

## **Advocacy Strategies to Stop the School-to-Prison Pipeline: From Working with Localities to Litigation**

By Rebecca C. Shore and Dawn Yuster

Exclusionary, punitive discipline and school policing negatively impacts all students, with a disparate impact on students with disabilities and Black and Hispanic students. After examining the harmful impact that exclusionary discipline and school policing has on all students, this white paper will discuss approaches that work to positively support students, improve school climate, and reduce suspensions, referrals to law enforcement, and inappropriate removals to the psychiatric emergency room. This white paper will also discuss strategies to dismantle the school-to-prison pipeline and the disparate impact on students with disabilities and students of color, including working collaboratively with school districts and localities, advocating to change laws, and litigation.

### **I. What are Exclusionary, Punitive Discipline and School Policing?**

In the past few decades, there has been a disturbing national trend of schools punishing normative child and adolescent behavior (i.e., horse play or talking back to school staff) with exclusionary discipline such as school suspensions, expulsions, law enforcement referrals, and eventual involvement in the juvenile and criminal justice systems. This trend is known as the “school-to-prison pipeline.” A disproportionate number of the impacted youth have histories of poverty and trauma, and unmet learning and social-emotional needs. See *Disrupting School-Justice Pathways for Youth with Behavioral Health Needs*. National Council of Juvenile and Family Court Judges, [https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ\\_SJP\\_ResponderModel\\_Final.pdf](https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ_SJP_ResponderModel_Final.pdf). Instead of receiving necessary academic and behavioral supports and services, they are excluded, punished, and pushed out of school. Students of color and students with disabilities are particularly vulnerable to trends that push out and discriminatorily apply discipline and school policing. Kim, Y.K., Losen, D.J., & Hewitt, D.T., *The School-to-Prison Pipeline: Structuring: Legal Reform*. New York: New York University Press (2012).

Such punitive, exclusionary discipline and school policing practices take many forms, such as in-school and out-of-school suspension, expulsion, removal from class periods, and school-based arrest, ticket/summons, and handcuffing. See *id.* Sometimes these practices are a result of zero tolerance policies, whereby schools exclude and punish students who engage in certain behaviors regardless of the circumstances, such as accidentally bringing a nail file or over-the-counter medicine to school. Skiba, R. J., & Knesting, K., *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*. *New Directions for Youth Development*, No. 92 (2001) [http://indiana.edu/~equity/articles/Skiba\\_Knesting\\_Zero\\_Tolerance\\_2001.pdf](http://indiana.edu/~equity/articles/Skiba_Knesting_Zero_Tolerance_2001.pdf). Inappropriate removals to the emergency room due to unaddressed or unsupported behavioral and mental health needs, school transfers, and discharges out of the school system also push out students for disciplinary reasons.

## II. The Impact of Exclusionary, Punitive Discipline and School Policing

The national data is deeply disturbing. Research shows that students of color do not misbehave more than their white peers. See Skiba, R. J., & Williams, N. T., *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior*, The Equity Project (2014), [http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior\\_031214.pdf](http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf); see also NAACP Legal Defense & Education Fund, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in Discipline* (2017), [http://www.naacpldf.org/files/about-us/Bias\\_Reportv2017\\_30\\_11\\_FINAL.pdf](http://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf). However, as early as preschool, Black children are disproportionately suspended from school: in preschool, Black children are 3.6 times as likely to get one or more out-of-school suspensions as white children. U.S. Dep't of Ed., Office of Civil Rights, 2013-2014 Civil Rights Data Collection: A First Look, (Rev. Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (hereinafter "OCR 2013-2014 CRDC"). In kindergarten through twelfth grade, Black children are 3.8 times as likely to get one or more out-of-school suspensions as white children. *Id.* Students with disabilities are more than twice as likely to get one or more out-of-school suspensions as students without disabilities.<sup>1</sup> *Id.*

The most disturbing disparities in suspension rates impact children who fall into more than one category. For example, when examining racial and gender disparities at any grade level, the highest suspension rates typically are for Black males, followed by Black females and/or Latino males. Losen, D., Hodson, C., Keith II, M.A., Morrison, K., Belway, S., *Are We Closing the School Discipline Gap?*, The Center for Civil Rights Remedies (2015), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf) (hereinafter "Losen et al., Discipline Gap") (analyzing 2011-2012 school year data). Black male students with disabilities are at the highest risk for suspension (33.8%), followed by Latino males with disabilities (23.2%). *Id.*

In addition, Black students are 2.2 times as likely to get a referral to law enforcement or be subject to a school-related arrest as white students. OCR 2013-2014 CRDC. Students with disabilities represent 12% of all students, but 67% of students subject to restraint or seclusion. *Id.*

The use of exclusionary discipline such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes. Research indicates that school suspension and expulsion increases the likelihood that students will be held back a grade, not graduate, drop out of school, receive a subsequent suspension or expulsion, and become involved in the juvenile justice system, proliferating the school-to-prison pipeline. Higher suspension rates are correlated with lower academic achievement and standardized test scores, even when controlling for

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<sup>1</sup> The data refers to students with disabilities served by the Individuals with Disabilities Education Act.

factors such as race and socioeconomic status. Council of State Governments Justice Center, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011); Losen, D.J., Gillespie, J., *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at The Civil Rights Project (2012). Higher suspension rates are also closely correlated with higher dropout and delinquency rates. Losen et al., *Discipline Gap*, at 4.

Additionally, students are losing an enormous amount of instruction time due to school discipline. Research conducted in California estimates that more than 840,000 days of instruction were lost during the 2014-15 school year alone. Losen, D.J. & Whitaker, Amir, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California* (2017), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/lost-instruction-the-disparate-impact-of-the-school-discipline-gap-in-california/UCLA\\_Lost-Instruction\\_R7-102317.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/lost-instruction-the-disparate-impact-of-the-school-discipline-gap-in-california/UCLA_Lost-Instruction_R7-102317.pdf). Adjusted for enrollment, students lost about 13 days of instruction for every 100 enrolled. *Id.* Suspensions also cost jurisdictions hundreds of millions of dollars in lost wages, tax revenue, and other social costs. Rumberger, R.W. & Losen, D.J., *The High Cost of Harsh Discipline and Its Disparate Impact*, The Center for Civil Rights Remedies at The Civil Rights Project (2016), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA\\_HighCost\\_6-2\\_948.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf).

There are numerous collateral consequences associated with the criminalization of normative child and adolescent behavior, including falling behind in school due to court appearances, potential incarceration for missed court appearances, and fines and/or incarceration associated with guilty pleas and convictions. See, e.g., Nance, Jason P., *Students, Police, and the School-To-Prison Pipeline*, *Washington Univ. L. Rev.* 93, 4 (2016); Legal Action Center, *Webinar: Helping Justice-Involved Individuals with Substance Use & Mental Health Disorders: Understanding How Laws, Regulations, & Policies Affect Their Opportunities* (July 19, 2016), <https://lac.org/wp-content/uploads/2016/08/Synthesis-of-Federal-New-York-Barriers.pdf>. A criminal record – or even an arrest – can hinder a student's ability to apply to college, get federal student loans, get scholarships or grants, obtain employment, and apply for housing. *Id.* It also carries serious immigration consequences and can lead to a student's deportation out of the country. Executive Order: *Enhancing Public Safety for the Interior of the United States* (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

### **III. Examples of Positive Behavior Supports**

#### **a. School-wide Positive Behavioral Interventions and Supports (“PBIS”)**

There are a myriad positive behavioral supports that schools can use to keep students in school learning and emotionally supported. School-wide PBIS is a multi-tiered, prevention framework that guides the implementation of evidence-based

academic and behavioral practices, which can lead to significant reduction in the behaviors that result in disciplinary removals. The first tier focuses on preventing the development of problem behaviors by implementing high-quality learning environments for all students and staff. U.S. Dep't of Ed. Office of Special Education Programs Technical Assistance Center on Positive Behavioral Interventions and Supports, *Positive Behavioral Interventions and Supports (PBIS) Implementation Blueprint: Part 1—Foundations and Supporting Information*, 6 (2015), available at [www.pbis.org](http://www.pbis.org). The second tier focuses on reducing the problem behaviors that are high risk or not responsive to primary intervention practices by providing more focused, intensive, and frequent small group-oriented responses in situations where problem behavior is likely. *Id.* The third tier focuses on reducing problem behaviors that are resistant to, or unlikely to be addressed by, primary and secondary prevention efforts by providing individualized responses to problem behavior. *Id.*

## **b. Academic and Behavioral Supports, Services, and Interventions**

### **i. Social-Emotional Learning**

Research indicates that the implementation of social and emotional learning in school is an effective approach to promoting a positive school climate, improving students' positive behaviors and reducing students' negative behaviors, and preparing youth for success in school and life. See Durlak, J. A., Weissberg, R. P., Dymnicki, A. B., Taylor, R. D., & Schellinger, K. B., *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of Schoolbased Universal Interventions*, *Child Development*, 82, 405-432 (2011) (hereinafter "Durlak et al. 2011"). Social and Emotional Learning ("SEL") is the process of acquiring knowledge and skills related to five core competencies: 1) recognizing emotions, values, strengths, and limitations; 2) managing emotions and behaviors; 3) making ethical, constructive choices about personal and social behavior; 4) forming positive relationships, working in teams, and dealing effectively with conflict; and 5) showing empathy for others. Weissberg, R. P., *Strategies to Support Social, Emotional, and Behavioral Needs of Students*, Collaborative for Academic, Social, and Emotional Learning School Climate Technical Assistance Symposium, New Orleans, LA (Mar. 11, 2011).

Studies indicate that students receiving quality SEL instruction in schools demonstrated decreased disruptive class behavior, aggression, emotional distress, and disciplinary referrals. The studies also showed improved classroom behaviors and attitudes, as well as better academic performance. See, e.g., Durlak et al. 2011, at 405, 417; Taylor, R. D., Oberle, E., Durlak, J. A. & Weissberg, R. P., *Promoting Positive Youth Development Through School-Based Social and Emotional Learning Interventions: A Meta-Analysis of Follow-Up Effects*. *Child Dev.*, 88: 1156–1171 (2017).

### **ii. Trauma-informed Approaches**

Many students have experienced traumatic events, which can profoundly impact learning and behavior. See National Child Traumatic Stress Network, *The Effects of Trauma on School and Learning*, <http://www.nctsn.org/resources/audiences/school->

personnel/effects-of-trauma (accessed Jan. 3, 2018); Trauma and Policy Learning Initiative, Helping Traumatized Children Learn, <https://traumasensitiveschools.org/trauma-and-learning/the-problem-impact/> (accessed Jan. 3, 2018). The harsh disciplinary and policing practices in schools can be re-traumatizing for students with significant histories of trauma. Substance Abuse and Mental Health Services Administration, SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach, HHS Publication No. (SMA) 14-4884. Rockville, MD: Substance Abuse and Mental Health Services Administration (2014), <https://store.samhsa.gov/shin/content/SMA14-4884/SMA14-4884.pdf>. Implementing a trauma-informed approach in schools "realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in [individuals] involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization." *Id.* A supportive, trauma-sensitive school-wide environment can play a significant role in addressing the needs of students who have endured traumatic experiences and can help all children by fostering positive connections with others and a sense of safety throughout the entire school. Trauma and Learning Policy Initiative, Helping Traumatized Children Learn Vol. 2: Creating and Advocating for Trauma-Sensitive Schools, <https://traumasensitiveschools.org/wp-content/uploads/2013/11/HTCL-Vol-2-Creating-and-Advocating-for-TSS.pdf>.

Therapeutic Crisis Intervention for Schools ("TCIS") is a model that prevents crises from occurring, de-escalates potential crises, manages acute crises, reduces injury to children and staff, and teaches constructive ways to handle stressful situations. Residential Child Care Project, "Therapeutic Crisis Intervention System for Schools," Cornell Univ. (2012), [http://rccp.cornell.edu/\\_assets/TCIS\\_SYSTEM\\_BULLETIN.pdf](http://rccp.cornell.edu/_assets/TCIS_SYSTEM_BULLETIN.pdf). Evidence indicates that implementing TCIS with fidelity may result in substantial reduction of the most aggressive behavior. Residential Child Care Project, TCI System Overview, [http://rccp.cornell.edu/tci/tci-1\\_system.html](http://rccp.cornell.edu/tci/tci-1_system.html) (accessed Jan. 1, 2018).

### **c. Alternatives to Suspension, Expulsion, and School Policing**

#### **i. Restorative Practices**

Restorative Practices is an evidence-based model that emphasizes repairing and preventing the harm that conflict causes, rather than imposing punishment. All people impacted by a conflict are included in the process of identifying and attempting to repair the harm and create a process that promotes reconciliation and solutions that rebuild relationships. In contrast to suspension and school policing, which focus on broken rules, blame, punishment, and exclusion, Restorative Practices allows school officials to consider how students will best learn why they must change their behavior, requires students to take responsibility for their behavior, helps students learn to avoid such behavior, and provides an inclusionary response that keeps students in the classroom. See [www.safersanerschools.org](http://www.safersanerschools.org); [www.restorativejustice.org](http://www.restorativejustice.org); <http://www.iirp.org>.

Examples of restorative approaches used in schools fall along a continuum of informal to formal practices. The informal practices include affective statements that

communicate feelings, as well as questions that cause students to reflect on how their behavior has affected others. More formal Restorative Practices include restorative circles and conferences and fairness committees that bring several students and adults together to talk through a problem and find a solution. *Id.*

Peer Mediation is a restorative approach that can be used when disputes arise between students to prevent problem behaviors and effectively resolve conflict. It is a structured, confidential process in which students trained to facilitate discussions as neutral student mediators use conflict mediation techniques to help other students resolve their problem. Students learn to listen to both sides of a disagreement, identify the problems they want to resolve, and create their own solutions. See <http://www.creducation.org/cre/home/>; <http://www.cruinstitute.org/>.

## ii. Collaborative Problem Solving

Another evidence-based model called Collaborative Problem Solving (“CPS”) has demonstrated effectiveness with children who have a wide range of social, emotional, and behavioral challenges. Unlike traditional models of discipline, CPS avoids the use of power, control, and motivational procedures and instead focuses on teaching students the skills they need to succeed. See [www.thinkkids.org/learn/our-collaborative-problem-solving-approach/](http://www.thinkkids.org/learn/our-collaborative-problem-solving-approach/) (accessed Jan. 4, 2018). Similar to students with learning disabilities who struggle with thinking skills in areas like reading, writing, or math, research has shown that students with behavioral challenges lack thinking skills in flexibility, frustration tolerance, and problem solving. CPS teaches these skills by helping children and the adults with them learn to resolve problems in a collaborative, mutually agreeable way. See *id.*; Greene, R., & Ablon, S. *Treating Explosive Kids: The Collaborative Problem Solving Approach*, NY: Guilford Press (2006).

CPS uses four steps: 1) gather information from the student to better understand the student’s concerns that drive the behavior and reassure the student that imposition of adult will is not how the problem will be resolved; 2) identify and share the adult’s concerns or perspective about the same problem; 3) invite the child to brainstorm solutions together with the adult; and 4) work together to assess potential solutions and choose one that is both realistic and mutually satisfactory, while the adult helps the student develop the strategy and coaches its use. See *id.*

Use of CPS helps schools move away from a punitive model to a problem-solving, skill building approach in which students take responsibility for long-term behavioral change in an environment where the adults are trained to support them. Research indicates that CPS can lead to dramatic decreases in the most challenging behaviors. Other results include significant reductions in time spent out of class, detentions, suspensions, injuries, teacher stress, and alternative school placements. See, e.g., Greene, R., Ablon, J., Goring, J., Raezer-Blakely, L., Markey, J., Monuteaux, M., Henin, A., Edwards, G. and Rabbitt, S., Effectiveness of Collaborative Problem Solving in Affectively Dysregulated Children with Oppositional-Defiant Disorder: Initial Findings, *Journal of Consulting and Clinical Psychology*, v. 72, no. 6, 1157-1164 (2004);

Stetson, E. and Plog, A., Collaborative Problem Solving in Schools: Results of a Year-Long Consultation Project, *School Social Work Journal*, v. 40, issue 2, 17-36 (2016).

#### **IV. Prevention of Exclusionary Discipline and the School-to-Prison Pipeline**

##### **a. Direct Representation of Parents and Students**

###### **i. At Disciplinary Proceedings**

The U.S. Supreme Court has recognized that a suspension is a deprivation of a student's property interest in his or her education that requires due process. *Goss v. Lopez*, 419 U.S. 565, 574-75, 581-82 (1975). The Court ruled that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. The Court further suggested that more formal procedures are required for suspensions for longer periods of time. *Id.* at 581-82. Except when the student poses a threat or danger, these due process proceedings must occur before removal. *See id.* at 582-83. An attorney or advocate's representation of a student at a suspension conference or hearing provides protection of the student's due process rights and can result in the student being removed for less or no time. At the suspension proceeding, an advocate also can request that the school provide behavioral supports for the student.

###### **ii. Manifestation Determination Reviews**

The IDEA prohibits schools from removing students from their regular instruction for more than ten days if the behavior that led to the removal was caused by or had a direct and substantial relationship to the student's disability or if the behavior was the result of a failure to implement the student's IEP. 20 U.S.C. §1415(k)(1)(E). A Manifestation Determination Review ("MDR") is the process by which a school determines whether a student is being removed because of his or her disability.

An MDR is a meeting with the student's parent and school to determine the relationship, if any, between the student's disability and the behavior leading to the suspension. If the participants at the MDR conclude that the behavior is a manifestation of the student's disability, the student cannot be suspended. 20 U.S.C. §1415(k)(1)(F). In addition to requiring MDRs for students with IEPs, the IDEA also requires MDRs for students without IEPs if the school district is deemed to know of the disability at the time of the discipline. 20 U.S.C. §1415(k)(5).

An MDR must be conducted when a student is removed for disciplinary reasons from the classroom for more than ten consecutive school days. In addition, the school must conduct an MDR when a student is subjected to a series of classroom removals or suspensions that result in the student being excluded from the classroom for more than ten cumulative school days in the school year and the exclusions constitute a "pattern". 34 C.F.R. § 300.536.

The parent must be invited and allowed to participate at the MDR and may bring an advocate and any providers who have knowledge about the relationship between the student's behavior and disability. The school team, comprised of "relevant members" of the IEP team, must review and consider all relevant information in the student's file, including the IEP, evaluations, teacher observations, and other relevant information provided by the parent, such as private evaluations and medical or school progress reports. 20 U.S.C. §1415(k)(1).

If the MDR team determines that the behavior was a manifestation of the student's disability, in most instances, the student must be allowed to return to school.<sup>2</sup> In addition, if the school had not yet conducted a Functional Behavior Assessment ("FBA"), the school must conduct an FBA and implement a Behavior Intervention Plan ("BIP"). If the school had already developed a BIP, the school must review and revise the BIP as necessary. 20 U.S.C. § 1415(k)(1)(F).

If the team concludes that the behavior is not a manifestation, the student may be suspended. While suspended, the student must receive the appropriate supports and services to allow the student to progress in a general education setting. Although these services may not be the full implementation of the student's IEP, the student must still receive appropriate services to allow the student to progress. 34 C.F.R. § 340.

Although not expressly identified as an MDR in the statute, under the implementing regulations for Section 504 of the Rehabilitation Act, a school district must conduct a "re-evaluation" prior to any significant change in placement. 34 C.F.R. § 104.35(a). The United States Department of Education Office of Civil Rights has interpreted this requirement to mean that prior to a disciplinary removal of a student with a disability for ten consecutive days or ten cumulative days in a school year "under circumstances constituting a pattern of exclusion", a school district must conduct an MDR. Letter of Finding re: Case No. 01-14-1238 Worcester Public Schools, U.S. Dep't of Ed. Office of Civil Rights (Aug. 24, 2016); see *also* Letter of Finding Re: OCR Docket #15-15-1375, U.S. Dep't of Ed. Office of Civil Rights (Mar. 4, 2016); Letter of Finding re: OCR Docket # 15-14-1071, U.S. Dep't of Ed. Office of Civil Rights (Aug. 13, 2014); Letter of Finding re: OCR Complaint No. 11-13-1266, U.S. Dep't of Ed. Office of Civil Rights (Mar. 11, 2014).

### iii. During the IEP Process

Advocacy at IEP meetings is often the first opportunity in ensuring that a student with a disability receives the appropriate behavioral supports.

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<sup>2</sup> Even if a student's behavior is found to be a manifestation of the student's disability, the student still can be placed in an interim alternative educational placement for up to 45 days in certain circumstances involving the student's use or possession of weapons or illegal drugs, or the student's infliction of serious bodily injury. 20 U.S.C. §1415(k)(1)(G).

Functional Behavioral Assessments (“FBAs”) and Behavior Intervention Plans (“BIPs”) are vital tools in understanding what causes the challenging behavior and what supports could assist a student when the student’s behavior is impeding with learning. 34 C.F.R. § 300.324(a). The purpose of the FBA is to hypothesize and eventually identify the function that the challenging behavior is serving for the individual student and develop a plan to address that underlying trigger for the behavior. To truly understand the function of the behavior, a student’s behavior must be observed and analyzed across various settings and times. A school then can identify the circumstances and triggers surrounding the challenging behavior. Amy Bobrow, *Problem Behaviors in the Classroom: What They Mean and How to Help—Functional Behavioral Assessment*, 7 Child Study Center Letter 2 (Nov./Dec. 2002).

After the FBA is conducted, a BIP creates a plan to address and prevent the concerning behavior. By addressing the triggers and causes for the student’s challenging behavior identified in the FBA, the BIP serves two purposes: first, the BIP creates a plan so that school staff consistently addresses the student’s behavior proactively during the school day to try to prevent the concerning behavior from occurring. Second, the BIP creates a plan for the school to implement if the student exhibits the concerning behavior so that behavior does not escalate. The use of effective FBAs and BIPs has been shown to decrease behaviors that often result in removing students from the classroom and/or suspending students. Lee Kern, *Addressing Persistent Challenging Practices*, [www.challengingbehavior.org/do/resources/documents/rph\\_pers\\_chall\\_beh.pdf](http://www.challengingbehavior.org/do/resources/documents/rph_pers_chall_beh.pdf) (accessed Jan. 3, 2018).

Parents can request an FBA, appropriate behavioral supports, and a BIP at IEP meetings. 34 C.F.R. §§ 300.301, 300.303. In addition, if the MDR team determines that the behavior was a manifestation of the student’s disability, the school must conduct an FBA and implement a BIP. 20 U.S.C. § 1415(k)(1)(F). It is also important to monitor the implementation of the IEP and BIP to ensure that supports are in place and that the plan for behavior in the BIP is working.

#### iv. Administrative and Due Process Hearings

If a parent disagrees with the supports provided in an IEP or Section 504 accommodations plan, or if the parent disagrees with a finding from an MDR, the parent can challenge the school district’s decisions at a due process hearing. 20 U.S.C. § 1415; 34 C.F.R. § 104.36; *see also Fry v. Napoleon Community Sch.*, 137 S. Ct. 743 (2017). IDEA and Section 504 administrative due process hearings can be used to obtain more supportive education for individual students, such as privately done FBAs, training for school staff, more supportive school placements, and compensatory educational services for the time students missed school due to inappropriate disciplinary removals. Expedited administrative due process hearings are available to challenge MDR findings of no manifestation. 34 C.F.R. § 300.532(c)(2).

## **b. Working with School Districts and Localities**

### **i. Discipline and School Policing Data Reporting Laws**

Collaborating with stakeholders can change systemic policy. For example, advocacy in New York City resulted in a local law that requires the school district and police department to publicly report data related to discipline and school policing. New York City enacted the Student Safety Act in 2011, requiring the New York City Department of Education (“NYCDOE”) and NYPD to report data to the City Council on suspensions, summonses, and arrests in schools. Amendments enacted in 2015 made New York City’s law a model for the rest of the country by requiring public reporting of even more robust data, including teacher’s classroom removals for up to four days, students sent by emergency medical services from school to a hospital, and the use of restraints and metal detectors in schools. N.Y.C. Admin. Code §§ 8-1101 – 8-1104. The amendments also limit the NYCDOE’s ability to redact data without sacrificing student privacy. N.Y.C. Admin. Code § 8-1101(b).

New York City advocates also collaborated with the NYCDOE and other city agencies to analyze the initial data reported pursuant to the Student Safety Act amendments and make recommendations to improve supports for students in schools with high rates of summonses, arrests, and summonses. See The Mayor’s Leadership Team on School Climate and Discipline, *Maintaining the Momentum: A Plan for Safety and Fairness in Schools, Phase 2 Recommendations* (July 2016), [http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT\\_Report\\_7-21-16.pdf](http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT_Report_7-21-16.pdf). Advocates have also used the data to push New York City to make strategic investments in funds and resources to provide students the appropriate supports and interventions they need to stay and succeed in school. See, e.g., *Advocates for Children of NY, Child in Crisis: Police Response to Students in Emotional Distress* (Nov. 2017), <http://www.advocatesforchildren.org/node/1183>.

### **ii. Changes to the Discipline Code**

Advocating for changes to the school and school district discipline codes can limit the use of classroom removals, suspensions, and expulsions. In Oakland, California, advocates successfully championed the elimination of all suspensions and expulsions for “disrupting school activities or willfully defying the authority of school personnel.” Oakland Unified School Board Policy, BP 51441.1, <http://www.fixschooldiscipline.org/wp-content/uploads/2017/03/Oakland-Unified-School-District-Board-Policy-5144.1.pdf>. New York City made progress towards the same goal by requiring principals to obtain approval to suspend a student for defying the authority of school staff or school safety agents. NYCDOE *Citywide Standards of Disciplinary and Intervention Measures, Effective April 2017*, (“NYCDOE Discipline Code”), <http://schools.nyc.gov/RulesPolicies/DisciplineCode/default.htm>.

2017 brought major changes in discipline codes for young students. For students in kindergarten through second grade, New York City began prohibiting (i) suspensions except in very limited circumstances where student’s behavior could cause

serious harm;<sup>3</sup> and (ii) teacher's classroom removals for more than 1 day. Similarly, the Denver discipline code began limiting suspensions of students in preschool to third grade to the most severe behaviors. See Denver Student Conduct and Discipline Procedures, <https://www.boarddocs.com/co/dpsk12/Board.nsf/Public?open&id=policies#>.

While reducing suspension, school districts are also expanding the use of alternatives, including Restorative Practices. For example, directly supporting board resolutions to improve school climate and discipline, the San Francisco Unified School District ("SFUSD") provides guidance and technical assistance for whole-school implementation of Restorative Practices. SFUSD, Restorative Practices Whole-School Implementation Guide, <http://www.healthiersf.org/RestorativePractices/Resources/documents/SFUSD%20Whole%20School%20Implementation%20Guide%20final.pdf> (accessed Jan. 2, 2018); see also <http://www.fixschooldiscipline.org/policies/> (listing promising school discipline policies in various California counties).

iii. Memoranda of Understanding ("MOU") between Agencies and Behavioral Health Diversion

In jurisdictions around the country, school districts and law enforcement agencies have entered into agreements called MOUs to clearly delineate the roles of school staff and school resource officers or police and clarify that school staff have primary responsibility for addressing student misbehavior. Some jurisdictions have created graduated response protocols with diversion options for low-level misbehavior that might otherwise subject students to an arrest or summons. By outlining specific graduated responses with referrals to diversionary programs at each level, arrest and court involvement is used only as a last resort to more positive and restorative alternatives. These agreements have led to a significant decrease in arrests and summonses within those jurisdictions.

The Cooperative Agreement in Clayton County, Georgia was the first of these agreements in the country, spearheaded by Chief Judge of the Juvenile Court Steven Teske in 2004. Clayton County Cooperative Agreement (2013), <https://www.ncmhjj.com/wp-content/uploads/2015/02/Clayton-County-Schools-and-Court-Inter-agency-governance-agreement-on-handling-of-school-offens.pdf> (accessed Jan. 4, 2018). The interagency agreement resulted in an 83% decline in school referrals to juvenile court. *Id.* Under the agreement, school resource officers have discretion not to refer students to juvenile court for some felony offenses. The agreement also designates certain types of behavior, such as disorderly conduct, theft, battery, and criminal damage to property, where school discipline must be used in a graduated response with alternatives to suspension, before a law enforcement response can be considered. Likewise, in Broward County, Florida, an interagency agreement requires schools to use school disciplinary responses without law enforcement intervention for

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<sup>3</sup> A student can be suspended for longer than 5 days pursuant to the federal Gun-Free Schools Act if the student is found in possession of a firearm in school. 20 U.S.C. §7961.

non-violent misdemeanors, including disorderly conduct, possession of cannabis, theft, and vandalism. Broward County, Florida Collaborative Agreement on School Discipline (2013)

<http://www.ncjfcj.org/sites/default/files/Broward%20Co%20Collaborative%20Agreement%20on%20School%20Discipline%20-%20MOU.pdf> (accessed Jan. 4, 2018). In San Francisco, the school district and police department created a graduated response protocol for low-level behavior including battery, disturbing the peace, and possession of marijuana for personal use. SFPD and SFUSD MOU, 2014 [https://www.aclupa.org/files/6214/2427/8289/SFUSD-SFPD-MOU-2-26-14\\_1.pdf](https://www.aclupa.org/files/6214/2427/8289/SFUSD-SFPD-MOU-2-26-14_1.pdf) (accessed Jan. 4, 2018).

Some jurisdictions use a school-based behavioral health response to address the root cause of behavior and reduce disproportionate referrals to the juvenile and criminal justice system. For example, in some schools in Connecticut, the School-Based Diversion Initiative (“SBDI”) diverts youth subject to arrest and suspension for certain misbehavior to one of Connecticut’s Emergency Mobile Psychiatric Services (“EMPS”) providers. EMPS staff come to the school to stabilize the crisis, conduct an assessment, and provide treatment and referral work. Bracey, J.R., Arzubi, E.R., Plourd, M.J., & Vanderploeg, J.J., *The SBDI Toolkit: A Community Resource for Reducing School-Based Arrests*, Farmington, CT: Child Health and Development Institute of Connecticut (2013), <https://www.chdi.org/index.php/publications/resources/sbdi-toolkit-community-resource-reducing-school-based-arrests>. Greene, Esq., J. D., & Allen, O. W., *Disrupting School-Justice Pathways for Youth with Behavioral Health Needs*. Nat’l Council of Juvenile and Family Court Judges (2017), [https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ\\_SJP\\_ResponderModel\\_Final.pdf](https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ_SJP_ResponderModel_Final.pdf) (hereinafter “NCJFCJ Behavioral Health Needs”). Among the schools that have participated in SBDI since 2010 court referrals reduced by an average of 45% during the first year of SBDI participation and referrals to behavioral health services have increased by an average of 94%. NCJFCJ Behavioral Health Needs, at 13-14.

Some Ohio school districts also use a behavioral health response to keep students in school by diverting them away from the juvenile justice system and towards mental health services. School staff refer students with behavior issues to Summit County Juvenile Court’s Family Resource Center where a case manager works with youth and their family after referral from the school, screens youth for behavioral health needs, completes an assessment, develops a service plan, links youth to needed services, and monitors and supports the youth’s progress. See Summit County Juvenile Court, Summit County Responder Model Program Manual, Front-End Diversion Workgroup of the Models for Change Mental Health/Juvenile Justice Action Network, n.d., <http://www.ohioattorneygeneral.gov/Files/Individuals-and-Families/Consumers/Task-Force-on-Criminal-Justice-and-Mental-Illness/Sample-Responder-Manual.aspx>; see also NCJFCJ Behavioral Health Needs, at 11. Over 75% of the 135 youth referred to the program between 2011 and 2013 successfully completed the program requirements. NCJFCJ Behavioral Health Needs, at 14. About 66% of the youth referred to the program before any juvenile justice system involvement remained free of any charges 12 months after referral to the program. *Id.*

### **c. Changing state legislation**

States are starting to recognize that disciplinary removals alone will not ultimately address students' behavioral challenges and can be detrimental to students. As a result, school discipline laws are changing to restrict the ages and causes for exclusionary discipline and encourage supports for students with behavioral challenges.

For example, the Arkansas school discipline statute prohibits out-of-school suspensions and expulsions for students in kindergarten through fifth grade except in cases of serious physical risk or serious disruption that cannot be addressed through other means. ACA §§ 6-18-507. California's recently amended school discipline statute prohibits suspensions and expulsions for students in kindergarten through third grade. Cal. Ed. Code § 48900, et seq. Connecticut prohibits students in pre-kindergarten through second grade from out-of-school suspensions except for violent or sexual actions that endanger persons. C.G.S.A. § 10-233c; see also M.C.L.A. 380.1311a (Michigan statute limiting automatic suspension or expulsion for physical assault to students in sixth grade and above); O.R.S. § 339.250(2)(d) (Oregon statute limiting school suspensions and expulsions for students in fifth grade and lower); V.T.C.A., Ed. Code § 37.005(c) (Texas statute prohibiting out-of-school suspensions for students in pre-kindergarten through second grade except for certain behavior involving violence, weapons, or drugs).

School discipline statutes also are encouraging the use of alternative discipline such as behavioral supports and restorative practices in lieu of exclusionary discipline by permitting suspensions and expulsions only when other disciplinary measures have failed. See, e.g., Cal. Ed. Code § 48900.5. The recently amended Michigan school discipline statute states that before suspending or expelling a pupil...the board of a school district "shall consider each of the following factors: ... (f) Whether restorative practices will be used to address the violation or behavior committed by the pupil. (g) whether a lesser intervention would properly address the violation or behavior committed by the pupil." M.C.L.A. 380.1310d. Likewise, the Oregon school discipline statute provides that prior to a student's expulsion or leaving school, a school district must propose alternative programs of instruction or instruction combined with counseling. O.R.S. § 339.250. In 2017, Texas passed a law providing for the development and implementation of a positive behavior program as an alternative to in-school suspension for pre-kindergarten through second grade students. V.T.C.A., Ed. Code § 37.0013.

Following the trend of other states, in 2016, a bill was re-introduced into the New York State Assembly and Senate that adds to the school discipline statute requirements for restorative practices and positive behavioral supports and limits the use of exclusionary discipline by age and behavior. See A03873A and S03036-A (N.Y. 2017).

### **d. Impact Litigation**

Advocacy for systemic change can be helpful when students are not receiving behavioral supports because a school or school district is not complying with the law

more globally. Impact litigation can be brought in federal or state court as an individual, class, or group action, or as an administrative complaint to state and federal education agencies. In framing a class action, recent opinions, including *Dukes v. Walmart*, 131 S.Ct. 2541 338 (2011), and *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 498 (7<sup>th</sup> Cir. 2012), emphasize that any class claims must be based upon a common contention “of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” 131 S.Ct. at 2552.

#### i. Litigation Challenging Discipline Practices

Lawsuits challenging the discipline practices within a school district are one approach to prevent exclusionary discipline and require behavioral supports for students in school. For example, in 2015, students and teachers in the Compton Unified School District in California filed a lawsuit under Section 504 and the Americans with Disabilities Act (“ADA”) because of the school district’s failure to provide trauma sensitive accommodations to students. See *P.P. v. Compton Unified School District*, 135 F.Supp.3d 1098 (C.D. Cal. 2015). The complaint detailed the neurobiological impact that sustained exposure to trauma had on the students’ brains and the behavioral challenges that students demonstrated in school because of exposure to trauma, resulting in suspensions and expulsions. The complaint requested that, as an accommodation to this disability, the school district provide trauma sensitive school environments that include

‘(1) training educators to recognize, understand, and proactively recognize and address the effects of complex trauma, in part through building students’ self-regulation and social-emotional learning skills; (2) developing restorative practices to build healthy relationships and resolve conflicts peacefully and avoid re-traumatizing students through the use of punitive discipline; and (3) ensuring consistent mental health support is available to appropriately meet student needs.’

*Id.* at 1107 (quoting the complaint). In denying the motion to dismiss, the court found that the complaint sufficiently alleged claims under Section 504 and the ADA.

In *Smith ex rel. Smith v. Mount Pleasant Public Schools*, 285 F. Supp.2d 987 (E.D. Mich. 2003), a student challenged the portion of the Michigan school discipline statute that permitted suspensions for “verbal assaults.” The court found that suspensions for “verbal assaults” violated students’ rights under the First Amendment and struck that part of the state’s school discipline statute. See *id.* at 995.

#### ii. Litigation Concerning Discipline of Students with Disabilities

*E.B. v. New York City Department of Education*, 02 CV 5118 (E.D.N.Y.), challenged the NYCDOE’s failure to comply with the requirements under the IDEA and Section 504 to provide due process protections and services to students with disabilities who were disciplined. The complaint pointed to the NYCDOE’s failure to hold MDRs,

failure to properly analyze at MDRs whether the behavior for which a student was suspended was a manifestation of the student's disability, and practice of transferring and discharging students with disabilities out of school as a means to push out. The complaint alleged that these failures denied students with disabilities a free appropriate public education.

As part of a 2015 settlement, the NYCDOE agreed to, among other requirements, enhance MDR procedures, seek approval before removing students with disabilities before suspension hearings, and ensure that students with disabilities receive appropriate instruction while suspended. The NYCDOE also agreed to procedures to prevent schools from discharging or transferring from school students with disabilities for disciplinary reasons.<sup>4</sup>

In 2016, the NYCDOE took the position that even when a school was deemed to know of a student's disability, an MDR was not required except when the NYCDOE had conducted an evaluation and determined that the student is entitled to special education services. In response to a state administrative complaint filed in 2017, the New York State Education Department ("NYSED") found that the NYCDOE's policy violates New York State Education Law (which mirrors the IDEA) and ordered the NYCDOE to conduct MDRs in all instances when the school district is deemed to know of a student's disability, even before an evaluation has been conducted or the student has an IEP.

### iii. Failures to Conduct FBAs and Develop BIPs

A 2013 complaint filed with NYSED alleged that the NYCDOE systemically failed to conduct FBAs and create BIPs, as mandated by state law and regulations. NYSED found that 10 out of the 11 investigated schools did not comply with the state regulations on FBAs and BIPs. In addition, NYSED found that the NYCDOE FBA and BIP forms did not comply with the requirements for FBAs and BIPs and that the NYCDOE did not provide sufficient support and guidance on FBAs and BIPs. NYSED ordered the NYCDOE to change its FBA and BIP forms, provide targeted professional development on FBAs and BIPs, and submit to monitoring by NYSED.<sup>5</sup>

## **Conclusion**

Disciplinary removals are detrimental to all students and disparately impact Black and Hispanic students and students with disabilities. It is more imperative than ever to advocate for local and state-wide change to exclusionary, punitive discipline and school policing laws, policies, and practices. Individual representation to protect students' rights and ensure appropriate supports in school as well as advocacy strategies for systemic change can be implemented to eliminate this disparate impact and ultimately dismantle the school-to-prison pipeline, while improving school climate for all students.

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<sup>4</sup> The settlement papers can be found at [www.advocatesforchildren.org/litigation/class\\_actions/eb\\_vs\\_doe](http://www.advocatesforchildren.org/litigation/class_actions/eb_vs_doe).

<sup>5</sup> The state complaint and decision can be found at [www.advocatesforchildren.org/litigation/afc](http://www.advocatesforchildren.org/litigation/afc).