

The Color of Inadequate School Resources: Challenging Racial Inequities that Contribute to Low Graduation Rates and High Risk for Incarceration

By Daniel J. Losen

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At the same time that our national education policy claims to raise expectations for all students, we are witnessing the deep failure of minority students to earn a high school diploma. This is a crisis with tremendous implications for our nation's future—ones both devastating to our economy and destructive to the fabric of our society. When high numbers of poor urban youth leave school ill-prepared to contribute to our labor force and our democracy, our economy suffers. Life opportunities for these youth are curtailed, and there are multigenerational costs. For example, black males are more likely to enter prison than college. Many of these inmates are fathers, whose children suffer the consequences associated with growing up with one parent in prison. The opportunity costs to families and communities are tremendous, and since the greatest economic benefits of earning a diploma as opposed to dropping out are realized in the next generation, the most significant loss is in the future.¹

Currently we are paying extraordinary attention to the responsibility of our schools, districts, and states to correct the low achievement of many poor and minority students. While raising achievement is a critical goal, preoccupation with achievement as measured by mathematics and reading proficiency test scores is myopic given the myriad other benchmarks of academic success, including good grades and fulfilling the full range of requirements necessary to earn a high school diploma.

Unfortunately the failure of these same students to earn a high school diploma gets almost no attention. Nor do we consider outcomes such as college enrollment or preparation for jobs that pay above poverty wages once students leave school. In fact, one serious unintended consequence of our test-driven accountability systems is the creation of strong incentives for schools to permit or encourage the lowest achievers

¹See Lance Lochner & Enrico Moretti, *The Social Savings from Reducing Crime through Education* (Joint Center for Poverty Research 2001), available at www.jcpr.org/policybriefs/vol4_num5.html; Arthur Blakemore & Dennis Hoffman, *The Economics of Dropouts: The Complexities of Uncovering the Real Costs of the Loss of "Human Capital"* (paper presented at the Southwest Conference on Enhancing School Completion, Arizona State University, Tempe, Arizona, Nov. 7, 2003) (unpublished manuscript on file with Daniel J. Losen). For a general overview of racial disparities in educational outcomes, see also Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOWARD LAW JOURNAL 243, 250–58 (2004).

to exit our middle and high schools for our streets. In the worst cases school principals faced with pressure to boost test scores are telling students who do not perform well to leave high school and enroll in a General Educational Development (GED) or alternative program instead. Research shows that students who are successful in GED programs are only slightly better off than dropouts.² Therefore efforts to move low-performing students into these programs seriously curtail their life chances while relieving schools of their legal and moral obligation to provide their education.

Consider the following excerpt from *Losing Our Future* describing recent developments in New York City:

*In the 2000–2001 school year, more than 55,000 students were discharged from New York City’s public high schools. Five high schools discharged more students that year than they graduated. Advocates for Children of New York Inc. recently filed and settled three federal class-action lawsuits on behalf of discharged students. All students in New York have a right to remain in school until they are 21. The suits alleged that students were pushed out because of pressure on principals to boost the percentage of students who graduate in four years and who pass the Regents exams (New York State’s high-stakes test). The suits further alleged that these students were asked to leave without written notice or an opportunity to be heard, in violation of federal law.*³

*New York City Schools Chancellor Joel I. Klein conceded that this pushing out of students is a city-wide crisis. “The problem of what’s happening to the students is a tragedy,” he said, “It’s not just a few instances, it’s a real issue.”*⁴

Similar practices to boost test scores at the expense of dropouts have been well documented around the nation.⁵

If test scores remain the yardstick of school accountability, and if graduation rates continue to be ignored, the number of push-outs will likely increase and graduation rates will decrease. On the other hand, if we truly seek to help all students meet high expectations, accountability policies should include expecting students to earn a diploma and to obtain the skills necessary to succeed in college or to have work opportunities with potential for upward mobility. Strides toward improving reading and mathematics proficiency should not lead us to ignore other critically important outcomes. Unfortunately, despite the talk of whole school reform, the current test-driven approach to education accountability is narrow and could result in more dropouts and ultimately in greater demand for prisons.

In this article I describe the devastating racial inequality in school graduation rates and connect it to both test-driven accountability and the rising tide of harsh school discipline policies. The failure to graduate and the high risk of incarceration experienced by children of color are framed as symptomatic of grossly inadequate school resources, racial isolation, and overly harsh school discipline practices. I suggest that the No Child Left Behind Act may eventually provide information that advocates can use to highlight these inequities to demand sounder policy. With better information in hand, advocates might

²Russell W. Rumberger, *Why Students Drop Out of School and What Can Be Done 1* (paper presented at the Southwest Conference on Enhancing School Completion, Arizona State University, Tempe, Arizona, Nov. 8, 2003) (on file with Daniel J. Losen).

³The lawsuits’ allegations regarding the motivation for the push-outs are bolstered by the schools’ discharging the most students around the end of October and March, right before the schools are evaluated for student attendance and performance. Since the suits, the U.S. Department of Education has begun to adopt new procedures and put out advertisements to notify students that they have a right to be in school until age 21.

⁴Gary Orfield, Daniel J. Losen, Johanna Wald & Christopher Swanson, *Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis* (The Civil Rights Project at Harvard University 2004), www.civilrightsproject.harvard.edu [hereinafter *Losing Our Future*]. See also Elisa Hyman, *School Push-Outs: An Urban Case Study*, in this issue.

⁵E.g., in Tampa, Florida, disenrollment letters were sent to untold numbers of students who failed to pass the state’s high school exit examination. *Losing Our Future*, *supra* note 4, at 42. In Houston, Texas, the school district was found to have engaged in altering enrollment records to make their dropout rates look commendable. *Id.* at 69. And in Birmingham, Alabama, in the course of a lawsuit, the school board admitted that 522 students (predominantly African American) were administratively withdrawn (involuntarily) in the spring of 2000. *Id.* at 25–26.

also tap into school finance and adequacy litigation to help turn the educational pipeline away from prison.

I. The Emerging Pattern of Inequity: the Graduation Rate Crisis Experienced by Minority Youth

High school graduation rates nationally are low for all students, with only an estimated 68 percent of those who enter ninth grade graduating with a regular diploma in twelfth grade. Rates are substantially lower for most minority groups, and particularly for males. According to the calculations used in a report issued jointly by the Urban Institute, The Civil Rights Project at Harvard University, Advocates for Children of New York, and the Civil Society Institute, only 50 percent of all Black students, 51 percent of Native American students, and 53 percent of all Hispanic students graduated from high school.⁶ Black, Native American, and Hispanic males fare even worse: 43 percent, 47 percent, and 48 percent, respectively, and less than 33 percent in some states, including New York and Ohio.⁷ These estimates were calculated by the nonpartisan Urban Institute and compared 2000–2001 enrollment in grade 9 with data on transfers and diploma recipients reported annually by most school districts.

A closer look at the nation's 100 largest school districts for this same period reveals more disturbing figures. For the

predominantly Latino population groups in New York City and Houston school districts, the graduation rates are 38 percent and 40 percent, respectively; and lower still for the predominantly black districts of Oakland (30.4 percent), Atlanta (39.6 percent), Cleveland (30 percent), and Columbus (34.4 percent).⁸

A review of characteristics of districts with low graduation rates across the nation highlights a number of trends. Districts with high poverty, located in racially isolated central cities, tend to have extremely low graduation rates.⁹

Not surprisingly, poverty in a school district is a powerful predictor of failing to graduate.¹⁰ However, research by the Urban Institute reveals that, independent of poverty, the level of segregation and the proportion of nonwhite students are also related to higher dropout rates.¹¹ These results further indicate that attending a school district with a high concentration of minority students and little exposure to white students in school is also a strong predictor of failing to graduate.

These findings are consistent with an independent study by researchers at Johns Hopkins University.¹² They looked at urban high schools across the country and performed an enrollment comparison based on what they termed the “promotion” or “holding power” of a school.¹³ For urban schools from the 100 largest school districts in the country, they found that, in almost half of the

⁶*Id.*

⁷*Id.*

⁸While occasional irregularities in how schools report their data contribute to inaccuracies at the district level, the very low numbers for black and Latino students are found fairly consistently in hundreds of smaller districts throughout the nation. *Id.* See also Christopher Swanson, *Sketching a Portrait of Public High School Graduation: Who Graduates? Who Doesn't?*, in *DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS* 14, 27–32 (Gary Orfield ed. 2004) [hereinafter *DROPOUTS IN AMERICA*].

⁹Gary Orfield, *Introduction: Losing Our Future: Minority Youth Left Out*, in *DROPOUTS IN AMERICA*, *supra* note 8.

¹⁰Swanson, *supra* note 8, at 29–30.

¹¹*Id.*

¹²Robert Balfanz & Nettie E. Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?* in *DROPOUTS IN AMERICA*, *supra* note 8.

¹³This measure requires considering only the number of students that a school “loses” from grade 9 through grade 12 without counting actual diplomas. Although it does not offer a true graduation estimate, the holding power analysis provides a useful and quick calculation for identifying and highlighting districts and schools with problematic graduation rates.

schools sampled (317 of the 661), the twelfth-grade class had shrunk by more than half from the school's ninth-grade class four years earlier.¹⁴ Most noteworthy is that, in schools where 90 percent or more of the enrollment were students of color, only 42 percent of all the freshmen advanced to grade 12.

In other words, the growing segregation of our public schools is likely a contributing factor to low graduation rates.¹⁵ Almost nine of ten intensely segregated minority schools also have concentrated poverty. These schools are characterized by a host of problems, including lower levels of competition from peers, less qualified and experienced teachers, narrower and less advanced course selection, more student turnover during the year, and students with many health and emotional problems related to poverty and to living in ghetto or barrio conditions. Few whites, including poor whites, ever experience such schools.

The low graduation rates of students of color do not bode well for their prospects of higher education or employment at livable wages. The number of jobs offering livable wages for individuals without high school diplomas has decreased in recent years, as demonstrated by the rapid shrinkage of the industrial workforce, which has lost 2.3 million jobs

since 1991.¹⁶ In 2001 the unemployment rate for dropouts 25 years old and over was almost 75 percent higher than for high school graduates—7.3 percent versus 4.2 percent.¹⁷ Approximately two-thirds of all state prison inmates have not completed high school.¹⁸

The U.S. census estimates that over their working lives high school dropouts will earn far less than high school graduates, and in 2002 high school dropouts were twice as likely to be poor than high school graduates.¹⁹ Census data also show that the earnings gap between high school graduates and dropouts has grown over the last two decades—in 1975 high school dropouts earned 90 percent as much as high school graduates; in 1999 high school dropouts earned 70 percent as much.²⁰

The negative impact of not graduating may be more severe for some minority groups. For instance, a 2002 Census Bureau report shows that the mean earnings of young adult Latinos who finish high school are 43 percent higher than those who drop out.²¹ The earning gaps are much larger for graduates with some college education even if they do not finish a degree.²² A 2003 report on the Chicago job market showed that more than half of young adult male African American dropouts had no job at all.²³

¹⁴See Balfanz and Legters, *supra* note 12.

¹⁵Gary Orfield & Chungmei Lee, *Brown At 50: King's Dream or Plessy's Nightmare?* (The Civil Rights Project at Harvard University 2004), www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

¹⁶U.S. Bureau of Labor Statistics, *Manufacturing*, available at www.bls.gov/ces/ (online table, modified Oct. 2, 2003).

¹⁷Russell W. Rumberger, *The Economic and Social Impact of High School Dropouts—Draft* (Jan. 12, 2004) (unpublished manuscript on file with Daniel J. Losen) (citing U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS tbl. 380 (2003), available at <http://nces.ed.gov/programs/digest/d02/tables/dt380.asp>).

¹⁸BRUCE WESERN ET AL., *EDUCATION AND INCARCERATION* 7–9 (2003).

¹⁹Rumberger, *supra* note 18 (citing U.S. BUREAU OF THE CENSUS, *POVERTY IN THE UNITED STATES: 2002* (2003), available at <http://ferret.bls.census.gov/macro/032003/pov/toc.htm>).

²⁰*Id.* See also Orfield, *supra* note 9, at 1 (“In 2002, the average annual earnings of an adult high school dropout were \$18,800, down by about a tenth in real terms since 1975.”).

²¹U.S. BUREAU OF THE CENSUS, *EDUCATIONAL ATTAINMENT IN THE UNITED STATES* tbl. 9 (2002).

²²U.S. BUREAU OF THE CENSUS, *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS* (2003), available at www.census.gov/prod/2002pubs/p23-210.pdf.

²³CENTER FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY, *YOUTH LABOR MARKET AND EDUCATION INDICATORS FOR THE STATE OF ILLINOIS* (2003).

At an absolute minimum, adults need a high school diploma if they are to have any reasonable opportunity to earn a living wage. Students who earn a GED have a much higher rate of unemployment than diploma recipients and are much more likely to need welfare or other forms of government assistance.²⁴ Most businesses need workers with technical skills that require at least a high school diploma. Yet the United States is allowing a dangerously high percentage of students to disappear from the educational pipeline.

II. Inadequate School Resources, Low Graduation Rates, and a State's Legal Obligation to Students and School Districts

A state's failure to fund fully those schools that serve poor and minority students seems to correspond with low graduation rates. A review of some of the nation's largest school districts show that schools in large high-poverty and high-minority districts tend to have far lower graduation rates. Research also shows us that being black or Latino, and being educated in a segregated setting, even after adjusting for poverty, correlates with low graduation rates.²⁵

Recent decisions in school finance litigation also connect inadequate school financing with high school failure, such as higher dropout rates, lower graduation rates, and higher failure on examinations required for promotion from one grade to the next. Courts throughout the nation have pointed to extraordinarily high levels of high school failure in high-poverty areas as

indicators of inadequate funding for education. Courts in both Ohio and Massachusetts recently deemed the state funding of the districts most in need to be so insufficient that it failed to satisfy the state's legal obligation to provide for the education of its children. Forty-nine states have an education clause in their state constitutions.²⁶ In each state the language detailing the State's legal obligation varies. Most often the language is open-ended. For example, the provision may state that all students are entitled to a free and efficient public education and leave the precise meaning up to state-court interpretation. However, in many cases courts explore an obligation to provide an "adequate" education even if the state constitution or code does not use the specific term.²⁷ Stating that the signs of some progress in the standardized reading and mathematics scores did not satisfy the state's obligation, a Massachusetts district court mentioned a number of measures of high school failure, including low graduation rates.²⁸

In Texas a district court more directly highlighted research on low graduation rates. In *West Orange Cove v. Neeley*, Judge John Dietz expressed serious skepticism regarding claims of remarkable test improvement despite minimum funding levels. In his ruling, given orally after the trial, the judge indicated his concern about enrollment attrition, an issue he researched without prompting from the plaintiffs.²⁹ In his remarks prefacing his decision, Judge Dietz also expressed concern over rising dropout rates and their impact on the future of his state.³⁰ Fortunately the district court judge in neither Massachusetts nor Texas focused

²⁴Orfield, *supra* note 9, at 1.

²⁵Swanson, *supra* note 8, at 28–32.

²⁶William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 BOSTON COLLEGE LAW REVIEW 597, 605–8 (1994). See also *Quality Counts 2005: No Small Change: Targeting Money Toward Student Performance*, EDUCATION WEEK (2005) (describing school finance and equity profiles for every state), available at www.edweek.org. Quality Counts 2005 is a nationwide survey, focusing on school finance and equity issues with comparative rankings for every state.

²⁷See, e.g., *Hancock v. Driscoll*, 2004 WL 877984, at *1–3 (Mass. Dist. Ct. April 26, 2004).

²⁸*Id.* at *36–100.

²⁹Terrence Stutz, *Dropout Issue Broached at Trial*, DALLAS MORNING NEWS, Aug. 9, 2004.

³⁰Remarks by Judge John Dietz, quoted in *School Finance Is Unconstitutional*, NEWS 8 AUSTIN, Sept. 16, 2004, available at www.news8austin.com/content/top_stories/default.asp?arID=119548.

exclusively on test-driven accountability performance. Although defendants claimed tremendous test score gains in each case, neither state prevailed in the face of dismal graduation rates and other glaring school deficiencies.

In Ohio plaintiffs' prevailing in court was not enough to drive school finance reform, even though Ohio's largest districts had graduation rates that are extremely low—consistently between 20 percent and 40 percent—in high-minority districts. After the state's highest court declared the school finance system unconstitutional for its inadequate support to lower income areas, the state legislature rebuffed the court and has yet to comply with the court's order.³¹

Private parties unfortunately may no longer have an opportunity to redress racial disparities in court under federal law unless the plaintiffs can demonstrate intentional discrimination.³² Although viable race-based claims may exist under some state law, challenging the graduation rate crisis more broadly through school finance and adequacy litigation may prove a very useful legal avenue for minority students attending schools and districts operating with inadequate resources.

III. No Child Left Behind Act Accountability Measures and the Graduation Rate Crisis

As described above, pressure to meet test-score goals creates incentives for pushing out low achievers. If low-scoring students drop out, their school's average test score rises. To some extent the incentives to push out students are exac-

erbated by the failure of the U.S. Department of Education to enforce graduation rate accountability, which was added to the law purposefully to mitigate the push-out problem. Weak implementation of the No Child Left Behind Act's reporting and accountability measures has undermined the Act's tremendous potential to mitigate this crisis.

Since the Act's accountability is primarily focused on test scores, it will more likely worsen the push-out crisis if the graduation rate accountability is not emphasized, or test accountability not mitigated in some meaningful way.

In order to understand the concerns about lax graduation rate accountability, consider the central element of the adequate-yearly-progress (AYP) provisions of the Act. Under the law, states must demonstrate that, in every school and district, students are on track toward achieving 100 percent proficiency in reading and mathematics in twelve years (by 2014). To ensure that this goal will be met, states must monitor the progress of the districts, and districts their schools, on interim benchmarks.³³ If the school or district in question does not improve enough, and if mandated technical assistance does not help, further intervention is mandatory and includes a host of progressively severe sanctions and consequences.³⁴

The Act requires that racial and ethnic minorities, English-language learners, students with disabilities, and students from low-income families make adequate yearly progress as defined in the statute. If any group does not meet the state's standards, the educational agency in question will not make adequate yearly

³¹*DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002). This case, now referred to as *DeRolph IV*, is based on a complaint filed in 1991 against the State of Ohio. The Ohio Supreme Court eventually ruled in 1997 that Ohio's school system violated the state constitution. See *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

³²*Alexander v. Sandoval*, 532 U.S. 275 (2001). See also *Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 774 (3d Cir. 2001) (holding that because Title VI proscribed only intentional discrimination, plaintiffs alleging that the New Jersey Department of Environmental Protection policies had a disparate impact on them did "not have a right enforceable through a 1983 action"), cert. denied, 536 U.S. 939 (2002); *Campaign for Fiscal Equity v. State of New York*, 769 N.Y.S.2d 106 (Sup. Ct. 2003). See also Losen, *supra* note 1, at 265–68 (describing the limited administrative avenues for redressing unconscious discrimination post-*Sandoval*).

³³If a school or district fails to make adequate yearly progress (AYP) for two years in a row, it is flagged for technical assistance and "identified for improvement." See 20 U.S.C. § 6311(b)(1) (2002).

³⁴See *id.* §§ 6316–6317.

progress and will be put on the track for more severe sanctions. Benefits should accrue from a sound multimeasure system of subgroup accountability for academic achievement. But students in these groups, which are disproportionately low achieving, are more likely to be pressured to leave when predetermined proficiency benchmarks, rigidly calibrated to meet the goal of 100 percent proficiency in twelve years, determine whether schools and districts are sanctioned.

The overwhelming desire of many districts and schools to avoid the test-driven accountability sanctions of the Act may be contributing to the push-out phenomenon. The following scenario illustrates this negative incentive: Imagine that a school has 1,000 tenth-grade students. Three hundred are very low achievers and fail a proficiency test. The remaining 700 are predominantly moderate achievers who pass. The school does not make the adequate-yearly-progress testing goals. The next year the pressure is higher because coming in under the goal for two years will result in state intervention. The Act requires an even higher percentage of the students who are enrolled to pass the test for the school to make adequate yearly progress; 95 percent of the enrolled eleventh graders must take the test. However, if 200 of the 300 low achievers leave for a GED program or simply drop out before the year gets under way, the “leavers” will not be tested or counted for test-based accountability. As a result, the smaller test pool will have far fewer low achievers, and the test scores of this group should rise considerably over those of the

original. Without any instructional improvements or added supports, the school’s test profile will have improved dramatically in just one year.

The Act added graduation rate accountability as an indicator of academic achievement. The graduation rate requirement was inserted into the Act’s definition of adequate yearly progress in part to create for school officials a counterincentive against pushing out struggling and disadvantaged students in order to improve test scores.³⁵ The original intent of the legislation was that a district’s or school’s failure to achieve adequate graduation rates would also result in failing to make adequate yearly progress.³⁶ If a school failed to meet adequate rates for two consecutive years, it would be sent into “school improvement status.”³⁷ However, federal and state implementation of graduation rate accountability shows that the rules and regulations issued by the Department of Education created confusion and inconsistency in how states designed their systems.³⁸ Moreover, the Department of Education took steps that demonstrably weakened the graduation rate accountability provision in the law.

Three developments in graduation rate accountability show how the weak implementation of graduation rate accountability might make matters worse, rather than act as an obstacle to push-out practices. First, the Department of Education approved state standards for defining and calculating graduation rates that fail to account for large numbers of students. Second, No Child Left Behind regulations all but eliminated graduation rate

³⁵Also note that the concern that adequate yearly progress is not made by increasing dropouts is shared by the secretary of education: “Discussion: The Secretary agrees that the graduation rate should not include students who have dropped out of school as students who have transferred to another school. With the passage of the [No Child Left Behind] Act, the expectations for schools to make AYP have increased; it is critically important that schools do not make AYP simply because students have dropped out of school. The Secretary also agrees that graduation rates should be measured from the beginning of high school in order to capture students who drop out before reaching 12th grade.” Title I—Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 71743 (Dec. 2, 2002) (codified at 34 C.F.R. pt. 200).

³⁶One provision of the law makes clear that having high graduation rates should not suffice to make adequate yearly progress if an educational entity failed to achieve adequate test performance. However, another provision does allow an entity to avoid accountability consequences if the percentage of nonproficient scores is reduced by 10 percent over the prior year *and* the school meets or exceeds its graduation rate goal or other academic indicator. The provision is commonly referred to as the “safe harbor.” 20 U.S.C. § 6311(b)(2)(l)(i) (West 2000 & Supp. 2003).

³⁷*Id.* § 6311 (b)(2)(vi).

³⁸Jeff Archer, *Graduation-Rate Plans Called All over the Map*, EDUCATION WEEK, Oct. 1, 2003, at 5.

accountability for major racial and ethnic groups. Third, the Department of Education approved state accountability plans despite extremely weak graduation rate accountability schemes.

A. No Definition of Graduation Rates?

The No Child Left Behind Act states that graduation rates are to be “defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years.”³⁹

Rather than clarify the definition, the government confused matters more. From the outset, the Department of Education misinterpreted the plain meaning of the law. In its summer 2002 draft guidance for state plans on No Child Left Behind implementation, the department began by suggesting that states were allowed to create their own definition of graduation rates. Correcting this error with another, the department told states to use the National Center for Education Statistics’ definition of “graduation rate” when no such definition existed. The department’s third error was to send to the states draft regulations that conflicted with the statute; they stated that for graduation rates states could use the statutory definition, “or, another definition....” The department acknowledged the problem but only partially corrected it in its final regulations issued in December 2002.⁴⁰

During a 2003 presentation for state school personnel on No Child Left Behind requirements, one administration official gave yet another misleading account of the definition of graduation

rates. Responding to a question about how to count graduates, Christine Wolfe, director of policy for the undersecretary of education, said, “There are many folks who would have liked a national definition in the statute.” She went on to suggest that congressional lawmakers did not believe that defining the graduation rate was appropriate.⁴¹ This statement contradicts the actual existence of the statutory definition cited above.

B. No Subgroup Accountability?

Perhaps the most dramatic erosion of graduation rate accountability is found in the Department of Education’s interpretation that the law does not require subgroup accountability for graduation rates. This is remarkable considering that accountability for racial and ethnic subgroup academic achievement is a fundamental component of No Child Left Behind’s adequate yearly progress and specifically applies to “other academic indicators.”⁴² In a controversial decision, U.S. Secretary of Education Rod Paige issued regulations stating that graduation rates did not have to be disaggregated by minority subgroups for accountability purposes, except for the “safe harbor” provision.⁴³ The secretary, in defending this reading, cited other regulations that he had authorized, and not the statute, to insist that

Section 200.19(d)(2) makes clear that the State must disaggregate its other academic indicators, including graduation rate, by each subgroup in order to report that information.... [H]owever, the State need not disaggregate its other academic indicators for determining [adequate yearly progress]. The Secretary is confident that publicly reporting disaggregated

³⁹20 U.S.C. § 6311(b)(2)(C)(vi) (emphasis added).

⁴⁰34 C.F.R. § 200.19 (2002).

⁴¹Lynn Olson, *Study: Formulas Yield Widely Varied Graduation Rates*, EDUCATION WEEK, May 2003, www.edweek.org/ew/articles/2003/05/21/37grad.h22.html?querystring=Christine%20Wolfe.

⁴²20 U.S.C. § 6311 (b)(2)(C)(vii).

⁴³See Title I—Improving the Academic Achievement of the Disadvantaged: Final Rule, 67 Fed. Reg. 71743(Dec. 2, 2002) (codified at 34 C.F.R. § 200.19 (d)(2) (2002)) available at <http://www.ed.gov/legislation/FedRegister/finrule/2002-4/120202a.html>. The secretary of education further stated, “The regulations do not require states to proffer graduation rate goals or hinge accountability success on making yearly progress.” *Id.*

data on the other academic indicators will ensure that schools, LEAs [(local educational agencies)], and the State are held accountable for subgroup performance.⁴⁴

In other words, schools need to be accountable for minority groups only on test scores of those in attendance, not on whether most black or Latino students stay in school and pass the courses they need to graduate with a diploma. This decision represented a substantive departure from the law's disaggregation requirement for accountability purposes in testing. It appears to have incorrectly interpreted the text of the statute and the will of Congress. It means that each state is now required only to set a graduation rate for students *in the aggregate*.

Further, the statistics on graduation rates bear out that in every state, using even a modest graduation rate target of 66 percent, many districts that would pass in the aggregate would fail based on the rates of many of the subgroups.⁴⁵

C. Federal Approval of Weak State Accountability Systems

A survey of state accountability plans reveals that Department of Education guidance, regulation, and monitoring contributed to the creation of weak state graduation rate accountability systems. Between October 2003 and January 2004, The Civil

Rights Project at Harvard reviewed all state accountability plans submitted to the Department of Education in September 2003. Some states left out graduation rate accountability entirely, but all plans were approved. The survey first determined if the state had established a graduation rate "floor"; having a floor meant that the state required schools or districts to achieve an absolute minimum graduation rate in order to make adequate yearly progress. States without floors were those that allowed some degree of improvement over the prior year to suffice if the graduation rate standard was not met.⁴⁶

As of February 2004, two years after the president signed the No Child Left Behind Act, no meaningful implementation of graduation rate accountability had taken place.⁴⁷ In fact, thirty-nine states set a "soft" AYP goal for graduation rates. Only ten states set a true floor for adequacy in graduation rates; in those states schools and districts that do not meet the stated goals for two consecutive years are designated as failing to make adequate yearly progress.⁴⁸ Only nine states disaggregated graduation rates by race.⁴⁹

The Texas system is representative of the thirty-nine "soft" systems. The Texas plan requires schools to either meet the 70 percent benchmark or show improvement. The required "improvement" in Texas is tiny, just one-tenth of 1 percent per year for

⁴⁴*Id.*

⁴⁵Daniel J. Losen, *Graduation Rate Accountability under the No Child Left Behind Act and the Disparate Impact on Students of Color*, in *DROPOUTS IN AMERICA*, *supra* note 8, at 53.

⁴⁶*Id.* at 47–49.

⁴⁷In June 2003 the U.S. Department of Education approved the plans of all fifty states even though most had not met the No Child Left Behind Act's requirements and few had any information on graduation rate accountability. For a full explanation of the method of the study, see *Losing Our Future*, *supra* note 4. The summary is based on a combination of reviewing state websites and interviewing a designated employee for each state. The interviews and website reviews were conducted between October 1, 2003, and January 25, 2004. Each state was given an opportunity to confirm the information reported about it. For a profile of each state's accountability for graduation rates, see *id.*, app. at 74–80.

⁴⁸The ten states identified as having a "floor" are Illinois, Colorado, Maryland, Nebraska, North Dakota, Oregon, Rhode Island, Tennessee, West Virginia, and Alaska. In some cases state officials insisted that they had set a clear floor for AYP determinations. Further questions, however, often revealed the loophole that any increase in rates would permit the school or district to avoid an AYP determination any time the rate improved over the prior year's rate. When asked hypothetically whether adequate yearly progress would be granted if a district slipped twenty points one year and improved 0.1 of 1 percent the next, many said yes.

⁴⁹The nine states that disaggregated for adequate-yearly-progress graduation rates are Hawaii, Colorado, Illinois, Kansas, North Dakota, Oklahoma, Oregon, South Dakota, and Wisconsin. For a thumbnail description of each state, see *Losing Our Future*, *supra* note 4, at 74–80.

any school or district that falls below the 70 percent goal. Furthermore, in Texas students who enroll in GED programs or who are incarcerated are no longer counted at all.

Thus far the resistance to rigorous graduation rate accountability at both the state and federal levels casts serious doubt on whether there is the political will to educate all children to high standards.

IV. Overly Harsh Discipline Policies and Low Graduation Rates

The failure to implement meaningful accountability measures for graduation rates also means that there is less of a deterrent to inappropriately harsh discipline policies, which also have the effect of pushing low-achieving students away from school. Research points to a strong correlation between the use of suspension and dropping out of school, and dropping out of school and ending up incarcerated.⁵⁰ That misbehaving students tend to be low-achieving students is also well established.⁵¹ One can infer that, along with disenrolling students, the overuse of suspension also tends to push low-achieving students out of school and simultaneously out of the test-taking pool of students whose test scores have everything to do with the performance profile of the school. Discipline policies, such as the zero-tolerance policy, that inappropriately suspend large percentages of students may also be motivated by the pressure to raise test scores.

As used in this article, the term “zero tolerance” refers to the shift toward adopting very harsh disciplinary codes, covering a wide range of student misbehavior from

truancy and vulgar language to drug and weapon possession. On the ground, suspension and expulsion for such offenses is increasing dramatically. Those policies formally labeled “zero tolerance” in a law or school policy may be limited to automatic punishments for drug or gun possession with no real opportunity for considering mitigating circumstances. However, most disciplined students are not gun or drug offenders but are suspended for nonviolent violations of the school code.⁵² The increase in suspensions for these lesser violations is also considered part of the zero-tolerance paradigm shift in school discipline. This broader shift by schools to invoke harsh penalties for minor offenses is what is most alarming. These lesser offenses do constitute the overwhelming majority of school suspensions.

A. Racial Disparities and Increasing Use of Suspension

As zero-tolerance policies have proliferated in our nation’s school codes, the number of students who are suspended out of school for a day or more, especially for minority students, has increased dramatically.

As a percentage of total enrollment, black children have experienced the largest increase in suspension, from 6 percent in 1972–1973 to 13.26 percent in 2000–2001.⁵³ However, Latinos and Native Americans have increasingly been caught up in the tsunami of intolerance in discipline flooding our public schools. And, as suspension has become a more frequent response to misbehavior, the discipline gap has grown between blacks and whites. In 1972–1973 the gap between blacks and whites was just 2.9 percent, with no group over 6 percent.

⁵⁰Russell Skiba et al, *Children Left Behind: Series Summary and Recommendations: The Children Left Behind Briefing Papers*, EDUCATION POLICY BRIEFS (Indiana Youth Services & Center for Evaluation and Education Policy), Summer 2004, available at www.ceep.indiana.edu/projects/PDF/PB_V2N4_Summary.pdf.

⁵¹*Id.*

⁵²Russell Skiba, *When Is Disproportionality Discrimination: The Overrepresentation of Black Students in School Discipline*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 180–85 (William Ayers et al. eds., 2001).

⁵³All the data were reported by the U.S. Department of Education’s Office for Civil Rights. The 1972–73 data were taken from the CHILDREN’S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? app. B (1975); the 1988 data are from the Office for Civil Rights’ Time Series CD-Rom; the 2000 data are from the 2000 Elementary and Secondary School Survey: National and State Projections (2003).

Today the gap between blacks and whites has grown to 8.17 percent.⁵⁴

These percentages represent a tremendous increase in both the use of suspension and the sheer number of students that experience suspension. They also demonstrate that while all subgroups experience the rising tide of zero tolerance, black students are experiencing a tidal wave. Moreover, when the numbers are examined at the middle and high school levels they are even more striking. In Flint City, Michigan, for example, a number of schools suspended more than half of their black and Latino students in a given year.⁵⁵ What the appropriate percentage should be is hard to say; however, we can easily conclude that suspension is not a very effective deterrent to student misbehavior in middle and high schools where each year more students are suspended than not.

B. Inadequate School Resources, Suspensions, and Failing to Graduate

Few would be surprised if research demonstrated a conclusive link between schools with fewer resources, socioeconomically disadvantaged students, and higher rates of suspension. Here I do not attempt to establish a definitive link. I do, however, illustrate a high correlation between high suspension rates and certain school resource factors. Therefore, court-ordered or legislated remedies that addressed these areas of deficiency would likely help students succeed in school.

While few studies have examined the link between inadequate school financing and low graduation rates or high rates of discipline, these issues have arisen in a number of school finance cases. In the *Hancock* case, for example, data showing

that poorly financed districts had both lower graduation rates and higher suspension rates than wealthier suburban districts were submitted to the court as part of a brief by The Civil Rights Project at Harvard.⁵⁶ In the recent case in Texas, low graduation rates were considered as evidence that schools were inadequately funded.⁵⁷

C. School Principals' Attitudes Toward Discipline and Teacher Quality

While more research showing the correlation between low finance and negative outcomes would certainly be useful, more attention might be paid at the remedy stage of litigation to the kinds of resources that would reduce suspension rates and raise graduation rates. Advocates would also benefit from research demonstrating that troublesome trends can be reversed by appropriate school policies and supports.

Some research results show the positive effects on student behavior of factors such as principals who use suspensions only as a last resort and see all their disciplinary actions as serving an educational purpose rather than primarily a punitive one. In fact, at least one researcher has shown that, when adjusted for poverty, race, and other factors that schools do not control, high suspension rates correlated to low achievement scores, suggesting that there the attitude that we must "kick out the bad kids so the good kids can learn" is having the opposite effect. One study specifically compared principals with different beliefs about discipline and found much higher use of suspension among principals who blamed students, blamed parents, and saw punishment as an effective deterrent. Conversely principals who saw suspension as a tool of last resort, believed

⁵⁴The data for each year were reported by the U.S. Department of Education's Office for Civil Rights for all students in K-12 and count students only once. Multiple suspensions are not reflected in these percentages. See *supra* note 54.

⁵⁵Office for Civil Rights, U.S. Department of Education, Elementary and Secondary School Compliance Data for 2000-2001, www.ed.gov/about/offices/list/ocr/data.html.

⁵⁶*Hancock v. Driscoll*, 2004 WL 877984 (Mass. Dist. Ct. April 26, 2004) (holding that the commonwealth was not fulfilling its constitutional duty to meet the educational needs of its children).

⁵⁷*West Orange-Grove Consolidated Independent School District v. Neeley*, No. GV-100528 (Dist. Ct., Nov. 30, 2004). See also *West Orange-Cove Consolidated Independent School District v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (holding that plaintiffs had standing).

that school discipline should serve an educational function, and reflected on the school's contribution to high use of suspension tended to lower its use.⁵⁸

Comprehensive school- and district-level research establishes that teacher quality is a leading predictor of academic success for all students.⁵⁹ These students include minority and low-income students.⁶⁰ “Conversely students who experience poor teaching year after year probably never recover from the learning deficit this imposes on them,” observe researchers Willis D. Hawley and Andrew J. Wayne.⁶¹ The evidence shows, for example, that students whose teachers have been trained in their subjects perform better than students whose teachers lack subject-matter preparation.⁶²

If teacher quality matters for academic outcomes for these students, then one would expect a similar influence on behavioral outcomes. Preliminary research findings support the hypothesis that states with higher teacher quality have lower overall rates of suspension and expulsion.⁶³ If true, and given that school suspension is a predictor of dropping out, and indirectly increases the risk of involvement in the juvenile justice system, then ensuring access to high-quality teachers may be an important measure to stem the flow of children of color out of our schools and into our penal system.⁶⁴

D. Special Education Resources, Low Graduation Rates, and High Suspension Rates

Students with disabilities also tend to have low graduation rates and high suspension rates. According to U.S. Department of Education data analyzed and reported by *Education Week*, graduation rates for students with disabilities are just over 32 percent and another 11 percent become decertified mainstream regular education students before their expected date of graduation. If the graduates were combined with those who no longer received services, one can see from the *Education Week* report that six states—Georgia, Mississippi, Nevada, Alabama, Louisiana, and Florida—still saw fewer than 25 percent of students with special needs earn a diploma.⁶⁵

These dismal graduation rates are paralleled by high suspension rates among students with disabilities. Moreover, black and Latino students with disabilities are far more likely than white students with disabilities to be suspended. Black students with disabilities are specifically more than three times as likely as whites to be suspended for the short term (less than ten days). They are also four times as likely to wind up in correctional facilities.⁶⁶ One study shows that black students with emotional

⁵⁸M. Karega Rausch & Russell Skiba, *Unplanned Outcomes: Suspensions and Expulsions in Indiana, The Children Left Behind Briefing Papers*, EDUCATION POLICY BRIEFS (Indiana Youth Services & Center for Evaluation and Education Policy), Summer 2004, available at www.ceep.indiana.edu/projects/PDF/PB_V2N2_.pdf.

⁵⁹See generally Willis D. Hawley & Andrew J. Wayne, *Good Teaching, Good Schools*, in *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN REFORM 1–7* (Gary Orfield & Elizabeth H. DeBray eds., 2003) (on file with The Civil Rights Project at Harvard).

⁶⁰STEVEN G. RIVKIN ET AL., *TEACHERS, SCHOOLS AND ACADEMIC ACHIEVEMENT* 30 (1998).

⁶¹Hawley & Wayne, *supra* note 59, at 2.

⁶²*Id.*

⁶³Daniel J. Losen et al., *Exploring the Link Between Low Teacher Quality and Disciplinary Exclusion* (paper delivered at the School to Prison Pipeline Conference, Harvard University Law School, May 2004) (on file with Daniel J. Losen).

⁶⁴Research on teacher quality and resources by the Fordham University study bolsters these inferences. MICHAEL ESKENAZI ET AL., *EQUITY OR EXCLUSION: THE DYNAMICS OF RESOURCES IN NEW YORK CITY PUBLIC SCHOOLS* (2003), available at www.ncscat-fordham.org/pages/publications.cfm.

⁶⁵Susan E. Ansell, *Put to the Test*, in *QUALITY COUNTS 2004: COUNT ME IN: SPECIAL EDUCATION IN AN ERA OF STANDARDS* 83 (Table on Outcomes for Students with Special Needs, based on *Education Week's* analysis of data from the Office of Special Education Programs, U.S. Department of Education, Data Analysis System, 2001–2002), available at www.edweek.org/rc/articles/2004/10/15/qc-archive.html.

⁶⁶David Osher et al., *Schools Make A Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in *RACIAL INEQUITY IN SPECIAL EDUCATION* 98 tbl. 1 (Daniel J. Losen & Gary Orfield eds., 2002).

disturbance constitute 45 percent of the youth in juvenile detention.⁶⁷ The same study shows that the difference in discipline correlates with racial disparities in the quality of special education services received.⁶⁸

A separate longitudinal study of Pinellas County, Florida, found that poor black males with disabilities had an exceptionally high risk of being suspended and of being suspended repeatedly during a given year.⁶⁹ In fact, in sixth grade alone, two-thirds of the poor black males with disabilities were suspended at least once, with most being suspended at least twice during that year.⁷⁰ The cohort analysis also predicted a high rate of school failure among students who were repeatedly suspended in the sixth grade.

Such correlation studies suggest a strong connection between inadequate special education resources and the high rate at which black students with disabilities are suspended, fail to graduate, and wind up incarcerated.

V. School Finance and Adequacy Litigation and No Child Left Behind Graduation Rate Accountability: Sources for Remedies

When students drop out, this act is usually based on a series of school failures and is not caused by one event or a solitary decision. Likewise, many factors contribute to a student winding up in jail. Some factors, such as the quality of special education resources and teacher training, are ones that schools can control. Advocates need to focus on those factors that lie within the powers of adults and their institutions to control. With that kind of focus in mind, I offer school finance cases and No Child Left Behind graduation rate accountability not

as holistic or complete solutions but as possible sources for remedies. Opportunities arise in the context of this litigation that could help stem the flow of students from school to prison.

Generally a conceptual anchoring takes place with regard to court-involved students—the assumption is that these students are at fault and possibly incorrigible. By contrast, where plaintiffs have won school finance and adequacy cases against states, the conclusion is that the state has failed its obligation to meet the needs of students. If advocates for students were to apply the court findings of school failure in the school finance case to their case representing a single student, this might mitigate against the assumption that court-involved students are incorrigible and might encourage judges to defer to the schools less often. Forty-five of the fifty states have litigated or are currently litigating school finance or school adequacy issues.⁷¹ Advocates should carefully examine these cases for ways to address school-to-prison-pipeline concerns both directly, as part of the litigation, and indirectly, by using aspects of the litigation in related challenges to the school-to-prison pipeline or as part of a defense strategy. Here I suggest three strategies that inject the failure of schools to meet their obligations to students into both the courtroom and public discourse with regard to incarcerated youth:

- Use research on the contributing factors to high rates of suspension and expulsion as evidence of systemic school district failure.
- Once high rates of discipline are associated with inadequate resources or funding, request programs and policies designed to lower suspension and expulsion rates as part of the remedy.

⁶⁷*Id.* at 93–94.

⁶⁸*Id.*

⁶⁹Linda Raffael Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *DECONSTRUCTING THE SCHOOL TO PRISON PIPELINE 19* (Johanna Wald & Daniel J. Losen eds., 2003).

⁷⁰*Id.* at 21–22.

⁷¹Access, *Litigation: Overview*, www.schoolfunding.info/litigation/litigation.php3 -

- Mine school finance cases for empirical evidence, admissions in the record, and conclusions of law that could bolster related impact litigation or defense of your clients.

A. Research on Contributors to High Suspension and Low Graduation Rates

High suspension and low graduation rates may be regarded as evidence of inadequacy in one or more aspects of schooling. Research shows that inadequate teacher training, school counseling, special education services, and other resource deficiencies often have a strong correlation to high rates of suspension. For example, the National Center for Schools and Communities at Fordham University reports that in New York City certain education resources are associated with good behavior regardless of race or poverty status but that those resources are inequitably distributed.⁷² Further, the report shows that behavior along race and poverty lines often runs parallel to the availability of resources.⁷³ A correlation like this could bolster plaintiffs' claims of systemic inadequacy in school finances or resources or both.

Although the connection between high rates of suspension and inadequate resources has rarely been raised in the context of these lawsuits, advocates should review these cases for opportunities. Discipline connections may be raised as part of the original set of issues before a trial court, raised as part of a settlement, or presented for consideration in the course of monitoring and enforcement. For example, in the recent *Hancock* case in Massachusetts, The Civil Rights Project (as amicus) used research showing that the kind of deficiencies described in the district court's findings were the same deficiencies that contributed to the high rate of discipline problems among minority youth with disabilities. To this finding, CRP added current data depicting unusually high rates of suspension among minority youth for the school districts in

question. This information was added late in the case via an appellate amicus brief; advocates might consider making such an argument earlier in future cases.

B. Remedies to Reduce Suspension Rates

To the extent that suspensions and incarceration rates are regarded as evidence of inadequacy, school finance and adequacy cases could produce remedies that are directed at stemming the flow of the school-to-prison pipeline. So far, the idea of achieving remedies in school finance and adequacy cases that address concerns such as the overuse of suspension is purely aspirational. Moreover, when discipline is introduced as part of the problem, advocates run the risk of poorly formed remedies that can exacerbate discipline problems. For example, a poor remedy might be the addition of more punitive discipline policies or the assignment of more police to school campuses. Advocates need to consider the perils of highlighting high discipline rates when the remedy is beyond their control. That said, advocates might try persuading lawyers bringing these cases to use high rates of suspension as evidence of inadequacy and to seek, as a remedy, technical assistance to reduce high suspension rates.

C. Court Findings and Conclusions, Admissions, and Empirical Evidence from School Finance Cases

Advocates can mine school finance litigation for useful evidence in other education pipeline cases. Even in the absence of direct or indirect involvement in the actual litigation, education advocates might make use of adequacy and finance cases in the following ways:

- Advocates can use evidence from these cases to bolster arguments that the state is abrogating its duty to students in related impact litigation. For example, in the *Hancock* case, evidence showed widespread failure to provide

⁷² ESKENAZI, *supra* note 64, at 1.

⁷³*Id.*

certified teachers with subject-matter knowledge in multiple districts, and the court found that the state had failed to provide resources to help students who failed statewide examinations. These district court findings could bolster other impact litigation against that same school district. For example, plaintiffs could bring suit claiming that a test-driven grade retention policy in Brockton, where certain students would have been promoted based on all other requirements, denied students due process rights.

- Advocates may also take arguments and data relied upon by the court and use them as evidence in representing an individual student who was inappropriately suspended or expelled from school. Notwithstanding the exceptions on the grounds of dangerousness or possession of weapons or illicit drugs, school authorities may not remove a student with disabilities beyond ten days without conducting a “a manifestation determination.”⁷⁴ If, during the manifestation determination hearing, the conduct in question was found to be “caused by, or [to have] had a direct and substantial relationship to the child’s disability; or the conduct in question was the direct result of the local educational agency’s failure to implement the individualized educational plan (IEP),” the school would be barred from going forward with the long-term removal.⁷⁵ In other words, if the school’s failure to meet its obligation to the student contributed to the behavior at issue, that could be grounds for preventing the school from suspending the student for longer than ten days.

With the reauthorization of the IDEA, these federal due process provisions represent reduced protection for students with disabilities, particularly the provision that the behavior at issue would have to be a “direct result of the failure to implement the IEP” for the school to be barred from proceeding with long-term suspension and expulsion.⁷⁶ This change arguably watered down the federal protection because, prior to the 2004 Act, three conditions had to be met for a school to suspend a student for more than ten days. They included that, “in relationship to the behavior at issue, the child’s IEP and placement were appropriate, and all services were implemented in accordance with the IEP.”⁷⁷ The old law provided more ways to infer that a school’s failure to meet the needs of the student contributed enough to the behavior that it would be unjust to punish the student further. That said, the new federal law does not necessarily trump existing state law because state law can provide more protection than what the federal law requires.

Furthermore, federal disability law protects against the unilateral removal of students with disabilities on disciplinary grounds, even if

- the school had not yet identified them as having a disability.⁷⁸ or
- the school should have known that a student had special education needs (usually because the question was raised by a parent or teacher to a school authority).⁷⁹

Whether the state or federal law is invoked, findings of fact from school finance and adequacy cases could benefit students with

⁷⁴Individuals with Disabilities Education Improvement Act of 2004 § 615 (k)(1) (E), Pub. L. No. 108-446, 118 Stat. 2647, 2726–27.

⁷⁵*Id.*

⁷⁶*Id.* § 615(k)(1)(F).

⁷⁷Individuals with Disabilities Education Act (IDEA), 20 U.S. C. § 1415(k)(4), 34 C.F.R. § 300.523(d). Although procedural protection provisions were reduced in the newly passed IDEA, state laws do not necessarily need to follow suit.

⁷⁸Individuals with Disabilities Education Improvement Act of 2004 § 615 (k)(1)(A–D), Pub. L. No. 108-446, 118 Stat. 2647, 2726–32.

⁷⁹*Id.* A full exploration of the shifting legal landscape of due process rights for disciplined students with disabilities is beyond the scope of this article.

disabilities in manifestation hearings. For example, as this excerpt of The Civil Rights Project's appellate amicus brief in the *Hancock* case shows, the district court's report (referred to as "A. (page #)") describes inadequate special education services for children with disabilities in district after district:

Lowell has insufficient resources to provide effective prereferral behavioral interventions, *see* A. (971), and a severely overloaded staff of psychologists and other service providers who cannot provide clinical services, *see* A. (971). Moreover, Lowell routinely fails to make timely referrals or provide appropriate services due to the lack of Spanish[-]speaking psychologists and large numbers of uncertified special educators. A. (970). Likewise, Springfield special education administrators describe severe resource shortages in qualified psychologists and other special educators and state for the record that "a disproportionate number of Latino, as well as African-American boys are inappropriately referred for special education services [despite several years of work toward correcting the problem]." A. (194). Judge Botsford further highlights pronounced and widespread deficiencies in many other areas including deficient IEP development and insufficient professional development for both regular and special education teachers. (A. 1116–1117).

A student in a manifestation determination hearing in Lowell or Springfield might be able to use these findings of fact to bolster his argument that his IEP was not met or services were deficient in ways that contributed to the misbehavior at issue and thereby improve the student's chances of prevailing.

VI. Recommendations and Conclusion

For schools to be appropriately evaluated, both common sense and the law calls

for a much harder look at how and why so many students are not earning a genuine diploma. With accountability emphasis focused only on improving test scores, schools and districts that succeed in keeping low achievers in school are unfairly penalized compared with those that simply cannot account for all the students who never return after starting in ninth grade. Graduation rate reporting and accountability requirements have the potential to counterbalance test-driven accountability and help safeguard against false claims of progress. Unfortunately, under the current implementation scheme of the No Child Left Behind Act, educators who are serious about improving graduation outcomes for all students face an uphill battle.

The first step toward turning these highly problematic accountability mechanisms into useful tools is developing an accurate system for counting students. Schools should be able to report accurately the number of graduates, the number of dropouts, the number of confirmed transfers, and all other legitimate removals from school rosters. These numbers should be equivalent to 100 percent of the entering high school class.

In reality schools and districts need help, and possibly pressure, from the state and federal government if they are to improve their accuracy in reporting graduation rates. States should be strongly encouraged to institute longitudinal tracking of all students by using a unique common identifier system that would follow students throughout their schooling. The legal obligation for graduation rate accountability under the No Child Left Behind Act should not be ignored simply because there are difficult obstacles to overcome.

As the Act is reexamined and revised, graduation rate accountability should be emphasized more and test scores less. Graduation rate accountability need not adopt the sanction-heavy, test-based accountability. Rather than calling for strict graduation rate benchmarks to make adequate yearly progress, schools and districts that fall under the benchmark yet demonstrate significant and

steady improvement over a period of years should be allowed to pass AYP goals. However, educators should not shy away from the disaggregation of graduation rates for determining adequate yearly progress. If the regulations that removed subgroup accountability for graduation rates remain in place, the focus on test-score improvement alone is likely to heighten the incentive for school officials to push out low-achieving minority students.

To the extent that inadequate school resources are directly and indirectly contributing to increased suspensions and

low graduation rates among students of color, something more than better due process is needed.⁸⁰ These schools need adequate resources, including counselors, highly qualified teachers, and special educators who are well trained. As important, schools need leaders who are willing to spend time and energy to help bring back into the mainstream those youth whose test scores may not make their school profile sparkle.

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⁸⁰One might argue that suspension rates would diminish if every suspended and expelled student knew and exercised the student's due process rights.