always be said for students who submit complaints to OCR.

[904] U.S. Department of Education, Office for Civil Rights, Achieving Simple Justice: Highlights of Activities, Office for Civil Rights, 2009-2016, https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf at 8 (discussing Oakland Unified School District).

[905] *Id.* at 7-8 (discussing John Doe School).

[906] U.S. Department of Education, Office for Civil Rights, Securing Equal Education Opportunity, Fiscal Year 2016, Report to the President and Secretary of Education, December 2016, https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf at 38 (discussing John Doe School District).

stressors on the imperative also to satisfy civil rights obligations to each and every child – and that imperative nonetheless controls and the students deserve nothing less than to live its promise every day.

I have done the spade work to review investigation files, sifting facts and applying law to those facts, evaluating students' and educators' experiences in schools. I know from that work what is not abstract: when differences in similarly situated students' experiences cannot be explained by neutral criteria dissociated from race or from disability, discrimination occurs. And children learn the messages their schools send to them about their perceived worth as people and their place in their communities. I am grateful for our longstanding federal laws protecting children from these harms and I support – and was proud to lead – aggressive enforcement of those laws to make those protections real in students' lives. That work must be done because Congress commanded it and our nation's students deserve it.

I am grateful that even in the Trump Administration, which has celebrated a public display of denigrating practices and even wholly rescinding guidance I led, the Office for Civil Rights at the Department of Education persists in resolving individual cases with appropriate recognition of the searing harm race- and disability-based discrimination in discipline practices can wreak on students and on school communities.[907] These children, and their families and schools, deserve the federal protection Congress promised to them and I am grateful when OCR continues to provide it.

Of course mere statistical disparity must not drive a federal mandate for change. As this report documents, it does not and has not.[908] OCR's appropriate role – the one Congress has assigned to it for six decades – is to investigate facts and where it determines that the law has been violated, to work with schools to ensure they operate nondiscriminatory practices going forward. OCR's mandate is to open for investigation any complaint over which it has jurisdiction;[909] that mandate now and historically has meant that OCR investigates hundreds of complaints alleging discrimination in school discipline practices. During the final two years alone of the Obama Administration, OCR received 464 complaints regarding disability-based discrimination in school discipline, 163 complaints specifically regarding use of restraint or seclusion in schools, and 494 complaints regarding race-based discrimination in school discipline.[910] As long ago as 1981, "OCR [] received and continues to receive a substantial number of complaints alleging discrimination

[907] *See* Report at 66-68 (discussing ED OCR's resolution of a case at Loleta Union Elementary School District in California) (citing U.S. Dep't of Education, Office for Civil Rights, *Letter to Superintendent John Sutter for the Loleta Union Elementary School District*, Nov. 22, 2017, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf; Resolution Agreement, U.S. Dep't of Education, Office for Civil Rights, Loleta Union Elementary School District, Case No. 09-14-1111, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf).
[908] *See, e.g.*, Report at 21-24, 148.
[909] 34 CFR §100.7(c).
[910] Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education to U.S. Senator Claire McCaskill, dated Jan. 17, 2017 at 3-5 (on file).

against minority students in the imposition of disciplinary sanctions. As of August 17, 1981, OCR had 141 Title VI [race based] discipline complaints pending nationwide."[911]

Families do raise claims, and long have done so, to OCR about their concerns that their children are subject to discrimination in discipline in schools on the basis of race and disability. Congress created OCR for the specific purpose to investigate these among other categories of complaints and to determine whether the law has been violated and if so how to rectify it.[912] OCR does its job best when it efficiently, fairly, and thoroughly resolves those investigations to protect student rights; shares its expertise about how to apply the law to facts to prevent discrimination from occurring in the first instance; and works with school districts around the country to satisfy the law before children are hurt.

I appreciate the Commission's detailed review of the law, literature, and existing federal enforcement practices in this report and stand firmly behind the recommendations the Commission majority voted to propound. My children and all children, and our nation, will benefit from their satisfaction in schools.

[911] Memo on file. Clarence Thomas authored this memo when he served as Assistant Secretary for Civil Rights, explaining his view that OCR should expend fewer resources examining school discipline practices. I was proud to rescind operation of that memo the day we issued the 2014 discipline guidance.
[912] James S. Murphy, *The Office for Civil Rights' Volatile Power*, The Atlantic, Mar. 13, 2017, https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/.

Statement of Commissioner Karen K. Narasaki

Our report[913] on the intersectional impact of school discipline practices on students of color with disabilities comes at a time when the Department of Education has decided to retreat from efforts to address the issue of discriminatory school discipline and to delay efforts to comply with IDEA's requirement to address significant disproportionality in the identification, placement, and discipline of students with disabilities based on race and ethnicity.[914] Our investigation found that many students of color receive more discipline and are punished harsher and longer for the same offense compared to their white peers, even though students of color do not commit more disciplinable offenses than their white peers.[915] Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities;[916] and when we examine school discipline through the lens of race and disability, many students of color with disabilities are more likely to be expelled than white students with disabilities.[917] Discriminatory school discipline practices are harmful because suspended and expelled students end up out of school without support and are more likely to be retained in grade, drop out of school, or be involved in the justice system.[918] It is particularly problematic for students with disabilities to miss days of learning and be without school provided support.

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[913] I would also like to express my heartfelt appreciation to the entire Commission team for everyone's efforts in organizing the briefing and preparing this exceptional report. I'd especially like to commend our Office of Civil Rights Evaluation team, including Director Katherine Culliton-Gonzales, Marik Xavier-Brier, Lashonda Brenson, and all the interns who contributed to this report. I would also like to thank our Staff Director, the General Counsel and the Chief of Administrative Services and their staffs for their help. In addition, I thank my fellow Commissioners, and our Special Assistants, especially my Special Assistant Jason T. Lagria and Rukku Singla, the Special Assistant to the Chair, who provided valuable feedback on the report and its findings and recommendations. I'd also like to express appreciation to the Regional Programs Coordination Unit staff and State Advisory Committees who have also examined the issue of school discipline, including Indiana, Maryland, and Oklahoma. Finally, I'd like to express my personal gratitude to Rebecca Cokley, the former Executive Director of the National Council on Disability, for her guidance and encouragement in developing this project. The National Council on Disability's 2015 report on school discipline and students with disabilities served as an important resource. *See* National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities* (2015), https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf.

I would also like to recognize the Commission's Oklahoma State Advisory Committee (SAC) for its 2016 report regarding the School-to-Prison Pipeline in Oklahoma, which served as the impetus for this investigation. *See* Oklahoma Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and the School-to-Prison Pipeline Oklahoma* (2016), https://www.usccr.gov/pubs/docs/Oklahoma_SchooltoPrisonPipeline_May2016.pdf. During a presentation to the Commission by its Chair, Vicki Limas, we learned the SAC received significant testimony regarding the disproportionate impact of school discipline on students with disabilities but was not able to investigate it further. *See* Transcript, USCCR Business Meeting (July 15, 2016), https://www.usccr.gov/calendar/trnscrpt/Unedited-Commission-Business-Meeting-Transcript-07-15-16.pdf. The Chair recommended the Commission take the issue up, and as a result, I proposed the Commission examine the "intersectionality" of school discipline policies for students who experience discrimination due to their race, their disability status, *and* their status as students of color with a disability. I believe this is the first time the Commission has taken such an approach.

[914] *See* Report at 137 n.743, 157 n. 871-73 (rescinding joint guidance on school discipline and delaying Equity in IDEA rules).

[915] *See* Findings I.A.1. Bullet 1.

[916] *See* Findings I.A.2. Bullet 1.

[917] *See* Findings I.A.3.

[918] *See* Findings I.B. Bullets 1-3.

Our investigation revealed the myriad causes that contribute to these disparities. These include the use of zero tolerance discipline and school resource officers to punish offenses traditionally handled by school administrators, and the role implicit biases play in perceiving behavior of students of color and determining whether to diagnose disabilities in students depending on their race. We also found that the use of alternatives to exclusionary discipline, such as positive behavior intervention supports and restorative justice principles, have been shown to improve safe and healthy learning environments for teachers, students, and staff.[919] This point was extensively explored during the hearing and the public testimony.

Systemic change requires a change in culture and extensive training and support.[920] What stood out the most to me during our investigation is that for schools to successfully incorporate these alternatives, teachers need to have the resources, trainings, and support to successfully implement these tools. When there is a lack of investment in teachers and lack of training on alternatives to exclusionary discipline and other forms of support, this is when problems may arise. We heard from many teachers who reinforced this point to the Commission.

Dan Losen, Director of the Center for Civil Rights Remedies, University of California Los Angeles, and former teacher, perfectly summed up this need for support for teachers.

> I have a lot of empathy for teachers who kick kids out of the classroom because I was that teacher. I was kicking kids out of my classroom right and left. I thought I had to demand respect from day one. And it was very frustrating. And I also would say my classroom bordered on chaos most days . . . My principal came back to me and said, Dan, you have a classroom management problem. And fortunately, I was in a district where they had training and support for young teachers like myself, who were really dedicated to improving our practice. And by my tenth year, I never sent a single student to the principal's office. I didn't need to because I found other ways, through training and support, to be an effective teacher without kicking kids out. So, there's a lot that schools can do. . . [e]verything from restorative practices, social and emotional learning, threat assessment . . . and so on.[921]

Robin McNair, a school administrator and teacher for over 27 years, had similar comments at our Maryland State Advisory Committee briefing on this topic.

> What the teacher is is more important than what the teacher teaches. . . [being an educator] in the late '80s and early '90s, I became acclimated to the zero tolerance policies and practices. So when a policy was put in place to have a zero tolerance towards any type of behavior that disrupted the learning in my classroom I was ready . . . [But] in 2013-14 I found something called restorative justice practices in education which says that all people are relational and worthy of respect, dignity,

[919] *See* Findings I.C.
[920] *See* Report at 91 n.506 ("teachers also stated that they want more training on how best to address school violence and improve student behavior using non-punitive strategies[.]").
[921] Dan Losen, Director of the Center for Civil Rights Remedies, University of California-Los Angeles, testimony, *Briefing Transcript*, pp. 92-93; Report at 98.

> and mutual concern . . . And when I took the time to take this training . . . I started taking the time to be in relation with my young students . . . In school we are taught how to be an amazing teacher . . . but we're not taught in our teacher preparation programs how to differentiate behavior, to look at the needs of the student to see how this student behaves and what you need to do to educate that student, not punish . . . [922]

Losen and his colleagues also found that, even after controlling for a variety of factors, the risk of suspension slightly increased for students of all grade levels when they were taught by less-experienced and novice teachers.[923] Not surprisingly, schools with higher concentrations of students of color, which are strongly linked to schools with concentrated poverty, are less likely to have experienced, well-trained teachers compared to schools with lower concentrations of students of color.[924] These schools are also more likely to be substituting law enforcement officers untrained in working with children for counselors trained to help students work through underlying issues.[925]

Critics of Obama-era guidance on school discipline have stated the guidance "in some ways impugn [teachers'] motives, in order to satisfy civil rights groups."[926] This rhetoric is unhelpful and unfounded. I highly respect teachers, who are too often underpaid and have the difficult job of maintaining order in their classrooms in often severely underfunded schools. The purpose of the guidance is to "arm schools with the tools and information to get out in front of discipline problems before they needed to rely on suspensions or referrals to the criminal justice system."[927] And as the testimony we received highlighted, teachers must be kept safe and equipped with a full complement of tools and support of counselors to successfully address student behavior in a nondiscriminatory way that keeps kids in school learning. No one is suggesting that suspension and expulsion is never appropriate.[928] It should just not be the only tool available and when it is used, it should be employed in a nondiscriminatory manner.

Regardless of the many layers that contribute to discrimination in school discipline, necessary investments must be made to ensure administrators and teachers at all levels are equipped, trained,

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[922] Robin McNair, Restorative Practices Coordinator, Maryland State Advisory Committee to the U.S. Commission on Civil Rights, testimony, *Briefing Transcript*, pp. 115-21; Report at 97.
[923] *See* Report at 82 n.453, *but see* Report at 109 n. 602 (noting some studies have found teachers with over 20 years of experience having more negative attitudes towards inclusion of students with disabilities in general education classes).
[924] We explored this in our 2018 report on inequities in public education funding and increasing racial segregation and concentration of poverty in our public schools. USCCR, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* 69-72 (2018), https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf.
[925] *See* Report at 60-62 (discussing lack of training for SROs).
[926] Report at 138 n.753. See note 914 regarding rescinding of Obama-era guidance.
[927] Jocelyn Samuels, former Acting Assistant Attorney General for Civil Rights at the Department of Justice and a co-signer of the 2014 guidance; Report at 140 n.760 (citing Greg Toppo, "DeVos commission eyes Obama school discipline rules," *USA Today*, Mar. 13, 2018, https://www.usatoday.com/story/news/2018/03/12/devos-commission-eyes-obama-school-discipline-rules/418147002/).
[928] *See* Findings IV. Bullet 3 ("In fact, the guidance did not, as some critics have charged, call to end the use of suspensions, mandate or implement quotas, or state that exclusionary discipline is never appropriate.").

and supported to employ all available tools to manage their classrooms.[929] That is why I strongly support of our recommendations that focus on ways the federal government can (1) educate school communities on how to comply with federal nondiscrimination laws, (2) provide support for schools to implement effectively alternatives to exclusionary discipline, and (3) ensure teachers are provided resources, guidance, training, and support to ensure nondiscriminatory discipline in schools.[930]

Students, especially students with disabilities, often need more support than many schools are providing. Our investigation highlights the fact that many schools are hiring law enforcement not trained to work in an educational setting and not hiring school counselors and other supportive social work professionals who also contribute to school safety.[931] According to federal data approximately 1.6 million students attend a school with a sworn law enforcement officer (SLEO) but not a school counselor.[932] Moreover Latinx, Asian, and black students were all more likely than white students to attend a school with an SLEO but not a counselor.[933]

School counselors have been shown to improve school safety and increase student achievement and it defies all common sense for a school not to have staff available to address the mental health needs of students who may be suffering from trauma or facing emotional distress.[934] As our report finds, school resource officers are being increasingly used to police non-criminal behavior[935] and this "is inappropriate[] because school resource officers' primary responsibility is not to educate students[.]"[936] The federal government should provide funding as needed and incentivize states to provide funding to ensure all schools have adequate counselors and social workers.[937]

The harmful consequences of not addressing the issues explored in our report are exacerbated by the current Administration's actions that are hostile and counterproductive to ensuring the nondiscriminatory administration of school discipline.[938] These actions, and other steps the current Administration has taken to limit the enforcement and investigatory role of the Department Education,[939] exemplify the Administration's abdication of the federal government's responsibility to ensure the administration of school discipline complies with federal nondiscrimination laws. Until the Administration does so, the cherished idea that all children in America can receive an equal opportunity to a high-quality education will remain elusive.

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[929] *See* Findings I.B. Bullet 3.
[930] Recommendations, Training and Resources, Bullets 1-3.
[931] *See* Report at 60-62 n.331-339 (lack of SRO training).
[932] Findings II.B. Bullet 1.
[933] *Id.* ("Schools with high poverty rates also had the highest percentages of SLEOs on campus.").
[934] *See* Findings II.B. Bullet 3.
[935] *See* Findings II.A. Bullet 1, 3.
[936] Recommendations, Training and Resources, Bullet 5.
[937] Recommendations, Training and Resources, Bullet 4.
[938] *See* Report at 137 n.743, 157 n.871-73 (rescinding joint guidance on school discipline and delaying Equity in IDEA rules).
[939] *See* Findings IV. Bullets 6-7 ("The Trump Administration has utilized an approach that narrows their investigations of allegations of race discrimination in school discipline, including limiting proactive identification of systemic patterns. Under the Trump Administration, OCR closed at least 65 school discipline investigations that were opened under the previous administration, without issuing any mandated reforms.").

As the end of my term on the Commission nears, I am proud of the work this Commission has done to highlight civil rights issues in education. In 2018 we highlighted the inequities of public education funding and how it is exacerbated by the increasing segregation of our public schools by race and poverty.[940] And with this report, we have highlighted the intersection of race and disability in school discipline. It is clear that the inequities in school funding are exacerbating the problem. These are serious issues to tackle, but can be overcome with dedication and resolve. It is my firm belief that making a high-quality public education available to every child regardless of their race, gender, disabilities, or zip code will go a long way in addressing many of the inequities and injustices that continue to hold America back from being able to fully live up to its highest ideals.

[940] *See supra*, note 924.

Dissenting Statement of Commissioner Gail Heriot

This is hardly the first time I've dissented from a Commission report. But to my knowledge, never before has the Commission so seriously misunderstood the empirical research that purportedly forms the basis for its conclusions. Time constraints prevent me from discussing all the report's problems. But I will try to discuss a few of the more important ones.

Discipline and Race:

> Perhaps the most insupportable Finding in the report is this:
>
> *Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers ….*[941]

The report provides no evidence to support this sweeping assertion and there is abundant evidence to the contrary. Not the least of that evidence comes from teachers. When one looks at aggregate statistics concerning which students are sent to the principal's office by their teachers, there are strong differences. Denying those differences amounts to an accusation that teachers are getting it not just wrong, but very wrong. It is a slap in the face to teachers.[942]

I wish racial disparities of this kind did not exist. And there is very little I wouldn't give to make them disappear. But the evidence shows they do exist, and pretending otherwise doesn't benefit anyone (with the possible exception of identity politics activists). It certainly does not benefit minority children. To the contrary, they are its greatest victims.[943]

African American students disproportionately go to school with other African American students. American Indian students disproportionately go to school with other American Indian students. If

[941] Report at Findings, pp. 165.

[942] The argument that rates of misbehavior in schools are equal across all races (despite differing rates at which teachers refer students for discipline and differing rates at which discipline is administered) is somewhat reminiscent of arguments concerning criminal activity. Some argue that racial disparities in arrests and incarceration are attributable in large part to race discrimination and not to differing rate of criminal activity. They should consider this: If racial disparities in arrests were largely attributable to race discrimination, one would expect the greatest disparities to occur in connection with minor crimes, where the chance of getting away with a false accusation is greatest. But the greatest disparities are at the other end of the spectrum. Murder, where the motivation for making a false accusation and the likelihood of getting away with one are at their lowest, is the best example. While African Americans are about 12.7% of the population, they are, according to FBI statistics for 2016, 43% of murder victims and 47.3% of offenders. See Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, Police Use of Force: An Examination of Modern Policing Practices (November 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285429.

[943] Interestingly, the Commission does not claim that the rates of school misbehavior by boys and girls are equal. As far as anyone on the Commission seems to believe, the sex disparities in rates of discipline, which in general are larger than the race disparities, are simply the result of disparities in behavior.

teachers fail to keep order in those classrooms out of fear that they will be accused of racism, it is these minority students who will suffer most.[944] Children can't learn in disorderly classrooms.[945]

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[944] In 2003, New York University professor of sociology and education Richard Arum reported that there is "little evidence supporting the contention that the level of disorder and violence in public schools has [generally] reached pandemic proportions." But, he writes, it is "indeed the case in certain urban public schools," various factors have combined "to create school environments that are particularly chaotic, if not themselves crime producing." See Richard Arum, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 2 (2003).

[945] Maintaining good order in the classroom is not always easy, but it is necessary if students are to learn. The problem is sometimes especially acute in the inner-city and other low-income areas. A 2007 article in the *San Francisco Chronicle*, entitled "Students Offer Educators Easy Fixes for Combating Failure," had this to say on the topic:

> As thousands of learned men and women gathered in Sacramento this week to chew over the vexing question of why black and Latino students often do poorly in school, someone had a fresh idea: Ask the students.
>
> So they did. Seven struggling students—black, brown and white—spent an hour Wednesday at the Sacramento Convention Center telling professional educators what works and doesn't work in their schools. …
>
> "If the room is quiet, I can work better—but it's not gonna happen," said Nyrysha Belion, a 16-year-old junior at Mather Youth Academy in Sacramento County, a school for students referred for problems ranging from truancy to probation.
>
> She was answering a question posed by a moderator: "What works best for you at school to help you succeed?"
>
> Simple, elusive quiet.
>
> Nyrysha said if she wants to hear her teacher, she has to move away from the other students. "Half our teachers don't like to talk because no one listens."
>
> The others agreed. "That's what made me mess up in my old school—all the distractions," said Imani Urquhart, 17, a senior who now attends Pacific High continuation school in the North Highlands suburb of Sacramento.

Nanette Asimov, *Students Offer Educators Easy Fixes for Combating Failure*, S.F. CHRON., November 15, 2007. These students' stories match up well with complaints that students gave in response to a 1998 study, entitled "Strategies to Keep Schools Safe." Sasha Volokh & Lisa Snell, Strategies to Keep Schools Safe, Policy Study No. 234, January 1998, available at http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf. "Some of my classes are really rowdy," a student from Seattle told the researchers, "and it's hard to concentrate." "They just are loud and disrupting the whole class," a student from Chicago similarly said about some of her classmates. "The teacher is not able to teach. This is the real ignorant people."

See also Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355 (2013)("I find that the threat of suspension deters students from ever committing an infraction, particularly those students who pose the greatest risk for poor behavior. Losing classroom time as a result of suspension has a small negative impact on the performance, whereas exposure to disruptive behavior significantly reduces achievement.").

What accounts for the differing rates of misbehavior? The best anybody can say is, "*We don't know entirely*."[946] But differing rates of poverty, differing rates of fatherless households, differing parental education, differing achievement in school, and histories of policy failures and injustices likely each play a part.[947] Whatever the genesis of these disparities, they need to be dealt with realistically. We don't live in a make believe world.[948]

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[946] Note that it is probably also error to suppose that *all* the differences in rates of discipline are due to differences in individual behavior (regardless of whether those differences in behavior are mediated by other factors, such as poverty rates). Different schools and school districts sometimes have different discipline codes, some more strict, others less so. Schools that have experienced higher rates of misbehavior are more likely to adopt stricter discipline codes. Since African American students tend to be over-represented at schools that have adopted such codes, this can have an effect on rates of discipline.

But these variations in discipline codes do not constitute discrimination. The evidence shows that at each such school or school district, students are treated equally regardless of race. Nor is there any evidence that these stricter codes were imposed on the schools because they have proportionately more minority students. School officials at those schools and school districts, who tend to be disproportionately minority themselves, appear to have chosen it for the school or school district based on their judgment of what was useful for maintaining classrooms where students can learn. See Josh Kinsler, *Understanding the Black-White School Discipline Gap*, 30 ECON. EDUC. REV. 1370 (2011)(finding cross-school variation in punishment in North Carolina); Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355 (2013)(finding that "the racial gap in discipline stemming from cross-school variation in discipline policies is consistent with achievement maximization" for the minority students at those schools).

[947] At an earlier school discipline briefing of the U.S. Commission on Civil Rights held on February 11, 2011, teacher Patrick Walsh acknowledged factors like these and made it clear that it was his opinion the disparities in school discipline are not related to race per se. He stated:

> It's not the African American girls on their way to UVa or William & Mary [who disproportionately are disciplinary problems at school]; it's not the black girls from Ghana or Sierra Leone or Ethiopia who come here to live the American dream, but it's the black girls who are products of what [*Washington Post* columnist] Colbert King … called an inter-generational cycle of dysfunction. Girls who have no fathers in their homes, who often are born to teen mothers. … [I]t's the same with the boys."

U.S. Commission on Civil Rights, Transcript of School Discipline Briefing at 26-27 (February 11, 2011), available at http://www.usccr.gov/calendar/trnscrpt/BR_02-11-11_School.pdf. Walsh openly acknowledged that this cycle of dysfunction may have roots in a history of racial discrimination. But that doesn't mean it can be solved by pretending it doesn't exist. Walsh was not optimistic that the disparity would disappear before "the problems of poverty and teen pregnancy and lack of fathers can be reduced or solved." *Id.* See Colbert I. King, *Celebrating Black History as the Black Family Disintegrates*, WASH. POST, February 4, 2011 (the article to which Walsh was referring).

Note that the February 11, 2011 briefing led to a very different report from this one. See U.S. Commission on Civil Rights, School Discipline and Disparate Impact (April 2012), available at https://www.usccr.gov/pubs/docs/School_Disciplineand_Disparate_Impact.pdf.

[948] When OCR and DOJ published their Dear Colleague letter on student discipline in 2014 ("2014 Dear Colleague letter"), I wondered what could possibly cause policymakers to promulgate a guidance that would push school districts in the direction of racial quotas in discipline. I suppose I have my answer now. If policy makers believe with their hearts and souls (and against all evidence) that all racial groups engage in school misbehavior at equal rates, quotas will seem like a good solution.

My colleagues are not willing to credit the data from teachers. But even self-reported data demonstrate racial differences in aggregate student conduct. The National Center for Education Statistics has asked students in grades 9-12 every other year since at least 1993 whether they have been in a physical fight on school property over the past 12 months. The results have been consistent. Each time, more African American students have reported participation in such a fight than white students.

In 2015, 12.6% of African American students reported being in a fight on school property, as contrasted with 5.6% of white students. Put differently, the African American rate was **125%** higher than the white rate. Similarly, in 2013, 12.8% of African American students reported being in a fight on school property and 6.4% of white students did. Back in the 1990s, the number of students reported participating in a fight on school property was generally higher. But the racial gaps were just as real. In 1993, 22% of African American students and 15% of white students admitted to participating in such a fight. Two years later, in 1995, the African American rate had declined to 20.3%, and the white rate had decreased to 12.9%.[949]

It should go without saying that these are aggregate statistics and have nothing to do with individual conduct. If a particular student is African American and has not been in a fight on school property then … well … he hasn't been in a fight on school property. If another student is white and she has been in a fight, then she has. Their race has nothing to do with it.

Note that neither African Americans nor whites were at the extremes among racial groups on the issue of fighting. Data on Asian American and Pacific Islander students didn't start to be collected until 1999. But in nearly every year for which data were collected, Asian American rates of participation in fights on school property were *lower* than white rates. On the other end of the spectrum, in every year since 1999 for which sufficient data existed, Pacific Islander students reported *higher* rates than African American students. For example, in 2005, 24.5% of Pacific Islander students reported being in such a fight, while only 16.9% of African American students did.[950] The rates for whites and Asian Americans in that year were 11.6% and 5.9% respectively.

Weirdly, the staff-generated portion of this very report also contradicts the Commission's Finding (despite assertions that the Commission's Finding is supported by it).[951] On page 185, a chart of

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[949] Digest of Education Statistics, Percentage of students in grades 9-12 who reported having been in a physical fight at least one time during the previous 12 months by location and selected student characteristics: Selected years, 1993 through 2015, available at https://nces.ed.gov/programs/digest/d16/tables/dt16_231.10.asp .

[950] See also Bach Mai Dolly Nguyen, Pedro Noguera, Nathan Adkins, & Robert T. Ternaishi, *Ethnic Discipline Gap: Unseen Dimensions in School Discipline*, ___ AM. EDUC. RESEARCH J. ___ (2019)(finding that Pacific Islanders have much higher rates of discipline than Asians and finding further differences when Asians and Pacific Islanders are disaggregated into ethnicities). See also Mark Alden Morgan & John Paul Wright, *Beyond Black and White: Suspension Disparities for Hispanic, Asian, and White Youth*, 43 CRIM. JUSTICE REV. 1 (2017).

[951] Shortly after the Commission meeting at which this report along with its findings and recommendations was adopted, I made an inquiry as to which studies the Commission's majority was relying on for this Finding (and for the Chair's statement in the April 2019 meeting to the effect that she stood by the Finding). My attention was directed specifically to pp. 184-186 of the then-current draft of the report (pp. 114-6 of the final version) as well as to unspecified materials that Chair Lhamon has reviewed in the course of her career.

self-reported wrongdoing by a sample of 10th grade students is broken down by race. And while the chart appears to have been deliberately designed to make the differences in misbehavior seem as small as possible, it still does not come close to supporting the Commission's Finding that there are *no* differences in misbehavior rates.[952] It shows instead that there are.[953] Moreover, a fair

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There is nothing on pages 184-86 of the final draft other than (1) the chart described above, which is taken from data presented in John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008), (2) a citation to Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, PSYCHOLOGICAL SCI. 1 (2015), and (3) a citation to an interrogatory submitted to the Department of Education by the Commission in connection with the research conduct for this report. As I have described in the text and infra at note 14, the data from the Wallace et al. study do not support the Commission's Finding. To the contrary, they tend to refute it. For a discussion as to why the other two citations are no more useful in supporting the Commission's Finding, see infra at note 13.

[952] For misbehavior rates, the bar graph on page 116 reports figures that range from 0.5 to 15.0. Yet the Y-axis runs from 0 to 60. This necessarily makes the differences look small. If the Y-axis had run from 0 to 20 things would have looked a lot different.

To justify this unusual method for presenting data, the Commission could say that it wanted to present data on office visit/detention rates and on suspension/expulsion rates in the same graph. But there was no good reason to combine those issues into the same graph. Office visits, detention, suspensions, and expulsions are not merely a response to the misbehaviors (e.g. gun possession) addressed in the graph. They are a response to all types of misbehavior combined. The effect of the graph is to mislead.

[953] The two other sources cited in the staff-generated portion of this report on which the Commission majority rely as proof of the Finding are Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, PSYCHOLOGICAL SCI. 1 (2015), and a citation to an interrogatory submitted to the Department of Education by the Commission.

The citation to Okonofua & Eberhardt is perplexing. That study reports an experiment. It does not purport to gauge rates of misbehavior in school by race. In the article's introductory paragraph it happens to describe some of the prior literature in the area of school discipline this way: "In a recent national survey of more than 70,000 schools … the Office for Civil Rights (2012) reports that Black students are more than three times as likely to be suspended or expelled as their White peers, a fact not ***fully*** explained by racial differences in socioeconomic status or in student misbehavior (Fenning & Rose, 2007; see also McFadden, Marsh, Price & Hwang, 1992; Shaw & Braden, 1990; Skiba et al., 2011; Skiba, Michael, Nardo & Peterson, 2002; Wu, Pink, Crain, & Moles, 1982)." (Emphasis supplied). That word "fully" is important. The authors mean that they believe that some of the previous studies they are citing show that *sometimes* Black students are disciplined more harshly than White students who have committed the same offense. Okonofua & Eberhardt were not going out on a limb and saying that rates of misbehavior in school are equal across all races. Nor do any of the studies they cite say this. See also John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver & J.C. Barnes, *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014)(discussed infra at n. 24).

As for the Department of Education's answer to the Commission's interrogatory, the report states the following in Footnote 655:

> "…OCR has not investigated or identified any information or evidence suggesting, one way or another, that students of color with disabilities engage in excludable or disruptive behaviors more often and/or more severely …." See e.g., U.S. Dep't of Education, Office for Civil Rights, Interrogatory Responses to Commission at 9.

This cannot be the basis for a finding there are no differences among the various races in rates of misbehavior at school. First of all, the Department of Education's response to our interrogatory was not that it had proof that

examination of the data finds the differences are not at all small. The most serious example is the possession of a gun at school. This is a comparatively rare form of misbehavior (especially at schools that have instituted metal detectors at the school entrances). Among 10th grade boys, 3.0% of whites and 7.9% of African Americans confess to having possessed one in the last 12 months. That means the rate reported for African Americans was **163.3% higher** than the rate reported by whites. Similarly, the rate reported by American Indian boys (7.4%) was **146.7% higher** than that for white boys.[954] Asian American boys on the other hand were at 2.7%, which is **10% lower** than that for white boys (although the sample size for Asian American boys was too small to yield statistically significant figures at the $p < .01$ level preferred by the authors of the underlying study being cited).

Similarly, self-reported gang membership is not evenly distributed among children and teenagers by race and ethnicity. In *Gang Membership Between Ages 5 and 17 Years in the United States*, David C. Pyrooz and Gary Sweeten took data from the National Longitudinal Survey of Youth 1997. They found that while Hispanics were 12.9% of the young people in the sample who had never been in a gang, they were 20% of those who had been. Similarly, African Americans were 15.6% of the young people who had never been in a gang, but they were 23.6% of those who had

misbehavior rates were the same across racial groups. Rather its response was that it had no evidence "one way or another." Second, even if it had evidence, the comparison it was being asked to make was not among students of the various races, but rather among students *with disabilities* of the various races. That is an entirely different thing. See infra at 16-17.

[954] These figures are from John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008). They were significant to a $p < .01$ level.

The article also provided figures for two other self-reported misbehaviors for which schools professed zero tolerance and these other misbehaviors were also reported on the Commission's chart on page 125. For example, among boys, African Americans reported having alcohol at school 25% more often than whites (9.0% vs. 7.2%). American Indians reported such conduct 73.6% more often (12.5% vs. 7.2%), and Hispanics reported it 98.6% more often (14.3% vs. 7.2%). On the other hand, whites confessed to such conduct 28.6% more often than Asian Americans. Unfortunately, the sample sizes for African American, Asian American, and American Indian boys were too small for the differences to be significant to the $p < .01$ level. Note, however, that the failure to prove a difference to a statistically significant level is emphatically not the same thing as proof that the behavior is the same. Believing otherwise is a rather elementary error. (Note also that .01 is an unusually stringent standard for measuring significance. Moreover, the authors inexplicably failed to combine the data for boys and girls, which showed even greater disparities, except in the comparison of White and Asian American rates. Combining data in that way is a routine method for dealing with small sample sizes and likely would have yielded more statistical significance.)

Among boys, African Americans reported having marijuana or other drugs at school at rates only 19% higher than whites did (10% vs. 8.4%). The corresponding comparisons for Hispanics and American Indians to whites were 94.4% higher (15.0% vs. 8.4%) and 22.6% higher (10.3% vs. 8.4%). For Asian Americans the corresponding figure was 20.2% lower (6.7% vs. 8.4%). Only the Hispanic-white comparison was significant to the $p < .01$ level. It is worth pointing out that not all studies of marijuana use have found that African American teenagers use marijuana and other drugs at higher rates than whites. National Institute on Drug Abuse, Drug Use Among Racial and Ethnic Minorities, (Table 16) , available at https://archives.drugabuse.gov/sites/default/files/minorities03_1.pdf; NYC Health, Drug Use among Youth in New York City Public High Schools, by Sexual Orientation and Gender Identity, 2015, available at https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief92.pdf. I have not, however, found a study that contradicts these numbers for use of drugs in school.

been. Asian Americans were also over-represented in gangs with 2.3% never in a gang, but 2.5% of those who had been in a gang. Whites were the only group to be under-represented in gangs. They were 72.6% of the non-gang members, but 58.4% of those who had been gang members.[955]

There are, of course, other forms of misbehavior. Not everything is fighting on school property or possession of a gun at school, and not everything is related to gang membership. But the Commission has presented no evidence that other forms of misbehavior are disproportionately committed by whites and Asian Americans such that they cancel out the disproportionalities I have discussed. Indeed, it would be extraordinary if the differing rates for each kind of misbehavior *just happened* to net out to zero for all racial groups. Moreover, insofar as there is evidence, it runs the other direction. While the Commission's Finding suggests that the Commission's majority views the differing rates of teacher referrals for discipline with suspicion, it is impossible to ignore the fact that those numbers are roughly consistent with the self-reported data I have discussed above.

I can only surmise that the Commissioners who voted in favor of the Finding have misread the studies that purport to find that discrimination *may* account for *some portion* of the differences in the rate of discipline imposed on African American students. Somehow they have conflated that with a finding that *all* of the differences in rates of school discipline are caused by discrimination or by some factor other than differing behaviors. To my knowledge, no researcher makes such a claim.

Note that, according to the Department of Education, African American students are suspended at a rate approximately three times that of white students.[956] Similarly, in the staff-generated portion of this report, among 10th grade boys, African Americans report being suspended or expelled at some point during their education slightly more than twice as often as whites so report.[957] In turn, whites report being suspended or expelled at some point during their education 41% more often than Asian Americans so report.[958]

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[955] David C. Pyrooz and Gary Sweeten, *Gang Membership Between Ages 5 and 17 Years in the United States*, 56 J. ADOLESCENT HEALTH 1 (2015).

[956] 2014 Dear Colleague Letter at 3.

[957] Report at 116.

[958] If you are wondering why the racial disparities are higher for suspension/expulsion rates than they are for office visit/detention rates that can be easily explained. It is likely to be at least in part the result of multiple violations. Suppose 10% of African American students have participated in a fight on school property and 5% of white students have. This is not too far off from the actual figures for 2015 (12.6% vs. 5.6%). I used 10% and 5%, because they make the calculations easier. Suppose also that a school district disciplines students who have been in just one fight with in-school detention. But a student who has been in two fights will be suspended, and a third fight will result in the student's expulsion.

If the school district has 10,000 African American and 10,000 white students, one would expect 1000 African American students and 500 white students to be given detention for fighting, which results in a 2 to1 ratio for detention. In the next year, if one assume that a random 10% of African American students will get a fight and that a random 5% of white students will get in a fight, 100 African American students and 25 white students will now have been in two fights, which results in a 4 to1 ratio for suspensions. In the third year, again a random 10% of African Americans will

If discrimination were to blame, it would take discrimination of epic proportions to account for all that.[959] It would mean that two out of three African Americans who are suspended would not have been suspended if they had been white. Similarly, it would mean that huge numbers of white students would not have been suspended if they had been Asian. Teachers, guidance counselors, principals and school district officials ***of every race and ethnicity*** would have had to cooperate together to produce such a result.

No explanation is ever given to as why teachers would be so pro-Asian and so anti-Pacific Islander if there is really *no difference* in their behavior. To believe that they are would require one to take it on faith that the country is not just deeply racist, but arbitrarily racist: One minority group, many of whose members are fairly recent immigrants, is treated especially well; another minority group with many members who are fairly recent immigrants, is treated especially poorly.

Are teachers a particularly racist element of the American population? I doubt it, and I cannot understand why anyone would think they are. For what it's worth, teachers are one of the most liberal/Progressive/left-leaning professions in the country.[960] Among them, Democrats outnumber Republicans by more than 3 to 1.

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be in a fight. This will mean 10 African American and 1.25 white students will have been in three fights, which is an 8 to 1 ratio for expulsions.

[959] Josh Kinsler appears to rule out race discrimination by teachers, principals or school district as the reason for large race disparities in discipline. Josh Kinsler, *Understanding the Black-White School Discipline Gap*, 30 ECON. EDUC. REV. 1370 (2011). But he suggests that differences in discipline policy from school district to school district (or school to school) may affect the racial statistics, because the school districts and schools that adopt stricter policies have disproportionately large numbers of minority students. See supra at note 6. This is not discrimination. At each school district or school, all students are treated exactly the same regardless of race. Nobody decides that one school (that happens to have more minority students than average) will have a harsher discipline policy while another school district or school (with fewer minority students) will have a more lenient one. Officials from each school district or school decide what sort of discipline policy is best for that particular school district or school.

Interestingly, in a later study, Kinsler suggests that heterogeneity in school discipline policies may be serving the interests of minority students. Those school district or schools that adopt more stringent policies in response to higher rates of misbehavior are more successful in maintaining order, which in turn leads to greater achievement by its students, including its minority students. To attempt to impose a one size fits all approach could sacrifice that gain. Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355 (2013.

[960] Ana Swanson, *The Most Liberal and Conservative Jobs in America*, WASH. POST (June 3, 2015). As a conservative, I am not inclined toward the notion that liberal/Progressive/left-leaning individuals are less likely to engage in race discrimination. It is on the left side of the political spectrum that the notion that colorblindness is a bad thing has taken root. See, e.g., Monnica T. Williams, *Colorblind Ideology Is A Form of Racism*, PSYCH. TODAY (December 27, 2011); Jennifer Delton, *In Praise of Colorblind Conservatism*, WASH. POST (October 9, 2018). But left-of-center racial ideology frequently calls for discrimination in *favor* of racial minorities in the form of affirmative action that is available to some groups and not others. It thus seems somewhat unlikely to me that teachers are discriminating *against* minorities. On the whole, however, the most likely explanation for the aggregate statistics is that race discrimination plays at most only an extremely small role in the differences.

A close friend of mine reported having dinner with two young elementary school teachers while the Commission was working on its Findings and Recommendations for this report. The two teachers faithfully hewed to the Progressive line on every single issue with one curious exception: *school discipline*. On that, they were troubled by their school's failure to support them as teachers in their efforts to maintain order in the classroom. The unruly students they sent to the principal would return shortly thereafter *with candy*. These teachers understood fully that the federal government's Obama-Era policy on school discipline was doing students, very much including minority students, no favors by pressuring schools to lighten up on discipline on account of its disparate impact on minority students.[961]

So allow me to discuss the studies that purport to present evidence that discrimination may be *part* of the explanation for the differences in discipline rates. For reasons I discuss in *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*,[962] I believe those studies fail even to demonstrate that race discrimination is a partial explanation for the differences in rates of discipline.[963] But they certainly do not support the Commission's Finding that *none* of the differences are the result of differences in rates of misbehavior.

Of course, the first and most obvious reason to believe rates of misbehavior are not equal across all races is that the eyewitnesses to the individual cases—the teachers—have, through their individual actions of sending students to the principal's office for discipline, demonstrated that they are not equal. Principals have evidently agreed with those teachers. No student gets suspended without the agreement of a school official above the teacher. Researchers working with aggregate statistics are looking to prove that these teachers and principals were in part motivated by race (or are otherwise systematically biased against one or more racial groups). But the researchers were not flies on the wall when the student's alleged misbehavior occurred; they don't have the facts concerning the alleged misbehavior.

One technique that researchers have used is to control for factors that are thought to be associated with misbehavior in school—like low-income status, family structure, parental education, etc. If, after attempting to account for such factors, there remains some residual differences in rates of

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[961] I believe this is an excellent example of historian Robert Conquest's rule that everyone is a conservative about the things they know best. Put differently, when it comes to dealing with problems in their own professions, even the most ardent Progressives are able to see the nuance and complexity, which allows them to understand better and appreciate the traditions of that profession.

[962] 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221.

[963] This is not because I believe that discrimination against African Americans or other racial minorities with higher than average school discipline rates is never a factor in school discipline decisions. It could be and indeed probably is. Particularly given that the U.S. Department of Education had recently been instructing school districts that they can be held responsible for mere disparate impact in school discipline, there could have been (and indeed probably was) discrimination against white and Asians too. Discrimination in one direction could mask discrimination in the other direction in aggregate statistics. As always, it is individuals who count and not groups. If a student is being punished (or punished more harshly) because of his or her race, that's a travesty and a violation of the law no matter what the aggregate statistics show.

misbehavior between racial groups these researchers suggest (or sometimes merely imply) that the possibility that race discrimination is a factor must be entertained. But they do not suggest or imply that the underlying rates of misbehavior were equal across races prior to controlling for other factors.[964] To the contrary, by controlling for those factors, these studies are acknowledging that we shouldn't expect misbehavior rates to be equal when other factors aren't.[965]

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[964] Interestingly one thing that most researchers had not been able to do until 2014 is control for each student's prior disciplinary record. In cases in which an African American student appeared to have been punished more harshly than a white or Asian student who committed the same offense, it was impossible to tell whether the students being compared had different past records of misbehavior. That changed with *Prior Problem Behavior Accounts for the Racial Gap in School Suspension.* The authors of that study had a database that gave them good evidence of whether particular students had been in disciplinary trouble before. John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver & J.C. Barnes, *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014).

The authors employed the Early Childhood Longitudinal Study, Kindergarten Class of 1998-99 database, which includes data on over 21,000 students; full data for the project was available for 2737 of them. Prior behavior measures came from the fall of kindergarten (1998), the spring of first grade (2000), and the spring of third grade (2002). In addition, the authors used parent-reported data from the eighth grade in response to questions whether the student cheats, steals, or fights. The disciplinary "outcome" data came from the spring of the eighth grades (2007).

In the abstract to the article, the authors put their findings modestly, stating that "the use of suspensions by teachers and administrators may not have been as racially biased as some scholars have argued." *Id.* at 257. In fact, as the title to the article suggests, their findings are devastating for those who argue that disproportionality in discipline signals discrimination.

In the body of their article, the authors explain their findings more completely:

> Capitalizing on the longitudinal nature of [our database], and drawing on a rich body of studies into the stability of early problem behavior, we examined whether measures of prior problem behavior could account for the differences in suspension between both whites and blacks. The results of these analyses were straightforward: The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and trigger disciplinary measures by teachers and school officials. Differences in rates of suspensions between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in classroom.

Id. at 7.

Put differently, they found that once prior misbehavior is taken into account, the supposed racial differences in severity of discipline melt away.

[965] John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008), which is discussed supra at n. 11 is an example of such a study. Another good example of this is *Breaking Schools' Rules: A Statewide Study on How Schools Discipline Relates to Students' Success and Juvenile Justice Involvement*—a report issued by the Justice Center of the Council of State Governments and the Public Policy Research Institute of Texas A&M University. That study purports to find that even after 83 different variables are taken into account, African American students are still 31.1% more likely than white students to have been the subject of discretionary disciplinary action in the 9th grade. The inference that the authors appear to want the reader to draw is that perhaps some teacher reports of misbehavior by African American students were false or misleading. It does not in any way

Another approach is associated with the work of Russell Skiba and his various co-investigators. In *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* ("*Skiba I*"),[966] for example, their analysis runs this way: Whites are (within the population of students referred for discipline in their database) more likely to be referred for "smoking," "left without permission," "vandalism," and "obscene language," while African Americans are more likely to be referred for "threat," "disrespect," "excessive noise," or "loitering."[967] The latter offenses, by the authors' reckoning, are more judgment calls than the former. They posit that this shows that African American students *could* be the victims of bias in the sense that things that they could be referred for discipline for something that would not be regarded as a "threat" or as "disrespect" if it had come from a white student.

I have criticized the *Skiba I* methodology in *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law.*[968] But the reasons for my criticism are unrelated to the Commission's current Finding that

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suggest that rate of misbehavior among races are equal. Indeed, quite the opposite: By controlling for factors like family structure, parental education (as a proxy for socio-economic status), and the region and urbanicity of the community in which students live, it implicitly acknowledges that it is naïve to expect rates of misbehavior to be equal when rates of poverty, etc. are not equal.

I have criticized the conclusions drawn in *Breaking Schools' Rules: A Statewide Study on How Schools Discipline Relates to Students' Success and Juvenile Justice Involvement* insofar as the article suggests that the residual differences are the result of race discrimination in Gail Heriot and Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221. There is no need to make those criticisms here, because the article does not claim that school misbehavior rates are equal across races.

[966] *Skiba I* is a study of 11,001 students in 19 middle schools in an unnamed large Midwestern city. Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002).

Skiba I found that attempting to control for socio-economic class did not account for all or even most of the racial disproportionalities. Put differently, African American students who are eligible for the free lunch program are referred more often for discipline than white students who are eligible for the free lunch program. Then again, eligibility for free lunch is a very restricted measure of socio-economic class. No attempt was made here to control for out-of-wedlock birth or low scholastic performance, both factors known to correlate with school discipline referrals. The latter, of course, is difficult to measure in that the same bias researchers are trying to measure in school discipline could conceivably infect school grades.

See also Russell J. Skiba et al., Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline, 40 SCH. PSYCHOL. REV. 85 (2011).

[967] Note that this does not mean that whites students generally are more likely to be referred for discipline for "smoking," "left without permission," "vandalism," and "obscene language," than African American students. The comparison here is between white students who were referred for discipline and African American students who were referred for discipline.

[968] 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221.

there are *no* differences in behavior among racial groups. At no point do Skiba and his co-investigators take the position that there are *no* differences in misbehavior rates among races. They are making comparisons within the population of students who have been disciplined. Their point is that *some* of the disparities in discipline rates could be caused by discrimination rather than by differences in behavior.

Another technique that one researcher—Michael Rocque—has employed on more than one occasion is ask individual teachers, in retrospect, to give an overall rating the conduct of individual students who have been in their classroom. He and his co-investigators then attempted to compare those ratings with each student's actual record of discipline. He found that in comparing students of different races with the same "rating," the African American students were more likely to have been the recipient of actual discipline or of more discipline.

Again, I have criticized Rocque's methodology in *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law,*[969] and will not do so again here. The point is that even Rocque does not claim that the teacher ratings he used as his benchmark of actual misbehavior were equal across races. Rather he makes the much more limited claim that the teacher ratings did not fully account for the differences in rates of discipline. Put differently, he is suggesting that race discrimination may be a *part* of the explanation for the differences in rates of discipline, not that it is anything close to the *full* explanation.

Discipline and Disability:

> With regard to disability, the Commission adopted the following Findings:
>
> *Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities. Five states (including the District of Columbia) reported a ten percentage point or higher gap in suspension rates between students with disabilities and students without disabilities.*
>
> *The type of disability a student has may also affect disparate discipline rates. Having a learning disability remains the largest category of students with disabilities (42 percent) served by special education. These students are majority male students, disproportionately poor, and often students of color. These students continue to receive disciplinary actions at much higher rates compared to students without learning disabilities.*

Here's the problem: We are not talking about students who are blind, wheelchair-bound, or deaf. As Max Eden testified at our briefing, those students generally have lower than average discipline rates (though for reasons I cannot fathom, this significant clarification didn't make it into the Commission's findings). ***Instead, it is students with behavioral disorders who have higher than average discipline rates.***

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[969] Ibid.

If that surprises anyone, it shouldn't. It is essentially *by definition* that students with behavioral disorders engage in misbehavior at school more often than other students. The diagnostic criteria established under the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM 5") for them often includes findings that the individual has engaged in some sort of misbehavior.

For example, one of the criteria used to diagnose Oppositional Defiant Disorder is "often actively defies or refuses to comply with requests from authority figures or with rules."[970] Similarly, the diagnostic criteria for attention deficit hyperactivity disorder (ADHD) note that a person with the disorder "often interrupts or intrudes on others (e.g. butts into conversations, games, or activities); may start using other people's things without asking or receiving permission; for adolescents or adults, may intrude into or take over what others are doing."[971] "Recurrent behavioral outbursts representing a failure to control aggressive impulses" is likewise a criterion for diagnosing Intermittent Explosive Disorder,[972] and the essential feature of Conduct Disorder is "A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate social norms or rules are violated."[973]

What the Commission has found is that students who misbehave a lot get disciplined a lot. ***That should not be news.***

One can question what the best method is for instilling discipline in students with (or without) such disabilities. The Commission seems to assume that once a student is pronounced to have a particular behavioral disorder that means the student should not be disciplined for misbehavior, presumably on the ground that he can't help it. As a matter of logic, that doesn't follow. In any event, "best practices" in school discipline is not a question for this Commission.[974]

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[970] DSM 5 at 462.

[971] DSM 5 at 60.

[972] DSM 5 at 466.

[973] DSM 5 at 470. The same is true for students with pyromania, which is "deliberate and purposeful fire setting on more than one occasion," DSM 5 at 476, or kleptomania, which is "recurrent failure to resist impulses to steal objects that are not needed for personal use or their monetary value." DSM 5 at 478.

With other types of disabilities, the relationship between disability and discipline problems may be subtler. A child with a sleep-related disability may be especially likely to misbehave at school because of irritability caused by lack of sleep. While children on the autism spectrum face exclusionary discipline at disproportionately low rates, they may be nonetheless disproportionately likely to misbehave (and hence face other kinds of discipline) because of the lack of social skills that is a hallmark of that disorder. Poor skills at reading faces, for example, might mean that they misunderstand that someone is angry at them and that they need to stop the behavior that is causing that anger. Good teachers will try to be attentive to this kind of problem and respond appropriately. But not every teacher can or will do so all the time, especially if the relationship between the disability and the misbehavior is subtle. None of this should be interpreted as driven by bias against disability per se.

[974] It is worth noting that the validity of the standard DSM labeling schemes for psychiatric disorder is now widely doubted in by researchers in psychiatry and psychology. See B.J. Casey, Nick Craddock, Bruce N. Cuthbert, Steven E. Hyman, Francis S. Lee & Kerry J. Ressler, *DSM-5 of RDoC: Progress in Psychiatry Research?,* 14 NATURE REVS.

Discipline and Intersectionality:

With regard to "intersectionality," the Commission's Findings were as follows:

> *The U.S. Department of Education recognizes that since it began collecting state-level data on suspensions and expulsions in the 1998-1999 school year, "there appears to be a consistent pattern where Black students with disabilities were suspended or expelled at greater rates than their percentage in the population of students with disabilities.*
>
> *Black girls with disabilities are substantially more likely than white girls with disabilities to experience school discipline; recent data reflects that black girls with disabilities are four times more likely than white girls with disabilities to experience one or more out of school suspensions.*
>
> *The most recent CRDC data reflects that, with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were more likely than white students with disabilities to be expelled without educational services.*

None of this is startling. The rates of discipline for African American students are higher than average; the rates of discipline for students with disabilities are also higher than average (though that is not true of students with physical disabilities like blindness, deafness and paralysis). It isn't surprising that the rates of discipline for African American students with disabilities would be higher than for white students with disabilities.

Sometimes interactions between variables can produce unexpected results. It is not impossible that both African American students generally and students with disabilities generally could have higher than average discipline rates, but that African American students *with disabilities* could have lower than average discipline rates. For example, suppose that white parents are more aggressive than African American parents at getting their children diagnosed with behavioral disabilities and that consequently a much larger proportion of African American students with disability diagnoses have physical disabilities rather than behavioral disabilities relative to white students with disability diagnoses. Since we know that students with physical disabilities have

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NEUROSCIENCE 810 (2013). There are some medical conditions—diabetes, thyroid disorders—that are detected by simple blood tests. Either you have the wrong level of something in your bloodstream or you don't. Behavioral disorders generally cannot be so easily identified. Most children have exhibited behavior at one point or another that could contribute to a diagnosis for ADHD, Oppositional Defiant Disorder, Intermittent Explosive Disorder, or Conduct Disorder (and those that haven't may have engaged in behaviors that could contribute to a diagnosis of some other disorder recognized by DSM 5). There are necessarily judgment calls that have to be made. But the issues go beyond that. For some or all behavioral disorders, it is difficult to know whether there is any "there" there. Given that the behaviors that go into a diagnosis are ordinarily distributed on a normal curve rather than found in discontinuous clusters, is it fair to call them disorders at all? Is there a functional reason to group disorders as the DSM 5 does? Is there any functional reason to distinguish between, for example, a teenager with Oppositional Defiant Disorder and a teenager who is more rebellious than most?

lower rates of discipline than average, it wouldn't be impossible for African American students with disabilities to have lower than average rates of discipline despite higher rates for African American students generally and disabled students generally. [975]

My point is simply that it isn't surprising that, at least according to the Commission's Finding, it didn't turn out that way. I do not know if the Commission has a sufficient basis upon which to make that Finding. I note that some researchers have found just the opposite—that "[s]tudents with disabilities who are Black, Hispanic, or of other race/ethnicity were not more frequently suspended than [students with disabilities] who are White."[976]

Conclusion:

One of my earliest heroes – Daniel Patrick Moynihan – famously said that "Everyone is entitled to his own opinion, but not to his own facts." A taxpayer-funded federal commission should be especially careful to avoid making these kinds of errors. Yet for all the reasons I discuss above, I fear that the Commission failed to do so with this report. The policymakers we advise and the public who fund us deserve better.

[975] Should we expect all racial and ethnic groups to have similar rates of disabilities? We know that certain racial and ethnic groups are more likely to have certain diseases or disorders that don't much affect academic performance or school behavior. Tay-Sachs disease is much more common in Ashkenazi Jews than in the general population. See, e.g., The Jewish Standard: Why to Test for Tay-Sachs, available at https://www.jewishgeneticdiseases.org/test-tay-sachs-article-jewish-standard/. French Canadians have unusually high rates of Leber's hereditary optic neuropathy because of a genetic mutation carried by a single common ancestor. See Sarah Zhang, How One Woman Brought the 'Mother's Curse' to Canada, September 19, 2017, available at https://www.theatlantic.com/science/archive/2017/09/how-a-fille-du-roy-brought-the-mothers-curse-to-canada/540153/. African Americans are unusually likely to have sickle cell trait (the genetic trait that can lead to the development of sickle cell anemia.) It is thought that this is because the gene for sickle cell trait has protective effects against malaria, meaning that groups in malaria-prone areas are more likely to carry it. See "Mystery Solved: How Sickle Hemoglobin Prevents Against Malaria," SCIENCE DAILY, available at https://www.sciencedaily.com/releases/2011/04/110428123931.htm.

[976] Paul L. Morgan, George Farkas, Marianne M. Hillemeier, Yangyang Wang, Zoe Mandel, Christopher DeJarnett & Steve Maczuga, Are Students with Disabilities Suspended More Frequently than Otherwise Similar Students without Disabilities, 72 J. SCHOOL PSYCH. 1 (2019).

Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

One of the defects in this report is that it starts from the assumption that disparate outcomes between groups of students are the consequence of discriminatory behavior on the part of teachers and school administrators. To put it another way, the report assumes that all children enter school on a trajectory of academic success and good behavior, but this trajectory is interrupted by teachers and administrators who discriminate against students on the basis of race, disability, and so on. The discriminatory behavior redirects a student's natural trajectory toward academic failure and eventual imprisonment.

The assumption is unsupported by the evidence.

Children do not enter school as blank slates. By the time a child enters kindergarten, she already has five years of life behind her during which she had a stable home life (or not), was able to learn to regulate her behavior (or not)[977], had parents who read to her every night (or not), and a thousand other variations that occur in life.

Many of a child's characteristics are already apparent by kindergarten or early elementary school. These include characteristics that are due to a child's environment or simple bad luck[978], but that nonetheless shape a child's temperament and abilities. Evidence suggest black children in kindergarten and first grade may, on average, have less-developed social skills than comparable

[977] Michelle Anne Coyne, Jamie C. Vaske, Danielle L. Boisvert, John Paul Wright, *Sex Differences in the Stability of Self-Regulation Across Childhood*, J. of Development and Life-Course Criminology, 1(1), 4-20 (2015) ("The general findings from the literature are that self-regulation, like self-control and other traits, typically emerges early during toddlerhood and that the ability to self-regulate one's affect, behavior, and attention increases throughout early childhood and becomes moderately stable during middle childhood for the majority of individuals."), https://link.springer.com/article/10.1007/s40865-015-0001-6.

[978] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, Psy. Rev.100(4), 674-701, 681 (1993), http://users.soc.umn.edu/~uggen/Moffitt_PR_93.pdf.

> Hertzig (1983) has described an empirical test of the proposed relationship between neurological damage and difficult behavior in infancy. She studied a sample of 66 low-birth-weight infants from intact middle-class families. Symptoms of brain dysfunction detected during neurological examinations were dignificantly related to an index of difficult temperament taken at ages 1, 2, and 3 (Thomas & Chess, 1977; the index comprised rhythmicity, adaptability, approach-withdrawal, intensity, and mood). The parents of the children with neurological impairment and difficult temperament more often sought help from child psychiatrists as their children grew up, and and the most frequent presenting complaints were immaturity, overactivity, temper tantrums, poor attention, and poor school performance. Each of these childhood problems has been linked by research to later antisocial outcomes (cf. Moffitt, 1990a, 1990b). Importantly, the impairments of the children with neural damage were not massive; their mean IQ score was 96 (only 4 points below the population mean). Hertzig's study showed that even subtle neurological deficits can influence an infant's temperament and behavior, the difficulty of rearing the infant, and behavioral problems in later childhood.

white children.[979] Black children are less likely to be raised by both their biological parents.[980] Across all racial groups, black children are the second most likely to be abused (after Native Americans) and across all races, the youngest children are most vulnerable to abuse.[981] By the time a child even arrives at school, the die, to a large extent, has been cast.

Differences in Behavior

The report glosses over the very likely possibility that different behavior, rather than racial discrimination, results in different treatment. The report cites panelist Monique Morris from the National Black Women's Justice Institute, who said:

> [B]ehaviors, particularly of black girls, are misinterpreted as defiant and violent and disruptive and sometimes those are just expressions of their critical thinking. But based upon some of the ways in which we have portrayed black femininity in our society, the way those words come out or the very act of dissent is perceived as an act of defiance.[982]

Notice that even Ms. Morris qualifies her statement by saying that *"sometimes"* these behaviors "are just expressions of their critical thinking." The obvious conclusion to draw is that sometimes – perhaps often – these behaviors really are just acting out. Even if the girl's intent is to politely disagree with the teacher, if the teacher reasonably interprets her behavior as defiant, it does the girl no favors to ignore that. If a teacher (who may be more inclined to be forgiving of a student's

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[979] Kevin M. Beaver, John Paul Wright, and Matt DeLisi, "The Racist Teacher Revisited: Race and Social Skills in a Nationally Representative Sample of American Children," in CLASSROOMS: MANAGEMENT, EFFECTIVENESS, AND CHALLENGES (Rebecca J. Newley, ed.), at 127 (2011).

> Using the largest longitudinal sample of kindergarten and first grade students [the ECLS-K], we tested these two competing perspectives. We first addressed the question of whether black students engaged in more problematic behaviors than did white students. T-tests revealed substantial differences, wherein white students scored significantly higher on measured social skills than black students. We should also note that to collaborate this finding, we analyzed parental reports of child social skills. The results gleaned from the *t*-tests (using parental reports of child social skills) produced virtually identical results. . . In both instances, black children were characterized as having a limited set of social skills.
>
> To test the possibility that white teachers are biased against black students, we examined whether the teacher's race had an appreciable effect on their evaluations of black and white students' social skills. In the multilevel tests, the ECLS-K data provided no evidence that white teachers differentially rate black students as demonstrating more deficient social skills. Indeed, the teacher characteristics did not have a measurable impact on the subjective appraisal of their students' social skills. The findings reinforce prior research showing that teachers provide accurate, reliable, and valid assessments of their students. . .

[980] *See* infra, "Racial Disparities in Family Structure".

[981] *Child Maltreatment 2017*, Administration for Children and Families, Department of Health and Human Services, 2017, at 21-22 (nationally, more than one-quarter of abused children are younger than three years old, and African-American children have the second-highest rate of victimization – 13.9 per 1,000 children), https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf#page=30.

[982] Report at n. 441.

poorly formulated response than many people would be) interprets a response as hostile, an average outside observer likely would as well. It is better for this girl to learn how to properly and politely interact with others now, at school, than for her to treat future supervisors and coworkers in a way that will be perceived as hostile.

A longitudinal study was conducted based on data from the Early Childhood Longitudinal Study, Kindergarten Class (ECLS-K) of 1998-1999. In addition to collecting other data, the ECLS-K asked kindergarten, first, and third grade teachers to rate problem behavior in students.[983] Then, in eighth grade, the study's authors asked parents if their child had ever been suspended. As the authors of the study wrote, their results were straightforward:

> ***The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspension between black and white youth.*** Thus, our results indicate that odds differentials in suspensions are likely produced by ***pre-existing*** behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials. Differences in rates of suspension between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom [citations omitted][emphasis added].[984]

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[983] John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver, and J.C. Barnes, *Prior problem behavior accounts for the racial gap in school suspensions*, Journal of Criminal Justice 42(3), 257-266, , at 251, May-June 2014, available at http://c8.nrostatic.com/sites/default/files/pdf_article_040214_KC_HeatherMac.pdf.

> To measure early and stable problem behavior, we employ Gresham and Elliott's (1990) widely used Social Skills Rating Scale (SSRS). The SSRS uses a Likert scale ranging from 1-4 (1 = Never exhibits this behavior; 4 = Very often/exhibits this behavior most of the time.) . . .
> Our measure of teacher-reported prior problem behavior utilized data from kindergarten, first, and third-grades only and is the sum of the four SSRS scales: self-control, interpersonal skills, externalizing problem behaviors, and approaches to learning. These scales tap a wide range of behaviors such as controlling one's temper, responding appropriately to pressure from peers, expressing thoughts and feelings appropriately, attentiveness, impulsivity, unnecessary arguing, disturbing ongoing classroom activities, and fighting. While some of the items that compose the subscales of the SSRS are attitudinal, studies have shown that measuring traits and behaviors with attitudinal measures is appropriate (see Pratt & Cullen, 2000). The SSRS scales have been used in a number of prior studies examining self-control and analogous problem behaviors (Beaver & Wright, 2007; Lamont & Van Horn, 2013; Vaughn, DeLisi, Beaver, & Wright, 2009; Wright & beaver, 2005).
>
> We note that the SSRS was administered to different teachers during kindergarten, first, and third-grade. Moreover, the parent report of the child ever being suspended was assessed in the eighth-grade. Thus, our measure of prior problem behavior was taken at least five years prior to the parental measure of child suspension. Additionally, we averaged the teacher-reported SSRS scores across kindergarten through third-grade and found no difference in our analyses when using the averaged versus the additive measure of teacher-reported prior problem behavior.

[984] Id. at 264.

The report cites statistics regarding crime in schools, and then quotes former Department of Education official Anurima Bhargava for the proposition that "simply suspending or expelling these students does not make the school safer."[985] Bhargava did not present any evidence for this, instead stating that if disruptive students are suspended or expelled from school, the disruptive students do not have "the opportunity to learn how to behave in classrooms."[986] The strongest assertion that suspensions do not make schools less safe comes from a source cited by the report that says:

> Punishing students by excluding them from school does not deter future misbehavior, and may in fact increase it, making the overall educational environment less safe. For example, students suspended in early middle school are more likely to be suspended again by the eighth grade, suggesting an increase in misbehavior. Overall, schools with higher suspension rates tend to have lower ratings in academic quality and school climate. Additionally, even when controlling for race and poverty, research has found that high-suspending districts have worse outcomes on standardized tests.[987]

None of this proves that suspensions are responsible for these problems in schools.[988] It is unsurprising that a student who was suspended once would be suspended again. A suspension is an indication that this student has trouble following rules and respecting authority. It is hardly surprising that a suspension might not change that. Furthermore, it is unsurprising that the number of suspensions would increase overall as students age. "[I]t is now known that the steep decline in antisocial behavior between ages 17 and 30 is mirrored by a steep incline in antisocial behavior between ages 7 and 17".[989] According to the CDC, high school students are most likely to get into a physical fight at school in ninth grade.[990] The prevalence of physical fighting declines each year after that. It appears that misbehavior increases as students reach puberty, and then decreases as they mature. In short, it is entirely likely that a student who was suspended in early middle school would have been suspended in eighth grade with or without the earlier suspension.

An earlier article by Russell Skiba "found that White students were more often referred to the office for offenses that appear to be more objective: *smoking*, *vandalism*, *leaving without permission*, and *obscene language*, while African American students were referred more often for *disrespect*, *excessive noise*, *threat*, and *loitering*, which are more subjective behaviors."[991] All this

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[985] Report at n. 684.
[986] Report at n. 686.
[987] Jenni Owen, Jane Wettach, and Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family Policy and Duke Law School, 2015, at 42, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.
[988] See *infra* on Restorative Practices.
[989] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, Psy. Rev.100(4), 674-701, 675 (1993), http://users.soc.umn.edu/~uggen/Moffitt_PR_93.pdf.
[990] Laura Kann, Tim McManus, William et al., "Youth Risk Behavior Surveillance," Centers for Disease and Prevention, Morbidity and Mortality Weekly Report, Vol. 65, No. 6, June 10, 2016, at 8, https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6506.pdf.
[991] Russell Skiba, Megan Trachok, Choong-Geun Chung, Timberly Baker, Adam Sheya, & Robin Hughes, *When Should We Intervene? Contributions to Behavior, Student, and School Characteristics to Suspension and Expulsion*, Center for Civil Rights Remedies and the Research-to-Practice Collaborative, National Conference on Race and

tells us, if anything, is that white students and black students tend to engage in different types of misbehavior.

Additionally, students do not engage in all sorts of serious misbehavior (the type that is likely to result in a suspension or expulsion) proportionately by race. The report cites an article by John Wallace, Jr. and others that gives three examples of misbehavior that may result in a student being sent to the office or detention: "alcohol at school," "drugs at school," or "gun at school" to show that there are not racial disparities in behavior, but that there are racial disparities in punishment. The survey from which this information is drawn, however, did not ask what type of discipline the student experienced for engaging in the three listed types of behavior. The survey simply asked students how often, if ever, a student had been sent to the office or detention, or suspended or expelled, over the past year. Answers were then dichotomized into "yes" or "no."[992] The same procedure was followed for offenses.[993]

Furthermore, the Wallace article characterizes its survey findings as "non-White youth are more likely than White youth to experience school discipline," which as a matter of numbers may be correct. However, the white/non-white dichotomy is misleading, because Asian students are less likely to experience discipline than are white students.[994] Rather, students of different races fall at different points on a continuum of misbehavior and discipline.[995]

The report also ignores other common types of misbehavior that may result in suspension or expulsion.[996] The report cites statistics from the Department of Education that indicate that "in 2015 approximately 7.8 percent of students reported being in a physical fight in the prior 12 months before the survey was conducted."[997] The Commission's report ***does not*** mention that there were pronounced disparities by race and sex among those who engaged in fights in school property. Males were far more likely to engage in fights on school property than females (10.3% vs. 5.0%).[998] Racial disparities were so stark that in some cases they overwhelmed the sex disparities. Black females (9.4%) were more likely to report engaging in a physical fight on school property than were white males (8.0%). Overall, 12.6% of black students and 8.9% of Hispanic students had engaged in a physical fight on school property in the previous year, as opposed to 5.6% of white students.

Gender Disparities in Discipline, 2013, , citing Russell Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, The Urban Review 34(4), 317, 2002, http://www.indiana.edu/~equity/docs/ColorofDiscipline2002.pdf.

[992] John Wallace, Jr., Sara Goodkind, Cynthia Wallace, and Jerald Bachman, *Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005*, Negro Educational Review, 59(1-2), 2008, 47-62, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678799/.

[993] Id.

[994] Id. (Asian-American 10th graders are 40% less likely than their white peers to be sent to the office or detention, and only half as likely to be suspended or expelled.)

[995] Id. at Table 2 (Asian-American students are also the least likely to report that they engaged in any of the three offenses).

[996] Report at n. 645.

[997] Report at n. 682.

[998] Laura Kann, Tim McManus, William et al., "Youth Risk Behavior Surveillance," Centers for Disease and Prevention, Morbidity and Mortality Weekly Report, Vol. 65, No. 6, June 10, 2016, at 9, https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6506.pdf.

This doesn't address whether the non-disruptive students – or, for that matter, those students whose misbehavior is particularly sensitive to peer influence – are safer and are better able to learn once the disruptive students have been removed. Studies and surveys of school districts that have reduced suspensions or implemented restorative practices suggest that non-disruptive students are *not* better off with their disruptive peers in the class.[999] And another recent study suggests that attending school with "crime prone peers," regardless of whether you share a neighborhood, reduces academic performance among non-crime-prone children by 0.016 standard deviations and increases antisocial behavior at the school level. Perhaps more importantly, the effect persists beyond school days, and "results in a 6.5 percent increase in the probability of being arrested, and a 4.5 percent increase in days incarcerated" at ages 19-21.[1000]

Emotional Disturbance as Learning Disability

The report notes with apparent surprise that:

> Other studies have found that teachers with over 20 years of experience reported more negative attitudes [regarding the placement of students with disabilities in general education classes], despite having experience with inclusive teaching, compared to newer teachers with no experience in inclusive classrooms. Further, additional studies suggest that the type of disability a student has may influence teacher biases. For example, these studies reflect that teachers held positive attitudes toward the inclusion of students with learning disabilities compared to negative attitudes toward students with behavioral disorders.[1001]

This suggests that teachers who actually have dealt with students with disabilities may have a less sanguine view of how feasible it is to educate students with behavioral disorders alongside those without behavioral disorders. The fact that teachers welcome the inclusion of students with learning disabilities but not those with behavioral disorders further suggests that this has more to do with the possibility of maintaining order in the classroom for all students than with the need to spend some extra time assisting a particular child.

The report states, "Nationally, over the 2011-2012 school year, 75 percent of students who were subjected to physical restraint were students with disabilities served by IDEA; and 25 states had higher percentages of restraint use than the national average."[1002] Well, yes. There are 50 states, so having 25 states with higher restraint use than the national average is roughly what you would expect (the median and the average are not the same thing, but the point holds).

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[999] See *infra* "Restorative Practices".
[1000] Stephen B. Billings and Mark Hoekstra, *Schools, Neighborhoods, and the Long-Run Effect of Crime-Prone Peers*, NBER Working Paper Series, Working Paper 25730, March 4, 2019, at 3, http://www.nber.org/papers/w25730.
[1001] Report at n. 602.
[1002] Report at n. 455.

The report also fails to seriously consider the use of restraints, instead simply stating that children with disabilities are more likely to be physically restrained than are children without disabilities. Again, this is unsurprising because "disability" includes "severe emotional disturbance" and "intellectual disability". When severe bad behavior is defined as a disability, it is unsurprising that children classified as having a disability are disciplined and restrained more often than others.[1003] Elsewhere, the report states, "Regarding discipline actions against students with disabilities, the researchers found that out of the 122,250 students with disabilities, nearly three-quarters of the students who qualified for special education services during the study period were suspended or expelled at least once."[1004] However, once again, this obscures the type of disabilities that are at issue. According to the cited report:

> Nearly three-quarters of the students who qualified for special education during the study period were suspended or expelled at least once. The level of school disciplinary involvement, however, varied significantly according to the specific type of disability. For example, ***students coded as having an "emotional disturbance" were especially likely to be suspended or expelled***. ***In contrast, students with autism or mental retardation – where a host of other factors was controlled for – were considerably less likely than otherwise identical students without disability to experience a discretionary or mandatory school disciplinary action.***[1005]

This strongly suggests that teachers are not simply biased against students with disabilities and suspend them out of dislike or discriminatory intent. If students classified as having "emotional disturbance" – which essentially means idiopathic learning and behavioral problems – are particularly likely to be suspended or expelled, whereas those who have learning problems are particularly ***unlikely*** to be suspended or expelled, it suggests that the suspensions and expulsions are based upon student behavior. If bad behavior with no discernible cause is classified as a disability, of course children classified as having a disability will be particularly likely to be disciplined.

[1003] CJN v. Minneapolis Public Schools, 323 F.3d 630, 634-35 (8th Cir. 2003).

> CJN is an eleven-year-old boy with lesions in his brain and a long history of psychiatric illness. A special education student in the Minneapolis Public Schools, Special School District No. 1 (District) since kindergarten, CJN has consistently had behavioral difficulties while nonetheless progressing academically at an average rate. . . .
>
> CJN nevertheless misbehaved in Ms. Schroeder's classroom many times, leading to him being given "time-outs" and even to being physically restrained. Most episodes of restraint were for less than a minute, but there were six days on which CJN was restrained for five or more minutes: Restraint was used after CJN began kicking others, hitting staff with pencils, or banging his head against the wall. On one occasion in December, a behavioral outburst led to police intervention and a period of hospitalization for CJN. This was his last day at Keewaydin.

[1004] Report at n. 187.

[1005] Tony Fabelo, Michael Thompson, Martha Plotkin, Dottie Carmichael, Miner Marchbanks III, & Eric Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Justice Center The Council of State Governments & Public Policy Research Institute, July 2011, xi, .

Restorative Justice and Suspensions

"Restorative practices, as they are typically called in a school or community setting, include many specific program types and do not have one specific definition in the literature; ***they are broadly seen as a nonpunitive approach to handling conflict*** (Fronius et al., 2016)[emphasis added]."[1006] When we talk about "restorative justice," as we see here, we are not talking about a clearly defined set of practices. We are talking about fuzzy muffles. Telling children to reflect upon the harm they have caused to others may be effective for children who are predisposed to empathize with others or to care about disappointing their teachers. But not all children care about the effects of their actions on others, or indeed, may be pleased that the harm they caused had its intended effect.[1007]

Restorative Practices in Pittsburgh

When studying the results of "restorative practices" in Pittsburgh, the Rand Corporation's researchers interviewed staff who "described disruptive behavior that frequently derailed well-intentioned circle discussions. . . A survey respondent wrote:

> There are several students who have not benefitted from the use of restorative practices at all. Rather, they disrespect it and scoff at it as a lenient form of discipline. These students, however few they may be . . . are disruptive to other students' learning and disruptive to their classroom, and the whole school in general. Because of these students, it becomes harder to implement restorative practices on the whole. . . I feel that restorative practices [don't] address such students at all, rather it fails them entirely and ultimately is the foundation for all of the failings we have experienced with restorative practices as a whole.[1008]

The report states that suspensions can still be given in certain instances. As I have often said, that message often does not filter down to the people who are supposed to implement these policies. The message they hear is, "Get your numbers right." In Pittsburgh, about one-third of staff surveyed were confused about how to integrate "restorative practices" and discipline. "[A few interviewees] believed that, in theory, using restorative practices did not preclude disciplinary

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[1006] Catherine H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*, Rand Corporation, Dec. 27, 2018, at 3, https://www.rand.org/pubs/research_reports/RR2840.html.

[1007] James Q. Wilson and Richard J. Herrnstein, CRIME & HUMAN NATURE 379.

> Palmer showed that the monthly arrest rates of neurotic (what he called "conflicted") delinquents were lower after treatment in an intensive probation program than were the rates of the "power-oriented" delinquents; indeed, the latter had *higher* arrest rates as a consequence of treatment, probably because they found that they could manipulate to their own advantage the therapeutic setting in which they had been placed.

[1008] Catherine H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*, Rand Corporation, Dec. 27, 2018, at 35, https://www.rand.org/pubs/research_reports/RR2840.html.

action; yet, the message from the district seemed to them to be that responses to incidents ought to be addressed through restorative practices only."[1009]

The most that can be said about Pittsburgh's experiment with restorative practices is that there may have been some marginal improvements, but other aspects seem to have deteriorated. Elementary school students were less likely to be suspended. Racial disparities in suspensions decreased.[1010] Teachers in schools that adopted restorative practices reported having a more positive perception of teaching and learning conditions.[1011] On the other hand, there was no change in suspensions among middle school students, and arrests did not decline.[1012] Academic performance declined among both black and white students in predominantly African-American middle schools.[1013] Students in schools that implemented restorative practices also rated their teachers' classroom management skills more negatively than did students in the control schools – in fact, the ratings trended downward more sharply than they had in previous years.[1014] Students in schools that implemented restorative practices also reported feeling less peer support than did students in the control schools.[1015]

Ending Suspensions in California

Several school districts in California – Los Angeles, San Francisco, Oakland, and Pasadena – banned out-of-school suspensions for "defiance," and the state instituted a statewide ban of out-of-school suspensions for defiance at the K-3 level.[1016] A Boston University doctoral student conducted an analysis of academic performance in the Los Angeles Unified School District (LAUSD) by examining test results from the 2010-11, 2012-13, and 2014-15 school years.[1017] LAUSD banned out-of-school suspensions for defiance in May 2013.[1018] Out-of-school suspensions for defiance within LAUSD declined dramatically from 2,814 in 2012-2013 to 618 in 2013-14 and 305 in 2014-15.[1019] Academic performance at middle schools (the only schools studied) within LAUSD ***declined*** after the ban. This seems to have been driven by declines in academic performance at middle schools that had suspended students for defiance prior to the ban.[1020] Although there was less data available for the San Francisco, Oakland, Pasadena, and K-

[1009] Id. at 35.
[1010] Id. at 71.
[1011] Id. at 70.
[1012] Id. at 71.
[1013] Id. at 55.
[1014] Id. at 57.
[1015] Id. at 57.
[1016] Dominic Zarecki, *Banning Progress: Suspension Bans and Schoolwide Academic Growth*, May 3, 2018, at 13-14, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176650&download=yes.
[1017] Id. at 10.
[1018] Id. at 1.
[1019] Id. at 7.
[1020] Id. at 11-12.

> Looking within LAUSD reveals a linear relationship between the intent to treat and academic growth. Schools with no suspensions in 2013 had almost no change in growth. Schools with one to ten suspensions in 2013 experienced an 18% standard deviation drop, while schools with at least eleven suspensions in 2013 experienced a 30% decrease in growth. This pattern also perfectly fits the expectations of the second strand of the literature: suddenly reducing suspensions harms

3 bans because of when they were instituted, what data there is indicates that academic performance suffered as a result of those bans too.[1021]

Despite panelist Dan Losen's claims to the contrary, there is some evidence from LAUSD's annual school experience surveys that school climate has deteriorated since 2013. In 2013, 71 percent of LAUSD high school students said they felt safe on school grounds, and 44 percent said bullying was not a problem at their school.[1022] In 2016, 63 percent of LAUSD high school students said they felt safe in school and the number of those who said bullying was not a problem at their school increased to 50 percent.[1023] Among middle-school students, 70 percent reported in 2013 that they felt safe on school grounds, which declined to 65 percent who said they felt safe in school in 2016.[1024] As with the high school students, middle school students reported bullying being less of a problem in 2016 than in 2013. Both middle-school and high school staff also reported a greater sense of safety on school grounds in 2016 than 2013, with 86 percent of middle-school staff and 88 percent of high school staff reporting in 2013 that they felt safe on school grounds increasing to 94 percent and 95 percent, respectively.[1025] The 2018 School Experience Survey has been partially released, but it appears that the middle school results are not yet available. 64 percent of high school students and 90 percent of high school staff reported feeling safe at school (the bullying question was changed to a series of questions about personal experience of bullying, so is not really comparable).[1026]

Ending Suspensions in Philadelphia

Likewise, Philadelphia's official ban on out-of-school suspensions for "conduct offenses"[1027] had a deleterious effect on the academic progress of the most at-risk students, and had no effect on the

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> academic growth. The small numbers of schools in each category prevent any of the differences from being statistically significant. However, this comparison of schools within LAUSD is a natural experiment: the schools are very similar in observed and unobserved characteristics, with the exception of the extent to which they were impacted by the suspension ban (because they gave different numbers of defiance suspensions in 2013).

[1021] Id. at 13-14.
[1022] "Results of the 2013 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 6, http://reportcardsurvey.lausd.net/surveys/reports.jsp.
[1023] "Results of the 2016 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 7, http://reportcardsurvey.lausd.net/surveys/reports.jsp.
[1024] "Results of the 2013 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 6, http://reportcardsurvey.lausd.net/surveys/reports.jsp; "Results of the 2016 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 7, http://reportcardsurvey.lausd.net/surveys/reports.jsp.
[1025] "Results of the 2013 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 21; "Results of the 2016 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 15; "Results of the 2013 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 22; "Results of the 2016 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 15.
[1026] "LAUSD School Experience Survey Results 2018-19," Los Angeles Unified School District, https://achieve.lausd.net/Page/15606.
[1027] "Conduct offenses" are: failure to follow classroom rules/disruption; profane/obscene language or gestures; alteration of grade reporting/excuses/school documents; forgery of administrator, teacher, or parent/guardian's signature; inappropriate use of electronic devices; public display of affection/inappropriate touching.

academic progress of less vulnerable students. The policy was unevenly implemented, with some schools following it completely, others essentially ignoring it, and other schools falling somewhere in the middle.[1028] The schools that ended suspensions had student populations that were less disadvantaged, academically stronger, had the lowest percentage of black and Hispanic students, and already had the lowest suspension rates. The schools that did not comply with the suspension ban at all had the poorest student population, were overwhelmingly black and Hispanic, were the weakest academically, and had suspension rates that were higher than the "full compliers" but lower than the "partial compliers." The "partial compliers" fell in the middle on each of these metrics except for suspensions – 16 percent of their students were suspended each year, as opposed to 13 percent of students at the non-complying schools.

Students who had been previously suspended under the old policy did not show any improvement in academic achievement under the new policy, but their attendance did improve.[1029] Unfortunately, students who had ***not*** been suspended prior to the policy change and who attended schools that previously had the highest suspension rates (the non-compliers and partial compliers) suffered academically.

> Partial Compliers: These are the 60 percent of schools that reduced, but did not eliminate, conduct suspensions in the post-reform year. In contrast to non-suspended peers in full complier schools, peers in partial complier schools experienced a 0.06 standard deviation *decline in math achievement*, relative to their comparison school counterparts. Total absences increased by 0.44 days per student (or forty-four days per one hundred students), representing a 3 percent increase over 2011-12 levels. The increase in total absences was driven by an increase in unexcused absences, on the order of 0.76 days per student and representing an 8 percent increase over 2011-12 levels.
>
> Non-compliers: These are the 17 percent of schools that (in all but one case) increased conduct suspensions in the post-reform year. Peers in non-complier schools experienced a 0.06 standard deviation *decline in math achievement* and a 0.03 standard deviation *decline in ELA achievement*, relative to their comparison school counterparts. We do not, however, find any change in total absences following the district's policy change.[1030]

Despite the damage done to Philadelphia's already abysmal academic achievement, schools appear to be no safer than they were before the anti-suspension initiative. According to the Philadelphia school district's own statistics, during the 2014-15 school year there were 5,509 "serious incidents" (e.g., assaults, harassment, drugs and alcohol, disorderly conduct).[1031] That increased to 5,921 "serious incidents" during the 2017-18 school year. And Philadelphia teachers have been the

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[1028] Matthew Steinberg and Johanna Lacoe, *The Academic and Behavioral Consequences of Discipline Policy Reform: Evidence from Philadelphia*, Thomas B. Fordham Institute, Dec. 15, 2017, at 23-24, https://fordhaminstitute.org/national/research/academic-and-behavioral-consequences-discipline-policy-reform.
[1029] Id. at 26.
[1030] Id. at 27.
[1031] "Serious Incidents," School Performance, District Performance Office, Philadelphia School District, https://www.philasd.org/performance/programsservices/open-data/school-performance/#serious_incidents.

victims of increasing violence at the hands of students *and* parents, leading to protests by the teachers and administrators unions.[1032] According to district records, there were over 100 assaults on teachers and administrators each year during 2015-16, 2016-17, and 2017-18.[1033] It is also worth noting that if teachers and staff have to worry about being attacked by parents, it is hardly surprising that there would be discipline problems in schools.

Implementing Restorative Practices in Baltimore

The report approvingly cites the Baltimore Public School System as an example of the implementation of restorative justice practices.[1034] Perhaps this should be revisited, given the poor outcomes of restorative practices elsewhere.[1035] The Commission's Maryland State Advisory Committee held its briefing on "disproportionate discipline"[1036] in August. By late November, violence against teachers and staff in the Baltimore City schools had become so common and severe that the teachers' union created a School Safety Task Force. According to records obtained by a local news station, "there were 436 incidents in the 2017-2018 school year, and 126 incidents this year [2018-19] through Dec. 4 . . . That includes student contact with any adult, not just teachers. It also includes unintentional physical contact, such as during a fight between students."[1037]

One teacher was assaulted by an 11th-grade male student. At another school, a high school student punched his teacher. A female teacher tried to break up a fight between two female students – which was apparently connected to another fight that had occurred earlier in the day – and was pepper-sprayed by one of the girls.[1038] And at yet another school, a cafeteria worker was attacked by two female students over a carton of milk and suffered a broken arm.

> "She grabbed our fruit off the counter and started throwing it in the kitchen at us," said Hill, referring to one of the girls involved in the incident.
>
> Hill said she was attacked by two female students who left her with injuries, including a broken wrist and shattered bones in her arm. "I was just doing my job

[1032] Kristen A. Graham and Claudia Irizarry-Aponte, 'Enough is enough': Philly school unions boiling over assaults on staff, The Inquirer, June 15, 2018, https://www.philly.com/philly/education/principals-teachers-assaults-violence-philadelphia-schools-20180615.html.
[1033] Id.
[1034] Report at n. 496.
[1035] Baltimore City Public Schools are already extremely violent. According to the district's annual student survey, in 2017 only 41.5 percent of students said that students fighting was *not* a problem at their school, and only 42.3 percent said that bullying was *not* a problem at their school. On the other hand, 73.9 percent said they felt safe at school, presumably despite the aforementioned problems. *See* "District-level results for 2007 through 2018," Data, Baltimore City Public Schools, https://www.baltimorecityschools.org/data.
[1036] U.S. Commission on Civil Rights, "Briefing on Disproportionate Discipline in Maryland Schools," Aug. 24, 2018, https://www.usccr.gov/press/2018/08-15-18a-IF.pdf
[1037] Bryna Zumer, "Baltimore school system reports assaults by students against adults last year," Fox5 News, Dec. 10, 2018, https://foxbaltimore.com/news/local/baltimore-school-system-reports-436-assaults-by-students-against-adults-last-year.
[1038] Tim Tooten, "Dunbar teacher pepper-sprayed while trying to break up students' fight," WBAL, Nov. 29, 2018, https://www.wbaltv.com/article/dunbar-teacher-pepper-sprayed-while-trying-to-break-up-students-fight/25351300.

> and they didn't want to follow the rules," said Hill. The confrontation was caught on camera and quickly posted to Instagram.
>
> Hill said a milk carton triggered the violence. She said the students were upset because they only wanted milk, no food – which, according to Hill, is required under the free lunch program.
>
> "Most of [the students] know that and follow the rules. This particular day, the young lady wanted to be disrespectful and not follow the rules. So, when I went to confront her about taking the milk, the girl jumped up and wanted to fight," said Hill.[1039]

"School official[sic] say the students involved will receive appropriate consequences following an investigation."[1040] Apparently those consequences didn't even rise to the level of a slap on the wrist. Less than a month later, one of the girls attacked and injured a school nurse and an aide.[1041] The Baltimore Teachers Union protested, "Under no circumstances should this student have been allowed to be readmitted to NAF after assaulting the cafeteria worker in November."[1042] This is one of the problems with discouraging the use of suspensions and expulsions. Lip service is always paid to, "Of course, this does not apply to students who pose physical threats to students or teachers," but in reality, two ideas become dominant: 1) we must get our suspension and expulsion numbers down, even if that means not suspending or expelling students who are dangerous; 2) we effectively place a higher priority on keeping dangerous and disruptive students in school than on the safety and security of teachers and non-disruptive students.[1043]

According to the city teachers union, media reports may understate the number of attacks on teachers and staff because of pressure not to report the attacks.

> "It's sad to say, there have been people and there are people that may have been suffering through certain incidents like this and they're not reporting them. So that's something else that needs to be addressed," said Antoinette Ryan-Johnson, president of the City Union of Baltimore.[1044]

In February, a special education assistant at Frederick Douglass High School in Baltimore was shot by Neil Davis, the 25-year-old brother of a student. Michael Marks, a special education

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[1039] Keith Daniels, "School cafeteria worker describes being attacked in east Baltimore," Fox5 News, Nov. 28, 2018, https://foxbaltimore.com/news/local/school-cafeteria-worker-describes-being-attacked-in-east-baltimore.
[1040] Id.
[1041] "Baltimore student arrested after allegedly assaulting, injuring school nurse and aide," WMAR, Dec. 20, 2018, https://fox43.com/2018/12/20/baltimore-student-arrested-after-allegedly-assaulting-injuring-school-nurse-aide/.
[1042] Id.
[1043] Report at n. 436 ("we do ourselves a disservice and really sort of steer the conversation in the wrong direction when we try to say, [] what is the impact of the disruptive students on the non-disruptive students?").
[1044] Jenny Fulginiti, Karen Campbell, and Tim Tooten, "Poly teacher assaulted; Union creates task force amid rising student assaults against staff," Nov. 29, 2018, WBAL, https://www.wbaltv.com/article/baltimore-teachers-union-creates-task-force-amid-rising-student-assaults-against-staff/25332333.

assistant, had disciplined the shooter's sister.[1045] The sister was taking part in a mediation that stemmed from a prior bullying incident and called her brother. When the brother entered the school, he was approached by 56-year-old Marks. The brother shot Marks twice. Thankfully, there were extra armed police *on hand for the mediation*, and they were able to subdue the shooter. When a school needs extra armed police on hand for a mediation involving a bullying incident, and one of the students involved in the mediation calls in her own armed backup, this is more than just a simple trip to the principal's office.

Restorative Practices in Minneapolis

The report also cites a report which claims that restorative justice practices improved some outcomes for students in Minneapolis.[1046] This report tracked outcomes for children who were recommended for possible expulsion by comparing their school records for the year before they were referred to a Restorative Conference Program (RPC), the year they participated, and the year after they participated.

There are approximately 180 days in a school year. The students under observation already had a significant number of absences in year 1. High school students were at school for an average of only 117 days out of 180, and middle school students for only 115. In year 2, when they were referred to a restorative justice program, high school students were present for only 64 days out of the year and middle school students were present for only 56 days out of the school year. The researchers wanted to find out if student attendance improved after the RPC.

However, when the researchers examined school attendance for year 3, they decided to only examine attendance records for students they deemed "actively attending" Minneapolis Public Schools, which they defined as being present for at least 75 days.[1047] The reason was to ensure that they were only examining students who were still attending Minneapolis Public Schools and who had not been expelled or changed districts. However, this definition guarantees that an improvement will be seen, because the average number of days in school in year 2 is so low that these students would not have been deemed "actively attending." It also seems likely that this captured the students who were less troubled to begin with, because the students who were "actively attending" in year 3 had higher-than average attendance in year 1 (128 days versus 117 days for the group as a whole).

Racial Disparities in Family Structure

[1045] Keith Daniels, "Exclusive: Douglass High shooting victim speaks out," WBFF, Feb. 20, 2019, https://foxbaltimore.com/news/local/exclusive-douglass-high-shooting-victim-speaks-out.
[1046] Report at n. 16, citing Barbara J. McMorris, Kara J. Beckman, Glynis Shea, Jenna Baumgartner, and Rachel C. Eggert, "Applying Restorative Practices to Minneapolis Public Schools Students Recommended for Possible Expulsion: A Pilot Program Evaluation of the Family and Youth Restorative Conference Program," University of Minnesota, Healthy Youth Development/Prevention Research Center, Dec. 2013, http://www.legalrightscenter.org/uploads/2/5/7/3/25735760/lrc_umn_report-final.pdf.
[1047] Id. at 29.

The report relies heavily on research by Russell Skiba that found racial disparities in discipline rates even after controlling for socioeconomic status.[1048] However, a problem with relying on socioeconomic status when making racial comparisons is that it obscures differences in family structure. For example, Raj Chetty and his coauthors recently released a report on intergenerational mobility between white and black boys. However, "[A]s Chetty et al. note in the study, they found 'two incomes for most white children but only one for most black children.' So, by controlling for household income growing up, their reported findings minimized the effect of family structure."[1049] The problem is that family structure plays an important role in children's behavior. Children raised by single mothers are far more likely to have behavioral problems.[1050] In the 2014 Juvenile Offenders and Victims report, the Department of Justice wrote:

> A 2004 study by McCurley and Snyder explored the relationship between family structure and self-reported problem behaviors. The central finding was that youth ages 12-17 who lived in families with both biological parents were, in general, less likely than youth in other families to report a variety of problem behaviors, such as running away from home, sexual activity, major theft, assault, and arrest. The family structure effect was seen within groups defined by age, gender, or race/ethnicity. In fact, this study found that ***family structure was a better predictor of these problem behaviors than race or ethnicity. The family structure effect emerged among both youth who lived in neighborhoods described as "well kept" and those in neighborhoods described as "fairly well kept" or "poorly kept."*** [emphasis added][1051]

Although the Juvenile Offenders report cautions that family structure itself may not be responsible for these outcomes, it seems fairly clear that whatever the unobserved variables might be, they tend to be present in two-parent biological families and absent in other family configurations.
A father's involvement with his child reduces the incidence of behavioral problems.[1052] This is the case even for poor, unmarried fathers. However, when parents are not married, a father's involvement with his child declines relatively quickly.[1053] The father's reduced presence in his

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[1048] Report at n. 447.
[1049] W. Bradford Wilcox, "For Black Boys, Family Structure Still Matters," Institute for Family Studies, Mar. 22, 2018, https://ifstudies.org/blog/for-black-boys-family-structure-still-matters.
[1050] Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 55-56 (2014)("The consequences of living in single-parent homes extend beyond the effects on household incomes and poverty rates. Children in such homes also suffer from cognitive, social, and emotional deficits relative to children raised in two-parent homes.").
[1051] National Center for Juvenile Justice, *Juvenile Offenders and Victims, 2014 National Report*, Office of Juvenile Delinquency and Prevention, December 2014, at 10, https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.
[1052] Jeong-Kyun Choi, Gina Kunz, and Minsung Kim, *Longitudinal relationships between unmarried fathers' involvement and their children's behavior problems: Using latent growth modeling*, 91 Children and Youth Services Review 424-430 (2018).
[1053] Id. (Fathers' involvement also decreased from 1.75 (S.D. =1.11) at age 1 to 1.58 (S.D.=1.12) at age 3 and flattened to 1.51 9S.D. 1.15) at age 5.").
See also Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 71 (over 80 percent of unmarried parents of children in the Fragile Families and Child Wellbeing study were romantically involved at the time of their child's birth, but only one-third of them were still together when the child turned five, as opposed to 80 percent of married parents who were still together).

child's life may also be important because the child's mother will likely shoulder additional financial and childcare responsibilities.

We all know that black children are far more likely to be born out of wedlock than are white, Hispanic, or Asian children.[1054] Relationships between unmarried parents rarely endure, and mothers tend to serve as "gatekeepers" who control access to the children.[1055] Furthermore, statistics regarding how many children live with two parents tend to obscure that often, both adults are not the child's biological parents.[1056] Outcomes for children raised by a single mother and a biologically unrelated male are, if anything, worse than for children raised only by a single mother. Thus, if black children are more likely to be raised by single mothers and have little contact with their fathers, we should not be surprised at elevated rates of misbehavior among black children. Nor, then, should we be surprised that schools that have larger percentages of black students have higher rates of discipline.

Social Maladjustment and Learning Disabilities

a. Troubled Home Lives and Social Maladjustment

It is important to bear in mind that this report does not use the term "disability" in the way most Americans think of the term. This report is not about children who are, e.g., confined to wheelchairs, or who are blind, i.e., with manifest physical disabilities. This report is about children

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[1054] Mitch Pearlstein, BROKEN BONDS: WHAT FAMILY FRAGMENTATION MEANS FOR AMERICA'S FUTURE xviii (2014)(almost 30 percent of white children, more than 50 percent of Hispanic children, and more than 70 percent of black children are born out of wedlock).

[1055] Id. ("[T]he level of father involvement overall – in other words, the extent to which fathers were allowed to be involved in child care and domestic activities – was heavily influenced by psychological and parenting functioning of unmarried mothers, as gatekeepers".).

See also Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 71-72 (2014).

> Adding together the proportion of these children whose mothers had new boyfriends and the proportion whose parents have had additional children with new partners, that more than three-quarters (78 percent) of all the children initially born to unmarried parents experienced a major change in their household by the time they turned 5. . . .
> The loss of a biological father or substitution of a "social" father for a biological one may also be upsetting to the child. Some of these children have not just nonresidential fathers, but fathers they rarely see or do not even know. Fathers sometimes gravitate toward children they have parented moat recently or who are the offspring of their current girlfriend, depriving their older biological children of any meaningful contact.

[1056] Mitch Pearlstein, BROKEN BONDS: WHAT FAMILY FRAGMENTATION MEANS FOR AMERICA'S FUTURE xix (2014).

> In 2009, for example, 75 percent of white, non-Hispanic children and 86 percent of Asian children lived with two parents. This was in comparison to 67 percent of Hispanic children and only 37 percent of black children. But keep in mind that significant number of two-parent teams are actually composed of a biological parent and a stepparent, or a biological parent and an adoptive parent. For instance, in 2009 again, among black children living with two parents, only 79 percent lived with both their biological mother and biological father. Completing the point, stepfamilies can be hard on children. They can be hard on everyone involved, in fact.

who do not behave in school. Some of these children have their behavior ascribed to a learning disability or to emotional disturbance. Learning disabilities and emotional disturbances are the disabilities with which this report is almost exclusively concerned.

This introduces an element of ambiguity into the report. Learning disabilities and emotional disturbances of course exist. But diagnosing them is a far more subjective endeavor than diagnosing a physical disability. A child may be angry and upset because he was recently moved to a foster home, or because his mother's new boyfriend just moved in with them. But this is not an emotional disturbance in the sense of having a mental disability. The report itself blurs these distinctions, approvingly quoting former Department of Education official Kristen Harper:

> On any given day, a child could walk into a classroom on Monday, after having suffering some form of trauma out of, you know, in their home or out in their community . . . any child may have a behavioral incident that is due to trauma or due to the circumstances that life may throw at them. What we are asking here is that schools do not simply throw away, exclude children that come to school with those difficulties but are prepared to handle children that are coming to school with the highs and lows of emotion, the trials and tribulations of approaching adolescence. And I think we do ourselves a disservice and really sort of steer the conversation in the wrong direction when we try to say, [] what is the impact of the disruptive students on the non-disruptive students? Instead, our conversation really should focus on how we support educators and support schools in utilizing evidence-based practices that help schools to identify quickly when a child is having an emotional breakdown or having an emotional issue and seek to address it.[1057]

We are all very concerned for children who have troubled home lives. But that is not a disability within the meaning of the IDEA.[1058] As the Fourth Circuit has written, "Courts and special education authorities have routinely declined, however, to equate conduct disorders or social maladjustment with serious emotional disturbance", and signs of social maladjustment include "a disregard for social demands or expectations. It appears that [the student] understands these expectations but that his behavior is not always guided by them."[1059]

[1057] Report at n. 436.

[1058] 34 C.F.R. § 300.8(c)(4)(i).

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

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

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

[1059] Springer v. Fairfax County Sch. Bd, 134 F.3d 659, 664 (4th Cir. 1998); *see also* R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007)(student who physically attacked staff and students, among other behavior, did not qualify as having an "emotional disturbance" because the inappropriate behavior did not take place under "normal circumstances").

Even children who are determined to have "emotional disturbances" within the meaning of the IDEA will pose serious problems for educators. They may not have unusual difficulty learning material, but their behavior makes it difficult to educate them and, in some cases, keep other students safe.[1060]

b. Special Education

The report strongly suggests that the disproportionate placement of black children in special education classes is due to racial discrimination.[1061] A disproportion does not equal racial discrimination. As the Third Circuit wrote in *Blunt v. Lower Merion School District*, these claims are "highly individualized" with "complex and varying facts asserted for the individual students".[1062] We know nothing about the individual facts of these disability determinations, and are in no position to suggest that these decisions are racially motivated. It is odd that the report says that the majority in that case "acknowledge[ed] the voluminous evidence in the form of data and testimony evincing racial discrimination and contending that, nonetheless, there was 'no evidence that the educators and administrators responsible for placing students intended to discriminate against them because of their race.").[1063] But the majority did ***not*** say that there was voluminous evidence evincing racial discrimination. Rather, the majority said:

> Appellants' evidence of discrimination consists of statistical evidence that African American students were overrepresented in special education classes, testimony indicating that certain LMSD educators had discussed different learning styles and an email from a School Board member expressing concern about putting extra stress on black students. However, the record also reflects that each individual student's education needs were assessed and satisfied through a thorough and individualized IEP process, and contains no evidence that the educators and administrators responsible for placing students intended to discriminate against them because of their race. Taking the record as a whole and drawing all inferences in appellants' favor, there is no genuine issue of material fact that LMSD itself – or a third party under its control – engaged in intentional discrimination.[1064]

[1060] Simms v. District of Columbia, 2018 WL 4761625, at *3, *7, *9 (D.D.C. 2018)("A treatment plan . . . noted that M.S. had trouble with anger management, mood swings, and impulsivity. . . . M.S.'s final fifth grade report card from Orr Elementary, dated June 18, 2015, evaluated him as advanced or proficient in all graded subjects except for math, in which he scored at the "basic" level." . . . "Plaintiff testified about M.S.'s educational history, noting that in pre-kindergarten, he stabbed a girl with a pencil who had criticized his art. . . . "Ms. Foster further testified about the incident in which .S. allegedly inappropriately touched a female student, which resulted in his suspension and the manifestation determination meeting."); *see also* Pohrecki v. Anthony Wayne Local School District, 637 F.Supp.2d 547, 550 (N.D.Ohio 2009)("The District . . . determined [J.C.] was eligible for special education under the category of "emotional disturbance." . . . Although possessing a normal IQ, the Record shows that J.C. is prone to misbehavior, obstinance, and inattentiveness while at school.").

[1061] Report at n. 91-93.

[1062] Blunt v. Lower Merion Sch. Dist., 767 F.3d 247,289 (3rd Cir. 2014).

[1063] Report at n. 94.

[1064] Blunt v. Lower Merion Sch. Dist., 767 F.3d 301 (3rd Cir. 2014).

This is the crux of the problem. The majority objects to the disproportionately high percentage of black students in special education classes. The decision to place a student in a special education class is often a judgment call about which people can disagree. In the case of the Lower Merion School Board, all students were given the same evaluation to determine if they needed special education services, and presented no evidence other than statistical disparities and their opinions to support their contention of discrimination.[1065] In other contexts, notably the EEOC's criminal background check policy, an individualized assessment is strongly recommended in order to avoid charges of discrimination. Of course, as I have observed in the past, whenever you adopt an individualized assessment rather than a hard-and-fast rule, you run the risk of disparate *treatment* or perceived disparate treatment.

Furthermore, as the district court pointed out in its decision upheld by the Third Circuit, in their Third Amended Complaint the plaintiffs claimed that they were disabled students who had been denied an appropriate education. But in their brief opposing summary judgment, the plaintiffs stated that they were not disabled and had been wrongfully placed in special education classes.[1066] If the plaintiffs themselves equivocate as to whether they are disabled or not, it is difficult for a court or this Commission to determine whether or not they should have been placed in special education classes.

There will certainly be cases where a child is misclassified as either needing or not needing special education services. Dr. Paul Morgan testified at the Commission's briefing that white children are

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[1065] Id. at 300.

> In considering the statistics, it is critical to recognize that there was no evidence presented in the District Court that the LMSD applied different evaluation procedures for determining placement of African American students than for Caucasian students. After all, if the same evaluation procedures are used for all students regardless of their race there simply is no discrimination.

See also Blunt v. Lower Merion Sch. Dist., 826 F.Supp.749, 760-61 (E.D.Pa. 2011).

> Several plaintiffs state that they were subject to racial discrimination. For instance, Quiana Griffin alleges that her educational placement was racially motivated. She asserted that Caucasian students in her instructional support lab class received more help from the teacher than African American students. Quiana also testified in her deposition that she believes she was placed into two special education programs because "a lot of African American kids were in [those classes]." However, she admitted that there is nothing else to support her belief that she was subject to racial discrimination. Lydia Johnson similarly believes that she was treated differently from Caucasian students. She stated that the School District "went on assumptions" when identifying her as disabled and that it placed her in special education because of her race. She offers no support for these assertions, except that: (1) she was told to do her school work while other Caucasian students were allowed more options for activities, such as playing or watching movies; and (2) she was told she could not participate in a vocational-technical program because she was in special education. She conceded that there is no other basis for her belief that the School District made decisions regarding her educational placement on the basis of race. Likewise, Jon Whiteman's mother commented that her son was placed in special education because of his race but that her only support for this conclusion was that "they do that with all African-Americans."
>
> Plaintiffs' beliefs and conclusory assertions are insufficient to defeat summary judgment.

[1066] Blunt v. Lower Merion Sch. Dist., 826 F.Supp.2d 749, 752-53 (E.D.Pa. 2011).

more likely to be identified as disabled than are children of other races, and that children who are racial or ethnic minorities are *under-identified* as disabled and therefore do not receive special education services.[1067] Human error and good-faith differences of opinion are unavoidable. But it is also true that many parents may be understandably reluctant to accept that their child needs special education services, or that their child has only limited academic ability even if special education services are provided.[1068] It is also entirely possible that some parents are more likely to decide that their child's academic underperformance indicates that the child has a learning disability and push for such an identification than are other parents. This may happen even if the child does not have a learning disability, but is simply not academically gifted. Every academic career that falls below the median is not attributable to a learning disability.

Crime Across the Life Course

As mentioned above, the report takes the view that there is something in schools that redirects students' trajectory toward prison – the "school to prison pipeline". The report suffers from failing to take a retrospective view of the life trajectory of prisoners. The Department of Justice has estimated that the percentage of individuals who have ever served time in prison may eventually

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[1067] Paul Morgan, Professor of Education at Pennsylvania State University, Presentation to the U.S. Commission on Civil Rights, Dec. 8, 2017 (on file with the Commission).

[1068] Jaccari J. v. Bd. of Educ. of City of Chicago, Dist. No. 299, 690 F.Supp.2d 687, 702-03 (N.D. Ill. 2010)

> According to Plaintiffs, Jaccari is a student of "low-average to average cognitive skills." Given this level of cognitive skill, Plaintiffs argue that Jaccari's poor performance on standardized tests indicate that the District is failing to provide him with a FAPE. In contrast, the District emphasizes portions of the record indicating that Jaccari is cognitively impaired. Therefore, they contend, Jaccari's standardized test scores cannot be the sole or dispositive indicators of progress.
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> In support of their characterization of Jaccari's potential, Plaintiffs point to a March 2004 psychological evaluation which classified Jaccari's overall level of intelligence as "Low Average." Additionally, they emphasize the testimony of a school psychologist who, based on a standardized intelligence test she conducted in May 2006, stated that Jaccari's potential for achievement was in the "low-average to average" range. The Court finds that these pieces of evidence are outweighed by other portions of the record indicating that Jaccari possesses below average cognitive skills. First, the aforementioned school psychologist also testified that the composite IQ score of 66 identified in the May 2006 test would fall in the "mild cognitive impairment range" and that Jaccari's "achievements would be commensurate with [his] overall IQ level." Two subsequent psychological reports further support the May 2006 findings. A psychological evaluation conducted on January 30, 2008 indicates that his level of cognitive ability is "within the mentally deficient range with a Full Scale IQ of 64." (*Id.* at 628.) Further, another psychological evaluation administered on February 14, 2008 diagnosed Jaccari as suffering from "mild mental retardation" and also noted "cognitive deficits." While Plaintiffs make much of the disparity between Jaccari's verbal and non-verbal scores on the May 2006 exam and the timing of the January and February 2008 examinations, their attempts to undermine the evidence fail to persuade the Court that Jaccari is a student of average intellectual potential who should be performing in the vicinity of his grade level on standardized tests. Thus, based on the preponderance of evidence in the record, the Court finds that Jaccari possesses below average academic potential.

reach 6.6%.[1069] This percentage is very similar to the percentage of males who engage in life-course-persistent antisocial behavior. As Terrie Moffitt wrote in her influential article on the topic:

> As implied by the label, continuity is the hallmark of the small group of life-course-persistent antisocial persons. Across the life course, these individuals exhibit changing manifestations of antisocial behavior: biting and hitting at age 4, shoplifting and truancy and age 10, selling drugs and stealing cars at age 16, robbery and rape at age 22, and fraud and child abuse at age 30; the underlying disposition remains the same, but its ***expression*** changes form as new social opportunities arise at different points in development. This pattern of continuity across age is matched also by cross-situational consistency: Life-course-persistent antisocial persons lie at home, steal from shops, cheat at school, fight in bars, and embezzle at work. [emphasis added][1070]

Since at least the middle of the 20th century, it has been known that certain individuals display criminal or antisocial characteristics at an early age, and that behavior persists across their life course. In the 1930s, Sheldon and Eleanor Glueck conducted a longitudinal study of 500 seriously delinquent white boys who they matched with 500 non-delinquent white boys of similar age, low socioeconomic status, intelligence, and ethnic background.[1071] Despite the two groups' general similarities, the delinquents tended to have more chaotic and troubled family histories.[1072] When the Gluecks followed up with the two groups of boys in adulthood, the non-delinquent group had largely avoided criminal activity.[1073] The delinquent group had racked up hundreds, if not thousands, of arrests, and over twenty percent of the delinquent group had served at least five years in prison.[1074]

[1069] Equal Employment Opportunity Commission, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 2012, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[1070] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, Psy. Rev.100(4), 674-701, 679 (1993).

[1071] James Q. Wilson and Richard J. Herrnstein, CRIME & HUMAN NATURE 175 (1985).

[1072] Id. at 176.

[1073] Id. at 177-78.

> Of the 442 non-delinquents who were located in adulthood, 62 were convicted for crimes by the age of thirty-one. The crimes were, on the whole, minor, involving mostly drunkenness, violations of license laws, and offenses within the family, plus a few serious crimes – an armed robbery, an assault with a dangerous weapon, an abuse of a child, and the like.

[1074] Id. at 178-79.

> [T]he delinquent group proved prolifically criminal: By the age of thirty-one, they had committed fifteen homicides, hundreds of burglaries, hundreds of larcenies (greater than petty), hundreds of arrests for drunkenness, over 150 robberies, dozens of sex offenses, and so on. Four hundred and thirty-eight of the original 500 in the delinquent sample were located, of whom 354 were arrested between the ages of seventeen to twenty-five. From twenty-five to thirty-one, only 263 were arrested, perhaps showing the characteristic decline of crime with age, or perhaps only the shrinking numbers not in prison. One hundred and forty-seven men from the delinquent sample spent five or more years in jails or prisons during the eight years from seventeen to twenty-five, and 45 did so

More recently, a longitudinal study was conducted based on data from the Early Childhood Longitudinal Study, Kindergarten Class (ECLS-K) of 1998-1999. In addition to collecting other data, the ECLS-K asked kindergarten, first, and third grade teachers to rate problem behavior in students.[1075] Then, in eighth grade, the study's authors asked parents if their child had ever been suspended. As the authors of the study wrote, their results were straightforward:

> The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspension between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials. Differences in rates of suspension between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom [citations omitted].[1076]

It is not surprising, then, that students that are disruptive in school are more likely to end up in prison. Behavior at school is, to a considerable degree, a manifestation of a person's general

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> during the six years from twenty-five to thirty-one. Despite the hundreds of man-years spent in correctional institutions, the delinquents had ample time outside for scores of arrests.

[1075] John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver, and J.C. Barnes, *Prior problem behavior accounts for the racial gap in school suspensions*, Journal of Criminal Justice 42(3), 257-266, , at 251, May-June 2014, available at http://c8.nrostatic.com/sites/default/files/pdf_article_040214_KC_HeatherMac.pdf.

> To measure early and stable problem behavior, we employ Gresham and Elliott's (1990) widely used Social Skills Rating Scale (SSRS). The SSRS uses a Likert scale ranging from 1-4 (1 = Never exhibits this behavior; 4 = Very often/exhibits this behavior most of the time.) . . .
> Our measure of teacher-reported prior problem behavior utilized data from kindergarten, first, and third-grades only and is the sum of the four SSRS scales: self-control, interpersonal skills, externalizing problem behaviors, and approaches to learning. These scales tap a wide range of behaviors such as controlling one's temper, responding appropriately to pressure from peers, expressing thoughts and feelings appropriately, attentiveness, impulsivity, unnecessary arguing, disturbing ongoing classroom activities, and fighting. While some of the items that compose the subscales of the SSRS are attitudinal, studies have shown that measuring traits and behaviors with attitudinal measures is appropriate (see Pratt & Cullen, 2000). The SSRS scales have been used in a number of prior studies examining self-control and analogous problem behaviors (Beaver & Wright, 2007; Lamont & Van Horn, 2013; Vaughn, DeLisi, Beaver, & Wright, 2009; Wright & beaver, 2005).
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> We note that the SSRS was administered to different teachers during kindergarten, first, and third-grade. Moreover, the parent report of the child ever being suspended was assessed in the eighth-grade. Thus, our measure of prior problem behavior was taken at least five years prior to the parental measure of child suspension. Additionally, we averaged the teacher-reported SSRS scores across kindergarten through third-grade and found no difference in our analyses when using the averaged versus the additive measure of teacher-reported prior problem behavior.

[1076] Id. at 264.

temperament and personality. Individuals who are troublesome at school tend to be troublesome elsewhere, both before they enter school[1077] and after they leave. There is no "school-to-prison pipeline" except in the sense that school precedes prison. Wherever these individuals happen to be at a certain point in their lives, whether it is home, school, or the workplace, they are more likely to cause conflict with peers and authority figures.[1078]

The Futility of Reducing Disparities by Relaxing Discipline

The report cites Russell Skiba for the proposition that a principal's view of discipline is an important factor in how often suspension and expulsion are used.[1079] It is hardly a surprise that some principals would suspend students more often than others. What we are really seeing is that some schools have tougher discipline policies than others, not that principals are treating students within a school more harshly on the basis of race. The report concludes that "the data suggest that closing racial disparities in discipline rates would require structural changes such as focusing on responding to behavioral infractions in more productive ways for all students."[1080]

The Commission seems to have paid no attention to James Scanlan's testimony at our briefing, which addressed this very issue. To put it simply, there is no way to have a neutrally-applied standard that has the same effect upon different groups when those groups have different characteristics. Think of it this way. You have a test, and 20 students are taking the test. 10 of the

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[1077] Terrie E. Moffit, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, Psy. Rev.100(4), 674-701, 682 (1993).

> Numerous studies have shown that a toddler's problem behaviors may affect the parents' disciplinary strategies as well as subsequent interactions with adults and peers. For example, children characterized by a difficult temperament in infancy are more likely to resist their mothers' efforts to control them in early childhood. Similarly, mothers of difficult boys experience more problems in their efforts to socialize their children. Maccoby and Jacklin (1983) showed that over time these mothers reduce their efforts to actively guide and direct their children's behavior and become increasingly less involved in the teaching process. [citations omitted]

[1078] Matt DeLisi, "A Window Into the Life-Course Persistent Offender," *in* Chad R. Trulson, Darin R. Haerle, Jonathan W. Caudill, and Matt DeLisi, LOST CAUSES: BLENDED SENTENCING, SECOND CHANCES, AND THE TEXAS YOUTH COMMISSION 167-68 (2016).

> The third group, life-course-persistent offenders, accounts for the remaining 10 percent of the population [as opposed to the 10 percent comprised of "abstainers" and 80 percent comprised of adolescence-limited offenders]. As their label indicates, these youths begin displaying pronounced problem behaviors very early in life, even before entering kindergarten. During elementary school, they are discrepant from their peers in terms of their aggressiveness, their deficits in self-control, their deficits in attending to school, and their cognitive problems. They also are more likely to have a poor home life characterized by high parental abuse, low parental involvement, low parental warmth, and poverty, among other deleterious circumstances. Their neuropsychological deficits create countless negative interactions with their parents, their siblings, their peers, their teachers, other adults, and ultimately with social work and juvenile justice officials. Unlike the relatively trivial delinquency of adolescence-limited youths, these children engage in more serious forms of problem behaviors and are more inclined to use interpersonal violence. They are children who will mature into full-fledged delinquents and often career criminals.

[1079] Report at n. 445-447.
[1080] Report at n. 454.

students wear blue shirts, and 10 of the students wear red shirts. 8 of the blue shirt students pass the test, and 7 of the red shirt students pass the test. This means that the blue shirt students make up 53% of those who passed the test, and 40% of those who did not pass the test. The red shirts make up 47% of those who passed the test, and 60% of those who did not pass the test. We don't like the disproportionality, so we lower the score required for a passing grade. Now 9 of the blue shirts pass the test, and 8 of the red shirts. The blue shirts now make up 52% of those who pass the test, but they only make up 33% of those who did not pass the test. The red shirts now make up 48% of those who passed the test, but they are 67% of those who did not pass the test. Or, to use the charts that Scanlan used:

Table 2. Illustration of effect of lowering test cutoff on (a) relative difference between pass rates and (b) relative difference between failure rates of advantaged group (AG) and disadvantaged group (DG)

Cutoff	AG Pass Rate	DG Pass Rate	AG Fail Rate	DG Fail Rate	AG/DG Pass Ratio	DG/AG Fail Ratio
1 High	80%	63%	20%	37%	1.27	1.85
2 Low	95%	87%	5%	13%	1.09	2.60

Table 3. Illustration of effect of lowering test cutoff on (a) relative difference between pass rates and (b) relative difference between failure rates of advantaged group (AG) and disadvantaged group (DG) and proportion DG makes up of (c) persons who pass the test and (d) persons who fail the test (where DG makes up 50% of test takers)

Cutoff	AG Pass Rate	DG Pass Rate	AG Fail Rate	DG Fail Rate	AG/DG Pass Ratio	DG/AG Fail Ratio	DG Prop of Pass	DG Prop of Fail
1 High	80%	63%	20%	37%	1.27	1.85	44%	65%
2 Low	95%	87%	5%	13%	1.09	2.60	48%	72%

As Scanlan wrote:

> These patterns are not peculiar to test score data or the numbers I used to illustrate them. Rather, changing the frequencies of virtually any outcome and its opposite tends to cause the relative difference in the increasing outcome to decrease and the relative difference in the decreasing outcome to increase (with related effects on the proportions groups more susceptible to the outcomes make up of persons who experience the increasing outcome and the decreasing outcome).
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> This will not invariably happen with the consistency that will be observed with hypothetical test score data. For many factors are at work. But it will typically happen, especially when the changes in the prevalence of an outcome are substantial. In the school discipline context in particular, generally reducing discipline rates, while tending to reduce relative racial differences in rates of avoiding discipline (analogous to test passage), will tend to increase relative racial differences in rates of being disciplined (analogous to test failure). And in fact that

> is being observed all across the country as school districts have been generally reducing discipline rates while mistakenly believing that doing so should reduce relative racial differences in discipline rates (or the proportions racial minorities make up of students who are disciplined).[1081]

Conclusion

The best that can be said for "restorative practices" and reducing suspensions is that in some school districts, students who would otherwise have been suspended are in school for more days. This is a paltry return for the price of increased classroom violence and disrupting the education of students who are there to learn.

[1081] Scanlan Statement at 3.