

“WE CAN’T TOLERATE THAT BEHAVIOR IN THIS
SCHOOL!”: THE CONSEQUENCES OF EXCLUDING
CHILDREN WITH BEHAVIORAL HEALTH
CONDITIONS AND THE LIMITS OF THE LAW

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ABSTRACT

The disciplinary exclusion of children with behavioral health conditions is rampant in public schools in the United States. The practice of suspending and expelling students with behavioral challenges, caused in part by a lack of understanding of the causes of children’s behavioral challenges and failures by schools to implement appropriate behavioral supports and interventions, results in the isolation and segregation of some of the most vulnerable students. Research has clearly established that these exclusionary practices are ineffective both in addressing behavioral challenges and in keeping schools safer. In fact, disciplinary removals result in lost educational opportunities, increased dropout risk, criminal justice involvement, increased public expense, and lost opportunities for economic self-sufficiency in life. Yet, while we know that exclusionary discipline practices destroy the lives and opportunities of young people, public schools persist in suspending nearly three million students per year, including nearly 700,000 students with disabilities. A disproportionate number of these suspended students are students with behavioral health conditions and particularly students of color with behavioral health conditions.

Students with disabilities lack sufficient legal remedies to stop this tremendously harmful cycle of disciplinary exclusion. This article proposes (1) amendments to special education laws and new guidance from the United States Department of Education, (2) increased oversight and vigilance in the enforcement of special education laws, and (3) increased funding for educational advocacy to ensure that students with disabilities, particularly those with behavioral health conditions, have access to an education and meaningful opportunities beyond.

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I.
INTRODUCTION

In a systemic and pervasive way, our educational system uses disciplinary exclusion to deny the opportunities of a public education to children with behavioral health conditions¹ and, in particular, students of color with behavioral health conditions. Despite gains in legal protections for children with disabilities over the past fifty years, spurred by the passage of the Individuals with Disabilities Education Improvement Act (IDEA),² Section 504 of the Rehabilitation Act,³ and Title II of the Americans with Disabilities Act (ADA),⁴ children with behavioral health conditions continue to be excluded from meaningful access to an education and, therefore, a chance at a successful life.

The IDEA ensures a free appropriate public education (FAPE)⁵ to public school students with disabilities, including eligible students with behavioral

1. Throughout this article, I refer to “behavioral health conditions” as a general category of conditions and diagnoses including mental health disorders, behavioral disorders, emotional disorders, and pervasive developmental disorders. I use the phrase “behavioral health” because it is broader and less stigmatizing than “mental health” and use “condition” because it is less stigmatizing than “disorder.” However, the phrases behavioral health condition and mental health or behavioral health disorder are often used interchangeably with each other and sometimes with “psychosocial disorder” to refer to mental and emotional conditions and diagnoses. Throughout this article, I use “behavioral health condition” to encompass all behavioral, emotional, and developmental conditions caused by mental illness or other factors which result in behavioral, emotional, or otherwise “anti-social” behaviors among young people.

2. The Individuals with Disabilities Education Improvement Act was initially passed into law in 1970 as the Education of the Handicapped Act (Pub. L. 91-230, 84 Stat. 175 (1970)). In 1975, the law was amended and named the Education for All Handicapped Children Act (Pub. L. 94-142). It was renamed the Individuals with Disabilities Education Act when it was reauthorized in 1990 (Pub. L. No. 101-476, 104 Stat. 1103 (1990)), and then the Individuals with Disabilities Education Improvement Act with its reauthorization in 2004 (Pub. L. No. 108-446).

3. 29 U.S.C. § 794 (2011).

4. 42 U.S.C. §§ 12131–50 (2011).

5. 20 U.S.C. § 1412(a)(1) (2011).

health conditions, who need specialized instruction and related special education services in order to benefit from their education.⁶ The IDEA further requires that students with disabilities receive an individualized educational program to meet their unique needs in an educational setting with non-disabled peers whenever possible, also known as the least restrictive environment requirement.⁷ Regulations promulgated under Section 504 similarly require FAPE, as well as accommodations and services to educate students with disabilities in the least restrictive environment.⁸ Students with medical or mental health conditions that impact a major life activity are eligible for a 504 plan.⁹ Special education services under IDEA should satisfy Section 504 requirements for students who meet eligibility under both laws, though some students with disabilities will only be eligible for accommodations and services under Section 504's broader definition of disability¹⁰ and not IDEA's specific list of conditions.¹¹ The rights and protections are parallel under IDEA and Section 504, particularly in relation to limitations of disciplinary removals.¹² However, while IDEA and Section 504 each limit long-term disciplinary removals of students with disabilities and provide for ongoing access to special education services in periods of removal, these protections fail to ensure access to an education for a vulnerable population of students with behavioral health conditions.

Students with behavioral health conditions—disabilities that may manifest in behaviors that school staff deem anti-social, bizarre, aggressive, or disruptive—can be subjected to repeated isolation, segregation, disciplinary removals, and complete loss of access to an education. Exclusionary disciplinary practices are even more prevalent for students of color with behavioral health conditions. Based on the most recent data from the United States Department of Education (DOE) Civil Rights Data Collection (CRDC), public schools suspended 2.8 million students (approximately six percent of all public school children) during the 2013–2014 school year.¹³ Of these 2.8 million students, 700,000 (approximately twenty-five percent) were students with disabilities served by IDEA, and 1.1 million (approximately thirty-nine percent) were black.¹⁴ Students of color with disabilities were more likely to be suspended than

6. *See* *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (“[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”).

7. 20 U.S.C. § 1412(a)(5)(A) (2012).

8. 34 C.F.R. §§ 104.33–34 (2000).

9. 34 C.F.R. § 104.3(j) (2000).

10. *Id.*

11. 20 U.S.C. § 1401(3) (2015).

12. *See infra* Part IV at 20–26, 39–42.

13. U.S. DEP'T OF EDUC., 2013–2014 CIVIL RIGHTS DATA COLLECTION, A FIRST LOOK: KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY IN OUR NATION'S PUBLIC SCHOOLS 3 (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>, [<https://perma.cc/SNN6-W5ZN>] (noting that out of the data sample, 14% of all students had disabilities and 15.5% of all students were black).

14. *Id.*

white students with disabilities, and male students of color with disabilities were suspended at the highest rates.¹⁵ While twelve percent of all students with disabilities were suspended, twenty-five percent of black boys with disabilities and twenty-seven percent of multiracial boys with disabilities were suspended compared to ten percent of white boys with disabilities.¹⁶ These figures are consistent with disproportionalities reported in the last CRDC data from 2011–2012.¹⁷ According to the 2011–2012 CRDC data, public schools also expelled approximately 111,018 students that year, including 23,032 students with disabilities, thirty-five percent of whom were black.¹⁸

These figures demonstrate that a significant and disproportionate number of students with disabilities and students of color with disabilities are excluded from school due to disciplinary removal, despite the fact that IDEA and Section 504 provide students with disabilities enhanced procedural protections in school disciplinary actions. Clearly, these special education laws and our current system of monitoring and enforcement do not adequately discourage the use of disciplinary removals against students with disabilities. Because of the known consequences of exclusionary practices—missed educational opportunities, increased risk of dropping out and court involvement, and lack of independence and economic opportunities in adulthood¹⁹—disciplinary removals result in high-stakes consequences for a vulnerable population. According to Ross Greene, a prominent clinical child psychologist who studies behavioral conditions among children:

The wasted human potential is tragic. In so many schools, kids with social, emotional, and behavioral challenges are still poorly understood and treated in a way that is completely at odds with what is now known about how they came to be challenging in the first place. The frustration and desperation felt by teachers and parents is palpable.²⁰

Furthermore, research on exclusionary disciplinary practices has demonstrated that disciplinary removals are ineffective both in addressing

15. *Id.* at 4.

16. *Id.*

17. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION (2011–12), <http://ocrdata.ed.gov> [<https://perma.cc/8498-JGFW>] (hereinafter DEP’T OF EDUC. CIVIL RIGHTS DATA).

18. *Id.* A snapshot of the 2013–2014 CRDC data was released in June 2016. See *Civil Rights Data Collection (CRDC) for the 2013–14 School Year*, U.S. DEP’T OF EDUC., 2 <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14.html> [<https://perma.cc/54K8-TY4R>] (last visited Feb. 13, 2017). Release of additional 2013–2014 national estimate data to the public via the CRDC reporting tool is pending. See *Civil Rights Data Collection State and National Estimations*, U.S. DEP’T OF EDUC., <http://ocrdata.ed.gov/StateNationalEstimations> [<https://perma.cc/224Z-2KCD>] (last visited Mar. 28, 2017).

19. Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight*, 41 *FORDHAM URB. L. J.* 403, 407 (2013).

20. ROSS GREENE, *LOST AT SCHOOL* xi (2008).

behavioral challenges among children and in making schools safer.²¹ The proven lack of benefit, coupled with the known harms of disciplinary exclusion, mandate a close critique and a purpose-driven revamping of the laws and systems protecting access to education for students with disabilities. The system should ensure that our most vulnerable children can realize the opportunities intended by the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act.

To highlight the struggles that students with behavioral health conditions commonly encounter when facing disciplinary exclusion and to underscore some limits of current law, I will share Jimmy's²² story. I worked on Jimmy's case at the Pediatric Advocacy Clinic (PAC) at the University of Michigan Law School from 2015 to 2016.

JIMMY

Jimmy is a thirteen-year-old boy with a history of behavioral health diagnoses including Attention Deficit Hyperactivity Disorder, impulse control disorder, mood disorder, and post-traumatic stress disorder. When I met him he presented as a young man who might function in the social fringes; he presented as socially immature for his age and had only one friend. Jimmy is intellectually above average but had failed or nearly failed most of his classes in the seventh grade due to eighty-four days of suspensions.

Jimmy's mother is an engaged parent who desperately sought support for her son in school. When Jimmy was in sixth grade, she requested a special education evaluation to test for special education eligibility under the emotional disturbance (ED),²³ or Emotional Impairment (EI),²⁴ category. Jimmy's school found him ineligible, determining his behavior was caused "more by social maladjustment than by emotional impairment."²⁵ His mother requested an

21. See Russell J. Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 BEHAV. DISORDERS 90 (2002).

22. I use Jimmy in place of my client's real name to protect his identity and the confidentiality of his educational records and mental health history.

23. "Emotional disturbance" is defined as "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." 34 C.F.R. § 300.8(c)(4)(i) (2015).

24. The Michigan Administrative Rules use the term "emotional impairment" in lieu of "emotional disturbance." MICH. ADMIN. CODE, r. 340.1706 (2015).

25. See 34 C.F.R. § 300.8(c)(4)(ii) (2015). This regulation clarifies that schizophrenia falls under the definition of ED. However, the ED label is not given to "children who are socially maladjusted," unless the other criteria for ED are met under 34 C.F.R. § 300.8(c)(4)(i) (2015); see also *Springer v. Fairfax Cty. Sch.*, 134 F.3d 659, 664 (4th Cir. 1998) (finding that a high school student with a conduct disorder was ineligible for special education services, noting that, "[t]eenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people"); Kenneth W. Merrell & Hill M. Walker,

independent educational evaluation (IEE). The independent evaluation indicated that Jimmy met eligibility requirements and would benefit from special education services under the ED category or the other health impairment (OHI)²⁶ category. However, even after the IEE, the school district refused to identify a disabling condition under IDEA and did not even consider accommodations or services under Section 504 of the Rehabilitation Act.²⁷ Instead, Jimmy continued to face repeated disciplinary removals for disrespectful behavior and arguing and fighting with peers. The school district, insisting that Jimmy was smart and able to “choose” to act differently, continued in its efforts to exclude him from school.

Finally, in the spring of seventh grade and with assistance from the PAC, the school developed a 504 plan and initiated a new special education evaluation to consider Jimmy’s eligibility under both the OHI and ED categories. Despite this, the school continued to suspend Jimmy for the same types of behaviors for increments ranging from two to ten days.

Jimmy’s mother tried to utilize the legal system to protect Jimmy from these continuing removals by filing an expedited due process hearing request.²⁸ She challenged the school district’s failure to provide special education services and extend IDEA’s procedural protections while Jimmy was being reevaluated by filing a due process complaint. She also challenged the school district’s repeated exclusions for behaviors caused by his disability. The state hearing officer hearing her challenge determined that Jimmy was not protected by IDEA because he was not yet identified as a student eligible for special education services and had no Individualized Education Program (IEP). Knowing that the hearing and appeals process could be long and drawn out and that Jimmy would

Deconstructing a Definition: Social Maladjustment Versus Emotional Disturbance and Moving the EBD Field Forward, 41 PSYCHOL. IN THE SCH. 899, 901 (2004) (describing interpretations of the “social maladjustment exclusionary clause” and explaining that “it has been widely assumed among researchers in the . . . Emotional or Behavioral Disorder[] field that this clause was added to satisfy the concerns of legislators and educational administrators who did not want schools to be mandated to provide services to delinquent and antisocial youth”).

26. IDEA defines OHI as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . (i) [i]s due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) [a]dversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c)(9) (2015).

27. A 504 plan is mandated in public schools and federally funded private schools by Section 504 of the Rehabilitation Act of 1973 for children with a physical or mental condition that substantially impacts a major life activity. *See* 29 U.S.C. § 701 (2012); 34 C.F.R. § 104.33 (2015). Examples of a major life activity include learning, communicating, reading, walking, breathing, etc. *See* 29 U.S.C. § 701 (2012); 34 C.F.R. § 104.33 (2015). A 504 plan could provide a student with accommodations and supports allowing the student to access a free appropriate public education. 34 C.F.R. § 104.33 (2015).

28. *See* 34 C.F.R. §§ 300.532–33 (2015) (outlining the procedure by which a parent of a child with a disability may initiate an expedited due process hearing regarding a disciplinary matter).

continue to face disciplinary removals in the meantime, Jimmy's mother withdrew her hearing request upon agreement that the school district transfer Jimmy to another school. She later filed complaints with the state department of education and the DOE Office for Civil Rights (OCR). The state department of education ultimately found the district to be in violation of a number of special education laws but failed to order meaningful corrective action, such as compensatory education. The OCR complaint had been pending for more than a year when it was withdrawn pursuant to a settlement agreement reached with the district under a new due process complaint seeking compensatory education services.

Using Jimmy's case as a backdrop, this article discusses the limits of special education law in protecting students with behavioral health conditions from harmful exclusionary discipline practices. Jimmy's case exemplifies the limitations of current special education laws as implemented and enforced by the judiciary, state departments of education, and OCR. Part II of this article provides a summary of data and literature on the prevalence of behavioral health conditions among children and the rates of disciplinary removals and segregated placements for students with disabilities. It pays particular attention to the impact on children with emotional and behavioral disabilities and children of color with emotional and behavioral disabilities. Part III explores the devastating effects of exclusionary discipline practices. Part IV provides an overview of current federal special education laws purporting to protect children with disabilities from excessive disciplinary removals, and Part V explores available remedies and obstacles under current law. Part VI proposes recommendations to protect children with behavioral health conditions from school exclusion.

II.

THE PREVALENCE OF BEHAVIORAL HEALTH CONDITIONS AMONG CHILDREN AND SCHOOLS' RESPONSES

A significant number of children in the United States suffer from behavioral health conditions at some point in their childhood. Many studies have measured the prevalence of behavioral health conditions among young people with estimates varying from as low as five percent to as high as twenty-six percent.²⁹ According to the Centers for Disease Control (CDC) and Prevention, an estimated thirteen to twenty percent of children in the United States experience a mental health disorder in a given year.³⁰ The CDC defines *childhood mental*

29. See Cheryl Boydell Brauner & Cheryl Bowers Stephens, *Estimating the Prevalence of Early Childhood Serious Emotional/Behavioral Disorders: Challenges and Recommendations*, 121 PUB. HEALTH REP. 303, 304–05 (2006).

30. Ruth Perou, Rebecca H. Bitsko, Stephen J. Blumberg, Patricia Pastor, Reem M. Ghandour, Joseph C. Gfroerer, Sarra L. Hedden, Alex E. Crosby, Susanna N. Visser, Laura A. Schieve, Sharyn E. Parks, Jeffrey E. Hall, Debra Brody, Catherine M. Simile, William W. Thompson, Jon Baio, Shelli Avenevoli, Michael D. Kogan & Larke N. Huang, *Mental Health Surveillance Among Children –United States, 2005–2011*, 62 MORBIDITY & MORTALITY WKLY.

disorder as a disorder that begins and can be diagnosed in childhood, such as “attention-deficit/hyperactivity disorder (ADHD), Tourette syndrome, behavior disorders, mood and anxiety disorders, autism spectrum disorders, substance use disorders, etc.”³¹ In 2007, the National Health Interview Survey (NHIS) and the National Survey of Children’s Health (NSCH) reported that 7.6% (NHIS) or 8.9% (NSCH) of children aged three to seventeen had been diagnosed with ADHD³² and that “4.6% of children aged 3–17 years had a history of a behavioral or conduct problem such as ODD [Oppositional Defiant Disorder] or conduct disorder.”³³ Though there are variations in the estimated rates of prevalence, as discussed in the following subpart, it is clear that behavioral health conditions affect a large number of children each year.

A. Behavioral Health Conditions and Special Education Identification

Children with behavioral health conditions can experience increased difficulties with the social, structural, and academic expectations in school. If a student’s behavioral health challenges are significant enough to affect her ability to participate in academic activities, learn, or function in a socially appropriate manner in a school environment, she may be entitled to protections and services as a student with a disability under IDEA, Section 504, and ADA.

If found eligible for special education services under IDEA, children with behavioral health conditions are likely to be identified under the special education disability eligibility categories of ED, OHI, or autism.³⁴ Because the OHI category can include students with any type of physical or mental health condition, and students eligible under the autism category may have a broad range of functioning on the autism spectrum, this article focuses on data related to the discipline of students eligible for special education services under the ED eligibility category as a proxy for behavioral health conditions. Under the IDEA, ED is defined as:

[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.

REP 1, 2 (2013), http://www.cdc.gov/mmwr/preview/mmwrhtml/su6202a1.htm?s_cid=su6202a1_w [<https://perma.cc/MVK8-4UQ7>].

31. CHILDREN’S MENTAL HEALTH – NEW REPORT, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/features/childrensmentalhealth/> [<https://perma.cc/XTR2-TRBH>] (last visited Feb. 17, 2017).

32. Perou et al., *supra* note 30, at 7.

33. *Id.*

34. See 34 C.F.R. § 300.8(c) (2015) (listing and defining disability categories providing eligibility for special education services).

(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.³⁵

Despite the rates of children estimated to have a behavioral health condition or mental health disorder, a small percentage of children are identified as eligible for special education under the ED category. In fact, “[m]ost children who have a severe emotional disturbance do not receive special education.”³⁶ This is concerning given that IDEA requires public school districts to engage in “child find,” a process of searching for, evaluating, and identifying children who have disabilities within the school district.³⁷ School districts are responsible for identifying these children if the district knows or suspects the child has a disability.³⁸

In 2014, the last year for which such national data is available, only 5.9% of the special education population between the ages of six and twenty-one, and less than 1% of the total student population, were identified as eligible for special education services under the ED category.³⁹ Black students, however, were 2.08 times more likely to be identified as ED.⁴⁰ These figures suggest that, while children with behavioral health conditions are likely under-identified as eligible for special education services for behavior-related challenges, black children may be over-identified under the ED category. Moreover, for those students who are identified as ED, there is significant risk that exclusionary placements and disciplinary practices may be used in lieu of supportive services and accommodations.

35. 34 C.F.R. § 300.8(c)(4)(i) (2015).

36. Jane Koppelman, *Children with Mental Disorders: Making Sense of Their Needs and the Systems that Help Them*, NAT'L HEALTH POL'Y F. 1, 11 (2004).

37. 20 U.S.C. § 1412(a)(3) (2015).

38. 34 C.F.R. § 300.111 (2012). The obligation to execute child find falls on the local education agency. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (allowing parents to recover cost of private education when district unreasonably failed to identify child with disabilities); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 949–50 (W.D. Tex. 2008) (“IDEA’s Child Find obligation imposes on each local education agency an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction . . .”).

39. U.S. DEP’T OF EDUC. 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES IMPROVEMENT ACT iii, 37–38 (2016), <https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf> [<https://perma.cc/2NNC-SQQ9>].

40. *Id.*

B. Restrictive Placements for Students with Emotional Disturbance

When IDEA, then called the Education of All Handicapped Children Act (EAHCA), was implemented in 1975, children with disabilities were systematically excluded and isolated from public education.⁴¹ Those who supported EAHCA were committed to providing children with disabilities access to an education and to include them as much as possible in the same educational experiences offered to students without disabilities.⁴² Over the last forty years, efforts have been made to provide special education services in an integrated and inclusive manner, and many students with disabilities have been successfully integrated into the mainstream⁴³ public education system. Despite a general decrease in segregated placements for students with disabilities over the past twenty-five years, however, students with an ED classification are still disproportionately excluded from general education settings and placed in separate facilities.⁴⁴

According to the most recent data available, students identified under the ED special education classification are much more likely to be educated in separate and isolated educational settings. In 2014, 17.5% of students identified as ED attended separate facility schools or residential facilities compared to 5.3% of all students with disabilities.⁴⁵ While 62.6% of all students receiving special education services are educated in a general education setting 80% or

41. Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN’S J. LEGAL COMMENT. 657, 683 (2004).

42. Education of All Handicapped Children Act, Pub. L. No. 94-142, § 3, 89 Stat. 773 (1975). The purpose of the law notes, in part, that “the special educational needs of [handicapped] children [in the United States] are not being fully met,” “more than half of [these] children . . . do not receive appropriate educational services which would enable them to have full equality of opportunity,” and “one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.” *Id.*

43. The term mainstream is often used to describe the inclusion of children with disabilities into general education or “typical” classrooms, as opposed to separate or self-contained classrooms, resource rooms, or facilities, which contain only students with disabilities. See generally Gus Douvanis & David Hulsey, *The Least Restrictive Environment Mandate: How Has It Been Defined by the Courts?*, ERIC DIGEST (2002) (tracking the development of the preference for “mainstreaming” in court opinions and legislation).

44. James McLeskey, Eric Landers, Pamela Williamson & David Hoppey, *Are We Moving Toward Educating Students With Disabilities in Less Restrictive Settings?*, 43 J. SPECIAL EDUC. 131, 134 (2012). Results of the study indicated that since 1990, placement of students with disabilities in “separate settings for most or all of the school day (i.e., [separate class/separate school] settings) showed a trend toward gradual decline,” placement in pullout settings have decreased since the early 2000s, and placement in general education settings has substantially increased. *Id.* From 1990 to 2007, “the percentage of students with EBD who were educated in [separate class/separate school] settings decreased by 27%,” “[pullout] placements declined by 37%,” and “[general education] placements . . . increased . . . by 105%.” *Id.* at 135.

45. See U.S. DEP’T OF EDUC., *supra* note 39, at 50.

more of the time, only 46.2% of students with ED are educated in a general education setting 80% or more of the time.⁴⁶

Black students have also historically been overrepresented in more restrictive placements and underrepresented in less restrictive placements.⁴⁷ Throughout the history of special education, certain disability categories were used as a proxy for race to continue the perpetuation of segregated school placements.⁴⁸ In the 1980s, black students with ED classifications “were 1.2 times more likely . . . to be placed in separate classrooms” than their white peers with ED and “about 50% less likely to be placed in general education classroom environments.”⁴⁹ In one study of the placement and exit patterns of students with emotional and behavioral disorders from 1989 to 1998, black males with disabilities were found to be “excluded from regular education classes at two to three times the rate of other students.”⁵⁰ A recent U.S. Department of Justice (DOJ) investigation of the Georgia special education program found that “thousands of students with behavioral issues and disabilities” have been segregated “in run-down facilities and provid[ed] . . . with subpar education,” with some students placed “in the same inferior buildings that served black children in the days of Jim Crow.”⁵¹ Given what we know about the continuing disproportionate identification of black students as ED and the history of segregation of black students and students with disabilities, the continuing trend of exclusion imposed on students with ED and particularly black students with ED is disturbing.

Admittedly, there is debate regarding the harms and benefits of inclusive versus segregated placements for students with disabilities.⁵² Some have argued that total inclusion of students with ED is actually harmful both to students with

46. *Id.*

47. Russell J. Skiba, Lori Poploni Staudinger, Sarah Gallini, Ada B. Simmons & Renae Feggins-Azziz, *Disparate Access: The Disproportionality of African American Students With Disabilities Across Educational Environments*, 72 EXCEPTIONAL CHILDREN 411, 413 (2006).

48. See RUTH COLKER, *DISABLED EDUCATION* 9, 21 (2013); Wanda Blanchet, Janette Klingner & Beth Harry, *The Intersection of Race, Culture, Language and Disability: Implications for Urban Education*, 44 URBAN EDUC. 389, 392 (2009).

49. See Skiba, Staudinger, Gallini, Simmons & Feggins-Azziz, *supra* note 47, at 418.

50. Zewelangi Serpell, Charlayne C. Hayling, Howard Stevenson & Lee Kern, *Cultural Considerations in the Development of School-Based Interventions for African American Adolescent Boys with Emotional and Behavioral Disorders*, 78 THE J. OF NEGRO EDUC. 321, 322 (2009) (citing Timothy Landrum, Antonis Katsiyannis & Teara Archwamety, *An Analysis of Placement and Exit Patterns of Students with Emotional or Behavioral Disorders*, 29 BEHAV. DISORDERS, 140, 142 (2004) (using student data from the DOE Annual Reports to Congress on the Implementation of IDEA “covering the 10-year period from 1989 through 1998, inclusive”)).

51. Marian Wang, *Georgia is Segregating Troublesome Kids in Schools Used During Jim Crow*, PRO PUBLICA (July 29, 2015), <http://www.propublica.org/article/georgia-is-segregating-troublesome-kids-in-schools-used-during-jim-crow> [<https://perma.cc/TH5H-4X8G>].

52. Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 856–57 (2006) (arguing that the integration assumption stemming from IDEA’s least restrictive environment mandate should be reassessed and focus should instead turn to mandating that schools offer a continuum of educational alternatives).

ED and general education students because general education teachers lack the skills, training, and resources to appropriately meet the needs of students with emotional and behavioral issues.⁵³ General education teachers feel unprepared to address the behavioral manifestations of ED and identify students with ED as “the most difficult to serve and caus[ing] the most stress in the mainstream classroom.”⁵⁴ Facilitating positive relationships between students with and without ED in a general education classroom depends on a number of variables including teacher attitude and preparation, systematic instruction of social skills, and opportunities for positive peer interactions.⁵⁵ In light of these findings, a focused effort on teacher training and development of skills necessary to educate students with behavioral health conditions could allow for more successful inclusive educational programming.

Others have raised concerns related to the harms of segregated placements of students. Some researchers argue that segregated placements can result in behaviorally challenged students actually regressing and developing new and more intensive behavioral issues that they learn and model from each other.⁵⁶ While segregated treatment of youth with behavioral health conditions is common across the educational, mental health, and juvenile justice systems, “[r]arely is placement with deviant peers associated with no or an incremental positive impact; more frequently, the marginal effect is negative”⁵⁷ One study found that even “students with mild disabilities were overrepresented as social isolates,” were “at risk for associating with deviant peers,” and “were underrepresented in prosocial peer groups.”⁵⁸ These studies suggest that segregated placements of students with behavioral health conditions can cause these students’ behaviors to worsen because they model each other’s anti-social and challenging behaviors.

53. James Kauffman, John Lloyd, John Baker & Teresa Reidel, *Inclusion of All Students with Emotional or Behavioral Disorders*, 76 PHI DELTA KAPPAN 542, 542–45 (1995).

54. Jennifer Cassady, *Teachers’ Attitudes Towards the Inclusion of Students with Autism and Emotional Behavioral Disorder*, 2 ELECTRONIC J. INCLUSIVE EDUC. 1, 10 (2011), <http://corescholar.libraries.wright.edu/ejie/vol2/iss7/5/> [<https://perma.cc/HR89-CEYD>] (citing Elias Avramidis, Phil Bayliss & Robert, *Burden Student Teachers’ Attitudes Towards the Inclusion of Children with Special Educational Needs in the Ordinary School*, in TEACHING AND TEACHER EDUCATION 279 (2000)).

55. See Gwendolyn Cartledge & Carolyn Talbert, *Inclusive Classrooms for Students with Emotional and Behavioral Disorders: Critical Variables*, 35 THEORY INTO PRACTICE 51, 52–55 (1996); Mark C. Weber, *Reflections on the New Individuals With Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 44 (2006), <http://www.floridalawreview.com/wp-content/uploads/2010/01/Mark-Weber-BOOK1.pdf> [<https://perma.cc/Z6NW-84B3>].

56. Kenneth A. Dodge, Thomas J. Dishion & Jennifer E. Lansford, *Deviant Peer Influences in Intervention and Public Policy for Youth*, 20 SOC. POL’Y REP. 1, 3 (2006).

57. *Id.* at 5.

58. Ruth Pearl, Thomas W. Farmer, Richard Van Acker, Philip C. Rodkin, Kelly K. Bost, Molly Coe & Wanda Henley, *The Social Integration of Students with Mild Disabilities in General Education Classrooms: Peer Group Membership and Peer-Assessed Social Behavior*, 99 ELEMENTARY SCH. J. 167, 180 (1998).

While some have debated the effectiveness of programs placing students with disabilities exclusively in general education classrooms,⁵⁹ Russell Skiba, a leading educational scholar on students with behavioral challenges, notes that, regardless of the challenges of inclusion in general education classrooms, “it is clear that educating students with disabilities in less restrictive environments with their nondisabled peers has become a widely accepted social value.”⁶⁰ The risk of continued segregated placements of students with behavioral health conditions is further isolation and exclusion as well as increased intolerance of behavioral challenges among educators. Moreover, these segregated placements seem to actually increase the risk of disciplinary removal for students with disabilities.

C. Disproportionate Disciplinary Removals of Students with Emotional Disturbance and Students of Color with Emotional Disturbance

In addition to placing students with ED in segregated educational environments, schools also exclude these students from the educational environment completely through use of disciplinary removals. Suspensions affect more than one out of three youths in the United States, two in five boys, half of Hispanic boys, and two-thirds of black boys.⁶¹ Students identified under IDEA’s ED category are more likely to be suspended than peers without disabilities and peers with other types of disabilities. Black students with ED are substantially more likely to experience disciplinary removal.

According to national data reported by the DOE CRDC, 700,000 students served under the IDEA received one or more out-of-school suspensions during the 2013–2014 school year.⁶² This is twenty-five percent of all suspended students, though students served under IDEA represent only twelve percent of the total student population.⁶³ Students with disabilities served under IDEA were “more than twice as likely to receive one or more out-of-school suspension as students without disabilities.”⁶⁴ According to 2011–2012 data, 23,032 students with disabilities were expelled, 58,805 received referrals to law enforcement, and

59. See McLeskey, Landers, Williamson & Hoppey, *supra* note 44, at 132.

60. Skiba, Staudinger, Gallini, Simmons & Feggings-Azziz, *supra* note 47, at 413.

61. Tracey L. Shollenberger, *Racial Disparities in School Suspension and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, in CLOSING THE SCHOOL DISCIPLINE GAP 31, 34 (Daniel Losen ed., 2015). Shollenberger analyzes the data results from a 1997 National Longitudinal Survey of Youth involving 9000 children “born between January 1, 1980, and December 31, 1984.” *Id.* at 33. The study involved baseline interviews of youths between the ages of twelve and seventeen and follow-up interviews annually from 1997 through 2010 when the respondents were twenty-six through thirty-one years old. *Id.*

62. DEP’T OF EDUC. CIVIL RIGHTS DATA, *supra* note 13, at 1, 3.

63. *Id.*

64. *Id.* at 4. These disproportionalities are unchanged from the last data released for the 2011–2012 school year. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE (2014) [hereinafter U.S. DEP’T OF EDUC. SNAPSHOT], <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [https://perma.cc/7H6Q-KHNY] (last visited Feb. 17, 2017).

16,576 were arrested at school.⁶⁵ Further, although students with ED represented only five percent of all special education students, these students represented thirty-five percent of special education students subjected to disciplinary action.⁶⁶ In fact, three quarters of students with ED have been suspended or expelled at least once by the time they reach high school.⁶⁷ Students with disabilities are also subjected to school-based arrests and referrals to law enforcement at disproportionate rates. While representing only twelve percent of the total enrollment, students with disabilities represented twenty-five percent of students who were arrested at school or referred to law enforcement.⁶⁸

Disciplinary exclusion is even more disproportionate for students of color with disabilities, particularly for boys. During 2013–2014, twenty-three percent of black boys with disabilities and twenty-five percent of multiracial boys with disabilities served by IDEA received one or more out-of-school suspensions compared to ten percent of white boys with disabilities.⁶⁹ Similarly, twenty percent of multiracial girls with disabilities received one or more out-of-school suspensions compared with five percent of white girls with disabilities.⁷⁰ According to CRDC data from the 2011–2012 school year, black students with disabilities, then just under twenty percent of the total special education population, made up nearly thirty percent of students with disabilities suspended and nearly thirty-five percent of those expelled.⁷¹

Other studies identify a high prevalence of disciplinary exclusion against students with ED. In one study, sixty-three percent of students with ED “experienced disciplinary actions, including suspensions and expulsions, in one school year, with an average of seven disciplinary incidents.”⁷² Over their school careers, seventy-three percent of students with ED received a suspension or expulsion.⁷³ One study seeking to identify factors associated with a higher likelihood of disciplinary exclusion among students with ED, OHI (for an ADHD diagnosis), and a learning disability (LD) indicated that students with ED

65. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION, 2011–2012 STATE AND NATIONAL ESTIMATIONS: DISCIPLINE ESTIMATIONS FOR NATION AND BY STATE, http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 [<https://perma.cc/BN7Q-WKUH>] (click “National Total” under “Discipline Estimations by Discipline Type,” then click “Expulsions With and Without Educational Services”).

66. *Left Out, Pushed Out, Placed Out and Worse: How Children with Serious Mental Health Problems Are Treated in our Schools—And How to Fix It*, BAZELON CTR. FOR MENTAL HEALTH LAW 2 (2011) [hereinafter BAZELON CTR.], <http://www.bazelon.org/LinkClick.aspx?fileticket=N7Q53i3SdBo%3d&tabid=134> [<https://perma.cc/8W2W-KL67>].

67. *Id.* at 2.

68. U.S. DEP’T OF EDUC. SNAPSHOT, *supra* note 64, at 7.

69. U.S. DEP’T OF EDUC. CIVIL RIGHTS DATA, *supra* note 13, at 4.

70. *Id.*

71. *Id.*

72. Patricia Gonzales, INST. OF EDUC. SCI., FACTS FROM NLTS2: SCHOOL BEHAVIOR AND DISCIPLINARY EXPERIENCES OF YOUTH WITH DISABILITIES 4 (2006), https://ies.ed.gov/ncser/pdf/NLTS2_discipline_03_21_06.pdf [<https://perma.cc/5X6W-Q3BM>].

73. *Id.*

and ADHD were more likely to receive a suspension or expulsion than students with LD.⁷⁴ Another study looking at the outcomes of students with ED educated in self-contained classrooms versus separate facilities found that students in the separate facilities received “significantly more disciplinary contacts and negatively worded items in their cumulative folders” compared with students in self-contained classrooms.⁷⁵

A simplistic explanation for the increased rates of discipline and exclusion of children with behavioral and emotional difficulties is that these children are predisposed to misbehave more frequently. Research reflects that forty percent of students with ED “are reported to have difficulty controlling problem behavior in class” (compared with twenty percent or fewer of students in other disability categories),⁷⁶ sixty-one percent of students with ED “argue in class, compared with 42[%] of students with learning disabilities.”⁷⁷ However, though students identified under certain categories of disability may be more likely to act aberrantly—which is actually a requirement for identification under the ED classification—it is also possible that these students are targeted more by school staff and penalized for more minor disciplinary infractions. One study in California found that black students, economically disadvantaged students, and students with disabilities were “disproportionately suspended for minor and nonviolent offences . . . at the discretion of school or district administrators.”⁷⁸ “Whether deliberate or not, there appears to be a bias associated with the EBD⁷⁹ label and, regardless of academic abilities or performance, students with EBD experience far less school success than other students with disabilities, either as a result of their own actions or the perception of their actions by the adults that surround them.”⁸⁰

Whether or not students with behavioral health conditions have greater tendency for disruptive behaviors in school, it is clear that many need services

74. Georgianna Achilles, Margaret McLaughlin & Robert Croninger, *Sociocultural Correlates of Disciplinary Exclusion Among Students With Emotional, Behavioral, and Learning Disabilities in the SEELS National Dataset*, 15 J. EMOTIONAL & BEHAV. DISORDERS 33, 41 (2007), <http://journals.sagepub.com/doi/pdf/10.1177/10634266070150010401> [<https://perma.cc/DJH3-7CXD>].

75. Kathleen L. Lane, Joseph H. Wehby, M. Annette Little & Cristy Cooley, *Academic, Social, and Behavioral Profiles of Students with Emotional and Behavioral Disorders Educated in Self-Contained Classrooms and Self-Contained Schools: Part I—Are They More Alike Than Different?*, 30 BEHAV. DISORDERS 349, 357 (2005).

76. Gonzales, *supra* note 72, at 3.

77. *Id.*

78. Robert Balfanz, Vaughn Byrnes & Joanna Fox, *Sent Home and Put Off Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the 9th Grade*, in CLOSING THE SCHOOL DISCIPLINE GAP 17, 21 (Daniel Losen ed., 2015).

79. EBD means emotional and behavioral disorders and is used by some states to mean ED or EI. See, e.g., GA. COMP. R. & REGS. § 160-4-7.05 (2016) (detailing special education categories of eligibility).

80. Renee Bradley, Jennifer Doolittle & Robert Bartolotta, *Building on the Data and Adding to the Discussion: The Experiences and Outcomes of Students with Emotional Disturbance*, 12 J. BEHAV. EDUC. 4, 20 (2008).

and supports to foster development of positive and appropriate behaviors and social interactions. Disciplinary exclusion clearly fails to offer this support and results in poor outcomes and lost opportunities.

III.

THE CONSEQUENCES OF SEGREGATED PLACEMENTS AND DISCIPLINARY REMOVALS

While schools commonly use exclusionary disciplinary practices against students with behavioral health conditions, numerous studies have found that these disciplinary removals not only fail to resolve behavioral problems, they exacerbate them.⁸¹ Even one suspension can have long-term consequences for a child’s educational and life-long success,⁸² and such removals result in significant consequences for students with behavioral health conditions. In fact, any period of absence from school can interfere with a student’s educational progress and may result in the student feeling alienated, particularly students with behavioral and academic difficulty.⁸³ Given this, the exclusionary data highlighted in the previous section is concerning and runs counter to the intent of special education and disability rights laws and the purpose of a public education system.⁸⁴

Students with recurrent suspensions have large deficits in academic and social skills.⁸⁵ According to clinical child psychologist Ross Greene, students with behavioral challenges lack important thinking skills necessary to regulate emotions.⁸⁶ He explains that just as students with learning disabilities may lack skills necessary to become proficient in reading or writing, behaviorally challenging kids may struggle to master skills required for proficiency in

81. See generally Katherine Reynolds Lewis, *What If Everything You Knew About Disciplining Kids Was Wrong?*, MOTHER JONES (July 7, 2015), <http://www.motherjones.com/politics/2015/05/schools-behavior-discipline-collaborative-proactive-solutions-ross-greene> [<https://perma.cc/BA2Q-73LG>]; Jeremy D. Finn & Timothy J. Servoss, *Security Measures and Discipline in American High Schools*, in CLOSING THE SCHOOL DISCIPLINE GAP 44, 45 (Daniel Losen ed., 2015) (“[R]esearch suggests that out-of-school suspensions, intended as a remedy for misbehavior, fail to deter further misconduct and might even encourage it.”).

82. See Balfanz, Byrnes & Fox, *supra* note 78, at 22 (finding that the chances of success for a student are “sensitive” to the first high school suspension and that likelihood of dropping out doubles with the first high school suspension); DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOL IN CRISIS* 9–11 (2010).

83. Finn & Servoss, *supra* note 81, at 45.

84. See HORACE MANN, *LECTURES ON EDUCATION* 58 (1840) (“Education must be universal. It is well, when the wise and the learned discover new truths; but how much better to diffuse the truths already discovered, amongst the multitude! Every addition to true knowledge is an addition to human power; . . . [e]ducation must prepare our citizens to become municipal officers, intelligent jurors, honest witnesses, legislators, or competent judges of legislation,—in fine, to fill all the manifold relations of life. For this end, it must be universal.”).

85. See Cindy Morgan-D’Atrio, John Northup, Lynn LaFleur & Sandi Spera, *Toward Prescriptive Alternatives to Suspensions: A Preliminary Evaluation*, 21 BEHAV. DISORDERS 190, 196–98 (1996).

86. GREENE, *supra* note 20, at 7–8.

handling life's social, emotional, and behavioral challenges.⁸⁷ A widespread lack of understanding of the causes of behavioral and emotional issues and the needs of behaviorally challenged students leads to ineffective interventions that result in harmful disciplinary exclusion rather than services and supports targeted at skill development. Without appropriate interventions, academic problems persist over time for this population.⁸⁸

Some school officials acknowledge that disciplinary removals do not serve the interests of children with behavioral and emotional challenges, yet profess that exclusion is necessary for the sake of the safety and educational opportunities of other children. However, harsh discipline policies and high rates of suspension and expulsion actually “threaten the academic success of all students, even students who have never been suspended.”⁸⁹ In fact, there is no evidence to support the position that suspensions improve the educational environment for other students or make schools safer.⁹⁰ Rather, research shows a strong correlation between suspensions, negative school environmental conditions, and lower school-wide achievement.⁹¹

For children facing disciplinary exclusion, the harms and long-term risks are great. Children who are suspended from school are more likely to academically underperform,⁹² drop out,⁹³ and become involved in the juvenile justice system, leading to a host of other potential life-long consequences.⁹⁴ As the United States Supreme Court noted, “total exclusion from the educational process for

87. *Id.*

88. See Paul Greenbaum, Robert R. Dedrick, Robert M. Friedman, Krista Kutash, Eric C. Brown, Sharon R. Lardieri & Amy M. Pugh, *National Adolescent and Child Treatment Study (NACTS): Outcomes for Children with Serious Emotional and Behavioral Disturbance*, 4 J. EMOTIONAL & BEHAV. DISORDERS 130, 145 (1996).

89. Brea Perry & Edward Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1085 (2014).

90. Shollenberger, *supra* note 61, at 32.

91. *Id.*

92. See Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin*, 39 EDUC. RESEARCHER 59, 60 (2010) (noting that “[r]esearch shows that frequent suspensions appear to significantly increase the risk of academic underperformance”).

93. See Tony Fabelo, Michael D. Thompson, Martha Plotkin, Dottie Carmichael, Miner P. Marchbanks & Erica A. Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CTR. 1, 54 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [<https://perma.cc/2P7P-3XXR>] (finding that “[s]tudents who experienced suspension or expulsion, especially those who did so repeatedly, were more likely to be held back a grade or drop out of school than students who were not involved in the disciplinary system”).

94. *Id.* at 61 (finding that “[s]tudents who were suspended or expelled had a greater likelihood of contact with the juvenile justice system in their middle or high school years, particularly when they were disciplined multiple times”); see generally Christopher Gowen, Lisa Thurau & Meghan Wood, *The ABA's Approach to Juvenile Justice Reform: Education, Eviction, and Employment: The Collateral Consequences of Juvenile Adjudications*, 3 DUKE F. L. & SOC. CHANGE 187 (2011).

more than a trivial period . . . is a serious event in the life of the suspended child.”⁹⁵ The effects are more significant for students with behavioral health conditions and students of color. Students with social, emotional, and behavioral challenges—particularly low-income students of color—are more likely to experience adverse outcomes caused by disciplinary removal, including lower academic achievement and reduced participation in employment, secondary school, and independent living; and are more likely to be expelled and suspended, drop out, or become involved in the juvenile justice system.⁹⁶

A. Exclusionary Discipline Policies Increase Dropout Rates and Decrease Graduation Rates

One consequence of exclusionary discipline policies is that students facing such removals stop attending school altogether. Dropping out is a severe consequence, resulting in complete disenfranchisement of the student from the educational environment. While students may drop out of school for a variety of reasons,⁹⁷ many advocates identify particular concerns regarding pushouts—dropouts resulting from schools pushing students out of school through excessive disciplinary policies, pressures to perform on high-stakes testing, or other overt efforts by school staff.⁹⁸

Studies in several states demonstrate that out-of-school suspensions are a principal cause of high school dropout.⁹⁹ “Excluding students from school for disciplinary reasons is directly related to lower attendance rates and increased course failures, and can set students on a path of disengagement from school that will keep them from receiving a high school diploma.”¹⁰⁰ In a study of the impact of suspensions on ninth-grade students, researchers found that one suspension in ninth grade can decrease chances of graduation from seventy-five percent to fifty-two percent.¹⁰¹ The rate of graduation reduces further with each

95. *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

96. See Cannon, Gregory & Waterstone, *supra* note 119, at 407.

97. See generally Jonathan Jacob Doll, Zohren Eslami & Lynne Walters, *Understanding Why Students Drop Out of High School, According to Their Own Reports: Are They Pushed or Pulled, or Do They Fall Out? A Comparative Analysis of Seven Nationally Representative Studies*, SAGE OPEN 1 (2013).

98. See Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999) (noting that sometimes suspension is “used as a tool to ‘push out’ particular students, to encourage ‘troublemakers’ or those perceived as unlikely to succeed in school to leave” without issuing a formal expulsion); see generally *Test, Punish, and Push Out: How ‘Zero Tolerance’ and High-Stakes Testing Funnel Youth Into the School-to-Prison Pipeline*, THE ADVANCEMENT PROJECT (2010), <http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel> [<https://perma.cc/LP4G-ZFNF>] (detailing the ways that repeated suspensions and high-stakes testing can create a cycle of low academic achievement which, in turn, pushes students to drop out of school).

99. Balfanz, Byrnes & Fox, *supra* note 78, at 17.

100. *Id.*

101. *Id.* at 23.

suspension; only twenty-three percent of those students suspended four times graduated.¹⁰² Suspensions were also directly linked to increases in dropout rates, with the rate increasing with each suspension, sixteen percent to thirty-two percent with one suspension and up to fifty-three percent for students facing four suspensions.¹⁰³ Students suspended in ninth grade were typically students who had experienced suspensions in middle school or earlier. Over two-thirds of students in the study who were suspended in ninth grade had been “suspended at least once in the middle grades.”¹⁰⁴ This study concluded that, while a variety of factors led to the dropout and graduation rates, “[f]or a significant subset of students, . . . being suspended in middle or high school is the triggering event, which then leads to broader disengagement from schooling and eventually dropping out.”¹⁰⁵

Students identified as ED are even more likely to drop out of school than their non-disabled peers: forty-eight percent of students with ED drop out between ninth and twelfth grades compared to thirty percent of all students with disabilities and twenty-four percent of all high school students.¹⁰⁶ The dropout rate is an alarming 58.2% for black students with ED.¹⁰⁷ One study conducted in 2008 found that over half of students with ED who left school did so by dropping out, “40% . . . did not obtain a high school diploma or GED, [over 75%] were below the expected grade level in reading, and 97% were below expected grade level in math.”¹⁰⁸ Another study found that students with ED are most likely to leave school before graduating.¹⁰⁹

There are also significant economic consequences arising from suspensions and the resulting impact on graduation rates and dropouts. A Texas study of the economic impacts of dropping out tracked three cohorts of young people from seventh grade through twelfth grade and found that there was significant economic loss resulting from exclusionary disciplinary practices.¹¹⁰ The study identified increased costs to the community, including lost wages and lost sales tax, increased welfare, and criminal justice costs, with a total cost of “between

102. *Id.*

103. *Id.*

104. *Id.* at 26.

105. *Id.* at 27–28.

106. David Osher, Gale Morrison & Wanda Bailey, *Exploring the Relationship Between Student Mobility and Dropout Among Students with Emotional and Behavioral Disorders*, 72 J. NEGRO EDUC. 79, 80 (2003).

107. *Id.*

108. Bradley, Doolittle & Barlotta, *supra* note 80, at 13.

109. *See* Osher, Morrison, & Bailey, *supra* note 106, at 80.

110. Miner P. Marchbanks III, Jamilia J. Blake, Eric A. Booth, Dottie Carmichael, Allison L. Seibert & Tony Fabelo, *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, in CLOSING THE SCHOOL DISCIPLINE GAP 59, 64–65 (Daniel Losen ed., 2015). These cohorts included all students enrolled in Texas public schools from 1999 to 2007 who were in the seventh grade during the 2000–01, 2001–02, or 2002–03 academic years. *Id.* at 61. The study tracked “[s]tudents’ progress . . . from 7th grade through at least their cohort’s 12th-grade year and up to 2 years beyond.” *Id.*

\$5.4 billion and \$9.6 billion.”¹¹¹ It concluded that because disciplinary measures resulted in a fourteen-percent higher risk of dropping out, reduction of this fourteen-percent elevation could save the state between \$750 million and \$1.35 billion over the lifetime of the cohort.¹¹² This study also tracked the potential cost of retention, another common consequence of exclusionary disciplinary policies, finding that retention can result in increased costs to the state in the form of an additional year of public education for the student amounting to approximately \$11,543 per child per year and lost wages and tax revenue, totaling approximately \$178 million per year.¹¹³ A recent multi-state and national study of suspension data released by Daniel Losen and Russell Rumberger and the Center for Civil Rights Remedies at the Civil Rights project found that being suspended accounted for a twelve-percent reduction in chances of graduating high school and caused the United States approximately eleven billion dollars in lost tax revenue and an overall thirty-five billion dollar cost to society.¹¹⁴

B. Exclusionary Practices Result in Increased Rates of Involvement in the Juvenile and Criminal Justice Systems

Students who are excluded from school through disciplinary removals are also at greater risk of becoming involved in the juvenile and criminal justice systems. A study in 1991 found that seventy-three percent of students with emotional disturbance who dropped out of high school “were arrested within five years.”¹¹⁵ According to a national longitudinal study, youths who were suspended for ten or more days were significantly more likely to be arrested and incarcerated than students who had never been suspended.¹¹⁶ The study found that nearly eighty percent of boys who were suspended ten or more days were arrested and just over thirty percent were incarcerated for some period of time, compared with boys who had never been suspended, of whom only twenty-five percent were arrested and four percent were incarcerated.¹¹⁷

111. *Id.* at 64–65. The study found the cohort had lost between \$5 billion and \$9 billion in wages throughout their careers and cost the state “between \$279 million and \$507 million in lost sales tax revenue,” increased welfare costs between \$404 million and \$736 million, and increased criminal justice costs between \$595 million and \$1 billion. *Id.*

112. *Id.* at 65.

113. *Id.* at 67–68.

114. Daniel J. Losen & Russell W. Rumberger, *The High Cost of Harsh Discipline and its Disproportionate Impact*, THE CTR. FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT 16, 20 (June 2, 2016), https://www.civilrightsproject.ucla.edu/news/news-and-announcements/2016-site-news/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf [<https://perma.cc/9FZK-BSDP>].

115. Peter Leone & Lois Weinberg, *Addressing the Unmet Educational Needs of Children and Youth in the Juvenile Justice and Child Welfare Systems*, THE CTR. FOR JUVENILE JUSTICE REFORM 1, 12 (2012).

116. Shollenberger, *supra* note 61, at 37.

117. *Id.*

Multiple studies have also found that students with behavioral health conditions are more likely to be engaged in the juvenile justice system and incarcerated.¹¹⁸ A disproportionate number of youth with learning disabilities and emotional or behavioral disorders are adjudicated delinquent in the juvenile justice system.¹¹⁹ Further, juveniles incarcerated in detention facilities receive special education services at a rate four times as high as youth in public school programs.¹²⁰ In a national survey of youth incarcerated in juvenile corrections systems, 33.4% of “youth [were] identified and receiv[ed] special education services in juvenile corrections” compared to “8.8% of students ages 6 to 21” who receive special education services in community schools under the IDEA; 47.7% of those receiving special education services in corrections facilities had been identified as eligible under the ED category.¹²¹ Authors of the study also noted the potential for under-estimation of the special education needs of youth incarcerated in juvenile facilities due to problems with transferring juveniles’ special education records and general issues with identifying special education needs.¹²²

Given the prevalence of behavioral health conditions and the proven disproportionalities and significant harms of disciplinary exclusion for this population, it is critical to look at how current law functions to protect the educational rights of students with disabilities. The next section considers special education and relevant civil rights laws and their present application in cases involving the disciplinary exclusion of students with behavioral health conditions.

IV.

THE CURRENT STATE OF THE LAW

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.¹²³

These are the words of the United States Congress in its findings necessitating enactment of the IDEA. While the initial passage of this landmark

118. See Bradley, Doolittle & Barlotta, *supra* note 80, at 14–15.

119. Leone & Weinberg, *supra* note 115, at 12.

120. See Mary Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher & Jeffrey M. Poirier, *Youth With Disabilities in Juvenile Corrections: A National Survey*, 71 COUNCIL FOR EXCEPTIONAL CHILDREN 339, 342 (2005).

121. *Id.*

122. *Id.*

123. 20 U.S.C. § 1400(c) (2012).

legislation in 1975 as the Education for all Handicapped Children Act and its subsequent reauthorizations over the years have enabled countless children with a wide range of disabilities to participate in our public school system,¹²⁴ these aims have not yet been fully realized for children with behavioral health conditions. Further, Section 504 and Title II of the ADA, civil rights laws enacted in 1973 and 1990 respectively that were passed to extend civil rights protections to people with disabilities accessing publicly funded institutions,¹²⁵ have failed to ensure that students with behavioral manifestations of a disability have equal access to a public school education.

As the data reflects, children with behavioral health conditions, particularly children of color with behavioral health conditions, do not have *equality of opportunity* or opportunities for *full participation* in education.¹²⁶ While the explicit purpose of special education law is to ensure this opportunity, current interpretation, enforcement, and implementation of the pertinent laws are failing to have the intended effect. This section explores the IDEA, Section 504, and Title II of the ADA and their application to cases involving exclusion of children with behavioral health conditions through disciplinary removals.

A. Protection Under the IDEA

The IDEA, the most expansive law protecting the educational rights of children with disabilities, was primarily motivated by efforts to afford students with learning disabilities and physical disabilities access to an appropriate education in as integrated a setting as possible.¹²⁷ This is accomplished through two fundamental provisions: (1) the right to a FAPE¹²⁸ and (2) the right to be educated in the least restrictive environment (LRE).¹²⁹ FAPE has been interpreted to mean “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.”¹³⁰ LRE, also known as the “integration presumption,”¹³¹ requires that schools educate students with disabilities alongside non-disabled peers to the “maximum extent

124. See generally U.S. DEPT. OF EDUC., *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (2015), <http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf> [https://perma.cc/X7YT-PAGV].

125. 29 U.S.C. §§ 794, 12131–50 (2011).

126. 20 U.S.C. § 1400(c) (2012).

127. Colker, *supra* note 52, at 792, 856–57.

128. See 20 U.S.C. § 1412(a)(1) (2015); see also Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 214, 215 (2013) (describing FAPE as the IDEA’s “central pillar”).

129. See 20 U.S.C. § 1412(a)(5)(A) (2015); see also Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982) (noting that in order for states to receive federal financial assistance under the Education for All Handicapped Children Act of 1975, handicapped children must be educated “with children who are not handicapped . . . to the maximum extent appropriate”).

130. Rowley, 458 U.S. at 188–89.

131. See Colker, *supra* note 52, at 795.

appropriate” unless 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.”¹³² FAPE and LRE together require that students with disabilities receive an individualized education in an integrated setting whenever possible. The individualized program and setting are articulated in writing in an IEP.¹³³ A significant amount of case law and literature discuss FAPE and LRE; this article primarily focuses on provisions of the IDEA protecting students with disabilities facing disciplinary exclusion.

IDEA contains several specific provisions offering protection from disciplinary removals. The protections collectively endeavor to prevent long-term removals for behaviors caused by a student’s disability and provide for the right to educational services during periods of long-term removals.¹³⁴ I use the phrase “long-term” to mean a removal of more than ten school days. Under current law, procedural protections are implicated when one removal or a series of removals reach this ten-day threshold.¹³⁵

The combination of FAPE, LRE, and procedural protections from long-term disciplinary removals for behaviors caused by a child’s disability should ensure that children with behavioral health conditions remain in school in an integrated setting receiving appropriate services and supports to address behavioral and emotional challenges. However, as discussed in Part II, a disproportionate number of students with emotional disturbance, particularly students of color, are excluded from general education, and frequently from any education at all, by disciplinary removals. Disciplinary exclusion and the effect on students with behavioral health conditions undermine the intent of the law and limit the future potential of hundreds of thousands of children with disabilities each year.

i. Exploring the Limitations on Disciplinary Removals of Students with Disabilities

The IDEA extends protection to students with disabilities facing long-term disciplinary removals. Under the IDEA, schools may “remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).”¹³⁶ Any removals beyond this initial ten-day threshold are subject to review and can be limited when the behaviors are caused by the student’s disability.

132. 20 U.S.C. § 1412(a)(5)(A) (2015).

133. 20 U.S.C. § 1414(d)(1)(A) (2015).

134. 20 U.S.C. § 1415 (k) (2015).

135. *Id.*

136. 20 U.S.C. § 1415(k)(1)(B) (2012).

a. The Ten-Day Rule

The ten-day rule originated from the United States Supreme Court case *Honig v. Doe*¹³⁷ and its progeny.¹³⁸ The *Honig* Court held that Congress clearly intended to protect students with disabilities presenting emotional and behavioral challenges from exclusion for behaviors caused by their disability: “We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”¹³⁹ However, the *Honig* Court also recognized that schools might need to remove students with disabilities who present a safety issue in the school setting. *Honig* balanced these interests by creating the ten-day rule. The *Honig* Court held that:

where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. This authority . . . not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a ‘cooling down’ period during which officials can initiate IEP review and seek to persuade the child’s parents to agree to an interim placement.¹⁴⁰

With amendments to IDEA in 1997, this rule was codified to prevent unilateral long-term disciplinary removals of students with disabilities.¹⁴¹ Under the current reauthorization of the IDEA, adopted in 2004, schools have ten days to remove students with disabilities through a suspension or other disciplinary removal regardless of whether the behaviors were caused by or related to the child’s disability.¹⁴²

Removals for more than ten days can occur only if the behavior that gave rise to the removal involved weapons, illegal drugs, or serious bodily injury,¹⁴³

137. *Honig v. Doe*, 484 U.S. 305 (1988); see Allan G. Osborne, *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L. J. 513, 529 (2001).

138. Gail Paulus Sorenson, *Special Education Discipline in the 1990s*, 62 EDUC. L. REP. 387, 389 (1990).

139. *Honig*, 484 U.S. at 323.

140. *Id.* at 325–26.

141. Osborne, *supra* note 137, at 532.

142. See 20 U.S.C. § 1415(k)(1)(B) (2015).

143. 20 U.S.C. § 1415(k)(1)(G) (2015).

School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the child’s disability, in cases where a child

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

the student poses a serious danger to others in the school environment,¹⁴⁴ or the behavior is not a manifestation of the child's disability.¹⁴⁵ If a child with a disability brings a weapon to school, possesses, uses, or sells illegal drugs, or inflicts serious bodily injury, the student can be removed to an interim alternative educational placement for forty-five days regardless of the cause of the behavior.¹⁴⁶ Further, if the behavior is not caused by, or is not a manifestation of, the student's disability, the student may be removed or disciplined according to the relevant disciplinary procedures and practices applicable to all students within the school district.¹⁴⁷

Honig proposed a third alternative mechanism for schools when a student poses a serious safety threat, which has since been codified within IDEA. It provides that, when a child whose current educational placement is "substantially likely to result in injury to himself, herself, or others," schools can obtain an injunction from a court to change the child's placement.¹⁴⁸ The 1997 IDEA amendments expanded this by permitting school districts to seek an injunction from a due process hearing officer in an administrative proceeding. The hearing officer may order a change of placement for a student to an interim alternative setting for forty-five days if the district can show that the current placement is "substantially likely to result in injury to the child or to others."¹⁴⁹

Under the IDEA, however, even if a child with a disability is removed from her educational placement for more than ten days, the child shall "continue to receive educational services" and "receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."¹⁵⁰ In other words, children with disabilities have an ongoing right to an education and special education services even during periods of long-term disciplinary removal.¹⁵¹

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

Id.

144. 20 U.S.C. § 1415(k)(3)(B) (2012) (allowing a hearing officer to order a change of placement to an interim alternative educational setting for up to forty-five days when she finds that "maintaining the current placement of such child is substantially likely to result in injury to the child or to others").

145. 20 U.S.C. § 1415(k)(1)(C) (2012).

146. 20 U.S.C. § 1415(k)(1)(G) (2012).

147. 20 U.S.C. § 1415(k)(1)(C) (2012).

148. *Honig v. Doe*, 484 U.S. 305, 328 (1988).

149. 20 U.S.C. § 1415(k)(3)(A)-(B)(ii) (2012).

150. 20 U.S.C. § 1415(k)(1)(D) (2012).

151. *Id.*; see also Cannon, Gregory & Waterstone, *supra* note 119, at 469 n.270 ("The statute requires that the student continue to receive services 'as provided in section 1412(a)(1),' which is the section of the IDEA that delineates the requirement to provide a free appropriate public

The ten-day rule can also be invoked by a series of removals of shorter duration.¹⁵² Repeated short-term suspensions can substantially impact a student’s ability to access and participate in her education, as demonstrated in Jimmy’s case. The law currently provides that a series of cumulative disciplinary removals over the course of a school year can constitute a change of placement invoking the same legal protections provided to students facing a single long-term disciplinary removal.¹⁵³ A series of cumulative removals results in a change of placement when:

The child has been subjected to a series of removals that constitute a pattern—

- (i) Because the series of removals total more than 10 school days in a school year;
- (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.¹⁵⁴

Under current law, therefore, procedural protections for students with disabilities are invoked when the student is removed from school for more than ten consecutive days during any one school year or when there is a change of placement due to cumulative removals totaling more than ten days.

b. Change of Placement

Determining when a change of placement has occurred is a critical component of the disciplinary protections provided under IDEA. IDEA uses the ten-day threshold described above in determining change of placement when disciplinary removals are imposed on a student. Change of placement determinations trigger protections including the manifestation of the disability doctrine,¹⁵⁵ the stay put mandate,¹⁵⁶ and other procedural protections including

education. Arguably, this provision suggests that the services the excluded students is entitled to receive are robust, in that they should approximate very closely the services contained in the IEP (which ostensibly constitutes the child’s FAPE).”).

152. 34 C.F.R. § 300.536(a)(2) (2015); *see* Letter to Bieker, 33 IDELR 125 (Aug. 3, 2000) (“Disciplinary removals of up to 10 school days prior to a change in placement agreed to by the parents cannot be ignored in determining which services must be provided to children subject to subsequent disciplinary removals. On the eleventh day of the child’s removal in any particular school year, a determination must be made as to the extent that the child would receive continued educational services A manifestation determination would only be required if a determination is made that the series of removals constitutes a ‘change of placement’ in the disciplinary context or a child is removed for more than ten consecutive school days at a time.”).

153. 34 C.F.R. § 300.536(a) (2015).

154. 34 C.F.R. § 300.536(a)(2)(i)–(iii) (2015).

155. 20 U.S.C. § 1415(k)(1)(E) (2012).

prior written notice and expedited appeal rights, discussed below.¹⁵⁷ Despite the significance of change of placement in the procedural protections of IDEA, there is some uncertainty in the law regarding when a change of placement has occurred or is being proposed by a district, particularly as it applies to cumulative repeated suspensions such as those experienced by Jimmy.

IDEA does not explicitly define change of placement;¹⁵⁸ however, several sections of the IDEA and its corresponding regulations refer to *educational placement* and *change in placement*. IDEA requires that the student's IEP team, including the parent, determine the initial determination of placement.¹⁵⁹ The IDEA's procedural notice requirements also refer to educational placement, requiring that school districts provide prior written notice to the parents of a student whenever the district proposes to *change the student's educational placement*.¹⁶⁰

In the disciplinary context, the IDEA provides that "school personnel may consider any unique circumstances on a case-by-case basis when determining whether to *order a change in placement* for a child with a disability who violates a code of student conduct."¹⁶¹ While this subpart suggests that districts may *order a change of placement* for disciplinary reasons, there are limitations on the district's authority to do so when the student's behaviors are caused by the student's disability.¹⁶²

The corresponding provisions of the Code of Federal Regulations offer further guidance and possibly further confusion on these disciplinary protections and guidelines:

(a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis *when determining whether a change in placement, consistent with the other requirements of this section*, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for

156. 20 U.S.C. § 1415(j) (2012).

157. See 20 U.S.C. § 1415(b)(3) (2012); 20 U.S.C. § 1415(k)(3) (2012).

158. 34 C.F.R. § 300.536(a)(2)(i)–(iii) (2015).

159. 20 U.S.C. § 1414(d)(1)(B) (2012); 20 U.S.C. § 1414(e) (2012).

160. 20 U.S.C. § 1415(b)(3) (2012); 20 U.S.C. § 1415(c)(1) (2012).

161. 20 U.S.C. § 1415(k)(1) (2012) (emphasis added).

162. See Part IV.A.1.b, *infra*.

separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).¹⁶³

34 C.F.R. § 300.536 defines change of placement in the context of disciplinary removals, or the ten-day rule. Unfortunately, the intersection between the provisions related to protections invoked by the IDEA and its implementing C.F.R. create some muddy waters for schools and parents to wade through and leave the scope of disciplinary removal protections unclear.

The federal regulations also reference educational placement in its mandate that school districts maintain a *continuum of educational placements* including “the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).”¹⁶⁴ While the regulations do not describe what constitutes a change of placement, there is some suggestion, supported by court interpretations, that movement along this continuum of placements is a change of placement.¹⁶⁵

In an advisory letter to the Tennessee Department of Education on April 18, 1994, the Director of the United States Office of Special Education Programs (OSEP) defined change of placement as follows:

In determining whether a “change in educational placement” has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child’s educational program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program as set out in the child’s IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.¹⁶⁶

Section 504 of the Rehabilitation Act, discussed below, also addresses change of placement, requiring a school district to conduct a re-evaluation prior

163. 34 C.F.R. § 300.530 (a)–(b) (2012).

164. 34 C.F.R. § 300.115(b)(1) (2012).

165. *See* N.D. *ex rel.* v. Haw. Dep’t. of Educ., 600 F.3d 1104, 1116 (9th Cir. 2010) (“[W]e conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student’s program even if the student remains in the same setting. This determination is made in light of Congress’s intent to prevent the singling out of disabled children and to ‘mainstream’ them with non-disabled children.”); *see also* Hale *ex rel.* v. Poplar Bluff R-I Sch. Dist., 280 F.3d 831, 834 (8th Cir. 2002) (finding a change in educational placement when a school district unilaterally decided to change the location of a student’s schooling from home to school).

166. Letter to Fisher, 21 IDELR 992, 995 (Apr. 18, 1994).

to a “significant change in placement.”¹⁶⁷ OCR, responsible for interpreting and enforcing Section 504, considers an exclusion from the educational program of more than ten school days a significant change of placement.¹⁶⁸ OCR also characterizes a significant change in placement as a transfer from one type of program to another or a termination or significant reduction in a related service.¹⁶⁹

While several provisions in IDEA and Section 504 reference change of placement, some ambiguity in the collective references leave room for interpretation on a case-by-case basis, a theme within special education law which emphasizes individualized determinations for children with disabilities.¹⁷⁰ Without clear guidance in IDEA on what an educational placement is and, therefore, what constitutes a change in the educational placement, case law offers some further clarification. However, as the Court of Appeals for the Seventh Circuit has recognized, it as an “inexact science.”¹⁷¹

The Court of Appeals for the Third Circuit stated that “[t]he touchstone in interpreting section 1415 has to be whether the decision [to change the child’s placement] is likely to affect in some significant way the child’s learning experience.”¹⁷² The United States District Court for Eastern Pennsylvania further determined that a change of placement is “at a minimum, a fundamental change in, or elimination of a basic element of the educational program.”¹⁷³ Whether a “modification or termination of an educational program constitutes a ‘fundamental change’ or ‘elimination’ of educational programming” can be made by distinguishing between “inconsequential modifications in a student’s program and those which ‘significantly affect the child’s learning experience.’”¹⁷⁴ One court described the concept of educational placement as “somewhere between the physical school attended by a child and the abstract goals of a child’s IEP.”¹⁷⁵ Courts have held that a change in transportation¹⁷⁶ or

167. 34 C.F.R. § 104.35(a) (2015).

168. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, PROTECTING STUDENTS WITH DISABILITIES, <http://www2.ed.gov/about/offices/list/ocr/504faq.html> [<https://perma.cc/9HCV-CQ4Y>] (last visited Mar. 1, 2016).

169. *Id.*

170. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982) (emphasizing the individuality involved in the FAPE standard, stating it must be “tailored to the unique needs of the handicapped child” through an IEP).

171. *John M. v. Bd. of Educ.*, 502 F.3d 708, 714 (7th Cir. 2007) (quoting Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996)).

172. *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 (3d Cir. 1984) (holding that changing the student’s transportation staffing and adding ten minutes onto the child’s ride to and from school did not constitute a change in educational placement).

173. *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 757 (E.D. Pa. 2010) (quoting *M.K. v. Roselle Park Bd. of Educ.*, No. CIV A 06-4499 JAG, 2006 WL 3193915, at *10 (D.N.J. Oct. 31, 2006)).

174. *See id.*; *In re Educ. Assignment of Joseph R.*, 318 F. App’x. 113, 119 (3d Cir. 2009).

175. *Bd. of Educ. of Cmty. High Sch. Dist. No. 218*, 103 F.3d at 548.

176. *See DeLeon*, 747 F.2d at 153–54.

physical location¹⁷⁷ does not constitute a change of placement if the change “does not significantly affect the student’s program.”¹⁷⁸ By contrast, courts have held that disenrollment,¹⁷⁹ long-term disciplinary removals,¹⁸⁰ graduation,¹⁸¹ transfers to more restrictive placement on the placement continuum,¹⁸² and transfers between different school districts¹⁸³ do constitute changes of educational placement.

Most courts considering change of placement have done so in the context of determining placement under the stay put mandate, which states that a child must stay in her current educational placement when a due process hearing request has been filed appealing a determination of placement by a school district.¹⁸⁴ Outside of the stay put analysis, little case law discusses the change of placement concept as referenced in the ten-day rule and its application to cumulative removals.¹⁸⁵

177. See *Douglas v. Dist. of Columbia*, 4 F. Supp. 3d 1, 4 n.3 (D.D.C. 2013) (“The Court does not find that transferring a student from his neighborhood school to a school several miles away necessarily constitutes a change in educational placement.”).

178. See *R.B. ex rel. Parent*, 762 F. Supp. 2d at 760; see also *George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F. Supp. 2d 546, 500 (citing *Michael C. v. Radnor Twp. Sch. Dist.*, Civ. A. No. 98-4690, 1999 WL 89675, at *3 n.10 (E.D. Pa. Feb. 4, 1999)); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 680 (4th Cir. 2007); *A.W. v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004).

179. See *R.B. ex rel. Parent*, 762 F. Supp. 2d at 758.

180. *Honig v. Doe*, 484 U.S. 305, 325–26 n.8 (1988) (noting that the DOE “correctly determined that a suspension in excess of 10 days does constitute a . . . ‘change in placement’”).

181. *R.B. ex rel. Parent*, 762 F. Supp. 2d at 757 n.78 (citing *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 203 (S.D.N.Y. 1988)) (finding that graduation constitutes a change of placement).

182. See *D.M. v. N.J. Dep’t of Educ.*, 801 F.3d 205 (3d Cir. 2015).

183. See *R.B. ex rel. Parent*, 762 F. Supp. 2d at 757 (citing *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996)); see also *Concerned Parents & Citizens v. N.Y.C. Bd. of Educ.*, 629 F.2d 751, 751 (2d Cir. 1980) (holding that the transfer of handicapped children in special education classes at one school to substantially similar, but less innovative, classes at other schools within the same district did not constitute a “change in placement” sufficient to trigger prior notice and hearing requirements of EAHCA of 1975).

184. See Part IV.A.1.b, *infra*.

185. See, e.g., *Grine v. Sylvania Sch. Bd. of Educ.*, No. L-04-1137, 2004 WL 2924335, at *5 (Ohio Ct. App. 2004) (noting the lack of case law interpreting the regulation in a way that limits “removals” to “suspensions” and finding a pattern of removal constituting a change of placement where a student was “dismissed” and sent home from school for behavioral issues on multiple occasions); *Baer v. Klagholz*, 771 A.2d 603, 628 (N.J. Super. App. Div. 2001) (holding that IDEA is not violated where parents are not involved in the decision as to whether a series of short-term removals constitutes a pattern creating a change of placement); *M.N. v. Rolla Pub. Sch. Dist.* 31, No. 2:11-cv-041732012, WL 2049818, at *8 (W.D. Mo. 2012) (determining that a series of suspensions did not constitute a “pattern” under C.F.R. section 300.536 when the suspensions were “short in duration, infrequent, and in the aggregate were barely greater than the ten day minimum”).

c. Who Can Change a Student's Placement?

An important piece of the change of placement discussion is determining who has the authority to change the placement of a student with a disability. IDEA contains language suggesting that districts can impose a change of placement on students,¹⁸⁶ yet procedural protections—including notice requirements,¹⁸⁷ the IEP team decision-making process,¹⁸⁸ and limitations under the ten-day rule and corresponding manifestation determination review procedures limit school districts' autonomy. The statutory and regulatory procedures, however, are unclear.

What is the parent's role in determining the placement of the child? IDEA requires parental consent for evaluations and an initial educational placement,¹⁸⁹ but it seems to stop short of requiring parental consent for a change in educational placement beyond the initial IEP¹⁹⁰ or if an action is pending under IDEA.¹⁹¹ Only Ohio¹⁹² and Kansas¹⁹³ have state laws requiring that a school district obtain parental consent before changing a student's placement.¹⁹⁴ In other states, schools appear to have the right to unilaterally change the placement of a student with a disability subject to the IEP team decision-making process¹⁹⁵ and the requirement to provide prior written notice to the parent within a reasonable time of a decision to change the student's placement.¹⁹⁶ However, if

186. 20 U.S.C. § 1415(k)(1)(A) (2012).

187. 20 U.S.C. § 1415(b)(3) (2012).

188. 20 U.S.C. § 1414(e) (2012).

189. 20 U.S.C. § 1414(a)(1)(D) (2012).

190. *Id.* (requiring informed parental consent for initial evaluations and before providing special education and related services to the child); 20 U.S.C. § 1414(c)(3) (requiring parental consent for any reevaluation).

191. 20 U.S.C. § 1415(4)(a) (2012).

192. OHIO ADMIN. CODE § 3301-51-05(C)(5)(b) (requiring informed parental consent before making a change of placement), <https://education.ohio.gov/Topics/Special-Education/Federal-and-State-Requirements/Procedures-and-Guidance/Procedural-Safeguards/Parental-Consent-for-Services-and-Change-in-Placem> [<https://perma.cc/FW7S-TJT6>]. If the school district cannot obtain parental consent, it may request a due process hearing or mediation in order to obtain agreement or a ruling that the placement may be changed. *Id.*

193. KAN. STAT. ANN. § 72-988(b)(6) (establishing that the parent has a right to “consent or refuse to consent to any substantial change in placement unless a change in placement of their child is ordered pursuant to KAN. STAT. ANN. § 72-991a, or the agency can demonstrate that it has taken reasonable measures to obtain parental consent to a change in placement or services, and the child's parent has failed to respond”).

194. *See* 20 U.S.C. § 1414(a)(1)(D) (2012) (requiring informed parental consent for initial evaluations and before providing special education and related services to the child); 20 U.S.C. § 1414(c)(3) (2012) (requiring parental consent for any reevaluation).

195. 20 U.S.C. § 1415(b)(1) (2012).

196. *See* 20 U.S.C. § 1415(b)(3) (2012); 34 C.F.R. § 300.503(a) (implementing regulations). IDEA does not explicitly define what would constitute a “reasonable time.” *See, e.g.*, Letter to Helmuth, 16 EHRLR 550 (1990) (“[S]uch notice must be given to parents at a reasonable time before the agency implements that action, but after the agency's decision on the proposal or refusal has been made.”); Letter to Chandler, 112 LRP 2763 (2012) (“There is no requirement in the [IDEA] regarding the point at which the written notice must be provided as long as it is provided a

the change of placement is proposed by the school district for purposes of disciplinary removal, the school district must hold a manifestation determination review.¹⁹⁷

ii. *The Manifestation of the Disability Doctrine*

The manifestation determination review (MDR) is the process that relevant members of a student’s IEP team use to decide whether a student’s disability caused the behaviors giving rise to a long-term disciplinary removal or change of placement.¹⁹⁸ The MDR is a procedure that safeguards access to education for students with disabilities that affect emotional and behavioral functioning.¹⁹⁹ Recognition that some forms of disability affect social interactions, behaviors, and emotional control necessarily means that, in order to provide these students access to a public education in the least restrictive environment, there must be a limit on the disciplinary autonomy of public schools.

This MDR process must occur within “10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.”²⁰⁰ If the behaviors are caused by the student’s disability, typical disciplinary approaches may be counter-productive, a violation of the FAPE requirements of IDEA, and even discriminatory.²⁰¹

For Jimmy, repeated disciplinary removals failed to support his functional development, hindered his ability to build emotional and social skills, and limited his access to education. In fact, according to outside experts brought in to consult on his case, including a psychiatrist and a board-certified behavior analyst, the repeated removals actually exacerbated the problem by reinforcing Jimmy’s problematic behaviors.

reasonable time *before* the [local educational agency] actually implements the action. This provides parents, in the case of a proposal or refusal to take action, a reasonable time to fully consider the change and respond to the action before it is implemented.”).

197. 20 U.S.C. § 1415(k)(1)(E) (2012).

198. *Id.*

199. *See Doe by Gonzales v. Maher*, 793 F.2d 1470 (9th Cir. 1986). The court agreed that EAHCA (the precursor to IDEA) “prohibit[ed] the expulsion of a handicapped student for misbehavior that is a manifestation of his handicap.” *Id.* at 1481. Although the act did not directly state this proposition, the court made the inference based on the law’s history and purpose. (“The EAHCA was enacted in response to Congress’s recognition that countless handicapped children were being denied a meaningful public education [W]e believe[] that a handicapped child’s unique needs and his corresponding handicap-related problems cannot form the basis for denying the educational services that the EAHCA was designed to foster. . . . Congress, having included seriously emotionally disturbed children within the EAHCA’s definition of handicapped children, must have intended that their handicap-related misbehavior should not be a cause for cessation of educational services.”). *Id.* at 1481–82.

200. 20 U.S.C. § 1415(k)(1)(E) (2012).

201. *See* Katherine Reynolds Lewis, *Why Schools Over-Discipline Children with Disabilities*, THE ATLANTIC (July 24, 2015), <http://www.theatlantic.com/education/archive/2015/07/school-discipline-children-disabilities/399563/> [<https://perma.cc/FWB6-F5CJ>].

In theory, the MDR is critical in preventing this type of discrimination and resulting exclusion because it requires the IEP team to determine the causes of the problematic behaviors and, specifically, whether there is a link to the student's disability. If disruptive behaviors are unrelated to the student's disability, the school can impose discipline within the limits of other provisions of IDEA, including FAPE and the obligation to provide ongoing access to special education services during long-term exclusions.²⁰² If the IEP team determines that the student's behavior was caused by her disability, the school district cannot suspend or expel the student for the behavior, unless the drugs, weapons, or serious bodily injury exception applies.²⁰³ Instead, the school must complete a functional behavioral assessment (FBA)²⁰⁴ and develop a behavior intervention plan (BIP)²⁰⁵ to address the student's problematic behaviors. If the parents and the school district disagree about whether the student's behavior was caused by the disability, the parents may challenge the school district's determination through an expedited due process complaint.²⁰⁶

Shortly after IDEA was first implemented as EAHCA, the manifestation of the disability doctrine emerged in *Doe v. Koger*, which involved a legal challenge to the expulsion of a student with a disability.²⁰⁷ The court held that the school could not expel students with disabilities when the students' disruptive conduct was caused by the student's disability.²⁰⁸ Several other courts after *Doe v. Koger* grappled with the question of whether to restrict schools from removing students for behaviors caused by their disability, with varying results, leading to the United States Supreme Court decision in *Honig v. Doe*.²⁰⁹

202. 20 U.S.C. § 1415(k)(1)(D)(i)–(ii) (2012).

203. 20 U.S.C. § 1415(k)(1)(G) (2012).

204. 20 U.S.C. § 1415(k)(1)(F)(i)–(iii) (2012). Perry A. Zirkel defines an FBA as “a systematic process of identifying the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors.” Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. R. 175, 175 (2011).

205. 20 U.S.C. §§ 1415(k)(1)(F)(i)–(iii) (2012). Zirkel defines a BIP as “a concrete plan of action for reducing problem behaviors, dictated by the particular needs of the student exhibiting the behaviors.” Zirkel, *supra* note 204.

206. 20 U.S.C. § 1415(k)(3) (2012).

207. *Doe v. Koger*, 480 F. Supp. 225, 228 (N.D. Ind. 1979) (holding that schools cannot expel a student with a disability for disruptive conduct caused by the disability).

208. *Id.*

209. ALLAN G. OSBORNE & CHARLES J. RUSSO, DISCIPLINE IN SPECIAL EDUCATION, 46–47 (2009). The authors reference *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1982), *abrogated by Honig v. Doe*, 484 U.S. 305 (1988) (holding that a specialized and knowledgeable group of people must make the manifestation determination decision and that even if they found no manifestation, the school must still provide educational services to the expelled student). The authors also reference *Sch. Bd. of Prince William v. Malone*, 762 F.2d 1210 (4th Cir. 1985) (holding that a more attenuated connection between the student's disability and the misconduct—in this case, poor self-esteem caused by the student's learning disability that resulted in the student partaking in drug deals for peer approval, without being able to understand the long-term consequences of his actions—was sufficient to show that the behavior was a manifestation of the student's disability).

An MDR provision was added to IDEA with its 1997 reauthorization.²¹⁰ This 1997 MDR provision provided that the behaviors were a manifestation of the student’s disability “if the student’s disability impaired his or her ability to understand the impact and consequences of the behavior and if the disability impaired the student’s ability to control the behavior.”²¹¹ The provision further required consideration of whether the services being provided to the student under the IEP were appropriate.²¹²

The MDR provision was amended in 2004, limiting the scope of review by the IEP team.²¹³ Under current law, the MDR process requires that relevant members of the IEP team:

review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a *direct and substantial relationship* to, the child’s disability;

or

(II) if the conduct in question was the direct result of the local educational agency’s *failure to implement the IEP*.²¹⁴

The MDR process now requires that the team determine that the behavior had a “direct and substantial relationship” to the student’s disability rather than that the disability “impaired [the student’s] ability to understand the impact and consequences” of the behavior or her ability to “control the behavior” as required in the initial 1997 provision. The 2004 provision also merely requires an inquiry about whether the school district is following the IEP without review of whether the IEP services were appropriate as required under the earlier version.²¹⁵ These 2004 amendments clearly make it harder for an IEP team to determine that a student’s behavior was a manifestation of the disability.²¹⁶

210. See Osborne, *supra* note 137, at 529–30 (citing 20 U.S.C. § 1415(k)(4) (2001) and 34 C.F.R. § 300.523 (1999) (implementing regulations)).

211. *Id.* (citing 20 U.S.C. § 1415(k)(4)(c)(i) (2001)).

212. *Id.* (citing 34 C.F.R. § 300.523(c)(2)(i) (1999)).

213. See Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. LAW REP. 445, 445 n.10 (2007) (citing 20 U.S.C.A. § 1401 (2005); 71 Fed. Reg. 46,539 (Aug. 14, 2006) (to be codified at 34 C.F.R. § 300) (providing a summary of the changes to disciplinary provisions of the IDEA with the 2004 reauthorization and corresponding 2006 regulations)).

214. 20 U.S.C. § 1415(k)(1)(E)(i) (2012) (emphasis added).

215. Compare 20 U.S.C. § 1415(k)(1)(E) (2012) with 20 U.S.C. § 1415(k)(4)(C) (2001).

216. In developing the 2004 IDEA amendments, the Conference Committee explained that the change in the MDR inquiry would allow schools to determine whether “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability, and was not an attenuated association, such as low self-esteem, to the child’s disability.” *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,720 (Aug. 14, 2006) (to be codified at 34 C.F.R. § 300) (internal citation and quotation marks omitted).

According to special education scholar Mark Weber, “[t]he obvious goal of the statutory change is to diminish the number of cases in which the school district must find that the behavior was a manifestation of the disability”²¹⁷ Perry A. Zirkel describes the MDR process as a compromise between the “‘zero reject’ for students with disabilities and ‘zero tolerance’ for safety-threatening behavior” and concludes that the 2004 amendments “adjusted it toward the zero tolerance direction.”²¹⁸ The DOE OSEP acknowledged as much in related guidance, which states in part, “The changes in the law would make it less difficult for review team members to conclude that the behavior in question is not a manifestation of the child’s disability, enabling school personnel to apply disciplinary sanctions in more cases involving children with disabilities.”²¹⁹

iii. The Procedural Safeguards

The MDR process and other provisions of the IDEA are enforced through procedural safeguards. Procedural protections for students and their parents are a core component of the IDEA.²²⁰ They ensure that parents and students are aware of their rights under the law, receive notice of significant action and inaction by school districts, and have procedures for challenging or appealing school district decisions and actions.²²¹ These IDEA-based protections, coupled with basic due process rights extended to all public school students facing disciplinary removal, offer some limited recourse to students with behavioral health conditions facing disciplinary removals.

All students, regardless of disability status, have the right to due process in disciplinary removal actions.²²² In *Goss v. Lopez*, the United States Supreme Court recognized the significance of access to an education in holding that procedural protections are required to protect the fundamental rights of children to access a publicly offered education.²²³ As such, in cases of short-term disciplinary removals (suspensions), students have the right to a fair process, which includes the basic due process rights of an informal hearing, notice of the allegations against them, and the ability to rebut evidence and present their case.²²⁴

In cases involving long-term disciplinary removals, typically referred to as expulsions, students have heightened due process rights, including a hearing

217. Weber, *supra* note 55, at 36.

218. Perry A. Zirkel, *Manifestation Determinations Under the New Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378, 378 (2010).

219. *Id.* at 379 (citing Notice of Proposed Rulemaking, 70 Fed. Reg. 35,823 (proposed June 21, 2005)).

220. *See Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (noting that the procedural due process protections included by Congress in IDEA are critical to effectuating the goals of the statute).

221. *See* 20 U.S.C. § 1415(k) (2012).

222. *Goss v. Lopez*, 419 U.S. 565 (1975).

223. *Id.* at 576.

224. *See id.* at 581.

before an impartial hearing officer prior to the imposition of the long-term removal, the right to present witnesses and evidence, the ability to cross-examine witnesses, etc.²²⁵ Students with disabilities maintain these due process rights in addition to the enhanced procedural protections set forth in IDEA. The enhanced rights presented in IDEA are available to children not yet identified as eligible for special education services, or not yet on an IEP, when the school district has knowledge that the student has a disability.²²⁶

For students with disabilities, one critical element of the IDEA procedural safeguards is prior written notice, a requirement that school districts provide parents detailed notice of any proposed action or refusal to take certain action, such as to initiate or change the identification, evaluation, educational placement, or FAPE provision.²²⁷ The prior written notice must include a description of the proposed or refused action of the district, an explanation for said action or inaction, a statement of the parents’ procedural protections under the law, resources for parents to help them understand their procedural protections, a description of the other options the district considered, and a description of the other factors relevant to the district’s decision.²²⁸ The notice must also be provided within a reasonable time prior to the proposed action.²²⁹ This notice requirement is critically important in informing parents and students of a school district’s intentions and also of their appeal rights.

The procedural safeguards section of IDEA also outlines the procedures for appeals and challenges to a school district’s actions or proposed actions, including provisions for mediation, state complaints, and due process hearing requests.²³⁰ These dispute resolution procedures can be utilized when a school inappropriately excludes a child with behavioral health conditions. The parent of a child with a disability who disagrees with any decision regarding placement or

225. See *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (clarifying the application of *Goss* to expulsion hearings, stating, “*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses”); *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (listing the following minimum procedural safeguards for students during discipline hearings: “(1) The student must be advised of the charges against him; (2) the student must be informed of the nature of the evidence against him; (3) the student must be given an opportunity to be heard in his own defense; (4) the student must not be punished except on the basis of substantial evidence; (5) the student must be permitted the assistance of a lawyer in major disciplinary hearings; (6) the student must be permitted to confront and to cross-examine the witnesses against him; and (7) the student has the right to an impartial tribunal”).

226. 20 U.S.C. § 1415(k)(5) (2012) (noting that a school district has knowledge if the parent of the child has expressed concern in writing that the child is in need of special education and related services, the parent of the child has requested a special education evaluation for the child, or a teacher or other school personnel has expressed specific concerns about a child’s pattern of behavior).

227. 20 U.S.C. § 1415(b)(3) (2012).

228. 20 U.S.C. § 1415(c) (2012).

229. Letter to Helmuth, *supra* note 196; Letter to Chandler, *supra* note 196.

230. 20 U.S.C. § 1415 (2012)

the manifestation determination may request a due process hearing.²³¹ When a parent challenges an MDR and disciplinary change of placement, an expedited due process hearing process is triggered.²³²

While an appeal or due process proceeding challenging placement is pending, the student is generally entitled to “stay put” in her current educational placement or an interim educational placement under IDEA.²³³ However, in cases challenging an MDR determination and disciplinary removal, this stay put rule does not apply.²³⁴ Under IDEA, during an appeal of an MDR determination and related disciplinary removal, the student must remain in the interim alternative educational setting pending the hearing officer decision or the expiration of the disciplinary removal.²³⁵ This exception to the stay put provision in disciplinary exclusion cases makes the expedited nature of the appeals process vital. This provision also means that a student challenging a disciplinary removal may be excluded from school throughout the pendency of the expedited due process proceedings.

iv. IDEA’s Procedural Safeguards Fail to Provide Adequate Protections to Limit Excessive Disciplinary Removals of Students with Disabilities

While the IDEA contains provisions and procedures to protect students with disabilities from long-term removals for behaviors caused by their disabilities, ambiguities emerge when these provisions are interpreted and applied to real student situations, leaving students with behavioral health conditions to face life-altering disciplinary exclusion without meaningful recourse. Further, inconsistent implementation by hearing officers, judges, and state departments of education only add to the confusion and provide school districts with the latitude to impose improper removals with little consequence. The result is inadequate protection for students with disabilities like Jimmy and a system of disproportionate disciplinary exclusions of students with behavioral health conditions and students of color with behavioral health conditions.

Section 1415 of IDEA sets forth procedural safeguards to protect the rights and interests of students with disabilities and their parents.²³⁶ It contains fifteen subparts, many quite lengthy. Some of the safeguards are buried deep in 1415, causing potential confusion in the relationship among the sections and issues in

231. 20 U.S.C. § 1415(k)(3) (2012).

232. *Id.*

233. The “stay put” provision “directs that a disabled child ‘shall remain in [his or her] then current educational placement’ pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree.” *Honig v. Doe*, 484 U.S. 305, 308 (1988) (internal citation omitted).

234. See OSBORNE & RUSSO, *supra* note 209, at 57 (discussing changes to IDEA provision 20 U.S.C. § 1415(k)(4) and regulation 34 C.F.R. § 300.533, giving schools “greater freedom to remove disruptive students with disabilities from classes when their behavior was unrelated to their disabilities”).

235. See 20 U.S.C. § 1415(k)(4) (2012); 34 C.F.R. § 300.530(d)(1)(i) (2015).

236. 20 U.S.C. § 1415 (2012).

implementation.²³⁷ For example, section 1415(k), which contains the most expansive protections in disciplinary proceedings, is found in the eleventh subpart of this statute after the appeal and mediation rights provisions.²³⁸ The stay put provision is found in section 1415(j); however, an exception to stay put that applies in cases of disciplinary removal is in section 1415(k)(4).²³⁹ This division creates some confusion regarding the impact of the stay put application in disciplinary removal cases. While interpreting complex and dense language may be a common barrier when reviewing state and federal statutes generally, special education laws are often interpreted by parents and educators without a law license or training in statutory interpretation. Misunderstandings and compliance issues are, therefore, common. Further, special education law is structured to allow for parents to advocate on behalf of their children without the assistance of counsel,²⁴⁰ making it all the more critical that the law be clear and concise in its requirements.

While IDEA sets forth a protocol for the MDR process, parents and school district staff do not always agree about whether the behaviors of the student are caused by the child’s disability or the district’s failure to properly implement the IEP.²⁴¹ As might be predicted, a school seeking a child’s removal has an incentive to determine that the child’s behavior is not a manifestation of the disability and that staff are following the IEP.²⁴² Remember, the MDR process is only invoked when the school district has decided to remove the student from school for more than ten school days. If a district has decided on a long-term removal, the district is likely interested in implementing the removal. Similarly, as parents and advocates of students with disabilities understand, a determination that the student’s behaviors were a manifestation of the disability can halt harmful long-term disciplinary removals and ensure access to an education with specialized instruction and related services and supports. This creates an incentive for parent and student advocates to argue that student behaviors were a manifestation of the disability. Because of these conflicting goals in an MDR, disagreements are common.

In anticipation of these disagreements and in acknowledgement that long-term removals are a serious matter for a child, IDEA provides parents with a method to challenge or appeal the school district’s position in the MDR process in an expedited manner.²⁴³ If a parent disagrees with an MDR determination, the parent can file an expedited hearing request, also known as a due process

237. *Id.*

238. 20 U.S.C. §1415(k) (2012).

239. 20 U.S.C. §1415(j)–(k) (2012).

240. See Erin Phillips, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1830 (2008) (noting IDEA’s high expectation of parent knowledge and capacity).

241. See 20 U.S.C. § 1415(k)(3) (2012).

242. See Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 62 (2000).

243. See 20 U.S.C. §§ 1415(k)(3), (4)(B) (2012).

complaint or request for a due process hearing, and request an expedited due process hearing challenging the MDR determination.²⁴⁴ However, though intended to result in fast resolution, the procedures don't really prevent long-term removals even under the "expedited" timelines.

Under the MDR provisions, a school district must hold an MDR within ten days of its decision to change a student's placement.²⁴⁵ If the parent requests an expedited due process hearing, that hearing must take place within twenty days and result in a decision ten days later.²⁴⁶ Given the timelines associated with the MDR process, this could mean that a student faces significant removals from school—as many as forty school days—assuming her parents are prepared to file an expedited due process complaint on the day of the MDR meeting. When a student like Jimmy experiences a series of removals for less than ten days each, the timeline gets more confusing and problematic, and the protections for students with behavioral health conditions fall short. The problem with the MDR process can best be illustrated with a series of case scenarios reflecting how the MDR process might play out in inconsistent ways.

Case scenario #1: School district suspends a student with a disability for twenty days. The district provides prior written notice to the parent such that the parent understands what is being proposed and what her rights are. The MDR meeting is scheduled on the tenth day of the disciplinary removal. If the student's behavior is determined to be a manifestation of her disability, the student would return to school on day eleven and would experience a removal of ten days.

Case scenario #2: A student with a disability is suspended for ten days for a violation of the school's code of conduct. On day five of the suspension, after an investigation and pressure from the parents of other students involved in the incident, the school informs the parents of the suspended student that it is seeking an expulsion. According to the plain language of the IDEA's discipline procedures, the district has ten days from its decision to change the student's placement to hold an MDR meeting.²⁴⁷ In this case scenario, an MDR meeting must arguably be held no later than the fifteenth day of the student's removal. If the MDR is held on the fifteenth day and the team determines that the student's behavior was caused by her disability, the student would return to school on day sixteen. This student would experience fifteen days of removal, more than the ten days provided for in *Honig* and the IDEA for behaviors caused by her disability. Of course, an argument can be made that the MDR meeting must be held within ten days of the first day of suspension. However, districts refusing to acknowledge this interpretation of IDEA must be challenged through the arduous

244. *Id.*

245. 20 U.S.C. § 1415(k)(1)(E)(i) (2012).

246. 20 U.S.C. § 1415(k)(4)(B) (2012).

247. 20 U.S.C. § 1415(k)(1)(E)(i) (2012).

and time-consuming due process system while the student continues to be subject to removal.

Case scenario #3: Jimmy’s case. In Jimmy’s case, the school district repeatedly suspended Jimmy for periods of less than ten days. According to current law, at a certain point in this series of removals, the district could have determined that it changed Jimmy’s placement. Once the district determines that its actions have resulted in a change of placement due to the series of removals totaling more than ten days, the district would schedule an MDR meeting. If the district suspends Jimmy for five days and then decides that it has changed his placement due to the pattern of removals, the MDR meeting may take place ten days later, after Jimmy has served his five-day suspension and is back in school. If the behavior was determined to be a manifestation of Jimmy’s disability, the effect would be meaningless because Jimmy would have already served the five-day removal. This pattern could repeat over and over until, as in Jimmy’s case, eighty-four days of suspension have occurred.

All of these case scenarios would be further complicated if the members of the IEP team disagreed about whether the student’s behaviors were caused by her disabilities. In Jimmy’s case, while his mother disagreed with the school district’s decision that his behaviors were not a manifestation of his disability, Jimmy was already back in school at the time of the MDR. An expedited due process hearing request could not stop the short-term removals, although it could result in corrective action retrospectively, such as compensatory education²⁴⁸ and correction of the disciplinary record. In Case #1, if there had been a disagreement about the manifestation determination and the parents had filed an expedited due process complaint, the hearing officer’s decision would be due long after the student’s removal had ended. In Case #2, involving a student initially suspended for five days but then faced with possible expulsion, a due process complaint could result in a decision to reduce the amount of time that student #2 would spend out of school but not before the student was out of school for forty-five days.

Even with compelling facts and strong legal claims, parents challenging manifestation determination review decisions through expedited due process complaints face a difficult road on several fronts. It is difficult for parents to anticipate a school district’s actions, especially when prior written notice is often lacking or non-existent, thus leaving parents with no warning of what to expect at MDR meetings and of what their procedural rights are.²⁴⁹ Though expedited

248. Compensatory education services are supplemental educational services awarded to a student to compensate the student for a school district’s violation of the IDEA. Generally, compensatory education services are intended to put the student in the position she would have been in if the district had complied with IDEA and provided FAPE. *See generally* Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 282 (2013).

249. In a case I worked on in Ohio several years ago, I learned that the practice for special education students at one high school involved merely providing the parent with notice of a

due process complaints are meant to protect student access to school, their timeline can be cumbersome for parents who must quickly find attorneys and experts, file complaints, and prepare for hearings. Schools are at a clear advantage in these types of proceedings because they have attorneys on staff or contract, a range of experts on their pay roll, relationships with hearing officers, and a better understanding of the process.²⁵⁰ In addition, deference is given to school district MDR decisions, and the stay put mandate can be challenging to invoke in disciplinary cases. In a 2009 analysis of MDR cases since the 2004 amendments, Zirkel found that sixty-five percent of the fourteen cases he reviewed resulted in a determination that the school district was correct in finding no manifestation of the student's disability.²⁵¹ He concluded that these cases hinged on factors such as "burden of proof, the relative evidentiary weight of district witnesses and parent experts (usually in the district's favor), and the impulsive versus deliberate nature of the student's actions."²⁵² These findings are not surprising given that school districts have greater resources to finance litigation and access expert witnesses.²⁵³

B. Protection Under Section 504 and Title II of the ADA

While this article primarily addresses the legal protections and limitations on disciplinary removals under IDEA, it is necessary to mention the parallel protections provided to students with disabilities under Title II of the ADA and Section 504 of the Rehabilitation Act. Both the ADA and Section 504 offer supplemental protections to students identified with disabilities under IDEA and extend rights to students with disabilities who are not found eligible for IDEA special education services. This section briefly outlines the protections set forth in the ADA and Section 504 and explores the relationship of these protections and their enforcement to IDEA and its enforcement mechanisms.

"discipline meeting." At the meeting, the incident was discussed and a decision was made about whether to invoke a long-term disciplinary removal. There was no prior written notice that an expulsion or change of placement was being considered or recommended by the school district or that a manifestation determination review was going to occur. If this parent had not already retained counsel, this process would have blindsided her and she would not have been able to timely respond with an expedited due process hearing request.

250. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 67 (2005) (Ginsburg, J., dissenting) (arguing in support of placing the burden of persuasion on school districts in due process hearings and noting, "In this setting, 'the party with the "bigger guns" also has better access to information, greater expertise, and an affirmative obligation to provide the contested services'" (quoting *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 458 (4th Cir. 2004) (Luttig, J., dissenting))); see also Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 453 (2012) ("School districts . . . typically contract with a law firm or lawyer that specializes in education law.").

251. Zirkel, *supra* note 213, at 382.

252. *Id.*

253. Chopp, *supra* note 250, at 451–57.

Section 504 of the Rehabilitation Act, the first civil rights law offering protections to individuals with disabilities,²⁵⁴ was passed into law in 1973.²⁵⁵ Section 504, modeled after Title VI of the Civil Rights Act of 1964, was intended “to extend the reach of federal antidiscrimination law beyond the area of education and to provide more comprehensive protection in the education area for individuals with disabilities.”²⁵⁶ Section 504 protects individuals with disabilities from discrimination, exclusion, or denial of benefits from federally funded or state or local government-run programs or activities.²⁵⁷ Public schools are specifically covered under Section 504.²⁵⁸ Private schools receiving federal operational funding are also subject to the restrictions set forth under Section 504.²⁵⁹ Section 504 ensures that students with disabilities receive a FAPE and sufficient aids and services designed to meet the individualized needs of the student with a disability.²⁶⁰ With language closely mirroring the wording of the IDEA, Section 504 provides that students with a 504 plan have the right to services and supports parallel to those more particularly outlined in the IDEA. Section 504 offers some enhanced protections for students with disabilities including the right to equal access to educational programming and activities and protection from discrimination.²⁶¹

The ADA was passed into law in 1990 in an attempt by Congress to expand protections for persons with disabilities to private entities, employers, and additional public entities.²⁶² In finding that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, *education*, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,”²⁶³

254. See Mitchell L. Yell, David Rodgers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It’s Been!*, 19 REMEDIAL & SPECIAL EDUC. 219, 223 (1998).

255. 29 U.S.C. § 794 (2012).

256. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT*, 10–11 (2005).

257. The Rehabilitation Act of 1973, Pub. L. 93-112, *amended by* the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794; 29 U.S.C. § 794(a)–(b) (2014).

258. 29 U.S.C. § 794(b)(2)(B) (2014).

259. 34 C.F.R. § 104.39 (2014).

260. 34 C.F.R. § 104.33(a) (2011).

261. See 34 C.F.R. § 104.33(b) (2016); *Mark H. v. Lemahieu*, 513 F.3d 922, 930 (9th Cir. 2008) (“Section 504 establishes an implied private right of action allowing victims of prohibited discrimination, exclusion, or denial of benefits to seek ‘the full panoply of remedies, including equitable relief and [compensatory] damages.’”); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010) (“A violation of one of the regulations implementing § 504 may support a claim for damages if the violation denied the plaintiff meaningful access to a public benefit, and the defendant organization acted with deliberate indifference.”); *Lyons v. Smith*, 829 F. Supp. 414, 419 (D.D.C. 1993) (finding that “a hearing officer may order [a school district] to provide special education to a student designated as ‘otherwise qualified handicapped’ under § 504” in order to “prevent[] discrimination on the basis of handicap”).

262. COLKER, *supra* note 256, at 17–21, 64.

263. 42 U.S.C. § 12101(a)(3) (2012) (emphasis added).

Congress adopted Title II of the ADA, providing that no individual with a disability shall, by reason of her disability, be excluded from participation in or denied the benefits of services, programs, or activities by a public entity.²⁶⁴ Public schools are a public entity under Title II of the ADA.²⁶⁵ Title III of the ADA requires equal access and accommodations for students with disabilities by private elementary and nursery schools and other places of public accommodation.²⁶⁶

The ADA Amendments Act of 2008 clarified and broadened the definition of disability applicable to both Section 504 and the ADA.²⁶⁷ Under both, a disability is a physical or mental impairment that substantially limits one or more major life activities.²⁶⁸ A major life activity can include, but is not limited to, learning, reading, thinking, concentrating, communicating, working, seeing, hearing, bending, caring for oneself, breathing, and major bodily functions.²⁶⁹ To qualify for accommodations under the ADA or Section 504, there must be a record of the impairment or a person must be regarded as having such impairment.²⁷⁰ In passing the ADA Amendments Act, Congress made clear that it intended for the definition of disability to be interpreted broadly, stating that the definition of disability “shall be construed in favor of broad coverage of individuals.”²⁷¹ The ADA Amendments Act thus extended enhanced protections to students with disabilities by specifically including several major life activities applicable to students—reading, communicating, concentrating, writing, hearing, speaking, and learning—and by requiring consideration of the impairment without treatment and mitigating factors such as medication, tutoring, or hearing aids.²⁷²

264. See 42 U.S.C. §12132 (2012); 42 U.S.C. § 12131(1) (2012) (defining public entity as state or local government or department or agency thereof).

265. See 42 U.S.C. § 12131(1)(B) (2012).

266. See 42 U.S.C. § 12181 (2012); 28 C.F.R. § 36.104 (2013) (defining public accommodation to include “a nursery, elementary, secondary, undergraduate, or postgraduate private school or other place of education”).

267. Pub. L. No. 110-325 (2008).

268. See 29 U.S.C. § 705(9)(B) (2011); 34 C.F.R. § 104.3(j) (2011) (section 504); 42 U.S.C.A. § 12102(2) (2011) (ADA).

269. 42 U.S.C. § 12102(2) (2009).

270. See 29 U.S.C. § 705(9)(B) (2011); 34 C.F.R. § 104.3(j) (2011) (section 504); 42 U.S.C. § 12102(2) (2011) (ADA).

271. 122 Stat. 3553 § 2(b)(2)–(5) (2008). Congress passed the ADA Amendments Act to overturn holdings by the United States Supreme Court which interpreted the definition of disability narrowly and required consideration of how mitigating circumstances affected the impairment. See *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

272. See 42 U.S.C. §§ 12102(2)(A), 12102(4)(E)(i); see also Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, ABA SECTION OF CHILDREN’S RIGHTS LITIGATION (May 23, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-section-504-ada-idea.html> [<https://perma.cc/D477-6TXB>].

Section 504 also extends protections to students with disabilities facing a change of placement or long-term disciplinary removal of more than ten days.²⁷³ Section 504 requires a “comprehensive evaluation by appropriate, qualified personnel before any ‘significant change of placement.’”²⁷⁴ This evaluation must include an analysis of whether the behaviors were caused by the disability when a change of placement is being proposed. This evaluation is thus the Section 504 MDR process, parallel to IDEA and requiring a review by a group of people knowledgeable about the student, the meaning of the evaluation data, and placement options.²⁷⁵ While the ADA does not specifically reference limitations on disciplinary removals, it does limit exclusionary practices when they are discriminatory or when they result in loss of access to programming because of a student’s disability.²⁷⁶ The “overriding prohibition against disability-based discrimination in [Section 504 and the ADA] . . . should preclude imposition of any punitive discipline for conduct that is a manifestation of disability.”²⁷⁷ These protections should complement those provided for in the IDEA.

V.

REMEDIES AND OBSTACLES

Under the IDEA, Section 504, and Title II of the ADA, students with disabilities are entitled to enhanced protections from long-term and discriminatory disciplinary removals. When disciplinary removals occur in error or in violation of a student’s rights, parents and students have some enforcement and dispute resolution options available to them. These options include mediation and facilitated IEP meetings, formal due process hearing requests, complaints with state departments of education, and OCR, DOJ, and federal court proceedings.²⁷⁸ Unfortunately, these dispute resolution processes and associated available remedies have failed to effectively curb the tide of excessive disciplinary removals.

Remedies under IDEA’s administrative due process hearing procedures can include administrative orders for a return to school, a different educational

273. See Part IV.A.1.b, *supra*.

274. Eileen L. Ordovery, *Disciplinary Exclusion of Students with Disabilities*, 34 CLEARINGHOUSE REV. 50, 53, 53 n.26 (2000) (citing 34 C.F.R. §§ 300.104.35, 104.36 (1999)); see Memorandum from L.S. Daniels, Assistant Secretary for Civil Rights, to Office for Civil Rights Senior Staff (Oct. 28, 1988), reprinted in 307 EDUC. HANDICAPPED L. REP. 7 (1988) [hereinafter OCR Memo].

275. *But see* Centennial Sch. Dist. v. Phil L., *ex rel.* Matthew L., 559 F. Supp. 2d 634, 646 n.4 (E.D. Penn. 2008) (noting that a Section 504 hearing and an MDR are not necessarily interchangeable, since an MDR “is only ‘one means’ of satisfying Section 504’s procedural requirement” and “[i]t is possible that Section 504 may be satisfied by other means that offer less process than a[n] [MDR]”).

276. See Ordovery, *supra* note 274, at 53; 42 U.S.C.A. § 12101(a)(5) (citing history of intentional outright exclusion of persons with disabilities as basis for the ADA).

277. Ordovery, *supra* note 274, at 54.

278. *Id.* at 51–52, 52 n.20.

placement, increased special education and related services, expungement of disciplinary records, compensatory education, new evaluations and assessments, expert consultations and training, and new IEP meetings.²⁷⁹ Governmental agencies may order individual relief similar to the relief a student might obtain through an IDEA due process proceeding but may also include systemic corrective action when school districts engage in widespread discrimination and violations of federal laws.²⁸⁰ Section 504 and Title II can provide for similar individual relief as well as injunctive relief and monetary damages.²⁸¹ Though claims under Section 504 and the ADA could present promising alternatives to the stay put limitations under IDEA, access to the courts under Section 504 and the ADA is limited when IDEA is also relevant in a particular case.²⁸² Many courts have held IDEA's exhaustion requirements applicable to claims brought under Section 504 and the ADA, making access to remedies under these laws more difficult for students and unnecessarily restricting students to the more limited remedies available under IDEA.²⁸³ Furthermore, state and federal oversight agencies often fail to intervene in a timely manner or with the requisite force to effectively curb the exclusionary disciplinary methods used against students with behavioral health conditions. Limitations on relief under Section 504 and the ADA and from governmental oversight agencies present challenges to students and their advocates.

A. The Exhaustion Requirement

While IDEA provides procedural protections to students eligible for special education services, it also requires that parents use IDEA's administrative appeal procedures to challenge a school's failure to comply with IDEA, requiring exhaustion of administrative remedies before parents can bring special education claims in state or federal court.²⁸⁴ Parents must also exhaust IDEA administrative procedures before bringing many claims for special education-

279. Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY ISS. 349, 363-67 (2009).

280. See, e.g., U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL 1.2, §§ 301-05 (2015) (describing procedure of investigation and resolution).

281. See Part IV.B, *supra*.

282. 20 U.S.C. § 1415(l) (2012).

283. See, e.g., *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1068 (10th Cir. 2002) (holding that student who had never been assessed for IDEA eligibility was required to exhaust administrative remedies under IDEA for claims of educational deficiencies before seeking relief under ADA and Section 504); *Polera v. Bd. of Educ.*, 288 F.3d 478, 480-81 (2d Cir. 2002) (holding that parents who sued under ADA and Section 504 seeking monetary damages unavailable under IDEA, as well as injunctive and equitable relief clearly available under the IDEA, were required to exhaust IDEA's administrative remedies).

284. See 20 U.S.C. § 1415 (2012); *Fliess v. Washoe Cty. Sch. Dist.*, 90 Fed. Appx. 240, 241 (9th Cir. 2004) (holding that administrative exhaustion required when remedies available under IDEA).

related violations under Section 504, the ADA, and section 1983,²⁸⁵ though these laws do not themselves require exhaustion.²⁸⁶ Generally, the exhaustion requirement is imposed in cases involving claims related to the education of a student with a disability as defined by IDEA or when relief for the injury is available through IDEA’s administrative hearing procedures.²⁸⁷ When IDEA or FAPE claims are implicated in a case, exhaustion can only be avoided if the plaintiff can prove that the administrative complaint process would be futile.²⁸⁸ This requirement significantly limits the expanded protections for students under Section 504 and the ADA, restricting the power of parents and students to challenge disciplinary removals in a meaningful way.

While exhaustion has been applied in non-IDEA cases, it is clear that students with disabilities may have valid claims and may seek relief under other laws in some circumstances. IDEA specifically states:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities²⁸⁹

285. 42 U.S.C. § 1983. This statute provides a conduit for potential causes of action under a variety of other statutes and constitutional provisions but does not itself provide a substantive right to students. Wasserman, *supra* note 279, at 363–67.

286. *See* 20 U.S.C. § 1415 (l) (2012); *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 641–43 (6th Cir. 2008); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 1999) (requiring exhaustion before commencing suit under the ADA when remedies for the alleged violations are available under IDEA even when the specific relief requested is not available under the IDEA); *A.W. ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 548 F. Supp. 2d 219, 222 (E.D. Va. 2008) (explaining that claims for injunction and monetary relief related to a student’s suspension brought under Section 504 and the ADA only were dismissed because IDEA contains provisions for relief in cases of student suspension, even though IDEA does not allow for the specific relief sought in this case).

287. Wasserman, *supra* note 279, at 363–67 (listing relief available under IDEA as including declaratory judgments, orders for future conduct, compensatory education, reimbursement of tuition and other costs, rescission of diplomas, expunction of records, and payment for independent educational evaluations).

288. *See Honig v. Doe*, 484 U.S. 305, 327 (1988) (“[P]arents may bypass the administrative process where exhaustion would be futile or inadequate.”); *Coleman v. Newburgh Enlarged Cty. Sch. Dist.*, 503 F. 3d 198, 205 (2d Cir. 2007) (“To show futility, a plaintiff must demonstrate that ‘adequate remedies are not reasonably available’ or that ‘the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process.’”) (quoting *J.G. v. Bd. of Educ. Rochester Sch. Dist.*, 830 F.2d 444, 447 (2d Cir. 1987); *Heldman v. Sobol*, 962 F.2d 1487, 158 (2d Cir. 1992)); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002) (“Congress specified that exhaustion is not necessary if (1) it would be futile to resort to IDEA’s due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies.”).

289. 20 U.S.C. § 1415(l) (2012). The statute continues “except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the

There has been discord among the circuits of the United States Courts of Appeals about how far the exhaustion requirement should be applied in educationally related non-IDEA cases and IDEA cases. The Sixth Circuit has taken a broad view of exhaustion, holding that claims under Section 504 and the ADA, which are *educational* in nature, require exhaustion.²⁹⁰ The Second Circuit adopted a similarly broad view of exhaustion but with a relief-centered approach, holding that if relief for the type of grievance raised is available under IDEA, not the relief actually requested in the claim, exhaustion is required.²⁹¹ The Ninth Circuit utilized a relief-centered approach, outlining three scenarios requiring exhaustion when both “the genesis and the manifestations of the problem are educational[:]” 1) the remedy requested, or its functional equivalent, is available under IDEA; 2) a plaintiff seeks alteration of an IEP or a change of educational placement, and 3) a plaintiff seeks to enforce rights that arise as a result of a denial of a free appropriate public education.²⁹²

The United States Supreme Court resolved some of these exhaustion inconsistencies in *Fry v. Napoleon*, decided on February 22, 2017.²⁹³ In *Fry*, a unanimous Supreme Court determined that exhaustion of administrative remedies under the IDEA is only required in lawsuits seeking relief for the denial of a free appropriate public education.²⁹⁴ The *Fry* Court held that claims brought under statutes other than IDEA, such as Title II of the ADA and Section 504, which seek remedies that do not involve a denial of FAPE, do not require exhaustion of the IDEA administrative procedures.²⁹⁵ This decision may open the door to more creative claims for discrimination and retaliation under the ADA and Section 504 against school districts seeking disciplinary removals of students with disabilities.

action been brought under this sub-chapter.” *Id.* Therefore, exhaustion under IDEA may be required before bringing claims under Section 504 and the ADA.

290. *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016), *and vacated*, 137 S. Ct. 743 (2017). *Fry* involved claims in federal court under Section 504 and Title II of the ADA related to a school district policy prohibiting service dogs but permitting guide dogs and the refusal of the district to allow the student’s service dog to attend school with her. *Id.* The plaintiffs sought monetary damages only, a form of relief not available under IDEA, and indicated that they did not dispute the appropriateness of the IEP services. *Id.*

291. *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 496 Fed. Appx. 131, 133 (2d Cir. 2012) (requiring exhaustion though claims only filed under Section 504 and the ADA because claims of discriminatory placement resulting in teacher mistreatment could be addressed through relief available under IDEA).

292. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (quoting *Blanchard*, 420 F.3d at 921 (quoting *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996))).

293. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

294. *Id.* at 4.

295. *Id.*

Courts have permitted IDEA claims without exhaustion when they relate to systemic challenges under IDEA,²⁹⁶ when the suit seeks interim relief to enforce the stay put provisions of IDEA,²⁹⁷ and when it would be futile to pursue administrative remedies for the grievances alleged.²⁹⁸ As one court surmised:

Congress specified that exhaustion is not necessary if (1) it would be futile to resort to the IDEA’s due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is impossible that adequate relief can be obtained by pursuing administrative remedies.²⁹⁹

In the disciplinary context, exhaustion requirements can interfere with efforts to prevent harmful and life-altering school exclusion. For example, in *Coleman v. Newburg Enlarged City School District*, the Second Circuit held that exhaustion could not be avoided to enjoin the suspension of a student with a disability even though the administrative appeals process would not be completed until after the student’s graduation.³⁰⁰ The Court held that IDEA does not provide a right for students facing disciplinary removals to remain in school while challenging a suspension and manifestation determination review, finding that Congress in fact crafted an explicit exception to stay put in just such circumstances.³⁰¹ Because no such protection was intended by IDEA, the Court ruled that the District Court erred in ordering an injunction that allowed the student to return to school.³⁰²

Coleman demonstrates the problem of applying the exhaustion requirement to disciplinary removal cases. In that case, Coleman, a track star and graduating senior facing long-term suspension jeopardizing his imminent graduation and college track scholarships, would have had no protection allowing him to remain in school even if his school had erred in finding that his behaviors were not a manifestation of his disability.³⁰³ If the District Court in *Coleman* had not issued an injunction ordering that he be allowed to return to school, Coleman would

296. See, e.g., *Beth V. v. Carrol*, 87 F.3d 80, 88 (3d Cir. 1996) (finding that exhaustion was not required when case raised allegations of violations of the complaint resolution procedures and the school board’s obligation to monitor and ensure compliance).

297. *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 755, *aff’d*, 532 Fed. App’x 136 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1280 (2014) (finding that exhaustion not required when seeking to enforce stay put after hearing officer refused to impose it in administrative matter).

298. *Muskrat ex rel. J.M. v. Deer Creek Pub. Sch.*, 715 F.3d 775, 786 (10th Cir. 2013) (holding that exhaustion was not required when the IDEA issues had been resolved by the parties and the only remaining issues were related to damages caused by the medical consequences of the school’s actions).

299. *R.B. ex rel. Parent*, 762 F. Supp. 2d at 754.

300. *Coleman v. Newburg Enlarged Cty. Sch. Dist.*, 503 F.3d 198 (2d Cir. 2007).

301. *Id.* at 205 (citing U.S.C. § 1415(k)(4)(A) (2006)).

302. *Id.*

303. *Id.*

have missed his graduation and final year of high school track. The District Court found that these missed opportunities could cause irreparable harm, including jeopardizing Coleman's education, his chance of graduating from high school, his chance for a college scholarship, and his opportunity to attend college.³⁰⁴ However, the Second Circuit reversed this decision, finding that there was no remedy under the law to protect Coleman from the removal and its irreversible effects.³⁰⁵

The lack of a timely remedy under IDEA for students facing irreparable harm from long-term removal is problematic. Though there is a method to challenge a suspension and manifestation determination once the administrative process is completed and further court action explored, any possible remedies cannot undo the past and provide missed opportunities to a child who was discriminated against.³⁰⁶ The most common remedy, compensatory education, can only do so much to curb the effects of missed educational opportunities. The exhaustion requirement coupled with the limited remedies provided under IDEA for students facing disciplinary exclusion from school is alarming in light of the known consequences of school exclusion.

Extraordinarily, school districts were provided an exception to the exhaustion requirement when seeking to exclude dangerous students from school. In *Honig v. Doe*, the United States Supreme Court established an exception to the exhaustion requirement that allowed school districts to obtain temporary injunctive orders in court to remove students from school by showing that "maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others."³⁰⁷ The lack of a reverse-*Honig* exception for parents of students facing school exclusion, as applied by the District Court in *Coleman*, sets a precedent for an imbalanced power dynamic between school districts and parents in exclusionary discipline cases. While *Honig* suggested that the exception for schools should only be utilized in the most egregious of circumstances—when a child is truly dangerous and an agreement on placement cannot be worked out during the ten-day removal period permitted under IDEA³⁰⁸—the ruling only reinforces school

304. *Id.*

305. *Id.*

306. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002). The Court held that "[t]he administrative process is 'inadequate' to remedy violations of § 1415(j) because, given the time-sensitive nature of the IDEA's stay-put provision, 'an immediate appeal is necessary to give realistic protection to the claimed right.'" *Id.* at 199. Because "[a] belated administrative decision upholding a student's stay put rights provides no remedy for the disruption already suffered by the student . . . , as a practical matter, access to immediate interim relief is essential for the vindication of this particular IDEA right." *Id.* That conclusion is consistent with the principle that the exhaustion requirement does not apply to stay put injunctions because the purpose of stay put is to prevent disruption during proceedings to exhaust. *See R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 755, *aff'd*, 532 Fed. Appx. 136 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1280 (2014).

307. *Honig v. Doe*, 484 U.S. 305, 328 (1988).

308. *Id.* at 325–26.

districts’ authority and discretion to exclude children with disabilities from the educational environment. In fact, it expands the methods available to school districts to achieve this. Ironically, the Court’s justification for permitting an exhaustion exception for school districts was based, in part, on the following argument:

[O]ne of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore, was “to prevent *school* officials from removing a child from the regular public school classroom over the parents’ objection pending completion of the review proceedings.”³⁰⁹

Since stay put does not apply to disciplinary removal placement changes, present law continues to give schools a variety of options to exclude children in disciplinary matters with no meaningful and timely method to challenge the removals.

B. Limitations of State and Federal Educational Agency Oversight

Other options available to parents of students with disabilities facing improper exclusionary disciplinary practices are the formal complaint procedures set forth by state departments of education for violations under the IDEA³¹⁰ and by OCR for violations under Section 504 and the ADA.³¹¹ The DOE and each state’s department of education have obligations to oversee the effective implementation of the IDEA.³¹² However, state and federal intervention into the autonomy of individual school districts is limited. While there are deadlines for resolution of such complaints, these deadlines are routinely extended. Further resolutions and findings are rarely timely enough to prevent improper disciplinary removals or aggressive enough to result in meaningful changes in school practices. Meaningful sanctions are rarely issued against school districts, and students do not obtain meaningful remedies for the harms they have suffered. Further, even if a positive decision is obtained, agency oversight of corrective action is limited and deferential to school districts.³¹³

309. *Id.* at 327 (citing *Burlington Sch. Comm. v. Mass. Dept. of Educ.*, 471 U.S. 359, 373 (1985) (emphasis added)).

310. 34 C.F.R. §§ 300.151–300.153 (2016).

311. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, HOW TO FILE A DISCRIMINATION COMPLAINT WITH THE OFFICE OF CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> [https://perma.cc/9D9B-2LJY].

312. *See* 20 U.S.C. § 1402(a)–(b) (2012); 20 U.S.C. § 1413(j)(2) (2012).

313. *See* Peter W.D. Wright & Pamela Darr Wright, *Back to School on Civil Rights: The Law, the Compliance/Enforcement Scheme, and the Context*, WRIGHTS LAW, http://www.wrightslaw.com/law/reports/IDEA_Compliance_1.htm [https://perma.cc/Y5CT-4NBD] (last visited Aug. 9, 2016) (detailing the history and effectiveness of IDEA’s three-pronged compliance and enforcement scheme involving the federal government, state government, and the judicial role of parents).

VI.
PROPOSED SOLUTIONS

Since initial passage of the IDEA, Section 504, and the ADA, there has been growing awareness of the prevalence of behavioral health conditions among school-aged children and of the detrimental consequences of disciplinary exclusion. As schools struggle to educate children with behavioral and emotional challenges, exclusionary disciplinary practices have been widely utilized to remove these students from the educational environment rather than to address behavioral issues and continue inclusive educational opportunities. Over the years, research has demonstrated that exclusionary responses are not only ineffective at altering behaviors, making schools safer, and improving academic outcomes, they actually cause great harm to students and are costly for society. Data showing that exclusionary disciplinary practices are utilized disproportionately against students with behavioral health conditions, particularly students of color with behavioral health conditions, should lead us to reevaluate the special education system to ensure it offers effective protections for such students.

Since IDEA was amended in 1997 and again in 2004 to expand school district authority to remove children with behavioral issues, knowledge and awareness of best practices have expanded and societal values and political will have shifted.³¹⁴ At the time of the last two reauthorizations of IDEA, political dialogue around discipline in schools centered on zero tolerance and harsh disciplinary responses to school-based violence. The early 1990's brought the Gun-Free Schools Act, which mandated that states require schools to expel students who possess firearms at school for at least one year.³¹⁵ Following the passage of this law, school districts increasingly instituted harsher exclusionary zero-tolerance codes of conduct.³¹⁶ Over the last two decades, however, research has shown that zero tolerance does not work and that exclusionary disciplinary policies have caused harm to students, particularly students with behavioral health conditions,³¹⁷ without the intended positive impact on school safety. This

314. See generally U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2013), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/FK7V-8HXB>]; U.S. DEPT. OF EDUC., OFFICE OF SPECIAL EDUCATION PROGRAMS POSITIVE BEHAVIORAL AND INTERVENTIONS SUPPORT, <http://www.pbis.org/> [<https://perma.cc/MEF6-6TDD>] (last visited Mar. 21, 2016).

315. See Kathleen M. Cerrone, *The Gun-Free School Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 163 (1999) (citing 20 U.S.C. §§ 8921–23 (1994)).

316. *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 852 (2008).

317. See generally Russell Skiba & Jeffrey Sprague, *Safety Without Suspensions*, 66 EDUC. LEADERSHIP 38, 40 (2008); U.S. DEP'T OF EDUC., GUIDING PRINCIPLES, *supra* note 314, at 13 (“Schools should attempt interventions prior to the disciplinary process but create a continuum of developmentally appropriate and proportional consequences for addressing ongoing and escalating student misbehavior after all appropriate interventions have been attempted. Zero-tolerance

research has resulted in growing recognition of the detrimental effects of zero-tolerance policies that effectively syphon youth from schools into the juvenile and criminal justice system.³¹⁸

Since the last two reauthorizations of IDEA, political will has shifted toward an emphasis on evidence-based practices; awareness of disproportionality in identification, isolation, and discipline; and a focus on developmentally appropriate disciplinary policies. In January 2014, DOE and DOJ issued joint guidance for public schools, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*.³¹⁹ The guidance recognizes the significant number of students, disproportionately students with disabilities and students of color, who face suspension and expulsion each year, directs public schools to make concerted efforts to temper disciplinary policies, and provides resources for the creation of safe and positive school climates. In a press release accompanying its guidance document, the DOE stated that “[s]chools can improve safety by making sure that climates are welcoming and that responses to misbehavior are fair, non-discriminatory and effective.”³²⁰

In February 2016, the DOE’s Office of Special Education and Rehabilitative Services issued a report on racial and ethnic disparities in special education and proposed new rules to address issues of equity in the provision of special education services to students of color.³²¹ These rules would require all states to use a standard methodology to identify significant disproportionality on the basis of race and ethnicity with respect to the identification, placement, and discipline

discipline policies, which generally require a specific consequence for specific action regardless of circumstance, may prevent the flexibility necessary to choose appropriate and proportional consequences.”); Russell Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 BEHAV. DISORD. 81 (2002) (citing studies consistently finding disproportionate exclusion of children with disabilities).

318. See, e.g., U.S. DEP’T OF EDUC., U.S. DEPARTMENTS OF EDUCATION AND JUSTICE RELEASE SCHOOL DISCIPLINE GUIDANCE PACKAGE TO ENHANCE SCHOOL CLIMATE AND IMPROVE SCHOOL DISCIPLINE POLICIES/PRACTICES (Jan. 8, 2014), <http://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package-enhance-school-climate-and-improve-school-discipline-policiespractices> [https://perma.cc/S9QZ-XHV5] (discussing a joint DOE and DOJ initiative to address the school-to-prison pipeline); JOINT “DEAR COLLEAGUE” LETTER, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC. (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [https://perma.cc/2JBC-4G29]; U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [https://perma.cc/RFU5-MWQP].

319. U.S. DEP’T OF EDUC., GUIDING PRINCIPLES, *supra* note 314.

320. U.S. DEP’T OF EDUC., U.S. DEPARTMENTS OF EDUCATION AND JUSTICE RELEASE SCHOOL DISCIPLINE GUIDANCE PACKAGE, *supra* note 318.

321. U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, RACIAL AND ETHNIC DISPARITIES IN SPECIAL EDUCATION: A MULTI-YEAR DISPROPORTIONALITY ANALYSIS BY STATE, ANALYSIS CATEGORY, AND RACE/ETHNICITY (2016), <http://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/disproportionality-analysis-by-state-analysis-category.pdf> [https://perma.cc/P76G-UE64].

of students with disabilities.³²² Acting Secretary of Education John B. King Jr. stated in a press release:

We have a moral and a civil rights obligation to ensure that all students, with and without disabilities, are provided the tools they need to succeed, regardless of background. . . . IDEA exists for the purpose of ensuring that students get the unique services they need, and we owe it to them and to ourselves to uphold all of the law's provisions.³²³

Educators have adopted these shifting views on harsh disciplinary practices. On July 6, 2016, the National Education Association (NEA), a national organization representing three million employees working at every level of education, adopted a policy statement on the school-to-prison pipeline. The organization linked the phenomenon to institutional racism and intolerance and called attention to “policies and practices that push many students out of public schools and into the juvenile and criminal justice systems, such as zero-tolerance discipline, increased police presence in classrooms and hallways, insufficient services and support, and rising class sizes.”³²⁴ The NEA’s policy statement was the result of a one-year study by the NEA on the ramifications of zero-tolerance policies and their disproportionate effects on students of color and students with disabilities. The NEA has promised to educate educators and policy makers and develop model discipline policies driven by five guiding principles: “Eliminating Disparities in Discipline Practices; Creating a Supportive and Nurturing School Climate; Professional Training and Development; Partnerships and Community Engagement; and Student and Family Engagement.”³²⁵

322. *Id.*

323. U.S. DEP’T OF EDUC., U.S. DEPARTMENT OF EDUCATION TAKES ACTION TO DELIVER EQUITY FOR STUDENTS WITH DISABILITIES: ED DATA DEMONSTRATES NEED TO ADDRESS WIDESPREAD DISPARITIES IN SPECIAL EDUCATION (Feb. 23, 2016), <http://www.ed.gov/news/press-releases/us-department-education-takes-action-deliver-equity-students-disabilities> [<https://perma.cc/8KVT-BK3G>].

324. Brenda Alvarez, *NEA Takes a Stand on the School-to-Prison Pipeline*, NAT’L EDUC. ASS’N (July 6, 2016), <http://ra.nea.org/2016/07/06/nea-takes-stand-school-prison-pipeline/> [<https://perma.cc/DY3M-8NBF>]. Scholars, child advocates, and activists have also referred to this phenomenon as the “schoolhouse to jailhouse track” and, as very young children are deprived of opportunities due to racial and economic injustice, the “cradle to prison track.” *See, e.g.*, ADVANCEMENT PROJECT, PADRES AND JOVENES UNIDOS, SOUTHWEST YOUTH COLLABORATIVE & CHILDREN & FAMILY JUSTICE CENTER OF NORTHWESTERN SCHOOL OF LAW, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (2005), http://b3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf [<https://perma.cc/8RET-2EKE>]; NAACP LEGAL DEFENSE & EDUCATION FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2005) http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf [<https://perma.cc/39PP-QAYQ>]; CHILDREN’S DEFENSE FUND, AMERICA’S CRADLE TO PRISON PIPELINE 3 (2007), <http://www.childrensdefense.org/library/data/cradle-prison-pipeline-report-2007-full-lowres.pdf> [<https://perma.cc/P88W-W6ZS>].

325. *Id.*

While these pressures from the DOE and the NEA are promising beginnings in a shifting discourse about children and school discipline, the election of Donald Trump, the appointment of Betsy DeVos as Secretary of DOE, and the possible priority changes within the DOE create some unknowns regarding future trends in education policy. There is, however, reason to hope that bipartisan educational policies will continue to shift in line with research, evidence-based practices, and priorities among educators. Given the breadth of research on the human and economic costs associated with school exclusion, it makes sense for policy makers to continue to focus on improved educational programming and enhanced protections for students with disabilities. Progress is likely to slow, however, and may be more prevalent in local and state governments and agencies in the near future.

Despite a shift in national leadership and the possibility of slowed opportunities for continued advancements in protections for students of color and students with disabilities at the national level for the immediate future, it is clear that to improve educational outcomes for students with behavioral health conditions and to end the harmful and discriminatory cycle of disciplinary exclusion, shifts in education policy and practice are needed. In order to curb the trends of disciplinary exclusion of students with behavioral health conditions and specifically black students with behavioral health conditions, the enforcement mechanisms of IDEA, Section 504, and the ADA need to be enhanced to reflect the critical importance of access to appropriate educational services in school. The following recommendations focus on enhanced enforcement-based strategies to protect students with behavioral health conditions facing disciplinary exclusion. However, there is also a clear need for increased funding for education and special education as well as improved resources and training for educators so that appropriate services and supports can be implemented in place of disciplinary removals.

A. The MDR Provisions of IDEA Should Be Amended to Prevent the Disciplinary Exclusion of Students with Behavioral Health Conditions

The current MDR provisions of IDEA convey a false sense of protection from discriminatory disciplinary removals. Jimmy’s case is a clear example of this. Though Jimmy is a child with a disability under the IDEA, Section 504, and the ADA, the special education system did not protect him from exclusion for nearly half of his seventh grade year for behaviors clearly related to his disabling conditions. While the MDR provisions, which go into effect after a ten-day school removal, are presumably crafted to protect students from long-term removals for behaviors caused by their disability, the limited scope of the MDR review and the lack of meaningful methods for challenging MDR decisions leave this provision lacking effectiveness. To combat some of these deficiencies, the MDR provisions of IDEA should be amended to require that an MDR take place *before* a change of placement is imposed for disciplinary purposes. The DOE

should also provide guidance on how an MDR should be conducted and how a child's disabling conditions and behaviors should be considered in the process. Further, an MDR should occur sooner, after three or more consecutive or five or more cumulative days of disciplinary removal in a school year.³²⁶ Finally, the stay put exception in cases appealing disciplinary removals and MDR decisions should be eliminated from IDEA so that parents and students have meaningful recourse to prevent harmful and often-irreparable long-term school removals when school districts get the MDR wrong and proceed with exclusionary removals of students with behavioral health conditions.

i. The MDR Provision of IDEA Should Be Amended

As discussed in Part IV, the MDR provisions of IDEA were amended in 2004, setting a higher bar for determining that a student's behavior was a manifestation of her disability and making it easier for school districts to remove students with disabilities. Current law thus requires a determination that the behavior in question was caused by, or had a direct and substantial relationship to, the child's disability or was a direct result of the school's failure to implement the existing IEP.³²⁷ Nothing within the IDEA or subsequent guidance from the DOE provides clarification on how causation should be determined in MDRs. The lack of guidance results in varied methods of conducting MDRs. Many school district reviews hinge on questions of whether the student knew right from wrong or whether the student is able to control her behavior.³²⁸ While these questions of understanding right from wrong and capacity to make good choices may or may not relate to a student's disability, these questions do not lead to a discussion of symptoms and manifestations of a child's disability. They also do not address how a disability may limit a child's ability to determine right from wrong in a moment of stress, control impulsivity, read the responses of others during an incident, or think through alternative choices during conflict.

Unlike some forms of disability that manifest in very visible symptoms, for example a student with cerebral palsy who uses a wheelchair, many students with behavioral health conditions may not be perceived to have a disability at all. Educators may not view these students as having a "real" disability and thus may perceive their behaviors as willful and dangerous.³²⁹ For students with invisible

326. Daniel Losen and his colleagues suggested that possible solutions to concerns about the MDR process and its trigger are to change "the threshold from 10 to 3 days" or "to drop the annual resetting" of the days each school year. Daniel Losen, Jongyeon Ee, Cheri Hodson & Tia Martinez, *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, in CLOSING THE SCHOOL DISCIPLINE GAP 103 (Daniel Losen ed., 2015).

327. 34 C.F.R. § 300.530(e)(1)(i)–(ii) (2014).

328. Michele Scavongelli & Marlies Spanjaard, *Succeeding in Manifestation Determination Reviews: A Step-By-Step Approach for Obtaining the Best Result For Your Client*, 10 U. MASS. L. REV. 278, 287 (2015).

329. See Kevin Golembiewski, *Disparate Treatment and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities Under the IDEA*, 88 TEMP. L. REV. 473, 478

disabilities such as ADHD, anxiety disorders, depression, or PTSD, it may appear to educators that a student has capacity to follow school rules and thus should not be excused from her conduct because of a dubious diagnosis. When the student with behavioral health conditions is also a student of color, cultural differences and implicit bias also affect the attitudes of educators³³⁰ and, therefore, MDR and disciplinary decisions.

To address the widespread misunderstanding of behavioral health conditions and the influence of implicit bias, the MDR process must be revised so it protects students with behavioral health conditions. The provision should ensure a positive MDR finding if the student’s conduct is related to the student’s disability or based on the failure of the school to provide FAPE, specifically appropriate and evidence-based behavioral supports and mental health services. Congress should, therefore, revert to the MDR language added during IDEA’s 1997 reauthorization, which required a determination that the behaviors were a manifestation of the student’s disability if the behaviors “impaired his or her ability to understand the impact and consequences of the misbehavior and if the disability impaired the student’s ability to control the behavior”³³¹ and further required consideration of whether the services being provided to the student under the IEP were appropriate.³³² The 1997 MDR language, which followed from thoughtful judicial decisions addressing the issue of disciplinary removals of students exhibiting behavioral manifestations of their disabilities and holding school districts accountable for providing FAPE, reflects a greater commitment to protect the rights of students with behavioral health conditions. Though school districts may oppose return to the initial intent of the MDR provisions of IDEA out of concern for losing disciplinary authority to exclude children, it is clear that schools overuse disciplinary removals with no proven impact on school safety.

ii. *The DOE Should Issue Guidance to School Districts on How to Conduct Manifestation Determination Reviews*

Along with restoring the IDEA’s 1997 MDR language, the DOE should also provide guidance to school districts on how to make MDR decisions. School

(2016) (citing Patrick Corrigan, Fred E. Markowitz, Amy Watson, David Rowan & Mary Ann Kubiak, *An Attribution Model of Public Discrimination Towards Persons with Mental Illness*, 44 J. HEALTH & SOC. BEHAV. 162, 163–64 (2003)).

330. See Cheryl Staats, *Implicit Bias and School Discipline Disparities: Exploring the Connection*, KIRWAN INSTITUTE SPECIAL REPORT 1–2 (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-ib-argument-piece03.pdf> [https://perma.cc/6828-RA6V] (defining implicit bias as “the unconscious biases that people are unaware they hold but influence their perceptions, behaviors, and decision-making” and linking implicit bias among educators to “racialized discipline disparities” seen in K–12 education).

331. See Osborne, *supra* note 137, at 530; 20 U.S.C. § 1415(k)(4)(C)(ii) (2001).

332. See Osborne, *supra* note 137, at 530 (referencing the Manifestation Doctrine as codified in the 1997 IDEA reauthorization (citing 20 U.S.C. § 1415(k)(2) (2001)); 34 C.F.R. § 300.521 (1999) (implementing regulations regarding the authority of hearing officers)).

district practices and state guidance regarding the MDR process vary greatly.³³³ The lack of formalized guidance results in inconsistency.³³⁴ To address these inconsistencies, I propose that the Department issue guidelines which would require school districts to engage in the following steps during the MDR.

1. Review the student's special education evaluation, current and past IEPs, current or recent behavioral intervention plans, disciplinary records from the current and past school year, documentation related to the incident in question, evaluations from private and community providers, DSM V diagnostic criteria of each of the student's diagnoses, and any other documentation that the district staff, parent, or community providers deem relevant to understanding the nature of the student's disability(ies) and symptoms.

2. Analyze the behavioral incident resulting in proposed disciplinary removal. This should include analysis of the setting, preceding events, and actions or inactions of peers and adults before, during, and after the incident, and the physical, verbal, and nonverbal behaviors of the student before, during, and after the incident.

3. Review the symptoms and manifestations of the student's disability(ies), including all medical and mental health diagnoses as well as the identified educational disability under IDEA. This should include analysis of how these conditions affect the student's ability to:
 - a. Engage in academic activities similar to those engaged in at the time of the incident;
 - b. Interact with peers and adults in various settings and under various environmental conditions (i.e. in a quiet small room versus a loud chaotic classroom or lunchroom);

333. Compare TENN. DEP'T OF EDUC., MANIFESTATION DETERMINATION – INSTRUCTIONAL GUIDANCE (2015), https://www.tn.gov/assets/entities/education/attachments/se_eligibility_manifest_determ_guide.pdf [<https://perma.cc/2ZGB-DWXF>] with VA. DEP'T OF EDUC., GUIDANCE DOCUMENT ON MANIFESTATION DETERMINATION (2006), http://www.doe.virginia.gov/support/student_conduct/manifestation_determination.pdf [<https://perma.cc/57BR-LWZZ>]; MD. DEP'T OF EDUC., MANIFESTATION DETERMINATION, SUMMARY OF INDIVIDUALIZED EDUCATION PROGRAM TEAM MEETING (2012), http://cte.jhu.edu/iep/forms/Manifestation_Determination_Guidance_Document.pdf [<https://perma.cc/ZL5Q-VJJJ>]; and *Ohio Required and Optional Forms*, OH. DEP'T OF EDUC., <http://education.ohio.gov/Topics/Special-Education/Federal-and-State-Requirements/Ohio-Required-Forms> [<https://perma.cc/VW4C-S34C>] (website provides links to “Form OP-3 Manifestation Determination Worksheet” and “PR-03 Manifestation Determination Review worksheet” that can assist an IEP team through the MDR process).

334. In my experience, school districts' MDR processes are inconsistent from school-to-school, district-to-district, and state-to-state. See generally Scavongelli & Spanjaard, *supra* note 328, at 278 (providing guidance to parents about inappropriate questions that school districts may raise in an MDR); OSBORNE & RUSSO, *supra* note 209, at 46–47.

- c. Communicate either expressively or receptively with adults and peers;
 - d. Meet sensory needs (i.e. avoid or seek sound, light, and physical inputs, need for movement, touch, etc.); and
 - e. Care for self (i.e. cope with stress or depression, eat and drink as needed, calm self when agitated, etc.).
4. Analyze the current IEP and behavioral intervention plans and services to determine whether the supports, setting, and services were provided at the time of the incident and leading up to the incident and also whether those services are meeting the child’s needs. Analyze the effects of the lack of needed or appropriate services or supports on the student’s behaviors (i.e. mental health services, occupational therapy services, modifications to academic work, behavioral interventions and supports, etc.).
 5. Analyze whether additional information, data or evaluations are needed to determine the scope of the student’s disabilities and related limitations or need for services. School districts have an ongoing child find obligation. If current evaluations and assessments do not clearly identify the student’s challenges, further evaluations should be completed before the MDR process is finalized.
 6. Analyze the current educational placement in terms of appropriateness related to staffing, class size, provision of adequate supports and supervision, and classroom and school expectations. This could lead both to a discussion of changes to staffing, supports, and student expectations in the current setting as well as discussions of alternative settings that would also meet LRE requirements under IDEA.
 7. Analyze whether the student’s disability(ies) impaired her ability to understand the impact and consequences of the behavior, if the disability impaired the student’s ability to control the behavior, or if the behavior was consistent with the symptoms and manifestations of any of the student’s disabilities or past disability-related challenges.

Comprehensive guidance on the MDR process can improve outcomes for students with behavioral health conditions by encouraging IEP teams to comprehensively consider the student’s diagnosis, emotional and behavioral struggles, history, and needs. Though this guidance could result in additional school district work, it will ensure that student needs will be thoroughly considered. This, in turn, will increase opportunities for students with behavioral health issues to access an education and receive appropriate evidence-based interventions. Implementing a thoughtful and comprehensive MDR process may

actually improve challenging behaviors, make schools safer, and save time spent on adversarial proceedings down the line.

iii. The MDR Process Should Be Triggered by a Disciplinary Removal of Three Consecutive Days or Five Cumulative Days

While returning to the more broad 1997 MDR inquiry and clarifying the MDR process is a good start toward ensuring that students with behavioral health conditions may remain in school and receive appropriate services, the current ten-day rule is excessive given what we know about the consequences of disciplinary exclusion. Further, the current application of the ten-day rule to cumulative removals allows for repeated short-term exclusions in excess of ten days in a school year before any procedural protections are triggered. In Jimmy's case, evaluations obtained after his eighty-four days of school exclusion revealed that the short-term disciplinary removals were actually reinforcing Jimmy's behaviors rather than discouraging them.

Out of concern for the effectiveness of the MDR process, Daniel Losen and colleagues recommend applying the MDR provision after three days of removal, stating, "One overarching concern is that these procedural protections are not working at all. Another might be that they are ineffective because they do not apply to the vast majority of students with disabilities who are usually suspended for 10 days or less . . ." ³³⁵ Since we know that even one short-term exclusion from school can have lasting negative effects on a student, the MDR process should be triggered when a student has been removed or proposed for removal for three consecutive days, as Losen and his colleagues have recommended, or upon five cumulative days of disciplinary removal during a school year. It is critical that the time tables for triggering procedural protections and interventions for students facing disciplinary removal be shortened to require intervention at the earliest possible moment and to prevent excessive school removals that result in loss of educational opportunity.

Some might argue that these adjustments to the timelines for protection are not necessary because long-term disciplinary removals are not irreparable and students continue to have the right to access an education and receive FAPE in an alternative educational setting. ³³⁶ Although the law provides that children with disabilities removed for more than ten school days have the right to continue to participate in the "general education curriculum, although in another

335. Losen, Ee, Hodson & Martinez, *supra* note 326.

336. *See* M.M. by L.R. v. Special Sch. Dist. No. 1, 512 F.3d 455, 461 (8th Cir. 2008) ("It is doubtless true that any child suffers a loss of educational benefit when suspended, and a transfer caused by serious misbehavior cannot be anything but an educational setback. Yet M.M.'s year-end progress report stated that she made adequate progress on her academic goals . . . and she made behavioral progress after her transfer When a child's primary disability is a behavioral disorder, the school district does not violate [FAPE] simply because the child failed to achieve the IEP's behavioral goals.").

setting, and to progress toward meeting the goals set out in the child’s IEP,”³³⁷ many school districts do not have alternative placements or providers who can offer appropriate special education services in an alternative educational placement.³³⁸ In addition, even alternative schools suspend and expel students or, worse, resort to police intervention.³³⁹ Many districts use online educational programs and home instruction as their alternative settings. This may allow for access to some academic content or general education but does not provide students with emotional and behavioral disabilities access to the kind of social stimulation that would allow them to make progress on behavioral and emotional goals. Districts relying on home instruction as an alternative “setting” frequently offer one hour of tutoring per day of school missed or less with no opportunities for engagement in social activities or opportunities to work on behavioral and social goals.³⁴⁰ If there is a shortage of home instructors or teachers available, home instruction can mean sporadic evening tutoring sessions at a public library or lack of access to an education for months until an instructor becomes available.³⁴¹

While some might argue that further revisions to IDEA’s MDR provisions are unrealistic because the standards were weakened in the last reauthorization of IDEA, attitudes toward discipline in schools have changed since 2004. At that

337. 20 U.S.C. § 1415 (k)(1)(D) (2015).

338. See Priscilla Rouse Carver, Laurie Lewis & Peter Tice, *Alternative Schools and Programs for Public School Students at Risk of Educational Failure: 2007–08*, NAT’L CTR. FOR EDUC. STATS 1, 5–6 (2010), <http://nces.ed.gov/pubs2010/2010026.pdf> [<https://perma.cc/5JS3-HD38>] (finding that in the 2007–2008 school year only sixty-four percent of public school districts had alternative schools available to at-risk students; thirty percent of these districts had alternative programs available within the district; and seventeen percent of these programs used distance education). Most alternative school programs were offered to high school students, with only eight to eighteen percent offered for elementary-aged students. Further, thirty-three percent of districts reported that they were unable to enroll students in the alternative programs due to staffing and space limitations. *Id.*

339. See DIGNITY IN SCHOOLS CAMPAIGN, ALTERNATIVE SCHOOLS AND PUSHOUT: RESEARCH AND ADVOCACY GUIDE 19 (2007), https://www.nesri.org/sites/default/files/%20DSC_Alternative_Schools_GuideFinalSmall.pdf [<https://perma.cc/BZ2B-X4MZ>].

340. See Mary Gifford-Smith, Kenneth A. Dodge, Thomas J. Dishion & Joan McCord, *Peer Influence in Children and Adolescents: Crossing the Bridge from Developmental to Intervention Science*, 33 J. ABNORMAL CHILD PSYCHOLOGY 255, 260 (2005) (“[S]uspended or expelled students lose the opportunity to be exposed to the influence of their conforming classmates.”). In practice I have observed school districts with policies—Toledo Public Schools in Toledo, Ohio, for example—which mandate one hour of home instruction for each day of school removal. This one hour per day missed is provided to all students removed beyond ten days without an individualized evaluation of need in this district. In a recent case, an expelled student was offered only four hours of tutoring per week by Romulus Public Schools in Romulus, Michigan, during her period of removal.

341. This is a common practice in Toledo Public Schools, an urban public school district in Northern Ohio, which struggles to maintain teacher staffing levels for students with disabilities and uses current teachers as home instructors. These teachers work all day and then make arrangements to meet with students on “home instruction” in the evenings and on weekends. Sometimes there are long delays in the provision of “home instruction,” and students end up making up hours with tutors in the summer months.

time, zero-tolerance policies were the standard in public schools.³⁴² Since then, the DOE has criticized the excessive and disproportionate use of disciplinary removals and questioned the effectiveness of zero-tolerance policies.³⁴³ Furthermore, research on the significant impact of even one short-term suspension should cause lawmakers to reconsider this MDR standard.³⁴⁴ Finally, school districts have the authority to initiate forty-five-day removals when students with disabilities engage in dangerous activities in school regardless of the cause of the behaviors. This provision ensures that schools have the ability to move students to interim alternative placements when they pose a serious safety threat. Requiring a more stringent MDR standard will allow more students with behavioral health conditions to remain in their schools and to receive appropriate services in the least restrictive environment. This would underscore the schools' long-standing obligation to treat behavioral manifestations as educational issues and respond with appropriate services and supports rather than exclusion and isolation.

iv. The Stay Put Exception in Disciplinary Removal Cases Should Be Eliminated from IDEA

The exception to the stay put rule in appeals challenging an MDR and disciplinary removal³⁴⁵ should be eliminated from the IDEA. The automatic injunction, which the stay put provisions establish for students with disabilities, is a critical protective measure within IDEA that provides parents and students with some power in a very imbalanced power dynamic with a public school district. This is particularly important when a school district acts in a unilateral and uninformed way in relation to the exclusion of a child with a behavioral health condition. There are adequate safety measures available to school districts through injunctive relief and a forty-five-day removal when there is sufficient evidence that a student poses a true safety risk to a school environment.³⁴⁶

The current exemption from stay put during due process appeals challenging MDRs and disciplinary removal allows for the exclusion of students with behavioral health conditions for forty days or longer when there is a dispute regarding whether the behavior at issue is a manifestation of the student's disabilities. For students facing cumulative suspensions, like Jimmy, and students facing long-term suspensions ranging from eleven to forty school days, the IDEA offers no protection from inappropriate and discriminatory removals because a hearing officer's decision would not be issued until after the student

342. See David L. Stader, *Zero Tolerance as Public Policy: The Good, the Bad, and the Ugly*, 78 CLEARINGHOUSE 62, 62 (2004).

343. JOINT "DEAR COLLEAGUE" LETTER, *supra* note 318.

344. See Balfanz, Byrnes & Fox, *supra* note 78, at 22 (citing research finding student success sensitive to the first suspension and chances of dropping out doubling with first suspension); LOSEN & SKIBA, *supra* note 82, at 9–11.

345. See 20 U.S.C. § 1415(k)(4) (2015); 34 C.F.R. § 300.530(d)(1)(i).

346. See *Honig v. Doe*, 484 U.S. 305, 328 (1982); 20 U.S.C. § 1415(k)(3)(B) (2012).

has already returned to school. Further, if the hearing officer issues an unfavorable decision in error, the student might face a lengthy removal from school while navigating the excessively long court process required to appeal a due process decision. Given that we know that disciplinary removals neither keep schools safe nor address behavioral issues and actually do great harm to students facing exclusion, the stay put provision’s automatic injunction is critical.

v. *Parents and Students Should Be Extended a Reverse-Honig Exhaustion Exemption when Appealing MDRs and Disciplinary Removals*

Just as *Honig* and the 1997 amendments provided school districts with an exception to the IDEA’s exhaustion requirement when seeking removal of a “dangerous” student, so should IDEA and the courts offer an exhaustion exception to students with disabilities facing disciplinary removals. This exception should be offered because of the extensive time required by the MDR process and the expedited due process and appeals procedures.

Because of the potentially irreparable harm to a student with a behavioral health disability who is excluded from the educational environment, access to justice through prompt court intervention must be provided. This exception is necessary even if the stay put provision applies to disciplinary removal cases because not all students can count on school districts and administrative hearing officers to uphold the law. Furthermore, for students removed to an interim alternative educational setting (IAES) for forty-five days under a special circumstances exception, there is currently no meaningful method for a parent to effectively challenge the removal.³⁴⁷ While this might encourage more litigation against school districts, allowing parents and students the remedy of injunctive relief could prevent irreparable harm to students and keep school districts in check.

B. *Improve State and Federal Oversight of IDEA Implementation*

State departments of education, the DOE, and the DOJ should implement policies and practices that result in more aggressive oversight of local public school districts. The DOE’s recently proposed rules on Equity in Special Education and guidance on disciplinary practices are good initial measures. However, willingness to intervene when school districts are imposing excessive and disproportionate disciplinary exclusion on students with behavioral health conditions is critical to ensuring that these students have access to an education and a chance at success.

347. Ohio Protection and Advocacy advocates reported in an interview with me a trend of Ohio school districts broadly interpreting the special circumstances category of serious bodily injury to invoke the forty-five-day emergency removal inappropriately for minor injuries resulting from incidents such as biting or hitting.

i. *Education Oversight Agencies Should Provide an Expedited Complaint Process for Students Facing School Exclusion*

As discussed earlier, state departments of education handle complaints regarding violations of IDEA and OCR handles complaints of violations of Section 504 and Title II of the ADA. Unfortunately, the complaint-processing procedures and timelines rarely offer timely relief to students facing disciplinary exclusion. In Jimmy's case, an OCR complaint filed in early June 2015 was still pending more than one year later when a settlement was reached with the school district.³⁴⁸ A state complaint filed in Jimmy's case also took longer than the mandated timelines and, despite multiple findings of violations against the district, resulted in no meaningful remedy.³⁴⁹

Because of the potential for significant harm to students facing school exclusion via disciplinary removals and the lack of access to attorneys to advocate on behalf of parents and students, state departments of education and OCR should implement policies and procedures allowing for expedited complaints so that the agencies can intervene to return students to school when appropriate. The complexities of due process hearing procedures leave many parents effectively without access to the remedies that might be available through that dispute resolution process.³⁵⁰ Families in poverty, in particular, lack access to information about their children's rights and the resources to hire lawyers to assist them with challenging the school district's actions.³⁵¹ Therefore, an opportunity to seek expedited assistance from a government

348. In interviews with staff at the Michigan Protection and Advocacy Service, advocates indicated that OCR complaints regularly take longer than the OCR 180-day deadline for complaint resolution. These delays can last from one to three years. Further, while engaged in advocacy in Toledo, Ohio, with Legal Aid of Western Ohio, I filed a systemic complaint with the DOJ in collaboration with the ACLU of Ohio, Advocates for Basic Equality Inc., and the Ohio Poverty Law Center alleging disproportionate disciplinary removals and arrests of students with disabilities and students of color. This complaint, filed on April 27, 2011, is still pending over five years later.

349. Half of the alleged violations were dismissed erroneously for being made untimely. These allegations were later considered under a new complaint, but separately from the earlier allegations, precluding consideration of all facts and allegations together. The Michigan complaint investigation process is problematic in that the school district must identify a local investigator to work the complaint in support of the state-level investigator. Both investigators clarify the complaint allegations through a clarifying phone call which can result in distortions of the allegations presented. Further, though the state department of education identified violations and ordered remedies—namely, completion of a special education evaluation, staff training, and a demand for assurances from the district that it would henceforth follow the law—its decision did not produce meaningful or individualized remedies for Jimmy, such as compensatory education. The Michigan Department of Education has since hired consultants to direct it in reassessing its complaint process.

350. See Elisa Hyman, Dean Hill Rivkin & Stephen Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 111 (2011) (noting families' difficulties with navigating the "increasingly technical nature of the IDEA" without an attorney).

351. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1436–38 (2011).

oversight body could offer students with disabilities protection from unwarranted removals and could result in more effective monitoring of school district compliance with the procedural protections provided under IDEA, Section 504, and Title II of the ADA.

ii. State and Federal Education Agencies Should Increase Oversight of School District Compliance with the Procedural Safeguards Under IDEA, Section 504, and Title II of the ADA

State departments of education, the DOE, and the DOJ should improve oversight and increase intervention at the state and local level. To enhance oversight of state departments of education complaint decisions, DOE could allow complainants to request DOE review of their complaints; DOE could also increase resources and procedures for the expedited handling of OCR complaints. The DOJ could similarly improve oversight of state practices and expedite the handling of complaints it investigates. State and federal oversight agencies’ long timelines for completing investigations and their unwillingness to intervene³⁵² results in limited accountability for local school districts and an assumption by districts that special education laws will not be enforced.

Federal agencies should also increase oversight of state and local educational agencies when school district data reflects disproportionate or excessive disciplinary removals and segregated placements of students with disabilities. The IDEA currently requires states to collect data documenting the rates of disciplinary actions and disparities by race for students with disabilities and to publicly report annually by the incident and duration of discipline among students with disabilities by gender, race, disability category, and English learner status.³⁵³ According to a review of states conducted by Losen and his colleagues, only eight states were approaching compliance with this mandate.³⁵⁴ According to guidance from OSEP, IDEA also requires that states gather data on the disproportionate identification of students of color under certain disability

352. *See id.* at 1463 (referencing long-held concerns that the federal and state governments have “failed to enforce the IDEA adequately” and that the federal government agency charged with enforcing IDEA “has almost never taken any formal action to withdraw funds, limiting its involvement to negotiation and acceptance of minimal improvements”) (citing NAT’L COUNCIL ON DISABILITY, *BACK TO SCHOOL ON CIVIL RIGHTS* 7, 53 (2000)); Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in DANIEL J. LOSEN & GARY ORFIELD, *RACIAL INEQUITY IN SPECIAL EDUCATION* 219, 222; Arun K. Ramanathan, *Paved with Good Intentions: The Federal Role in the Oversight and Enforcement of the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB)*, 110 *TEACHERS COLL. REC.* 278, 290 (2008).

353. Losen, Ee, Hodson & Martinez, *supra* note 326, at 101 (referencing 20 U.S.C. § 1418(a) (IDEA, 2004)).

354. *Id.* (citing THE CIVIL RIGHTS PROJECT, THE CENTER FOR CIVIL RIGHTS REMEDIES, *NATIONWIDE SURVEY OF STATE EDUCATION AGENCIES’ ONLINE SCHOOL DISCIPLINARY DATA* (July 29, 2014), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/online-data-resources/nation-wide-survey-of-state-education-agencies2019-online-school-disciplinary-data> [<https://perma.cc/BLA2-47C2>]).

categories and on the disproportionate placement of students in particular educational settings.³⁵⁵ If states determine a significant disproportionality of identifications, placements, or disciplinary actions, the state must take measures to address the problem with the local school district through redirection of funds to early intervening services.³⁵⁶ It is, therefore, imperative that federal agencies oversee data collection. The DOE has taken the first step with its proposed “Equity in IDEA” rule. As the National Council on Disability recognized, “[the] rule would, for the first time, require states to implement a standard approach to compare racial and ethnic groups, with reasonable thresholds for determining when disparities have become significant in identification, placement, and discipline.”³⁵⁷

Given the need for more expedited handling of complaints and more aggressive oversight of local and state educational agencies, the federal government should “direct more resources to the agencies responsible for monitoring and enforcing the legal protections against discrimination afforded to students with disabilities.”³⁵⁸ While some may argue against expenditure of additional resources to oversight systems rather than programming and services for students, it is important to note that we cannot ensure resources will be used appropriately without such oversight.

C. Increase Funding for Education Advocates and Attorneys

In order to adequately monitor school district compliance with the IDEA and protect the rights of students with behavioral health conditions to access an education free from excessive segregation and isolation, students with disabilities and their parents need access to trained special education advocates and attorneys.³⁵⁹ Although IDEA provides for attorneys’ fees to parents who are deemed a prevailing party in a due process case,³⁶⁰ prevailing party status and fee orders can be challenging to obtain,³⁶¹ leaving parents reliant on nonprofit

355. *Id.* at 102 (citing Apr. 24, 2007 OSEP guidance on 20 U.S.C. § 14189(d); 34 C.F.R. § 300.646, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep07-09disproportionalityofracialandethnicgroupsinspecialeducation.pdf> [<https://perma.cc/GQ82-BFVL>]).

356. *Id.*

357. NAT’L COUNCIL ON DISABILITY, NCD APPLAUDS NEW PROPOSED RULE BY THE DEPARTMENT OF EDUCATION TO ASSIST STUDENTS OF COLOR WITH DISABILITIES (Feb. 23, 2016), <http://www.ncd.gov/newsroom/2016/ncd-applauds-new-proposed-rule-department-education-assist-students-color-disabilities> [<https://perma.cc/LYX8-MUZW>].

358. *Id.*

359. See generally Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL L. REV. 471 (2016) (arguing that students facing expulsion need counsel in disciplinary hearings to properly advocate for their critical right to an education).

360. 20 U.S.C. § 1415(i)(3)(B) (2012).

361. See Pasachoff, *supra* note 351, at 1446–50; see also *Tina M. v. St. Tammany Parish Sch. Bd.*, No. 15-30220, 2016 WL 723352, at *2 (5th Cir. 2016) (holding that obtaining an IDEA stay put order is not sufficient to qualify a litigant as a “prevailing party” who is entitled to attorneys’ fees). This Fifth Circuit decision follows the Third, Seventh, and Ninth Circuit holdings on the subject, highlighting that stay put orders are “interim in nature” and “do not address the merits.”

organizations for attorneys or having to pay out of pocket for representation. Further, changes to IDEA’s attorney’s fees rules have affected availability of private attorneys,³⁶² leaving many families without the benefit of IDEA’s full range of dispute resolution options.

IDEA protections disproportionately fail children who come from families without financial resources. With one-fourth of all children with disabilities eligible for IDEA services “(approximately 2 million) liv[ing] below the poverty line and two-thirds (approximately 4.5 million) liv[ing] in households with incomes of \$50,000 or less,” public and private enforcement measures (due process hearings, state complaints, federal complaints, etc.) must be made more accessible.³⁶³

Additional resources for special education advocates and attorneys are necessary to empower parents and students, particularly from low-income families, to enforce IDEA and protect students with behavioral health conditions from excessive disciplinary removals. These additional resources can be invested in a pre-existing system of service delivery for families in poverty and for families with children with disabilities: the protection and advocacy system, the legal services system, and other nonprofit education advocacy programs for children. Each state has a legal services program serving families in poverty funded by the United States Legal Services Corporation.³⁶⁴ Many of these programs already maintain specialized projects that advocate for children in special education matters, such as pediatric and family medicine-based medical-legal partnerships, child advocacy projects, and even education advocacy projects.³⁶⁵ Further, protection and advocacy services around the country advocate for children with disabilities in education matters,³⁶⁶ often with

Id.; *J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267 (3d Cir. 2002); *Bd. of Educ. of Oak Park v. Nathan R.*, 199 F.3d 377 (7th Cir. 2000); *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009) (“The moving party [in a motion for a stay put order] need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief.”).

362. 20 U.S.C. § 1415(i)(3)(B). In 2004, IDEA was amended to allow for school districts to obtain attorneys’ fees from parents and parents’ attorneys if a complaint was frivolous, without foundation, or presented for any improper purpose. *See Pasachoff, supra* note 351, at 1447.

363. Hyman, Rivkin & Rosenbaum, *supra* note 350, at 112–13.

364. *See* LEGAL SERVICES. CORP., LSC 2014 ANNUAL REPORT (2014), <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC2014AnnualReport.pdf> [<https://perma.cc/X4QF-MKL5>].

365. Some examples include the JustChildren program of the Legal Aid and Justice Center in Virginia and several pediatric and family medical-legal partnerships that are located within legal services programs throughout the country. LEGAL AID JUSTICE CENTER, *JustChildren Program*, <https://www.justice4all.org/justchildren/justchildren-program/> [<https://perma.cc/FAK5-QV9V>] (last visited Apr. 18, 2017); Education and Children’s Rights Practice, ADVOCATES FOR BASIC LEGAL EQUALITY, <http://www.ablelaw.org/able-services/education-childrens-rights> [<https://perma.cc/3VJA-JYTN>] (last visited Apr. 18, 2017); NAT’L CTR. FOR MEDICAL LEGAL PARTNERSHIP, *Partnerships Across the U.S.*, <http://medical-legalpartnership.org/partnerships> [<https://perma.cc/SCE5-QJB3>] (last visited Apr. 18, 2017).

366. *P&A/CAP Network*, NAT’L DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/about/paacap-network.html> [<https://perma.cc/U35Q-G3EN>] (last visited Apr. 18, 2017). The National

inadequate resources to meet all of the students' needs. Publicly funded programs struggle with resource allocation and the ability to serve all eligible clients.³⁶⁷ An infusion of both public and private foundation funds is necessary to support expansion of advocate and attorney representation of students with disabilities, particularly those challenging disciplinary exclusion. These added resources are critical to protect the rights of vulnerable students and hold public schools accountable to the law and their obligations to educate all students, behavioral challenges and all.

VII. CONCLUSION

As acknowledged by Chief Justice Warren in the landmark *Brown v. Board of Education* decision:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even services in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³⁶⁸

While there are numerous laws intended to protect students with disabilities and to provide them with access to a free and appropriate public education in the least restrictive environment, enforcement of these laws does not go far enough to ensure students with behavioral health conditions, particularly students of

Disability Rights Network maintains a list of Protection and Advocacy Agencies throughout the country. *NDRN Member Agencies*, NAT'L DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/en/ndrn-member-agencies.html> [https://perma.cc/H9GM-XAAY] (last visited Apr. 18, 2017).

367. In 2014, only 0.8% of cases closed by Legal Services Corporation-funded programs were education cases. LSC 2014 ANNUAL REPORT, *supra* note 364, at 43; *see also The Justice Index 2016*, NAT'L CTR. FOR ACCESS TO JUSTICE, <http://justiceindex.org/> [https://perma.cc/A2BL-LZAL] (last visited Apr. 18, 2017) (finding that "[t]here is less than one civil legal aid attorney to help every 10,000 Americans living in poverty"); Dion Chu, Matthew R. Greenfield & Peter Zuckerman, *Measuring the Justice Gap: Flaws in the Interstate Allocation of Civil Legal Services Funding and a Proposed Remedy*, 33 PACE L. REV. 965 (2013); Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687 (2009).

368. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

color with behavioral health conditions, equal access to an education and thus opportunities for success in life. Improved special education regulations and guidance, enhanced enforcement measures, and increased access to attorneys are necessary to protect these students from harmful disciplinary exclusion and to give them the opportunities that access to a public education can provide.