



**THE UNITED STATES COMMISSION ON CIVIL RIGHTS**

**THE SCHOOL-TO-PRISON PIPELINE: THE INTERSECTIONS OF STUDENTS OF COLOR WITH DISABILITIES**

**December 8, 2017**

**Statement of Kristen Harper, Senior Policy Specialist**

**Child Trends**

**INTRODUCTION**

Good morning, Commissioners. My name is Kristen Harper, and I’m a Senior Policy Specialist for Child Trends, a national research institute devoted to improving the lives of children, youth, and their families through rigorous research, unbiased analyses, and clear communications to improve public policy and child-serving institutions. It is my pleasure to share with this body Child Trends’ perspective on how to address one of the most pernicious phenomena that plagues our education systems today—the school-to-prison pipeline—and its implications for children of color with education disabilities.

Data from the U.S. Department of Education’s Civil Rights Data Collection illustrate the glaring discipline disparities occurring at the intersection of race, disability, and gender. During the 2013–2014 school year, six percent of all public school children experienced at least one out-of-school suspension. This figure doubles (to 12 percent) among children with disabilities.<sup>1</sup> Worse still, the figure doubles again, to approximately one-quarter of children, for black, Hispanic, multi-racial, and American Indian/Alaskan Native boys with disabilities.<sup>2</sup>

Further, we know that exclusionary discipline practices are associated with poor academic outcomes. Thanks to the 2011 *Breaking Schools’ Rules* study, a longitudinal study of over 1 million Texas school children, we know that students who receive a suspension or expulsion are more likely to drop out, be retained in the same grade, and enter the juvenile justice system than their peers.<sup>3</sup>

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<sup>1</sup> U.S. Department of Education. (2016). 2013-2014 Civil Rights Data Collection: A First Look. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>

<sup>2</sup> U.S. Department of Education. (2016). 2013-2014 Civil Rights Data Collection: A First Look. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>

<sup>3</sup> Fabelo, T., Thompson, M. D., Plotkin, M., Carmichael, D., Marchbanks, M. P., & Booth, E. A. (2011). *Breaking schools’ rules: A statewide study of how school discipline relates to students’ success and juvenile justice*

Given the ongoing threat that disciplinary exclusion represents for children of color with disabilities, I'm grateful for the opportunity to share with the U.S. Commission on Civil Rights available data and research, the safeguards offered by federal and state policy (or not offered), and some emerging issues that have yet to be addressed.

## **BACKGROUND**

I'll briefly explain my perspective on the problem, based on my understanding from the available research. The data and research are clear on this point: children of color with disabilities face high, disparate rates of exclusionary discipline. We have this information thanks to the federal Civil Rights Data Collection, which includes data from every public school and school district in the country. However, data submitted by states under Section 618(d) of the Individuals with Disabilities Education Act (IDEA) provide further confirmation. Black children with disabilities represent less than 14 percent of children ages 3 through 5, and under 19 percent of children ages 6 through 21, served under IDEA Part B.<sup>4</sup> Why, then, do black children with disabilities receive 37 percent of all out-of-school suspensions of 10 days or less, and 47 percent of all out-of-school suspensions exceeding 10 days, administered to children with disabilities?<sup>5</sup>

It must be understood that these discipline disparities seen among children with disabilities stem from factors within our general and special education systems. Both systems require close examination to understand how each responds when children of color display behavioral challenges in school. Consider, for a moment, an illustration of the experience of black children, as presented by IDEA section 618 data. From an early age, black children are underrepresented among children, birth through age 2, who receive services under IDEA, Part C. Black children are 20 percent less likely than all other racial and ethnic groups to receive such services. Among children ages 3 through 5, however, appearances of disparity disappear at the national level—black children are just as likely as all other groups to receive services under IDEA, Part B.<sup>6</sup> Once black children begin grade school, disparities reappear: among students ages 6 through 21, black students are *40 percent more likely* to be identified with a disability than their peers, and twice as likely to be identified with emotional disturbance (one of the disability categories under IDEA).

Why do disparities in disability identification matter? One of the most common reasons for special education referrals is child behavior. We know from research that teacher perceptions of student behavior vary by the race and ethnicity of students. Thanks to a recent study by Dr. Walter Gilliam, we know that early childhood educators watch black students more closely when prompted to watch for

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involvement. Retrieved from [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)

<sup>4</sup> U.S. Department of Education, ED Facts Data Warehouse (EDW): "IDEA Part B Child Count and Educational Environments Collection," 2014-15. Data extracted as of July 2, 2015 from file specifications 002 and 089.

<sup>5</sup> U.S. Department of Education, ED Facts Data Warehouse (EDW): "IDEA Part B Discipline," 2014-15. Data extracted as of June 6, 2016 from file specifications 005, 006, 007, 088, 143 and 144

<sup>6</sup> U.S. Department of Education. (2016). 38<sup>th</sup> Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016. Washington, DC. Available at <https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf>

behavioral challenges.<sup>7</sup> The disparities we see in disability identification, then, serve as a bellwether for the disparities we find in school discipline.

Most higher-incidence disabilities categories are marked by the overrepresentation of children of color, including emotional disturbance, specific learning disabilities, intellectual disability, and other health impairment. In 2014, according to IDEA Section 618 data covering children ages 6 through 21, black students were more than twice as likely to be identified with intellectual disabilities as all other students, while American Indian/Alaskan Native students were almost twice as likely to be identified with specific learning disabilities.<sup>8</sup> However, the disparities in these same categories can be far more pronounced at the school-district level. The U.S. Department of Education found 786 school districts that, for three consecutive years, identified black students with emotional disturbance at rates at least three times as high as for all other children.<sup>9</sup>

Research continues to clarify the relationship between how we perceive the behavior of children of color, how we identify education disabilities, and how we respond to the behaviors of children of color with disabilities. Meanwhile, our efforts to improve policy and practice cannot focus on school discipline alone. The effort to dismantle the school-to-prison pipeline for children of color with disabilities must begin with a child's entry into special education.

#### **FEDERAL LAWS SAFEGUARDING CHILDREN WITH DISABILITIES: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

A number of federal statutes provide legal safeguards for children of color with disabilities, including Titles IV and VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. These statutes contribute to our efforts to prevent disparate disciplinary removals from school by prohibiting discrimination on the basis of race, color, national origin, and disability.

However, I will restrict my remarks to those protections provided by a fourth federal statute: the Individuals with Disabilities Education Act (IDEA). IDEA is unique in two respects: first, it contains provisions that directly address the intersection between race and disability, including in the administration of school discipline; and second, the formula dollars IDEA provides to support special

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<sup>7</sup> Gilliam, W. S., Maupin, A.N., Reyes, C.R., Accavitti, M., Shic, F. (2016). Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions? Yale University Child Study Center. Available at [http://ziglercenter.yale.edu/publications/Preschool%20Implicit%20Bias%20Policy%20Brief\\_final\\_9\\_26\\_276766\\_5379\\_v1.pdf](http://ziglercenter.yale.edu/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf)

<sup>8</sup> U.S. Department of Education. (2016). 38<sup>th</sup> Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016. Washington, DC. Available at <https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf>

<sup>9</sup> U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs. (2016). Racial and Ethnic Disparities in Special Education: A Multi-Year Analysis by State, Analysis Category, and Race/Ethnicity, Washington, D.C. Available at <https://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/disproportionality-analysis-by-state-analysis-category.pdf>

education systems across the country serve as a lever allowing communities to push for improvements in practice and policy.

Given the degree of disparity we find in our public schools, IDEA has proven insufficient to safeguard children of color with disabilities; nevertheless, it provides a foundation on which to work with schools to keep children with disabilities within classrooms. IDEA's most relevant legal protections and program requirements include the following.

A "Reasonably Calculated" Individualized Education Program. IDEA's promise of a free appropriate public education (FAPE) is realized with the development and implementation of an individualized education program (IEP) that meets the needs of an eligible child with disabilities (34 CFR §300.17). In 1982, the Supreme Court ruled in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley (Rowley)* that the services provided within an IEP must be "reasonably calculated" to confer an educational benefit; however, the nature and scope of this benefit was left undefined.<sup>10</sup> In 2017, however, the education field's understanding of what this promise entails has shifted significantly. The Supreme Court has now clarified—with its ruling in *Endrew F. v. Douglas County School District (Endrew)*—that special education services must provide more than a merely de minimis educational benefit. Instead, IDEA requires that schools offer children with disabilities an "appropriately ambitious" educational program that allows children to "meet challenging objectives."<sup>11</sup>

This decision has incredible implications for our work to dismantle the school-to-prison pipeline for all children with disabilities, including for children of color. Prior to the *Endrew* ruling, the U.S. Department of Education put forward 2016 guidance to clarify that IEPs must include behavioral supports in addition to academic services, if such services are needed to make academic progress. The Department clarified that, to the extent that any child with a disability faces disciplinary removals—or struggles to participate in the learning environment due to behavioral challenges—these are signs that the IEP has either not been implemented appropriately or needs revision. A failure to provide such behavioral supports to a child that needs them to make academic progress could, depending on the circumstances, constitute a denial of FAPE. The Supreme Court's ruling on *Endrew*—on a case centered on a family working to secure for their child the behavioral supports needed to make academic progress—reinforces and bolsters the Department's guidance.

At the same time, it must be understood that it will likely be grueling work to overhaul IEPs to incorporate behavioral supports and meet the *Endrew* standard. What research we had prior to the *Endrew* ruling raised strong concerns that IEPs did not contain adequate behavioral supports.<sup>12</sup> Indeed, a 2014 examination of IEP studies found that, in general, schools had difficulty complying with IDEA's requirements regarding the development and content of IEPs, particularly those requiring that IEPs be

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<sup>10</sup> *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) Available at <https://www.law.cornell.edu/supremecourt/text/458/176>

<sup>11</sup> *Endrew v. Douglas County School District*, 580 US \_\_\_\_ (2017) Available at [https://www.supremecourt.gov/opinions/16pdf/15-827\\_0pm1.pdf](https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf)

<sup>12</sup> Mattie, H. D., & Kozen, A. A. (2007). Consideration of behavior states and patterns in IEP development and daily planning: A multiple case study approach involving students with multiple disabilities. *Education and Training in Developmental Disabilities*, 42, 38-47.

tailored to the needs of individual children.<sup>13</sup> If schools were already having difficulty complying with the plain text procedural requirements of IDEA, we have much to do to assist them in meeting the new substantive standards articulated in *Endrew* (e.g., “appropriately ambitious”).

Restrictions on the Authority of School Personnel. Beyond the behavioral supports that would prevent behavioral incidents in school, IDEA also contains procedural hurdles that discourage long-term or discriminatory suspensions. The federal law allows school personnel to remove children with disabilities from their current placement by means of a suspension, but for no more than 10 school days. Disciplinary removals that exceed this 10-day limit trigger a set of a procedural steps to determine if the child’s conduct is a manifestation of the child’s disability. If, ultimately, the child’s conduct and ensuing discipline are related to the child’s disability, the child must be returned to his or her placement, and the IEP team must build or modify a behavioral intervention plan to address the child’s behavior (34 CFR §300.530). Aside from the 10-day limit, IDEA’s provisions only allow school personnel to use disciplinary removals for children with disabilities to the extent they are used for children without disabilities.

While the IDEA’s restrictions on school personnel have provided students with disabilities with some protection, they have also given schools broad permission to remove children with disabilities from classrooms for any violation of a code of student conduct, rather than encourage schools to seek more supportive and effective alternatives. Further, the 10-day allowance is inconsistent with research on the impacts of chronic absenteeism, which show that missing even a minimal amount of school can have significant implications on a child’s achievement.<sup>14</sup>

Mandate that States Address Significant Disproportionality in Disability Identification and Discipline.

IDEA contains three provisions designed to address systems-level racial and ethnic disparities in special education. For each, states are required to cite school districts with disparities, triggering a set of statutory remedies that the district must implement. Under IDEA section 612(a)(22), states must identify “significant discrepancy”—including disparities by race and ethnicity—in the use of long-term suspensions and expulsions. Under IDEA section 616(a)(3)(C), states identify districts with “disproportionate representation” or racial and ethnic disparities in the identification of disabilities, where the disparity is the result of inappropriate identification. Last, and most important, IDEA section 618(d) requires states to identify districts with “significant disproportionality,” or racial and ethnic disparities in the identification, placement, or discipline of children with disabilities, regardless of the underlying causality.

Until 2016, the influence of these three provisions had been extremely limited, as states were allowed broad authority to define significant disproportionality, disproportionate representation, and significant discrepancy. This continues to be the case for the latter two provisions, allowing states to develop strict definitions that keep district citations to a minimum. In any case, IDEA sections 616(a)(3)(c) and

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<sup>13</sup> Blackwell, W.H., and Rossetti, Z.S. (2014). The Development of Individualized Education Programs: Where Have We Been and Where Should We Go Now? *SAGE Open*, 1-15.

<sup>14</sup> Spradlin, T., Cierniak, K., Shi, D., Chen, M. (2012). Attendance and Chronic Absenteeism in Indiana: The Impact on Student Achievement. Center for Evaluation and Education Policy: Education Policy Brief, 10(3).

612(a)(22) only require districts to undergo a review of practices, policies, and procedures to ensure broad compliance with IDEA.

However, of the three provisions, IDEA section 618(d) is by far the most meaningful. In addition to a review of practices, policies, and procedures, districts cited with significant disproportionality must also set aside 15 percent of their IDEA, Part B formula dollars to implement comprehensive, coordinated early intervening services. There is also reason to hope that states will take necessary action to encourage local change. In 2016, the U.S. Department of Education issued the Equity in IDEA rule to require all states to utilize a standard approach to identify significant disproportionality among school districts. While the standard approach still affords states some flexibility to determine when racial and ethnic disparities constitute significant disproportionality, the regulations will foster public transparency in state implementation of the provision. States must begin using this standard approach in the 2018–2019 school year. These regulations also specified that, as part of their implementation of early intervening services, cited districts must identify and address the factors that contribute to the significant disproportionality. That is, the procedural reviews must go beyond a search for IDEA compliance to uncover the causes of racial and ethnic disparity.

In the effort to dismantle the school-to-prison pipeline, the importance of IDEA section 618(d) and its implementing regulations cannot be overstated. This provision can directly address disparities by race and ethnicity in the administration of discipline for students with disabilities, and puts resources on the table to drive reforms in the communities that need it most. Further, this provision also prompts states to address other disparities in special education that may be a bellwether for future school discipline disparities. For example, school districts with disparities in emotional disturbance identifications may find that strong, schoolwide behavioral supports may reduce the classroom disruptions that prompt special education referrals.

### **STATE EFFORTS TO IMPROVE SCHOOL DISCIPLINE AND CLIMATE**

Given the available data and research on the extent of exclusionary discipline, and their implications for student success, states have assumed a powerful leadership role in encouraging schools to implement more supportive alternatives. While this shift has largely been focused on new mandates and restrictions on the use of exclusionary discipline, the 2015 reauthorization of the Elementary and Secondary Education Act—the Every Student Succeeds Act (ESSA)—has brought a new infusion of federal financial support that could support the transition away from exclusionary school discipline. For the most part, these shifts have been instituted with the goal of achieving broad reductions in suspension and expulsion, and in gaps by demographic characteristics.

State Implementation of the Reauthorized Every Student Succeeds Act. I noted earlier that efforts to address discipline disparities for children of color with disabilities must span both our general and special education systems. Thankfully, ESSA contains new levers to help states shift practice in general education. First, each state’s ESSA plan, submitted to the U.S. Department of Education, must describe how it will reduce the “overuse of discipline practices that remove students from the classroom; and the use of aversive behavioral interventions that compromise student health and safety” (ESSA, Section

1111(g)(1)(C)(i-iii)). School districts are also required to formulate implementation plans with similar content (ESSA, Section 1112(b)(11)).

Second, for the first time since 2009, states received \$400 million in federal formula dollars this year to implement student health and safety initiatives under ESSA's new Student Support and Academic Enrichment (SSAE) program.<sup>15</sup> While this amount is not entirely dedicated to issues of school climate and student supports (it also supports efforts to broaden coursework and improve education technology), it does provide states with a new source of financial support for their efforts to rethink their approaches to school discipline.

Recent Shifts in State School Discipline Policies. Children of color with disabilities will likely benefit from states' efforts to replace exclusionary discipline with more supportive alternatives. In recent years, states have worked to enact new statutes and regulations to curtail the use of suspension and expulsion as the primary approach to addressing students' behavioral challenges. In 2016 alone, 44 states introduced new laws and legislation to reform school discipline. In total, state policymakers introduced 88 new laws and amended 351 existing laws.<sup>16</sup>

State approaches to legislating school discipline have varied widely. In some places, such as Illinois, we've seen efforts to replace zero tolerance discipline with greater educator discretion.<sup>17</sup> In others, like Colorado, we've seen states mandate the use of mediation and counseling to address student behavior.<sup>18</sup> We've also seen more direct efforts to limit the use of suspension and expulsion. This school year, Maryland and Texas are implementing new laws that restrict the use of out-of-school suspension for young children, from preschool through the second grade (and up to third grade, for Texas).<sup>19,20</sup> In California, educators are now prohibited from expelling students for willful defiance.<sup>21</sup>

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<sup>15</sup> Harper, K. (2017). Federal formula funding for school safety is restored, but now states need a plan. Child Trends: Bethesda, MD. Available at: [https://www.childtrends.org/ssae\\_blog/](https://www.childtrends.org/ssae_blog/)

<sup>16</sup> Bezinque, A., Meldrum, J., Darling-Churchill, K., & Stuart-Cassel, V. (2015). Compendium of school discipline laws and regulations for the 50 states, Washington, D.C. and the U.S. territories. Retrieved from Washington, D.C.: <http://safesupportivelearning.ed.gov/school-discipline-compendium>

<sup>17</sup> Associated Press. (2016, September 18). New law means Illinois schools must limit long-term suspensions. Chicago Sun-Times. Retrieved from <https://chicago.suntimes.com/news/new-law-means-illinois-schools-must-limit-long-term-suspensions/>

<sup>18</sup> Associated Press. (2014, March 28). Colorado school expulsions drop following law. USA Today. Retrieved from <https://www.usatoday.com/story/news/nation/2014/03/28/colorado-school-expulsions-drop/7026457/>

<sup>19</sup> Ryan, K. (2017). Md. Lawmakers pass bill to curb young student expulsions. WTOP. <https://wtop.com/maryland/2017/04/md-schools-discipline-policy-of-young-students-could-change-with-new-bill/>

<sup>20</sup> Chang, J. (2017). House approves bill to ban suspension of Texas' youngest students. Statesman. Retrieved from <http://www.statesman.com/news/state--regional-govt--politics/house-approves-bill-ban-suspension-texas-youngest-students/8ikY7uTOvxhFkCCx1zE3DI/>

<sup>21</sup> California School Boards Association, & Public Counsel. (2015). Recent legislation on discipline: AB 420. Retrieved from [https://www.csba.org/GovernanceAndPolicyResources/~/\\_media/CSBA/Files/GovernanceResources/GovernanceBriefs/201503\\_AB420DisciplineFactSheet.ashx](https://www.csba.org/GovernanceAndPolicyResources/~/_media/CSBA/Files/GovernanceResources/GovernanceBriefs/201503_AB420DisciplineFactSheet.ashx)

## EMERGING CONCERNS

Much progress has been made in the last 10 years. However, we cannot believe for a moment that continued progress is secured, or that the gains we've won are safe. A range of emerging challenges—spanning policy, data collection, and public perception—must be addressed head on if we are to be effective in replacing exclusionary discipline with more effective, supportive alternatives. Admittedly, most of these challenges concern the broad effort to dismantle the school-to-prison pipeline, and are not unique to children of color with disabilities.

Efforts to Roll Back or Delay the Equity in IDEA Rule. As I noted earlier, IDEA, Section 618(d) is probably the most important policy tool we have to dismantle the school-to-prison pipeline, community by community. However, in recent weeks, news reports have found that the U.S. Department of Education may delay implementation of the 2016 Equity in IDEA rule by two years. During that time, the Department may reconsider whether the rule should be left in place at all.<sup>22</sup> These reports seem to be more than rumor, as reporters have identified a draft federal register notice from the agency that would invite public feedback on a delay of the rule. It remains to be seen whether the agency will move forward with publishing the notice in its current form.

The heart of the Equity in IDEA rule—a requirement that states utilize a standard methodology to identify significant disproportionality—should be maintained in its current form and timeline. It must be understood that, even with the current timeline, students will not see benefits from the regulation for some years. Based on a “model timeline” published by the U.S. Department of Education, states do not have to identify districts with significant disproportionality until the spring of 2019. At best, this means that these districts won't begin to implement the statutory remedies—the review and revision of policies, practices, and procedures, and the comprehensive, coordinated early intervening services to identify and address the factors contributing to the disparities—until the following school year. That's two years that children of color must wait for relief; they should not be made to wait longer.

Punitive Alternatives to Traditional School Discipline. In our discourse about school discipline, and the need to pursue alternatives to disciplinary removal, policymakers and researchers often highlight the need to reduce out-of-school suspension. The high prevalence of out-of-school suspensions, coupled with (in the public mind) a close association with a loss of instructional time, make this form of discipline easy to use as a proxy for broader school discipline challenges. However, as we consider policy initiatives to address exclusionary discipline, this narrow focus could lead to unintended consequences for our young people. For example, schools may attempt to use law enforcement solutions in place of traditional school discipline actions to remove children with disabilities from school in order to evade new restrictions. We can learn much from Colorado's Smart School Discipline Law, which the state fully implemented during the 2012–2013 school year. During the first year of implementation, Colorado saw steep drops in out-of-school suspension and expulsion across all racial and ethnic subgroups. However, for black and Native American students, referrals to law enforcement actually increased—by 8 percent

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<sup>22</sup> Samuels, C. (2017). Ed. Dept. Scrutinizing Rule on Minority Representation in Special Education. Edweek. Retrieved from [http://blogs.edweek.org/edweek/speced/2017/10/special\\_education\\_bias\\_rules\\_reconsidered.html](http://blogs.edweek.org/edweek/speced/2017/10/special_education_bias_rules_reconsidered.html)

for black students and 3 percent for Native American children.<sup>23</sup> The possibility that schools might replace out-of-school suspensions with referrals to law enforcement is particularly concerning, given renewed interest in school-based policing in the aftermath of the 2012 school shooting in Newtown, Connecticut. According to the Council for State Governments, 29 states introduced legislation to fund, train, and arm school resource officers in 2013, and at least 17 bills were enacted before the end of that year.<sup>24</sup> An increase in the presence of law enforcement on school grounds, just as schools are asked to reform their discipline practices, may create an incentive for teachers and administrators to call upon police to deal with student behaviors best left in the hands of educators and parents.

Beyond law enforcement, we should also watch for informal methods of disciplining students, especially for students with disabilities. By “informal,” I refer to actions for which official records are not kept. These include sending children home without an official suspension, shortening students’ school days, or placing a child in an alternative environment. Such approaches have the effect of improving the appearance of a school’s discipline data, while continuing to deny students access to instruction and placing additional burden on parents and families.<sup>25</sup>

The solutions to both concerns are fairly simple: our efforts to reduce out-of-school suspensions must incorporate a focus on other forms of removal (including in-school suspension, expulsion, and referrals to law enforcement), student attendance, and chronic absenteeism.

Validity of School Discipline Measurement. Even as we maintain a broad focus on preventing discipline approaches that remove children from their classrooms and schools, efforts to restrict traditional discipline may inspire efforts to hide reports. While District of Columbia Public Schools, for example, has reported reductions in the use of suspension, a report published this summer found that area high schools consistently underreported suspensions for the last two years.<sup>26</sup> This won’t be the last such report—schools have a strong incentive to show district officials and communities that they are making progress. However, this means that we should think now about effective, efficient ways to audit school discipline records and reporting.

Reemergence of Narratives that Attempt to Use Poverty to Explain Disparity. Much of the work to address disparities in school discipline, and in special education, must take place outside of local school board meetings, state legislative initiatives, or federal offices. Data and policy alone are not enough if

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<sup>23</sup> Padres & Jóvenes Unidos. (2014). The Colorado School Discipline Report Card: The State of 179 Districts. Available at:

<http://cdpsdocs.state.co.us/safeschools/Resources/Colorado%20School%20Discipline%20Report%20Card.pdf>

<sup>24</sup> Council of State Governments Justice Center. (2014). Officers in Schools: A Snapshot of Legislative Action . New York, NY. Available at <https://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Police-Brief.pdf>

<sup>25</sup> Harper, K. (2017). Five Questions Families Should Ask About School Discipline. Child Trends: Bethesda, Md. Available at <https://www.childtrends.org/child-trends-5/5-questions-families-ask-school-discipline/>

<sup>26</sup> Matos, A., Brown, E. (2017). Some D.C. high schools are reporting only a fraction of suspensions. *Washington Post*: Washington, DC. Available at [https://www.washingtonpost.com/local/education/some-dc-high-schools-reported-only-a-small-fraction-of-suspensions/2017/07/17/045c387e-5762-11e7-ba90-f5875b7d1876\\_story.html?utm\\_term=.472acc8eacb2](https://www.washingtonpost.com/local/education/some-dc-high-schools-reported-only-a-small-fraction-of-suspensions/2017/07/17/045c387e-5762-11e7-ba90-f5875b7d1876_story.html?utm_term=.472acc8eacb2)

we are not willing to question our own biases and preconceptions, or engage in honest dialogue with our colleagues and neighbors about the root causes of disparity.

In recent years, some researchers and analysts have worked to advance theories that attempt to explain away racial and ethnic disparities in disability identification (and racial and ethnic disparities in discipline) as the result of differential exposure to poverty. While this group seems small, it may be increasing in volume—the collective voice of these researchers carries. I strongly caution the Commission against relying on such research. In making this argument, I could choose to pit numbers against numbers, and methodology against methodology: research has clearly shown that, for black and Hispanic students, socioeconomic status does not explain disparities by race or ethnicity in the administration of discipline.<sup>27</sup> However, I believe that this is not a problem of numbers; after reviewing the issue carefully with associates, I'm now convinced that the conflict stems from a fault within the underlying theories that drive our respective research questions and our analyses.

In a recent piece that I coauthored with Dr. Edward Fergus, we reminded policymakers of the dangers of drawing conclusions about a child's characteristics based on their income.<sup>28</sup> And as Dr. Carla O'Connor and Dr. Sonia DeLuca Fernandez make clear, the reliance on poverty to explain systems-level education disparities by race and ethnicity advances a theory of compromised human development that assigns traits to children based on the circumstances of their birth.<sup>29</sup> It evades our collective responsibility to ensure that systems serving children of different races and ethnicities—and of different socioeconomic backgrounds—both treat students fairly and equitably and work to create a more equal playing field for those arriving with different resources and privileges.

Emergence of Narratives that Frame School Discipline Reform as a Threat to School Safety. In recent months, there have been calls to rescind federal guidance issued in 2014 that interprets Titles IV of VI of the Civil Rights Act of 1964, which clarified schools' obligation to not discriminate based on race, color, or national origin in the administration of school discipline. Others may be best positioned to explain the dilemma that federal officials will create for schools, and for students of color, if educators are unsure of their legal obligations as set by court precedent. Rather, I will address the underlying narrative that has fueled demands to rescind the guidance; if left unchecked, this may discourage state and local policymakers from working to reduce discipline disparities and replace traditional discipline with more supportive alternatives. According to this narrative, efforts to build fair school discipline policies—in which children who commit minor offenses receive instruction and support to improve their behavior—

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<sup>27</sup> Skiba, R. J., Chung, C.-G., Trachok, M., Baker, T. L., Sheya, A., & Hughes, R. L. (2014). Parsing disciplinary disproportionality: Contributions of infraction, student, and school characteristics to out-of-school suspension and expulsion. *American Educational Research Journal*, 51(4), 640-670. doi:10.3102/0002831214541670

<sup>28</sup> Harper, K., Fergus, E. (2017). Policymakers Cannot Ignore the Overrepresentation of Black Students in Special Education. *Child Trends*: Bethesda, MD. Available at <https://www.childtrends.org/policymakers-cannot-ignore-overrepresentation-black-students-special-education/>

<sup>29</sup> O'Connor, C., Fernandez, S.D. (2006). Race, class, and disproportionality: Reevaluating the relationship between poverty and special education placement. *Educational Researcher*, 35(6), pp 6-11. Available at <https://www.jstor.org/stable/3876747>

create unsafe school environments. Further, this narrative posits that initiatives meant to ensure that school discipline is equitably administered allow “dangerous children” to stay in school.<sup>30</sup>

Each of these statements flies in the face of available research and presents a line of reasoning that endangers both our effort to address discipline disparities by race and disability and broader efforts to keep children safe in school. The drive to reform school discipline is based on three premises, each supported by the body of research. First, schools that can prevent student misbehavior—by building relationships with students and offering supports to young people who struggle with trauma and other challenges—can create safer, more inclusive school environments, compared to schools that continuously suspend and expel students after incidents have already taken place.<sup>31</sup> Second, when students engage in minor acts of misbehavior, which comprise the vast majority of current suspensions,<sup>32</sup> schools can effectively prevent the reoccurrence of such behavior through instruction and support.<sup>33</sup> These premises advance a vision for creating safer, more supportive environments for all children.

As we examine the distance between our current system and our ideal, we cannot ignore that the chasm is widest wherever schools serve children of color and children with disabilities. When educators are more likely to recommend a suspension for a black student than a white student for the exact same behavior—as was found in a 2015 study by Stanford University—we cannot endorse claims that initiatives to rectify such disparity are injurious to school safety.<sup>34</sup> This brings us to the third premise: discipline disparities by race and disability are reflective of both systemic education inequities (e.g., exposure to novice teachers<sup>35</sup>) and individual biases<sup>36</sup> that must be addressed.

Admittedly, not all communities that have pursued discipline reform have done so with the understanding that teachers and schools must have access to training, evidence-based practices, and effective student services to support their transition away from school exclusion. At a time when such

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<sup>30</sup> Wermund, B. (2017). Obama’s School Discipline Guidelines Next to Go? Politico Morning Education: Washington, D.C. Available at <https://www.politico.com/newsletters/morning-education/2017/11/17/obamas-school-discipline-guidelines-next-to-go-027074>

<sup>31</sup> Losen, D. (2015). Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion. Teachers College Press: New York, NY.

<https://books.google.com/books?id=pnTYCQAAQBAJ&lpg=PP1&pg=PA128#v=onepage&q&f=false>

<sup>32</sup> In one study, 95 percent of out-of-school suspensions were due to nonviolent offenses. Skiba, R. (2000). Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice. Bloomington, IN: Education Policy Center Indiana University.

<sup>33</sup> Wilson, D.B., Gottfredson, D.C., Najaka, S.S. (2001). School-based prevention of problem behaviors: A meta-analysis. *Journal of Quantitative Criminology*, 17(3), 247-272. Available at <https://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/Wilson%20et%20al%202001.pdf>

<sup>34</sup> Okonofua, J., Eberhardt, J. (2015). Two strikes: Race and the disciplining of young students. *Psychological Science*, 26(5), 617-624. See also <https://news.stanford.edu/2015/04/15/discipline-black-students-041515/>

<sup>35</sup> Losen, D., Hodson, C., Ee, J. (2014). Disturbing inequities: Exploring the relationship between racial disparities in special education identification and discipline. *Journal of Applied Research on Children: Informing Policy for Children at Risk*, 5(2). Available at <http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1224&context=childrenatrisk>

<sup>36</sup> Downey, D.B., Pribesh, S. (2004). When race matters: Teachers’ evaluations of students’ classroom behavior. *Sociology of Education*, 77(4), 267-282. See also <https://daily.jstor.org/white-teachers-black-students/>

communities need help to determine how to provide this support so that we advance the causes of school safety and equity together, we have no time for narratives that present these two goals as a zero sum game.

## RECOMMENDATIONS FOR FEDERAL AND STATE LAWMAKERS

Maintain the Timeline and Scope of the Equity in IDEA Rule. The U.S. Department of Education should be encouraged to maintain the Equity in IDEA rule, and fully enforce its provisions.

Publish School District-Level IDEA Section 618(d) Data Sets. The Office of Special Education Programs within the U.S. Department of Education is responsible for gathering IDEA section 618(d) data from the states; like the Civil Rights Data Collection, these data sets include a treasure trove of information about the extent of racial and ethnic disparities within our education systems. However, whereas the Office for Civil Rights provides the public with school- and district-level data from the Civil Rights Data Collection, the Office for Special Education Programs only publishes state- and national-level data from IDEA section 618(d). By keeping local data in-house, the agency severely restricts the role that parents, families, communities, and researchers might play in diagnosing and addressing discipline disparities and other forms of inequity. There are a couple of potential solutions. Ideally, the agency would mirror the approach used by the Office for Civil Rights and annually publish a public-use data set for the broad education community to analyze and sift through. Alternatively, the agency could prepare a restricted-use data set for researchers only.

Support the Development of New Tools and Frameworks to Aid Schools in Creating IDEA-Compliant IEPs. As I noted earlier, researchers have found that schools struggle to build IEPs that are consistent with IDEA requirements. These studies took place before the *Endrew* decision, meaning that schools today may face greater challenges balancing special education costs with the need to create IEPs that “enable a child to make progress appropriate in light of the child’s circumstances.”<sup>37</sup>

In light of the *Endrew* ruling, the U.S. Department of Education has included language among the Secretary Priorities—a set of regulatory priorities which, once finalized, can be used to amend the regulations governing appropriate

***Proposed Priority 5: Meeting the Unique Needs of Students and Children, including those with Disabilities and/or with Unique Gifts and Talents***

*Projects that are designed to address one or more of the following priority areas:*

*(a) Ensuring students with disabilities are offered the opportunity to meet challenging objectives and receive an educational program that is both meaningful and appropriately ambitious in light of each student's circumstances by improving one or more of the following:*

*(i) Academic outcomes.*

*(ii) Functional outcomes.*

*(iii) Development of skills leading to competitive integrated employment or independent living.*

*(iv) Social or emotional development.*

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<sup>37</sup>*Endrew v. Douglas County School District*, 580 US \_\_\_\_ (2017) Available at [https://www.supremecourt.gov/opinions/16pdf/15-827\\_0pm1.pdf](https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf)

discretionary grant programs administered by the agency—to fund projects to ensure that students with disabilities are provided services consistent with the standards set by *Endrew*.

While well-intended, the Proposed Priority 5 would have the unfortunate effect of providing temporary grant funding to support activities that states and school districts are required by law to implement. This is a poor use of scarce discretionary grant dollars, given that any benefit to children with disabilities would be limited to the few school districts or states that receive funding, and may evaporate with the conclusion of the grant project period. A far better use of these dollars would charge grantees with creating and refining evidence-based tools and frameworks—to be shared with the broader education field—that would assist schools and school districts to meet the *Endrew* standard.

## **CONCLUSION**

As a nation, we've taken critical steps in recent years to help reduce disparities by race and disability in the administration of discipline and, hopefully, to disconnect our learning spaces from what has become a school-to-prison pipeline. However, we have a long way to go, and our schools and communities still need support to make this happen. Our education leaders continue to need data to track progress, and need high-quality research to help place these figures into their proper context.

I am grateful to have had the opportunity to share my perspective with this body, and I am thankful to the Commission for its work to elevate this critical issue.