The Center for Civil Rights Remedies

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Disabling Inequity:

The Urgent Need for Race-Conscious Resource Remedies

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EXECUTIVE SUMMARY

Among the most critical pre-pandemic inequities that have not received sufficient attention is the fact that many districts are not meeting their legal and moral obligation to educate students with disabilities, which must include providing needed mental health services, behavioral supports and educationally sound interventions by well qualified staff. This report begins by revealing serious pre-existing conditions of inadequate support that are likely to be exacerbated by the current pandemic. We also summarize the pandemic's disparate impact, which is resulting in greater losses of instructional time amidst increasing experiences of trauma. This report argues that post-pandemic we will need to do much more than return to the pre-pandemic efforts in order to avoid serious and continuing hardship to students, and especially to students of color with disabilities. This includes, but is not limited to, additional steps to ensure that all students with disabilities who need supports and services to receive a free appropriate public education (FAPE) have those needs met, and that they are not excluded because of behaviors caused by their disability.

This report has three parts. **Part I** demonstrates that there is a large subgroup of students with disabilities who have a right to receive supports and services but whose needs appear to be ignored in many large districts all across the nation. When most people think about students with disabilities, they think of the roughly 7 million students that are deemed eligible for special education, as required by the Individuals with Disabilities Education Act (IDEA). But there is another large and growing group of nearly 1.4 million students with disabilities that districts are supposed to identify and support, even though they do not necessarily require specialized instruction. Another federal anti-discrimination law, Section 504 of the Rehabilitation Act of 1973, protects both types of students from disability discrimination: those who need special education and those who do not. Section 504 requires all public schools that receive federal funds to identify those that do not require specially designed instruction, but do have a disability that substantially limits one or more major life activities. Districts must provide a wide range of supports and services to these students known as "504-only" students, to ensure that they, too, receive a FAPE.

The 504-only students often include those with ADHD, depression, anxiety disorders, students who have experienced trauma, and many others who may need mental/behavioral health services on a regular basis. Some 504-only students may need a wide range of supports and services, in and out of the classroom including modifications in their classroom from their teacher to help them with attention, organization, processing or behavioral challenges. Others may only need regular assistance from a school nurse for conditions like diabetes, asthma or food allergies. Although 504-only students typically do not include students with the most severe needs, the range of disability types and extent of needed supports and services is quite broad.

For example, some students with ADHD might be deemed eligible for special education pursuant to an evaluation for eligibility under the IDEA, and for those students the IEP team would proceed to develop an individualized education plan (IEP). For other students with ADHD the evaluation team

might determine that they do not need special education in order to ensure that the student receives a free appropriate public education (FAPE). However, if the team finds that their ADHD "substantially impairs a major life activity," the district would be required to provide whatever supports and services the team determined that the student needed in order to receive a FAPE and the team would develop a 504 Plan. But, if the team determines that their condition does not "substantially" impair a major life activity, the district would not be required to provide any supports or services.

The last reported count of 504-only eligible students was for the 2017-18 school year as part of the Civil Rights Data Collection (CRDC). This report reveals that they are at least 2.7% of all public-school students, which represents more than a quadrupling of their share of the nation's student body since 2000. However, state-level rates vary widely, from Mississippi, at 0.65%, to New Hampshire, at 6.32%.

We find strong evidence suggesting that hundreds of large districts could be failing to identify 504-only students. Our findings show that in 3,298 districts, serving nearly 1.8 million students (1,781,962), not one 504-only student is identified. When all the districts with at least 1,000 enrolled students are examined, one can see that in 306 districts serving nearly one million students not one 504-only student is identified.

Our review of the data also shows that students from certain racial/ethnic groups are more likely to attend school in districts that identify 504-only students at low rates. This report further examines only those districts that enrolled at least one hundred students of their respective racial/ethnic groups. The percentage of each racial/ethnic group attending a district where not one student from their group was identified as 504-only is as follows: Native American: 22%; Black: 6%; Latinx: 4%; White: 3%. Our analysis also reveals the percentage of each group enrolled in districts where students from their respective group are identified for 504-only at or below the rate of 0.4%, which we deem a "low rate" (based on statistical methods) as follows: 39% of all Native American students, 23% of all Latinx students, and 16% of Black students attend districts with low 504-only rates. White students are consistently the racial group with the highest identification rates for 504-only.

Part II of this report focuses on the school experiences of students with disabilities who are eligible for special education and related supports and services under the IDEA and who constitute close to 14% of all public-school students in grades K-12. We examine three outcome areas: disciplinary exclusion, referral to law enforcement, and chronic absenteeism. In each area we find glaring disparities, which are far worse for non-White students receiving special education. The key Part II findings are:

1. Students with disabilities (IDEA) have far higher rates of lost instruction due to discipline than their non-disabled peers: Due to out-of-school suspensions, across all grade levels nationally, students without disabilities lost 19 days per 100 students enrolled while students with disabilities (IDEA) lost 41 days per 100 students enrolled. When we focused on secondary students in large districts, we found many districts with much higher rates and wider disparities, including 30 districts

where students with disabilities (IDEA) lost at least 90 more days per 100 students than were lost by their peers without IEPs. In five large districts, the difference was at least 149 days more.

2. Profound racial differences among students with disabilities (IDEA) exist in students' risk for being suspended out-of-school at least once: Nationally, among secondary students with disabilities (IDEA), 24% of Black students, 15% of Native American students, and 11% of White students were suspended out of school at least once in 2017-18. These disparities are even greater in many large districts highlighted in the report, where the risk for suspension for Black secondary students with disabilities was well above 40% for Blacks and 33% for Native American students.

We also find large differences when the data are broken down by discipline category. For example, students with emotional disturbance, a category in which Black students are over-represented, have a 37% risk for being removed for discipline and the highest risk for being educated in a correctional facility. The extraordinarily high rates and wide disparities featured in this report raise grave questions about the quality of educational supports and services that are provided to students with disabilities to address their social and emotional needs and challenges pre-pandemic. Further, to the extent that students with disabilities are being denied access to school for disability-caused behaviors, these descriptive findings also raise questions about possibly unlawful, discriminatory discipline on the basis of race and/or disability status.

3. Students with disabilities experience high and racially disparate rates of referrals to law enforcement: We consider it to be a serious problem that in 2017-18, 61% of districts with at least 1,000 secondary students reported zero school-related arrests. This represents a slight increase over 60% in 2015-16. Districts reporting zero students arrested included New York City, Pittsburgh, PA and several other large cities. In some cases, police reported data to other agencies, proving that the zeros are not true. These data discrepancies raise concerns that non-compliance with federal civil rights collection and/or reporting requirements may be masking over serious problems of excessive policing in some districts. Therefore, to illustrate concerns with policing, this report focuses just on the referrals to law enforcement, which covers all calls to police to address specific instances of student misconduct, and includes all arrests.

We reveal that in 811 districts rates of referral to law enforcement for secondary students with disabilities (IDEA) were at least 2% in 2017-18. Altogether these 811 districts enrolled 619,372 secondary students with disabilities (IDEA) from 48 states and the District of Columbia. Each of these districts had rates of referral to law enforcement for students with disabilities (IDEA) that were between 2% and 45%. Included among these districts were many in Texas, Chicago, Illinois, and in California, both the San Diego and Los Angeles Unified School Districts.

Given concerns about racism in policing directed at Blacks, our findings highlight that in 38 of the large districts that enrolled at least 100 Black secondary students with disabilities (IDEA), 10% or more of these students were referred to law enforcement. Austin, Texas, had the highest rate for

these students, an astonishing 32.3%! In seven of these 38 districts, including Los Angeles, the rate of referral to law enforcement for Black secondary students with disabilities (IDEA) was higher than their rate of out-of-school suspension! We also found that in 53 districts, among secondary students with disabilities (IDEA), the Black risk for referral to law enforcement was at least five percentage points higher than it was for their White peers with disabilities (IDEA).

4. Students receiving special education experience high and disparate levels of chronic absenteeism: One additional outcome measure that flags a wide set of factors and has recently been added to most statewide accountability systems is chronic absenteeism. This is defined in the CRDC as the percentage of students who missed 15 or more school days in a given year for any reason. In 2015-16 we found that, nationally, 22.5% of students with disabilities (IDEA) were chronically absent, compared to 14.9% of students without disabilities. According to our analyses, high school students with disabilities (IDEA) had a rate of 28%, compared to 20% for students without disabilities.

When we further disaggregate the data for 2018-19 from the state of California, this report finds that racial disparities persist. Among low-income high school students with disabilities in California, the rates of chronic absenteeism disaggregated by race are as follows: African American, 37%; Native Americans, 40%; Asian, 16%; Latinx, 28%; and White, 22%. Given that the economic fallout from the pandemic has resulted in an increase in evictions and homeless families, it is important to note that pre-pandemic data showed that chronic absenteeism among homeless high school students with disabilities were the highest of all. The rates ranged from 59% chronically absent for Native Americans to 29% for Asian students. Viewed together, these pre-pandemic data raise concerns about the racially disparate impact of inadequate special education and related supports and services, and the likelihood of even worse outcomes in the future if we return to the inadequate status quo once schools fully re-open in person.

Part III reviews the evidence that the pandemic is exacerbating the pre-existing inequitable conditions and concludes with recommendations for federal policymakers. It begins by examining the rising incidence of childhood trauma and mental health problems, which have likely created additional racially disparate burdens during the pandemic. These include greater exposure to violence or abuse in the home, loss of family members to COVID-19, parents losing jobs, and evictions. According to the Centers for Disease Control and Prevention (CDC), there has been a steep increase in depression and anxiety disorders, and these adverse experiences can contribute to the development of a disability. Part III also summarizes findings from studies demonstrating that, mid-pandemic, students with disabilities are losing much more instructional time than their non-disabled peers.

The purpose of providing this analysis now is to suggest that the magnitude of the inequities that students with disabilities experience is being overlooked, especially those experienced by children of color. Part III concludes by documenting the pre-existing grossly inadequate federal (and state)

funding that leaves us poorly prepared to cope with the additional disparate burden from the pandemic. For FY 2021, Congress allocated only $13.8 billion for the IDEA, which is approximately 13% of the total additional costs of providing education to students who need special education. A truly equitable remedy would begin by fulfilling the original promise of meeting 40% of the additional costs, which would require an additional $20 billion, for a total of over $33 billion annually for IDEA alone. Ideally full funding would start next year, but a more realistic goal would aim to reach the 40% mark with incremental budget increases.

However, more funding is needed because fully funding the IDEA still leaves no federal funding earmarked for the 504-only students.[1] Nor did we find any states that earmarked state funds to provide supports and services to 504-only eligible students. We conclude that under federal law the 504-only students have rights, but there are no resources specific to meeting their needs. We recommend beginning with at least one billion dollars per year with some of those funds dedicated to more accurate counts and estimates of the additional costs of meeting the needs of 504-only students. State educational agencies should also earmark additional funding to meet the needs of 504-only students. Legislative solutions might include amending the Every Student Succeeds Act, or creating a new statute that would specify additional funds to provide mental health services and effective behavioral supports and interventions for students who have a disability pursuant to 504-only, as well as for students who have experienced trauma.

A long-term remedy will also need to boost efforts to remedy the impact of race and disability bigotry. Left unaddressed, biases could easily influence the flow of any additional funds. Confounding any federal remedy is also a looming crisis in state funding caused in part by the pandemic, but also due to the history of state tax cuts and an incomplete recovery in state funding for education from cuts made during the last recession.

Part III concludes with specific federal policy recommendations based on this report's research findings including the following:

1) **Bolster civil rights enforcement and the capacity to bring about substantive change when responding to systemic discrimination:** Reinstate the federal DOJ/OCR school discipline guidance issued in 2014, and add explanations and examples of how disparate impact also applies to the discipline of students with disabilities and the disparate impact that burdens students of color with disabilities from unsound discipline policies and from the failure to provide required behavioral supports; create a system to flag for possible investigation those large districts that report enrolling no 504-only students; collect, publicly report and review civil rights education data annually, starting with 2019-20; boost civil rights investigations into systemic discrimination; provide additional incentives and technical support to ensure that accurate data are reported to the public, especially the data on school policing, and used to investigate high rates and large disparities in referrals to police by race, disability and the confluence of the two.

2) **Expand federal funding to eliminate the shortages of counselors, social workers, nurses, school psychologists and well trained fully certified special education teachers:** Provide incentives for state funding to cover students experiencing trauma and for 504-only students; include accountability for states like Ohio that have not provided adequate or equitably distributed resources and have been found in violation of their own state constitutional mandates.

These are just some of the important steps that the federal government will need to take so that the pandemic recovery does not simply return students with disabilities to the gross inadequacies and racial inequities of the pre-pandemic status quo.

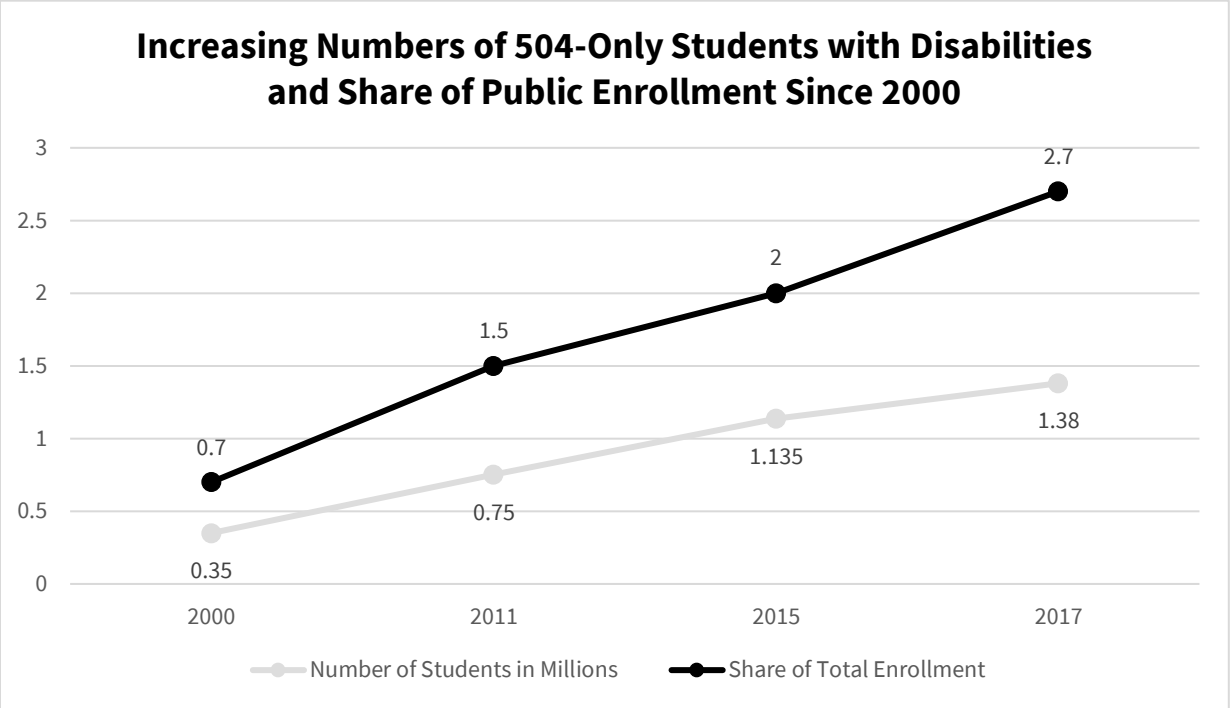
PART I. PRE-EXISTING INEQUITIES

The failure to identify and support all students with disabilities is contributing to racial inequity in educational opportunity, especially regarding access to supports and services pursuant to Section 504.[2]

We have reason to believe that the numbers of children with mental and behavioral health needs are rising during the pandemic. In Part III we explore both the pre- and mid-pandemic evidence of the increase. At the same time, the evidence reviewed in this part suggests that many large districts are overlooking or neglecting to meet the needs of many of these students, despite their legal obligations. While some may be eligible for special education pursuant to the IDEA, this part is focused on the subset of students with disabilities who have rights to receive a free appropriate public education (FAPE) only pursuant to Section 504 of the Rehabilitation Act of 1973, and are not eligible for special education under the IDEA. "OCR enforces the Section 504 rights of students with disabilities who are IDEA-eligible, as well as the Section 504 rights of students with disabilities who are not IDEA eligible. This latter subset is often referred to by OCR as '504-only' students."[3]

We do know that the numbers of 504-only students were increasing sharply prior to the pandemic based on CRDC data from 2017-18 as well as from every other prior year. However, 2017-18 are the most recent counts of these students.

Figure 1: The Numbers of Section 504-Only Students Are Rising



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection.

In fact, as of 2017 there are approximately 1.4 million students with disabilities in need of supports, services or accommodations in school, but who are not eligible for special education under the IDEA. Their numbers quadrupled from just over 300,000 students, when they constituted just 0.74% of all public-school students, nationally in the year 2000.[4] They now number 1.38 million and constitute 2.7% of all students enrolled. The percentage of students eligible pursuant to the IDEA has increased too, but in smaller increments, from 12.9% in 2011 to 13.7% in 2017.[5]

One may wonder how educators can improve access to such supports and services if we don't annually count how many students need or currently use them. Our failure to count these students likely reflects the fact that there is insufficient federal funding to meet their needs. This also makes it difficult to provide adequate oversight to ensure that the schools they attend provide them with a FAPE. Only for the IDEA eligible students can we annually track racially disaggregated academic and non-academic outcomes such as discipline and absenteeism. In contrast, for 504-only students the CRDC collects data every other year on their enrollment overall, and enrollment by race/ethnicity, as well as outcome data for 504-only students, but the 504-only students' outcome data are not racially disaggregated.

This report is the first to cover in detail the identification rates of 504-only students who need supports and services to ensure they receive FAPE. Although both Section 504 and the IDEA require that districts must identify all eligible students, only the IDEA further requires that the IDEA data are publicly reported annually and disaggregated by disability type, at least at the state level. In contrast, there are no statutory requirements to ensure that the student identification rates for 504-only are reported publicly. Nor are 504-only students assigned a disability category.[6]

Section 504-only students are often students with ADHD, students with PTSD, students with anxiety disorders, those on the milder end of the autism spectrum, students with behavioral disorders, those with chronic depression or a wide range of other mental or physical health needs.[7] It's important to realize the wide range of students covered by Section 504 as described by the U.S. Department of Education's Office for Civil Rights in its Letter of Guidance on Students with ADHD.[8]

> "Section 504 prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance, including school districts. The definition of disability is the same under both Title II [of the ADA] and Section 504. Under these laws, a person (including a student) with a disability is one who meets any of the following criteria:
> • has a physical or mental impairment that substantially limits one or more major life activities;
> • has a record of such an impairment; or
> • is regarded as having such an impairment. Some examples of a major life activity that could be substantially limited by ADHD include concentrating, reading, thinking, and functions of the brain."[9]

Many schools and districts are not meeting their obligation to identify and meet the mental and behavioral health needs of 504-only students:[10] One of the core safeguards that is grounded in the requirements of Section 504 (as well as in the IDEA) is the obligation to find and educate all the students whose disabilities impacted their learning.[11] Referred to as the "child find" obligation, the rules require educators to respond to concerns raised by parents and educators and to evaluate and identify all students that one would have reason to believe have a disability. The process of the IDEA evaluation typically would help determine whether a student suspected of having a disability is eligible pursuant to the IDEA for special education or related services, but the same process can also be used to determine eligibility for Section 504. But in some cases, a 504 eligibility evaluation must be conducted distinctly.[12]

The services that the 504 team determine are needed can be as extensive and expensive as what a student may receive pursuant to the IDEA:[13] Although it is true that students with the most severe forms of these conditions are often deemed eligible for special education pursuant to the IDEA, one cannot make categorical assumptions about the severity of needs or degree of supports or services that are needed based on type of disability. For example, a student with dyslexia may need two hours a week of intensive reading instruction and be identified pursuant to the IDEA and have an IEP, while another student with ADHD may need to meet with the school counselor for 30 minutes each day, need weekly check-ins and extra help from staff members in a learning center, yet not need specialized instruction and might only be deemed eligible to have disability-related needs met under Section 504. In other words, the student with a Section 504 plan may need an intensive system of supports and services even if not eligible for special education and related supports and services as required under the IDEA.

The DoED's Office for Civil Rights, which has jurisdiction to enforce Section 504, has issued guidance that further clarifies a district's obligation to fully meet the needs of 504-only students as follows:[14]

> "OCR has learned that some educators have the mistaken impression that placement options under Section 504 are limited to free or low-cost services. Likewise, some educators mistakenly equate reasonable modifications with low-cost or free services. ... the 504-only student is entitled to the provision of any services the placement team decides are appropriate to meet their individual educational needs, regardless of cost or administrative burden."

In some cases, students with temporarily disabling conditions may still qualify as having a disability, even if the condition is not expected to last more than six months.[15] Of course, early on, when support is needed it may be hard to know how long the observed problems will last, and failure to provide support early may increase the risk of permanent damage.[16]

Despite their growing numbers, the under-identification of students needing 504 supports and services appears to be widespread: This report is the first ever to draw attention to the many students who are likely eligible, but *not* identified pursuant to Section 504-only.[17] The 2017-18 numbers also represent an increase over 2015-16 by nearly one percentage point and it appears that all but one state showed an increase.[18] If this trend continues, it is not unrealistic to think that the national rate could double again in the next 10 years as rates in several states are already above 6%, while many are still below 2%.

Considering the rising numbers of students with ADHD, depression, and anxiety disorders, as well as increases in the numbers of students who have PTSD, one would think that most large districts would identify at least some 504-only students. *However, in 2017-18, out of the 17,498 districts in the CRDC, 3,434 districts (roughly 20%) serving over 1.8 million students identified zero 504-only eligible students—none whatsoever.*[19]

Of course, statistically speaking, there is always a chance, especially in districts with relatively low total enrollments, that no students would be eligible. One cannot assume noncompliance with child-find requirements based strictly on the numbers. In order to explore indicators of possible non-compliance we re-ran our analysis with only medium to large districts, those that enrolled at least 1,000 students in 2017-18. We also eliminated specialized districts that enrolled 100% students with disabilities (IDEA). With those limits, the new analysis yielded 7,451 districts with at least 1,000 students enrolled, K-12. In the aggregate, across the selected mid- to large-sized districts, 2.9% of the students were reported as 504-only eligible.

However, we found that 4.1% of these medium to large districts identified no 504-only students. In other words, it is highly unlikely that for districts with 1,000 or more students, not one student would be found 504-only eligible. In terms of students affected, we found that 975,194 students attended 306 districts that failed to identify a single 504-only student.[20] Moreover, when the scope was narrowed even further to districts with enrollments of at least 3,000 students there were 91 "no-504" districts serving a total of 630,450 students.

State distribution of districts with no 504-only students suggests a need for more state and federal oversight: Although most states had at least one large district, of the 306 districts with at least 1,000 students where we found zero students eligible for 504, 26 were in Michigan; 27 were in Arizona; 25 were in Mississippi; 21 were in Georgia; 21 were in Illinois; 20 were in California; and 18 were in Missouri. These seven states account for just over half of these large "no-504" districts. Each of these seven states had mean 504 identification rates for all students that were below the national average, even though Michigan, Georgia and Illinois did not rank among the bottom five.

For the sake of comparison, it is worth noting the number of districts that reported enrolling zero students with disabilities eligible under the IDEA. Before applying enrollment restrictions, we found

505 such districts. Their total enrollment was 122,405 students. Of these 505 districts, 137 were charter school districts at which 38,814 students were enrolled (nearly 32% of the total sample).[21]

However, of these 505, we did find 352 districts (more than half), enrolling 68,091 students, that reported enrolling no students with disabilities at all (neither 504 nor IDEA). Similarly, 87 of the 137 "charter" districts, were among those reporting no students with disabilities. This subset of 87 charter districts enrolled 23,599 students without disabilities. Even strong proponents of charter schools acknowledge that they tend to enroll fewer students with disabilities than one would expect based on the demographics in the neighborhoods in which they are located.[22] On the other hand, in order to assess the impact of charters schools on the failure to identify 504-only eligible students one would need to conduct a school-level analysis.

Most of the districts that identified no IDEA students were small. Compared to the 306 no-504 districts, only 23 medium-to-large districts enrolled at least 1,000 students yet identified no IDEA students. Of these 23 districts, nearly half were located in three states. Specifically, five were located in Michigan, three in Indiana and three were in Illinois. Further, of these large districts enrolling at least 1,000 students, 11 of them also reported enrolling no 504-only students.

National, state and district level data suggest inadequacy of supports and services for students only eligible under Section 504: Although every state identified some 504-only students, as one can see from Table 1 describing the rates in the highest and lowest states, there was a wide variation compared to the national average, with rates ranging from 0.65% in Missouri to 6.32% in New Hampshire.

Table 1: States with Highest and Lowest Rates of Section 504-Only Identification in 2017-18, with Corresponding Rates in 2015-16

States with the Highest 504 Identification Rates			
State	**17-18 Percent of 504 Students**	**15-16 Percent of 504 Students**	**Change in Rate Since 2015-16**
1. NH	6.32%	5.84%	0.48
2. TX	6.07%	4.94%	1.13
3. LA	5.65%	5.37%	0.28
4. VT	5.48%	4.94%	0.54
5. CT	5.35%	4.66%	0.69
States with the Lowest Identification Rates for 504-Only			
45. OK	1.47%	1.14%	0.33
45. AZ	1.47%	1.19%	0.28
46. CA	1.37%	1.14%	0.23
47. NE	1.26%	0.93%	0.33
48. WI	1.10%	0.77%	0.33
49. NM	1.01%	1.28%	-0.27
50. MS	0.65%	0.34%	0.31

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

In 2017-18, when compared with data from 2015-16, a state-level review revealed that rates of identification for 504-only rose in every state but New Mexico. Other states with rates at the high end were Texas,[23] Louisiana, Connecticut and Vermont, all with 504-only identification rates that were above 5%. Others with relatively low rates were California, Nebraska, Wisconsin, Mississippi and New Mexico.[24] Given the very low 504-only identification rates in some states and the wide span, these overarching state-level data raise concerns about the sufficiency of federal and state oversight of 504-only child find practices in many states.

District level data suggest that many under-identify 504-only students, especially students of color

When it comes to 504-only eligibility, in the aggregate national data, every racial group had a lower rate of identification than Whites. Whites also have the highest 504-only identification rates of all reported racial/ethnic groups in nearly every state (see Appendix B, Table B6). Many states have state averages below the national mean of 2.7% for all students.[25] If we used the rate for Whites in each state as the comparison point, the pattern of lower rates of identification in comparison to Whites

was the case for Latinx students in all 50 states. Blacks, and multi-racial students were also identified at lower rates than Whites in 45 states. Similar patterns were found for Asians (48 states), Hawaiian/Pacific Islander (47 states), and Native Americans (43 states). Although it is beyond the scope of this report, this pattern raises the possibility that in some districts' over-representation for special education and either zero or very low rates of 504-only identification may be related. It should be noted that this report did not explore the possible connection and no conclusions can be drawn based on these descriptive data, but curious readers will find that they can compare 504-only identification rates to IDEA identification rates for all students in the spreadsheet accompanying this report.[26]

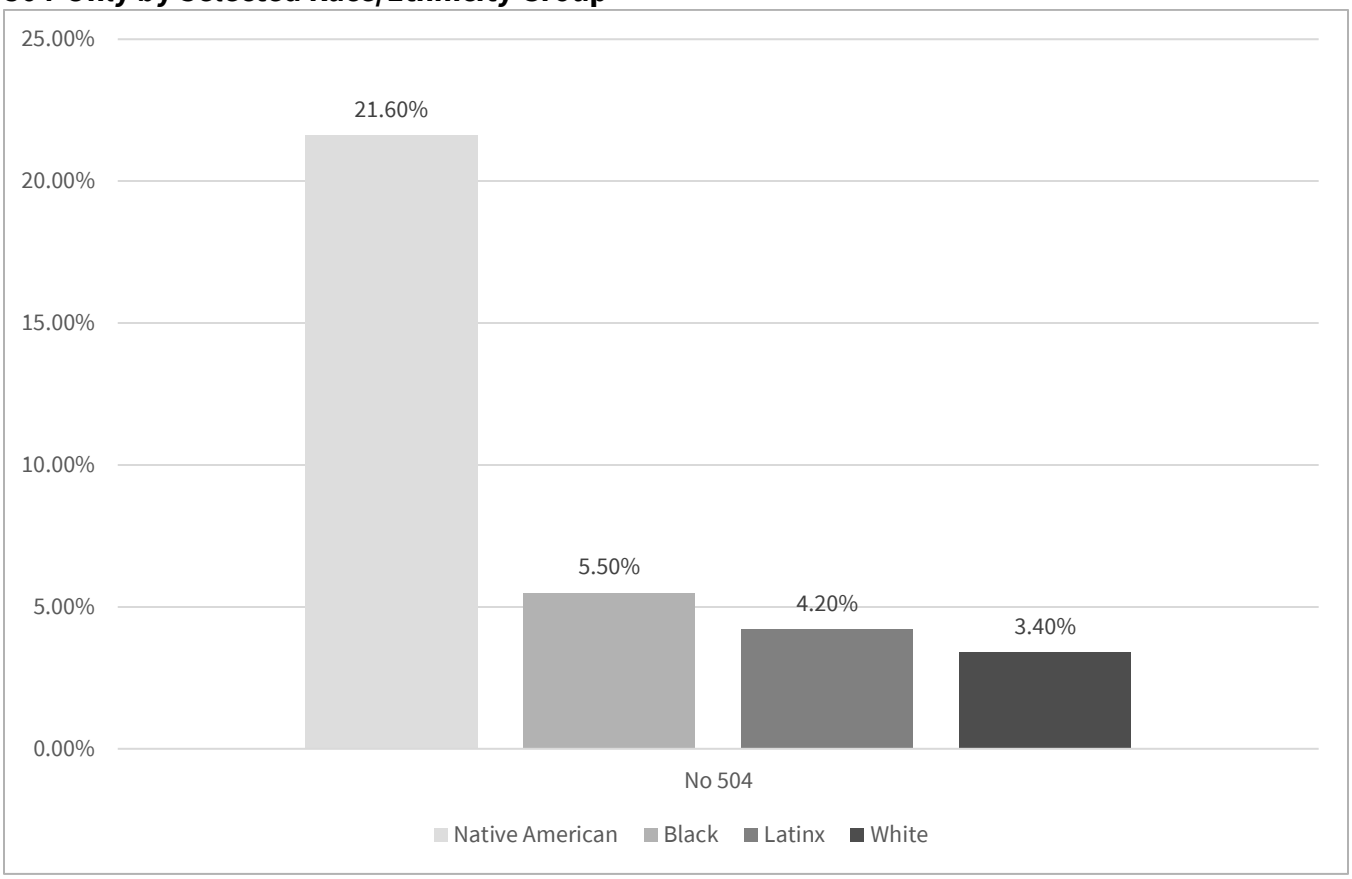
A closer look at district identification rates for 504-only by race/ethnicity suggests possible unlawful discrimination[27] in many districts: Our review of the racial disparities at the state and district level, based on data from the CRDC covering the 2017-18 school year, raises serious concerns regarding the possibility that many districts are denying FAPE to a broad subset of students of color with disabilities. One additional reason to be concerned about pre-pandemic lower rates of 504-only identification is that, as we will discuss in Part II, the evidence suggests that many children who have emotional or behavioral disorders due to experiencing trauma could be eligible for supports under 504-only, and could receive earlier intervention if so identified. However, if some large districts do not provide supports and services for 504-only students as a matter of policy, that would be unlawful, and an indicator that the district is unprepared to provide for the continuum of supports and services that will likely be in much greater demand in the near future. To further examine these problematic results as they impact racial/ethnic groups, we call attention to districts that identified not a single student from each of the selected racial/ethnic groups in 2017-18.[28]

For each racial group we examined their likelihood of attending school in a district where there were at least 100 students from their racial group enrolled, yet no student from their group was identified as eligible pursuant to 504-only.[29] This reduces the likelihood of chance or error explaining the patterns. For each group we also describe the total number of districts that had sufficient enrollment to meet the enrollment criteria.[30] Based on combined racial group enrollment across those districts meeting the enrollment requirements, Figure 2 below describes the percentage of each group that attended a school in a district where no children from their group was identified pursuant to 504-only. Although a detailed investigation would require more recent data and a much closer analysis, such stark disparities raise the possibility that in some districts only White students receive the supports, services and classroom and testing accommodations that students with disabilities under 504-only are entitled to receive.

In addition, we describe for each group the percentage who attend school in a district that we estimate to be a "low" 504-rate of identification for their group. We chose an identification rate of 0.4% or below as the marker for "low" because 0.4% is one standard deviation below our sample's per-district average for all students. Arguably, our analysis of each racial group's attendance in "low-

504-identifying" districts relies on a very conservative estimate of what is a low 504-only identification rate.

Figure 2: Percent of Total Enrollment Attending School with 0% Identification for 504-Only by Selected Race/Ethnicity Group



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

Districts with low to no White 504 eligibility: We found 13,255 districts had at least 100 Whites enrolled. Together they represent 23,736,644 White students. Of these districts, 1,592 identified no White students as 504-only eligible. These districts, combined, enrolled 807,633 White students. This means that 3.4% of the nearly 24 million White students in this sample attended school in a district where no White students were deemed eligible.

We also found that in 2,133 of the 13,255 districts White students had a 504-only rate of less than 0.4% representing 1,549,682 White students. This means that 6.5% of White students in our sample attended school in a district where Whites had what we deemed was a low 504 identification rate.

Districts with low to no Latinx 504 eligibility: There were 7,167 districts representing 13,465,882 Latinx students that met our criteria of having 100 or more enrolled Latinx students. In 1,326 of these districts, with a combined total enrollment of 571,070 Latinx students, not a single Latinx student

was identified as 504-only. In other words, of the over 13 million Latinx students covered by the districts in our sample, 4.2% of Latinx students attended school in a district with a 0% Latinx 504-only identification rate.

Further, 1,862 of these districts had Latinx rates at less than 0.4%. In the aggregate, they enrolled 3,028,806 Latinx students. In other words, 22.5% of all Latinx students attended school in a district where less than 0.4% of Latinx students were deemed eligible for 504 only.

Districts with low to no Black 504 eligibility: We examined 5,015 districts that enrolled at least 100 Black students. These districts represented a combined total of 7,399,111 Black students. We found 874 districts representing 404,025 Black students where Blacks had an identification rate of 0% 504-only eligibility. That means that 5.5% of the Black students in our sample attended school in a district that identified no Black students as 504-only. In other words, across the U.S., roughly 1 in 20 Black students attended school in a district that had at least 100 Black students but found no Black students eligible under section 504-only.

In addition, our analysis found 1,154 districts representing 1,210,733 Black students had low rates of identification for 504-only. They represent 16.4% of the students in the sample which means that approximately 1 in 6 Black students attended school in a district with a low rate of 504-only identification for Black students.

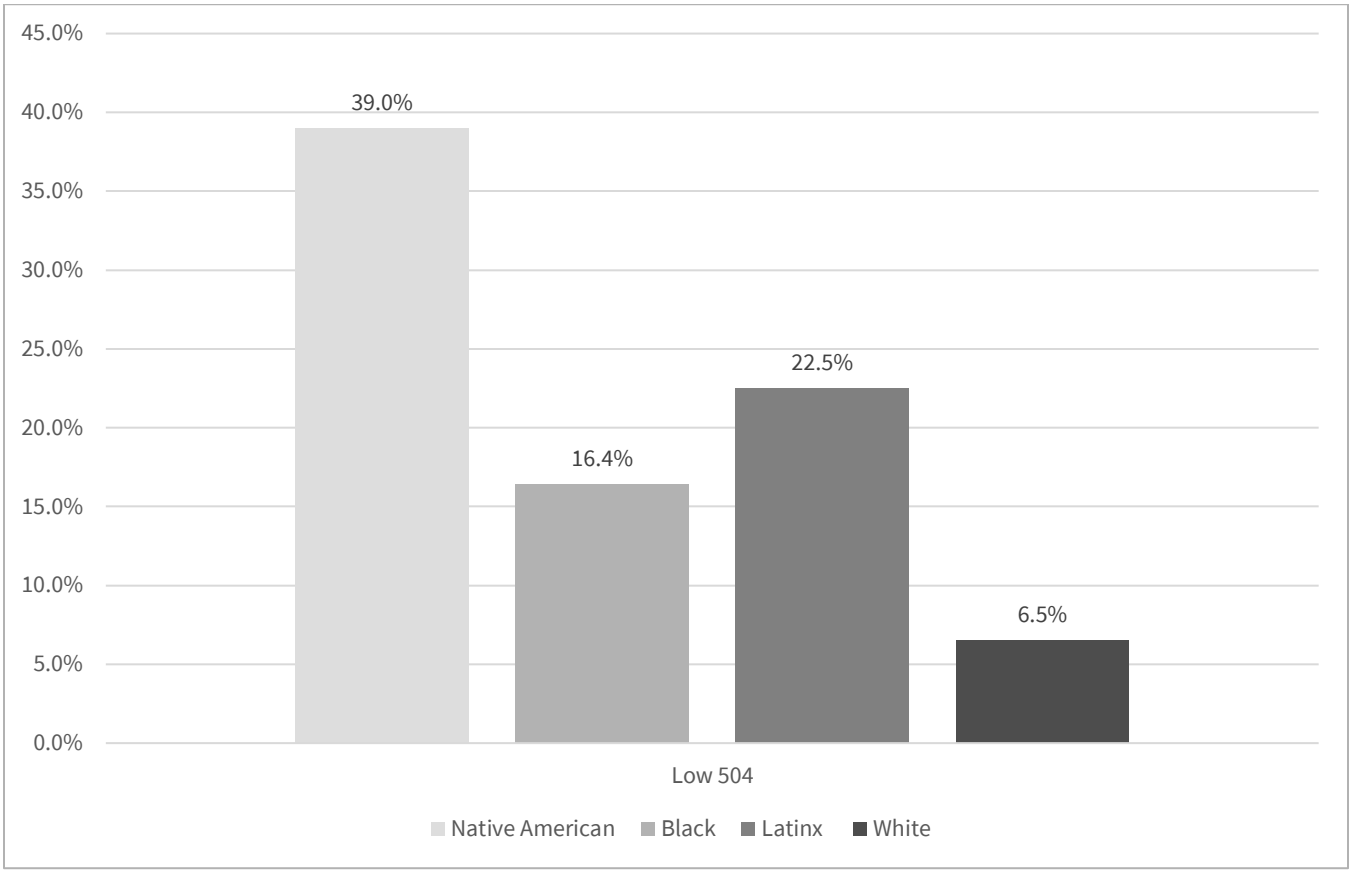
Districts with low to no Native American 504 eligibility: At least 100 Native American students were enrolled in each of 915 districts. Altogether these represented 366,011 Native American students. In 276 of these districts representing 79,009 Native American students, not one Native American student was identified as 504-only. That means that 21.6% of the Native American meeting the criteria for this analysis attended school where no Native Americans were deemed eligible pursuant to 504.

Further, in 328 districts representing 142,630 students, the Native American identification 504 rates were below 0.4%. In other words, 39% of Native American students attended a district where they had low identification rates pursuant to Section 504-only.

These stark racial differences in the access to 504 supports and services should prompt a much closer look, especially in those districts where no students of certain racial/ethnic groups were identified. Data alone are insufficient to draw firm legal conclusions, but differences of this magnitude raise the possibility that the denial is influenced by racial bias, intentional disability discrimination, or might reflect an unlawful racially disparate impact from a policy that lacks justification. An unlawful disparate impact may be evidenced by a facially neutral policy where that policy is determined to be the cause of the difference and where the policy has no educational justification.[31] For example, if a district were found to have a policy or practice of discouraging educators from identifying any 504-only students, it would be a violation of the child find

requirements, but it might also violate Title VI if the implementation of such a policy caused more harm to students from certain racial groups than others.

Figure 3: Percentage of Group Attending a District with 504-Only Rate at or Below 0.4% by Race/Ethnicity



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

It should also be mentioned that whenever schools fail to identify students with needs for mental health services or behavioral supports, for students not eligible under the IDEA, this also indicates that there is little to no required support for students or for their teachers.

One of the most surprising findings, mentioned in the introduction, is that there is no annual review of the data on 504-only students and no state laws or regulations that provide funding specifically for their needs. Moreover, OCR's oversight provides only minimal accountability. For example, in a January correspondence, OCR explained that they do not flag large districts for closer review if the district failed to identify a single student as eligible pursuant to 504-only. This straightforward analysis is likely the first time all of the nation's districts were reviewed for their failure to identify 504-only students, but such a review could easily be added to OCR's enforcement oversight.

The current approach by OCR is to rely on complaints from parents. Concerns have been raised by the National Council on Disability about the undue burden that parents bear to enforce the IDEA.[32] Given the data reviewed in Part I, those same concerns apply to parents of 504-only students. Unless the parent is a disability or education lawyer, or unless the district that failed to identify students pursuant to 504 notified parents of children deemed ineligible for special education that their child might have a right to receive supports and services pursuant to 504, most parents would never know they even have a basis to file a complaint.

The failure to identify and support 504-only students is likely having a harmful racially disparate impact: Equally important, this review of the data collected from every district in the nation for 2017-18 suggests that the pre-pandemic failure to identify 504-only students was more likely experienced by students of color and low-income students.[33]

Simply identifying as eligible those students that had likely been overlooked will not help them if the quality and quantity of services available is in serious short supply. Teachers and student support staff, already exhausted by the stressors of the current year, will be overwhelmed if we do not recognize these pre-existing inadequacies.[34] Efforts to create healthy learning environments when schools restart in-person learning will be undermined unless the pre-pandemic shortcomings indicated in this report are addressed as part of the preparations.

Evaluating students for 504 eligibility, developing individualized 504 plans, taking the time to meet with parents, creating behavior improvement plans, providing sufficient counseling and other support services, revising plans, and training teachers how to make classroom accommodations and implement 504-plans all take time and resources and, therefore, there are additional costs associated with meeting their needs.

Unfortunately, as will be discussed further in Part III, there have never been any federal funds earmarked for schools to meet the needs of 504-only students, despite an obligation to provide additional supports and services that can be just as costly as those some students would receive pursuant to the IDEA. This means that there is likely to be an incentive to avoid acknowledging the legal obligation to such students altogether. The data analyses that follow help provide more details regarding the scope of the identification problem, but the reasons for failing to identify students in some districts but not in others raises more questions than answers because the available data don't describe the outcomes of students who were not found eligible under either 504 or the IDEA.

The current monitoring and enforcement of the treatment of children with disabilities is weak: OCR has jurisdiction to monitor and enforce Section 504, but no federal law requires that the public be made aware of the number of 504-only students or that states monitor progress in meeting the needs of students with disabilities eligible under 504-only. And no state does so on their own initiative. If schools fail to provide the supports and services that these 504-only students need in order to receive FAPE, and fail to provide procedural protections to safeguard these students from

unjust disciplinary removal, OCR may regard such failure as a form of unlawful disability discrimination. However, the OCR's oversight is alarmingly weak and parents may not know that their child has a right to supports and services if found eligible under Section 504, even if not found eligible pursuant to the IDEA. Outside of the oversight provided by DoED's OCR and the biennial data collected as part of the CRDC, unlike all the other groups that are protected against discrimination, there is neither funding nor required public reporting to help ensure that all eligible students with disabilities receive FAPE.[35]

All students with disabilities who are eligible under 504-only are protected from exclusion on the basis of disability-caused behavior: 504-only students are supposed to be protected from discriminatory discipline in the much same way that students eligible under the IDEA are protected. If a student has a disability or is soon to be evaluated and, at any point, the student exhibits misconduct that is caused by the disability, including before the evaluation process has started, the student would be entitled to procedural protections against inappropriate removal.[36] If a functional behavioral assessment is conducted and a behavioral intervention plan is warranted, it should be addressed in the student's Section 504 plan or IEP. Even if a student has challenging behavior that is not directly caused by their disability, it can factor into their evaluation and need for services.[37] Moreover, there is a procedural protection known as a manifestation determination that is intended to prevent disciplinary removals in response to behaviors that are directly caused by the disability, or when misconduct is a response to a failure to implement a student's IEP. The IDEA describes the rules for these manifestation determinations explicitly, and a similar process applies to 504-only.[38]

As this report will explore in Part II, the empirical evidence on the use of disciplinary removal, referral to law enforcement, and absenteeism raises very serious doubts about whether the sufficient mental health services, behavioral supports and procedural protections are actually provided. If they are provided, the question becomes whether they are adequate or of the appropriate type to address the disability related need for such supports and services.

When schools re-open in person, there will be a high need for personnel who can evaluate students' needs and, if appropriate, help design and implement effective behavioral intervention plans. Not to mention that, pre-pandemic, there was already consensus regarding a shortage in school psychologists, social workers, counselors, special education teachers, and nurses. All the evidence indicates that students have experienced an increase in adverse experiences during the pandemic yet there is no plan to remedy these pre-pandemic shortages. Further, the evidence is pretty clear that a reduced workforce will be expected to meet the needs of far more students with disabilities and mental health needs.[39]

The glaring problem that few policymakers mention is worth reiterating. Namely, there are zero federal and zero state funds earmarked to meet the needs of this subset of 504-only students. This also means that there is little incentive to identify 504-only students as required by law, because in meeting that legal obligation, districts must acknowledge that they must allocate scarce resources.

In the context of funding inadequacy, the burden of insufficient funds translates into inadequate support for educators as well as students. It is unclear how simply increasing rates of identification for 504-only will bring about the access to supports and services of adequate quality.

Adding to this inadequacy conundrum is the reality that when a student is determined to not be eligible for special education, in some districts the parents may not receive notice of the possibility that their child has a qualifying disability that entitles them to receive potentially beneficial supports and services pursuant to Section 504. Parents of students with disabilities cannot fight for state or local funding for supports and services if they are unaware that their children are entitled to receive them. The "Catch 22" is that, as a practical matter, especially for individual complainants, fighting for 504-only eligibility may not seem like a productive pathway to a parent when the problem is systemic in nature in a district that currently identifies no such students and has no funds budgeted to provide the needed services.[40] In such cases, parents may not have even heard of Section 504. The related problem of districts failing to provide adequate notice of substantive and procedural rights is fairly common. For example, the aforementioned ADHD guidance specifically reminds districts that "... they must provide parents and guardians with due process and allow them to appeal decisions regarding the identification, evaluation, or educational placement of students with disabilities, including students with ADHD."[41]

The CDC health data suggest an increase in the types of students that are frequently identified under 504-only; the only reported count occurs through the CRDC and no other source. Due to the pandemic, the Trump administration decided to postpone the 2019-20 CRDC for one year. The Biden administration can reverse that decision, but it is unclear that they will.

Given that the lack of in-person schooling can make it hard to conduct the observations and evaluations used to identify students with disabilities, some suggest that for the 2020-21 school year school staff may wind up referring fewer students for these required evaluations. This means that the pandemic may contribute to fewer students being identified for 504-only, even though the stressors due to the pandemic will likely increase the numbers of students who will need supports and services. For these reasons, it is not unreasonable to think that post-pandemic, we may witness a decline in the overall number of 504-only eligible students and an increase in the number of districts that report having no 504-only students enrolled.

Ultimately, there is no justice if we identify students with rights but provide no resources: A just remedy must include the resources to ensure its implementation. Therefore, any additional federal and state oversight should ensure that districts do not just identify the eligible students, but actually provide sufficient resources to address their needs. As the descriptive data examined in Part II indicates, there are serious questions regarding the adequacy of special education and related supports and services, especially with regard to how well the Black and Native American students are served.

PART II. INEQUITABLE OUTCOMES INDICATE INADEQUATE SUPPORT AND POSSIBLE UNLAWFUL DISCRIMINATION

As mentioned in the Executive Summary, federal funding for the IDEA has never come close to the amount that Congress had promised it would provide. We examine the outcome disparities in three areas: discipline, policing and chronic absenteeism because they raise questions about the adequacy of supports, services and procedural safeguards for students with disabilities generally, but especially with regard to children of color who are identified for special education pursuant to the IDEA.[42]

Poor outcomes as indicators of inadequacies within general and special education: Arguably the clearest markers of inadequacy generally, and racial inequity within special education specifically, are the poor academic and non-academic outcomes experienced by students with disabilities in our schools. As is often pointed out, racial differences in identification rates would not raise concerns if children of color who received special education were clearly receiving all the benefits and procedural protections that special education is intended to provide.[43] This part begins with an examination of discipline disparities because discipline policies and practices have a tremendous impact on both academic and life outcomes, and are under the control of school districts.[44] Moreover, there are also numerous law and policy implications that arise from the discipline disparities that will be discussed.

Frequent and disparate disciplinary removal suggests that students with disabilities are put on a path toward prison: When we look at disparate discipline, it is easy to forget that, pre-pandemic, students with disabilities, who often relied on schools for mental health supports and food to eat, were excluded far more than students without disabilities. As the U.S. Department of Education has recognized on numerous occasions, being suspended out of school is a strong predictor of lower achievement, grade retention, dropping out, juvenile delinquency and adult incarceration rates.[45] Perhaps the most well-known study of the long-term harms was conducted using student-level data tracking every middle school student for over seven years.[46] The majority, 60%, were subjected to some form of disciplinary removal. Moreover, by studying three cohorts of Texas middle school students beyond their high school graduations, the researchers found that being suspended was associated with a threefold increase in the risk for juvenile justice involvement and that such involvement took place within a year of being suspended. Another different and particularly strong national study controlled for 60 variables, including socioeconomic status and delinquency, and found that, compared to similar peers, students who had been suspended were less likely to graduate high school or college and more likely to have been arrested or on probation.[47]

One noteworthy and robust study published by Stanford University researchers in 2019 combined the CRDC suspension data from every school in the nation with achievement data.[48] The Stanford study determined that the racial discipline gap was positively correlated with the racial achievement

gap, and this relationship was strongest when the researchers analyzed the difference in outcomes between Black and White students.[49] Another study found that school suspensions account for approximately one-fifth of the difference in school performance between Black and White students.[50]

Finally, the Stanford study that explored the association of racial bias with test scores, and found a positive relationship with higher score differences, also found a positive correlation between racial bias in the community and the risk that Black students would be designated as in need of special education services.[51] It is also well documented that students with disabilities are overrepresented among incarcerated youth.[52] For far too many youth, our public failure to meet their educational and health needs results in destitution and incarceration.[53]

The Center for Civil Rights Remedies (CCRR) has often called attention to high and disparate rates of disciplinary exclusion to emphasize the impact that suspending students has on their educational opportunity and life outcomes. Given the need to recover from the economic impact of this pandemic, it should also be mentioned that suspending students can have serious long-term economic costs that are frequently overlooked. Specifically, CCRR has produced two prior studies with research conducted by Russell Rumberger, estimating that there are billions in lifetime costs caused by suspensions. These estimates were based on research showing that suspensions do predict lower graduation rates, after controlling for other factors that contribute to the risk of dropping out.[54] At the national level, suspensions increased the number of dropouts by more than 67,000, which cost taxpayers more than $11 billion. Cutting the suspension rate in half would save taxpayers $5.5 billion.[55] The U.S. Government Accountability Office cited these studies in its own March 2018 report.[56]

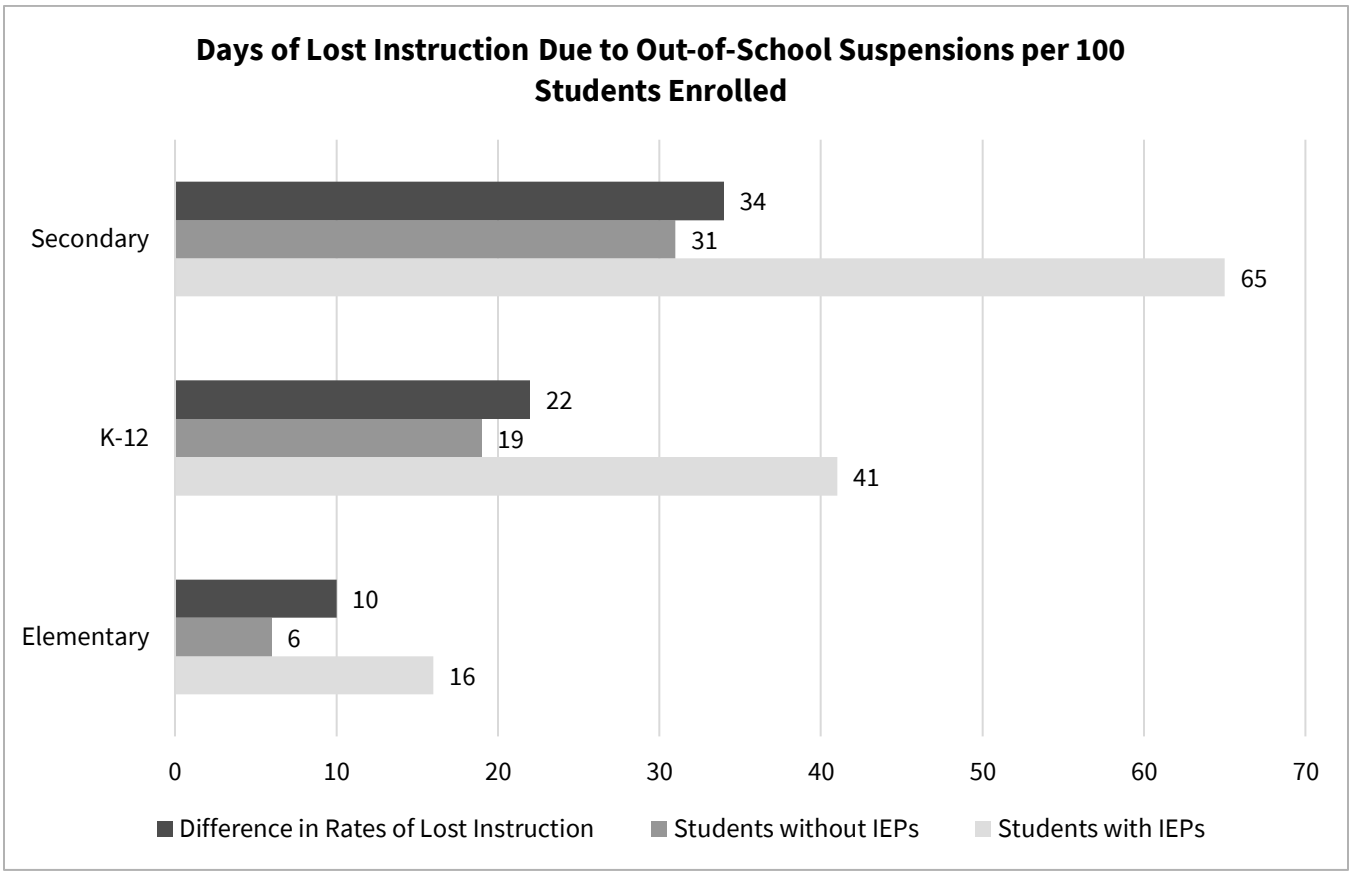
In consideration of the importance of suspension from school as an indicator of student well-being, as well as for the economic ramifications, this report reviews two kinds of discipline data: differences in the rates of lost instruction when students with disabilities (IDEA) are compared to students without disabilities and the confluence of race and disability in terms of each group's risk for being suspended out of school at least once. The race and disability analysis is actually the only way to look at every district in the nation that allows one to capture the racial disparities among students with disabilities.

This section examines how educators respond to students with disabilities (IDEA) at the secondary level. The impact of their responses on the students is expressed in terms of rates of lost instruction. When possible, it is critical to review the impact of discipline in terms of days of lost instruction per 100 students because, unlike other measures, they show quantitatively the degree to which the use of disciplinary exclusion impacts educational opportunity for certain groups of students. We do not calculate the days lost per student because, unlike the average test score which is calculated from all test-takers, most students are not suspended.[57] Therefore, expressing lost instruction as a rate of days lost per student would distort our understanding of the problem and make the impact on the group artificially small.

Discipline disparities contribute to inequities in the opportunity to learn for all students with disabilities[58]

This report used the actual CRDC data collected and reported regarding the number of days of instruction that students missed due to out-of-school suspensions for 2017-18. Nationally, we found that students eligible pursuant to the IDEA lost 41 days per 100 students, which is 11 more days than those with 504-only eligibility, and 22 more days per 100 than students without disabilities.[59] If the resources, including mental health and behavioral supports, were provided to all students with disabilities that needed them, ideally, the net result would be that these students would lose very little instructional time.

Figure 4: Comparison of Rates of Lost Instruction for Students with & without IEPs



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017–18.

However, when the data are broken down by grade configuration, one can see that the secondary rates are 4 to 5 times higher at the secondary level than at the elementary level. Most reports use the

K-12 data. But as one can see from Figure 4, the K-12 data fail to capture the full impact on educational opportunity experienced by students at the secondary level.

As one can also see from Figure 4, across all grade levels (K-12), students with disabilities (IDEA) lost more days of instruction than their non-disabled peers, and this pattern held true in the elementary grades as well as at the secondary level (middle schools and high schools). However, the absolute difference in rates of lost instruction between students with and without IEPs was more than three times higher at the secondary level (34 days versus 10 days).[60]

When rates of lost instruction for students with disabilities (IDEA) are compared to those without at the district level, much larger disparities raise serious questions: In the following data set, if districts suspended the same students multiple times, and/or if they tend to suspend students for multiple days each time, the rate of lost instruction due to out-of-school suspensions will capture the magnitude of the difference. The following 30 districts represent all those with at least 10,000 secondary students and at least 20 secondary students with disabilities (IDEA). The table rank orders them by the difference in rates of lost instruction (days per 100 students enrolled) between students with and without disabilities. They illustrate large disparities that are hard to reconcile as an acceptable status quo.

Table 2: Comparing Rates Lost Instruction of Students with and without Disabilities: 30 Districts with the Largest Gaps

Days Lost per 100 Secondary Students in 2017-18 Due to Out-of-School Suspensions				
State	**District Name**	**IDEA Students**	**Students Without Disabilities**	**Difference in Rate of Lost Instruction**
VA	Richmond City Pblc Schs	498.00	194.39	303.61
WA	Tacoma School District	303.93	109.75	194.18
CA	Victor Valley Union High	225.61	37.49	188.12
NE	Omaha Public Schools	273.11	93.34	179.77
WI	Milwaukee School District	245.09	95.79	149.30
AZ	Glendale Union High School District	198.96	53.97	144.99
SD	Sioux Falls School District 49-5	186.72	52.05	134.66
NC	Harnett County Schools	205.99	74.31	131.68
DC	District of Columbia Public Schools	215.22	87.98	127.24
MO	Springfield R-Xii	203.23	77.21	126.02
OK	Tulsa	205.07	83.11	121.95
NC	Durham Public Schools	214.05	93.27	120.77
FL	Bay	193.46	74.12	119.34
MD	Harford County Public Schools	170.04	52.43	117.61
WV	Kanawha County Schools	212.42	96.50	115.92
VA	Stafford Co Pblc Schs	245.69	134.16	111.53
NC	Pitt County Schools	242.03	132.90	109.13
VA	Spotsylvania Co Pblc Schs	178.86	70.34	108.52
MO	Ft. Zumwalt R-Ii	157.03	48.94	108.10
NC	Wake County Schools	128.79	28.41	100.38
NC	New Hanover County Schools	149.64	51.61	98.03
SC	Greenville 01	160.96	63.18	97.78
OH	Cleveland Municipal	224.36	126.60	97.76
MN	St. Paul Public School District	141.95	44.70	97.25
VA	Norfolk City Pblc Schs	277.99	181.04	96.95
SC	Horry 01	149.85	53.91	95.95
WA	Everett School District	122.99	30.79	92.21
VA	Henrico Co Pblc Schs	134.21	43.20	91.01
FL	Hernando	153.02	62.14	90.88
NC	Alamance-Burlington Schools	183.45	93.29	90.16

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

The patterns depicted at the national level are found in nearly every school district in America that uses out-of-school suspensions. The 30 listed above are from a subset of large districts with at least 1,000 secondary students which were then ordered by the size of the difference in the rate of lost

instruction. For example, among secondary students attending Richmond, Virginia public schools, every 100 students receiving special education lost 498 days of instructional time.

In Richmond, we can see that even students without disabilities are losing instruction at a rate that is more than six times the national average for secondary schools. But the identified gap means that students with disabilities lose 303 days more per 100 students enrolled than their non-disabled counterparts. Readers should ask themselves why the difference is so large. Data alone cannot tell us why such large disparities exist, but they do raise critically important questions about the adequacy of the behavioral supports and services that students with disabilities receive.

Some readers might assume that students with disabilities misbehave more often than those without disabilities. If so, evidence of such a pattern might help mitigate a suspicion that the differences resulted from a teacher treating students with disabilities more harshly than their non-disabled peers. However, there are several more factors and types of discrimination to be considered. Strictly for arguments sake, assume that students with disabilities do misbehave more often. Even if that were the case, in every one of the districts in Table 2, it would not be a sufficient reason to accept these high and disparate rates.

Many have made the erroneous assumption that there is just one kind of unlawful discrimination, which is when an individual treats otherwise similar students differently based on race or disability status. This is commonly referred to as "different treatment," but it is just one of many types of discrimination that must be considered. Anti-discrimination law is far more complex, especially so when it comes to students with disabilities. Understanding why the IDEA was initially enacted helps explain why it is not always lawful for educators to suspend students with disabilities at a higher rate, even if the evidence proves that the students with disabilities misbehaved more often than their non-disabled peers and even if the suspensions were meted out in a neutral, even-handed manner in accordance to school policy or practice.

Unjustified disciplinary exclusion strikes at the heart of the IDEA's purpose: It is important to note that before Congress enacted what is now the IDEA, a key defense raised by districts for not allowing students with disabilities to attend school at all was that they exhibited problematic behavior that posed challenges to teachers and administrators and that addressing these needs added to the cost of providing them with an education. The decision in the *Mills* case made it clear that these higher costs were insufficient grounds for denying students access to education (see Appendix B for an expanded discussion of the historical roots of the IDEA).[61]

One of the core concerns that the IDEA was intended to address was that districts should not be able to deny students with disabilities access to school because of behavior caused by their disability.[62] The analyses above and those that follow all raise a fundamental question that we should be able to answer, but often cannot, namely, "Why do the results show such profound differences in rates of lost instruction due to out-of-school suspensions for students identified for special education?" Even

before we examine the large racial differences among those with disabilities, the data disparities for students with disabilities compared to those without raise questions with regard to the quality of behavioral supports, intervention plans and procedural protections against disciplinary exclusion based on behaviors that are manifestations of a student's disability or the district's failure to provide FAPE.

Excluding a student from school because they have a disability is denial of a free appropriate public education (FAPE) and constitutes unlawful discrimination:[63] Therefore, denying a free appropriate public education because of a behavior caused by that disability is the equivalent of exclusion because of that disability.[64]

Once it is determined that a student needs behavioral supports and services, the district is required to provide them in order to fulfill the obligation to provide FAPE. As DoED states in a guidance letter issued in 2017, "Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs. IEP teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers."[65]

The IDEA provides procedural protections against this type of FAPE denial, (which is a form of discrimination) including the requirement of a "manifestation determination hearing" before a school suspends a student for more than 10 days (this can be cumulatively or from one suspension). If the result of the hearing is that the behavior in question was caused by the disability, then the school cannot suspend the student for even one additional day for the same disability-caused behavior. However, it could still violate the law if educators knew all along that the behavior that resulted in a suspension was caused by the student's disability, yet failed to provide behavioral supports and suspended the student anyway.[66]

In fact, the U.S. Department of Education's Office for Special Education and Rehabilitative Services (OSERS) issued a "letter of significant guidance" in August, 2016, reminding educators across the country that, there is no such thing as "free days" because even suspensions of less than 10 days could constitute a denial of their obligation to provide a free and appropriate public education, especially if these shorter suspensions reflected a failure to provide, or effectively implement, behavioral supports.[67]

Most importantly, even for those students with disabilities who exhibit far more frequent misconduct, if a student's challenging behavior is caused by the student's disability, it cannot be the basis for denying the student access to education.[68] Many students with disabilities may exhibit heightened behavioral problems only when their academic or behavioral needs are not being met. This can result from a misdiagnosis, providing supports and services that do not address the disability, overlooking the behavioral needs caused by the disability, or failing to deliver the

supports, services and responses that are in the student's IEP or 504 plan including, but not limited, to those described in a behavioral intervention plan. If they had well-designed behavioral intervention plans as part of their IEP or 504 plan, one would expect that such a plan would include alternative non-punitive and more effective disciplinary responses that are individually tailored to the student. Most importantly, if a student already has a behavioral intervention plan, but it does not appear to be helping, as the aforementioned guidance from DoED makes clear, the student may need a new behavioral intervention plan (BIP) or may need to be re-evaluated. Unfortunately, the data we can observe cannot tell us whether such additional efforts were undertaken.

Unfortunately, neither states nor the federal government tracks data on the actual supports and interventions provided to students with disabilities despite the fact that both 504-only and IDEA requires that if these students need behavioral supports, *they must be provided*. Therefore, there is no way to compare districts with regard to the numbers of students with disabilities that had IEPs or 504 plans that included behavioral interventions or other supports. Nor can we gain a sense of how many students with disabilities have had a functional behavioral assessment, or how many schools or districts have conducted a manifestation determination meeting, or what the outcomes of such meetings were.

Therefore, while under some circumstances students with disabilities can be suspended and may be treated no differently than their non-disabled peers, in many other circumstances they are not supposed to receive the same response to their misconduct as their non-disabled peers. In such cases, equal treatment could be unlawful and unjust. Therefore, the combination of high and disparate rates implicates a possible violation of the legal protections against punishing students for behaviors that are manifestations of their disability and/or for whom the district has failed to provide FAPE. Specifically, if the educator who suspended the student knew or should have known that the behavior leading to the disciplinary removal was caused by the student's disability, yet suspended the student anyway, the educator's decision could be regarded as discriminatory.

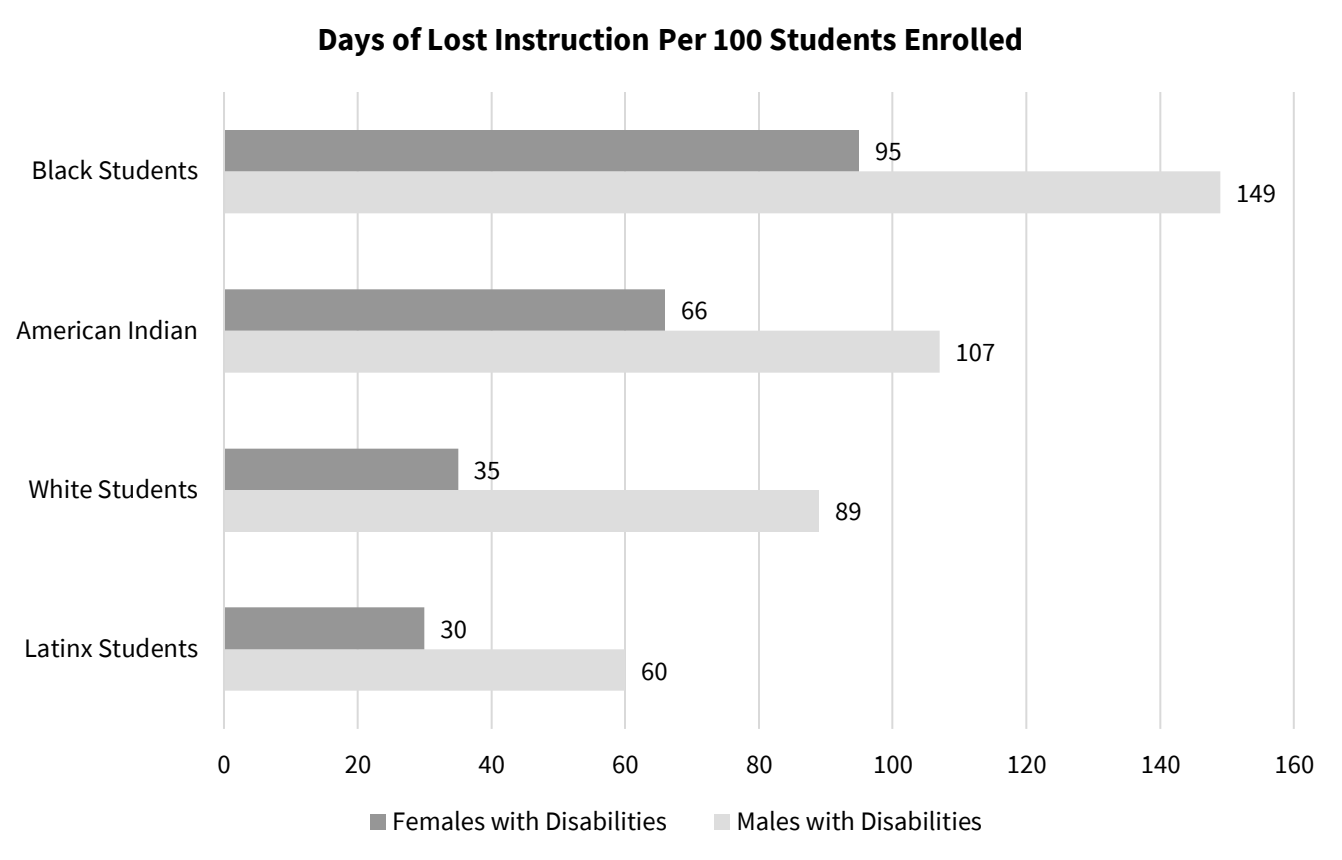
The federal guidance makes clear that if the failure to follow appropriate procedures in responding to students with disabilities' behavior pursuant to the IDEA (and Section 504) rises to the level of a denial of FAPE it would constitute disability discrimination:[69] When one looks at these disparities, questions should arise as to whether the district neglected to provide needed behavioral supports or behavioral intervention plans and instead punished the student the same as a non-disabled student. Contrary to popular yet limited views of what constitutes discrimination, equal treatment can be discriminatory treatment.[70] Further, in large districts, when rates are as high as those in Table 2, the observed pattern may be the product of systemic failure or an unsound policy rather than of the discriminatory actions of a particular staff member.

An unjustifiable policy that has a disparate impact by race and/or disability may also be considered discriminatory: Any time a district, or schools within, frequently suspends students, it raises the question of whether there are unnecessarily harsh or unjustified discipline policies or

practices. If the policies or practices cannot be justified and they disparately harm a group from a protected category, such as having a disability, the policies or practices may be deemed a violation of anti-discrimination law. In fact, Section 504 has "disparate impact" regulations that can be applied to observed disciplinary disparities that would prompt a closer investigation.[71]

Unfortunately, the CRDC does not further disaggregate the data on days of lost instruction by race, so we can only use the CRDC to calculate rates of lost instruction for each district based on either race or disability. Nor can we see data disaggregated by the reasons for suspension.[72] Fortunately, in 2018-19, the state of California began publicly reporting the count of all suspensions by race with disability, gender, income status and even further by clusters of grade configuration. In our recently published report on discipline disparities in California, CCRR used the breakdown of counts of suspensions (both in-school and out-of-school) provided by the state to estimate the rates of lost instruction by attributing a length of two days to every suspension. The following analysis estimates the amount of lost instruction by race with disability, due to in-school and out-of-school suspensions, further disaggregated by gender, to show the impact on educational opportunity for low-income students enrolled in grades 7-8.

Figure 5: California Racial/Ethnic and Gender Differences in Lost Instruction Due to Suspension for Low-Income Students with Disabilities Enrolled in Grades 7-8 in 2018-19



Source: California Department of Education, DataQuest, 2018-19.

In California, one can see from Figure 5 that low-income Black middle school males with disabilities lost instruction at an estimated rate of 149 days per 100 enrolled. They lost 60 more days than what was experienced by low-income White middle school males with disabilities, who lost 89 days per 100 enrolled. In the same year, low-income Latinx males with disabilities lost 60 days per 100 enrolled, a high rate but lower than that of their White counterparts. Native American males with disabilities at this grade level clearly had the second highest amount of lost instruction. Also noteworthy is that Black low-income females with disabilities had the third highest rate of lost instruction. This analysis helps to further establish that other factors such as income level and homelessness are associated with worse outcomes for students with disabilities, but that racial differences remain large between students with disabilities that share these additional risk factors.

It should be noted that alternative schools often have a very high percentage of students with multiple challenges. In our recently published national report, *Lost Opportunities,* based on data from 2015-16, we point out the following: "Many alternative schools are ostensibly designed to serve students with disabilities (IDEA), yet the average days lost is 148 days per 100 for these students

when enrolled in alternative schools—more than twice the 68 days lost per 100 at the secondary level for students with disabilities (IDEA)."[73]

The disability data disparities in both traditional and alternative schools raise several important issues for students with disabilities. First, the tremendous number of days lost raises questions as to whether these schools are providing these students with their right to a free appropriate public education. Second, the disproportionate representation of students with disabilities in alternative schools raises questions about the necessity of their placement in the far more restrictive alternative settings, especially considering the fact that in the more restrictive settings educators are sending them home and causing them to lose instruction at extraordinarily high rates.

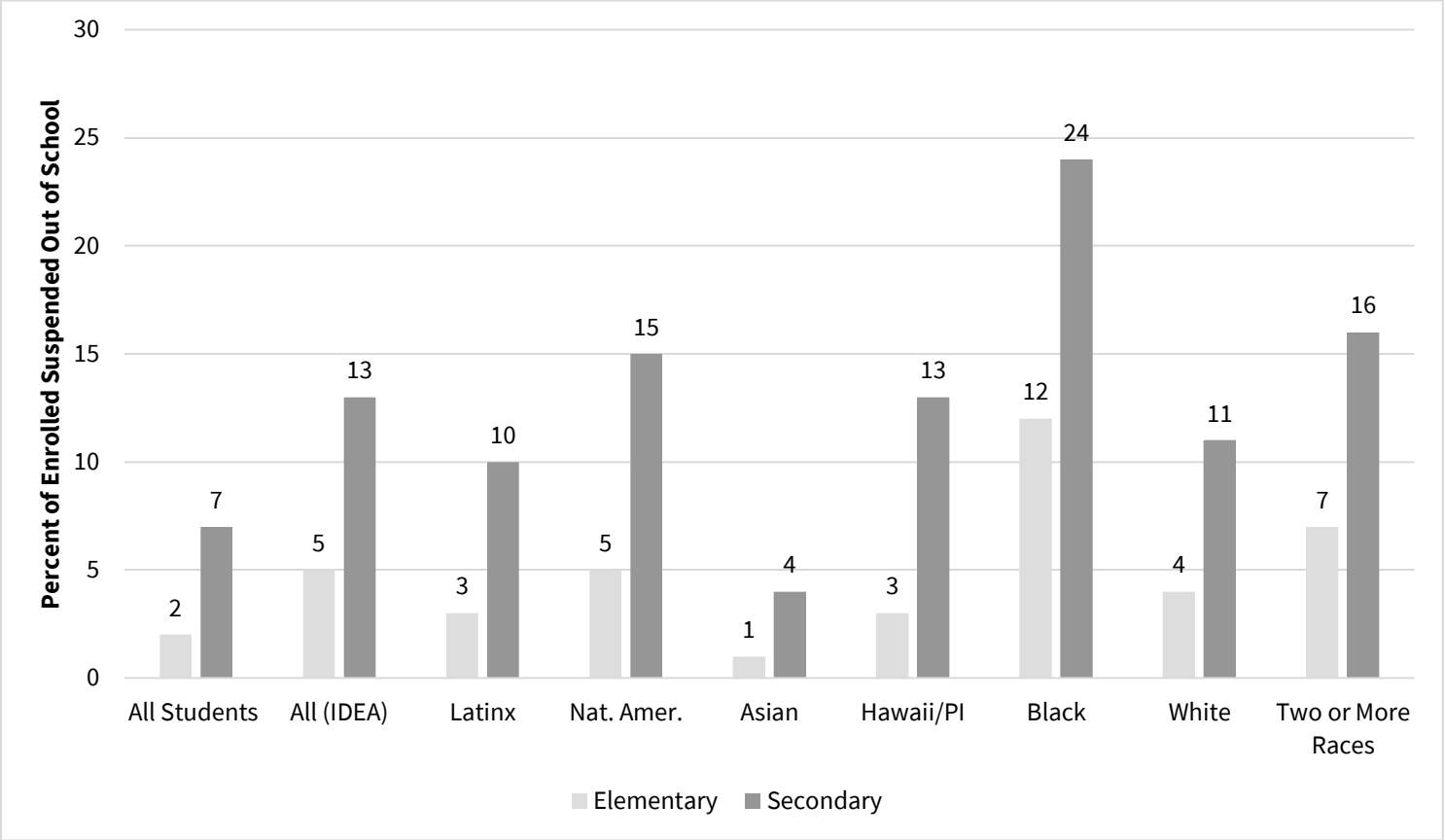
One important concern regarding students with disabilities being unfairly punished in this way is that students who receive special education not only tend to receive greater academic supports than their non-disabled peers but also often rely on schools for additional supports and services, including mental health, occupational therapy, and physical therapy. For example, according to an ACLU report, "Students are 21 times more likely to visit school-based health centers for mental health than community mental health centers."[74] Therefore, even when suspensions are for behaviors not caused by the disability, the burden of even a one-day suspension may be much greater when it removes a student with disabilities with mental health needs from school, especially if the removal from school means the student loses access to their therapy. It may also be far more difficult for students with disabilities to make up all the instructional time they missed.[75]

Racial disparities in out-of-school suspensions among IDEA-eligible students

Although the discipline data showing the cross-section of race with disability and lost instruction is not readily available from other states or districts, we can look at the disparities by disability with race/ethnicity by using a much more limited measure known as the "risk" for suspension.

The "risk" for suspension is calculated by dividing the number of students from each group that were suspended at least once during the school year by their group's enrollment that year. Here, the term "risk" tells us what percentage of each group student body received at least one out-of-school suspension. Because "risk" is not based on the total count of suspensions or the total days lost, the risk for suspension is a far more conservative measure. For example, when the risk is calculated, a student suspended 20 times for a total of 60 days counts no more or less than another student suspended one time for one day. The following Figure 6 shows the risk for suspension for both elementary and secondary students with disabilities (IDEA) broken down for each major racial and ethnic group collected by the CRDC.

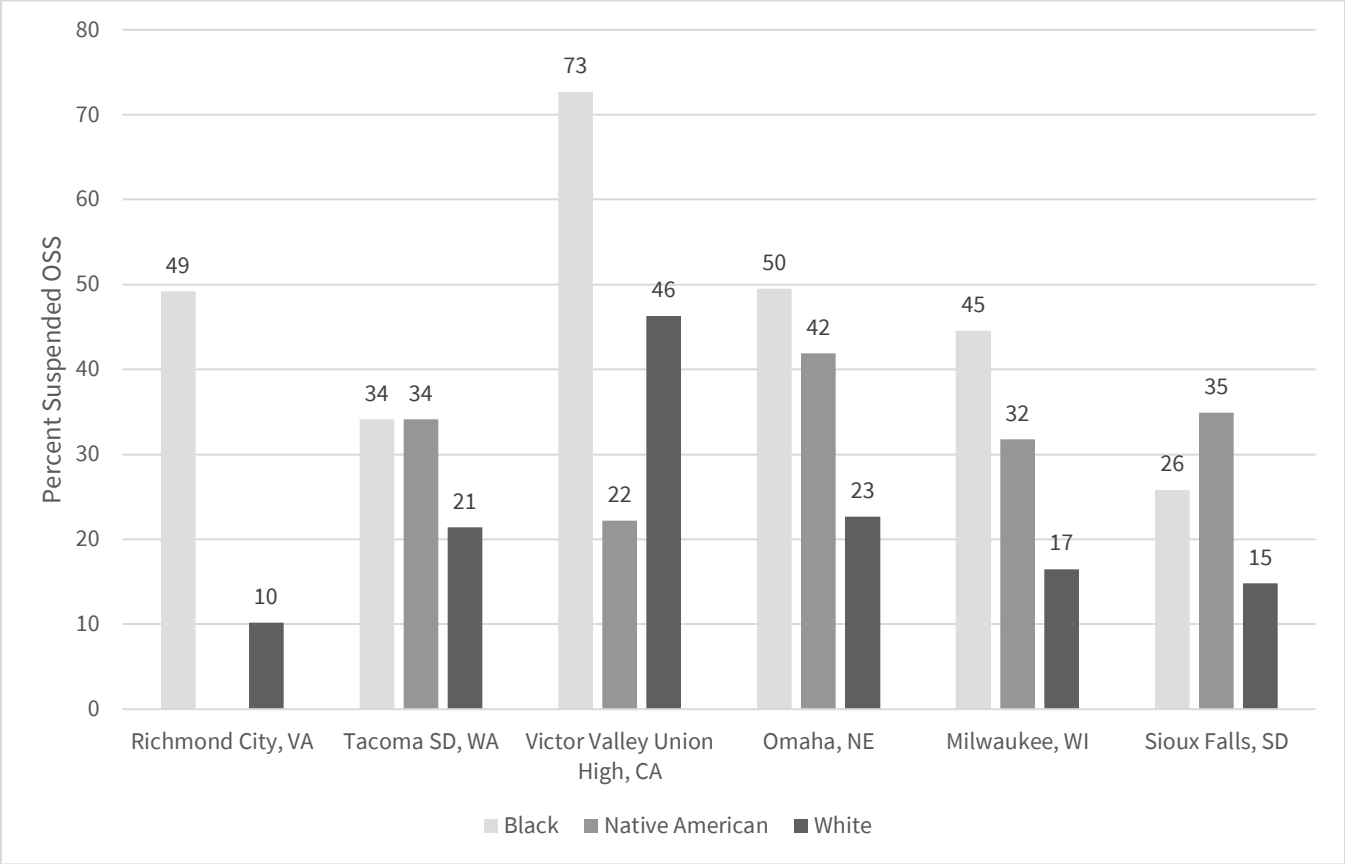
Figure 6: National Racial/Ethnic Disparities in the Risk for Suspension Among Students with Disabilities in 2017-18



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

The first two columns on the far left in Figure 6 represent the elementary and secondary risk for suspension for all students, combining those with and without disabilities, without any racial disaggregation. The third and fourth, and all remaining columns represent only students with disabilities (IDEA). The "all students" risk serves as a comparison point to emphasize that for students with disabilities (IDEA), the differences in the risk are quite a bit larger. The 2% risk of suspension at the elementary level increases 2.5 times when one compares the all-student rate to those receiving special education.[76] The racial disparities are less noticeable if one observed them across all grades, K-12 combined, which is how the data are typically presented to the public by the DoED. Although we make the K-12 analysis available, Figure 6 is meant to call attention to larger disparities at the secondary level.[77] The remainder of our analysis of risk differences looks more closely at the racial disparities among secondary students with disabilities.[78] To emphasize our concern with high rates at the district level in Figure 7, we feature 6 of the largest districts from those first highlighted in Table 2.

Figure 7: A Closer Look at the Racial Disparities in Risk Among Secondary Students with Disabilities (IDEA) at the District Level in 2017-18[79]



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

Some readers may find the district rates in the above table disturbing. We present them in this report to call attention to the extremes, but also because the existence of these high and disparate rates in large districts across the nation suggests a failure in oversight that is at least partially rooted in a lack of funding for oversight and/or a lack of federal capacity to provide needed technical assistance.[80]

Inadequate supports and services and high rates of lost instructional time for students with disabilities are also likely reflected in frequent use of restraint and seclusion, high and disparate rates of chronic absenteeism, low rates of proficiency in reading and math, and low graduation rates.[81]

With regard to the racial disparities, special education teachers and administrators typically work closely with regular educators, and they are equally likely to treat students differently based on race or have their perceptions of behavior influenced by implicit negative racial biases as their regular-education colleagues.[82] Many other factors may contribute to the observed racially disparate outcomes for students with disabilities including, but not limited to: the unintended racially

disparate impact of policies and practices, resource inequities in general education such as differential access to the most challenging courses and most experienced certified teachers, racial differences in access to high-quality pre-school. There is no reason to think that the inequities in general education are not replicated in special education. It is also important to recognize possible contributing factors that are external to the system of public education such as limitations in the access to health care having a racially disparate impact on families of color.[83] Exposure to racism both inside and outside of school is also harmful to children's mental health.[84]

While it is difficult to disentangle the numerous possible contributing factors to the outcome disparities described in this report, it is also true that the magnitude of the contributing factors that are controlled by schools and districts are difficult to capture in just a few measures, even within the topic of discipline.

A review of all disciplinary removals by race with disability and separately by disability type suggests an even greater impact on the opportunity to learn.

Table 3: National Risk for Removal for Students with Disabilities (IDEA) in 2018-19 (K-12)

Group	Risk for a removal	Risk for removal of more than 10 days
All Disabilities by Racial/Ethnic Group		
American Indian or Alaska Native	13.3%	1.7%
Asian	3.7%	0.3%
Black	**24.8%**	**3.9%**
Hispanic/Latino	10.4%	1.2%
Native Hawaiian or Other Pacific Islander	11.1%	1.6%
White	11.5%	1.2%
All Races, By Disability Category		
All Disabilities	13.5%	1.7%
Emotional disturbance	**37.2%**	**6.4%**
Autism	6.6%	0.4%
Intellectual Disability	11.0%	1.4%
Other Health Impairment	20.9%	3.0%
Specific Learning Disability	14.4%	1.7%
Speech or Language	4.5%	0.3%

Source: U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, 2018–19.

For example, OSEP collects and reports on the unduplicated count of students who were removed from school for any one of several disciplinary reasons. Disciplinary removals is a much broader category as it captures in- and out-of-school suspensions, expulsions, and involuntary disciplinary transfers. Therefore, Table 3 provides two slightly broader risk calculations, both of which are each based on the unduplicated counts of students.

The "risk for removal" is the number of students who experienced at least one removal, divided by the number of students with disabilities (IDEA) enrolled, respective to the group. Because each student is only counted once it tells us what percentage of each group was affected by at least one removal. The second column uses the same formula but is based on the counts of students removed for more than ten days (including cumulatively). The students in this group should usually have triggered a manifestation determination hearing pursuant to the IDEA procedural safeguards.

Higher suspension and removal rates for students with emotional disturbance (ED) raise serious concerns about the protections from discriminatory discipline: It is noteworthy that students with emotional disturbance were the group most likely to be removed and the most likely to receive removals of over ten days in 2018-19.[85] When it comes to discipline differences among those students who are eligible pursuant to the IDEA, it should be noted that Blacks are over-identified for emotional disturbance (ED), and this category of disability is one of several associated with an above-average risk for placement outside of the regular classroom for more than 80% of the school day.[86] ED is also the one that most clearly has a behavioral component. Therefore, "emotional disturbance" is the category where one would expect students to receive supports and services to address mental and behavioral health needs.[87] Yet, ED is also the category with the highest risk of disciplinary removal associated with it.

The data from across all grade levels for 2018-19 indicate that students with emotional disturbance typically have more than a 37% risk for experiencing a disciplinary removal from school at least once in a given year. This is nearly double the risk experienced by students in the next highest category.[88] In 2018-19, students with ED made up 20.6% of all students removed for more than ten days, yet they were only 5.5% of all the students receiving special education aged 6-21. The fact that students with ED are among the most likely to be educated outside of the regular classroom by special education teachers also raises the distinct possibility that they are being suspended for problematic behavior that they exhibit while in more restrictive settings by their special education teachers.

It is also possible that there are racial differences in the access to high quality supports and services. These may differ by disability category and/or by race. At least one study found that Blacks with ED received fewer services but were more likely to be suspended than Whites with ED. Blacks with ED were also the group most likely to be educated in a correctional facility.[89]

Moreover, from 2018-19 data, Black students are more likely to be identified as having ED compared to White students.[90] Unlike the CRDC, these data are collected and published each year by the U.S. DoED's Office of Special Education Programs (OSEP) and made public on a separate website than the CRDC data.[91] In 2018-19, 7.1% of all Black students with disabilities were identified as having ED, compared to 5.9% of all White students with disabilities. However, that difference describes the distribution once students are identified pursuant to the IDEA. The risk for any Black student being

identified as having ED nationally was about 40% higher than the risk for White students, yet the disparity in identification rates varies dramatically by district, and in some cases can be well over three times as high as the risk for White students. (See Appendix B, Table B9 for additional information.) It is worth noting the differences when comparing respective share of enrollment in the general education population, where Blacks were 15% and Whites 47%, to respective share of ED, where Blacks are 23.4% and Whites are 50%, and finally to share of those educated in correctional institutions where Blacks are 49% and Whites are 27.6%. (See Appendix B, Tables B11 and B12 for more details.)

Further, the potential for placement decisions where the student spends less time in a general education setting limiting a student's access to the general curriculum are well documented.[92] In several cases, districts that have been required to desegregate have been held responsible for pursuing policies that have a segregation impact, including inappropriately identifying students of color as disabled and then, based on their supposed need for special education, placing them in a segregated setting.[93] Along these same lines, researchers have highlighted patterns of over-identification of Black students as emotionally disturbed or mentally retarded such as was asserted in the *Jamie P.* case in Connecticut, pointing out that these are the two disability categories where students are most likely to be educated in a separate setting.[94] In fact, in the DoED's 2020 report to Congress on the Implementation of the IDEA, they found that less than half the students with ED spend 80% or more of their time in the general education classroom.[95] Less than 1 in 5 students with intellectual disabilities spend 80% or more of their time in the general education classroom.[96]

More disturbing is that students with ED were by far the most likely to be educated in a correctional facility. Specifically, CCRR analyzed the data from both 2017-18 and 2018-19, and found that over 1.1% of students with ED were educated in a correctional facility, compared to just over 0.2% of students in the next highest category (other health impairment) and just under 0.2% for all students with disabilities.[97]

The high rates of disciplinary exclusion, experienced by all students with disabilities, as well as the racial disparities, suggest that an inadequacy of IDEA funding may have contributed to shortfalls in both the quality and quantity of behavioral supports and services, and burdens students of color with disabilities far more than their White counterparts.[98]

The racially disparate outcomes of students with disabilities make clear that being identified does not safeguard students from suspensions. Moreover, experiencing unjust removal from school may be contributing to trauma. After the pandemic has denied students from school for such extended periods of time, the experience of being removed unjustly once school re-opens in person would predictably create an even higher level of stress for students as well as for their families.[99] The same can be said for being referred to law enforcement for school misconduct.

The policing of students with disabilities raise questions about the adequacy of special education

Abusive and racist policing, generally, and children's exposure to the adverse experience of racism by police or others in school, may contribute to disability by adding to the risk of trauma. And when students experience stress, it can clearly negatively impact their opportunity to learn. Considering the rising awareness and concerns about the use of police in schools, it is important that the public and civil rights enforcement agencies be able to review the available data. This is one reason that Congress mandated the collection and reporting of discipline data, including the school policing data, in every district's report cards.[100] However, as important as the data on school policing may be, there is an overarching concern that these data are often not collected and/or not accurately reported to the public.

Serious questions arise regarding the protective procedures of the IDEA, when one observes the data on school policing available from 2017-18, and specifically, how often schools call police about children with IEPs. In 2011-12, for example, DoED's OCR reported in its "Data Snapshot" that students with disabilities pursuant to the IDEA were 12% of the total enrollment, yet 25% of all those referred to law enforcement and 25% of those subjected to arrest for school-related offenses.[101] Unfortunately, as with all purely relative numbers, those data do not tell us the likelihood that students were being referred or arrested. The truth is that even when we look at the underlying risk levels, with so many large districts reporting zeros, it is not possible to calculate national- or state-level numbers with accuracy. In our prior report covering the data from 2015-16, we pointed out that at the secondary level, 60% of the districts with at least 1,000 secondary students reported zero school-related arrests, including zero for New York City. The data from 2017-18 were slightly worse, with 61% reporting zeros. Some of these data indicating zeros are accurate, but some, like New York City, and Pittsburgh, Pennsylvania are clearly not.[102] The data reported do not enable researchers to distinguish districts reporting true zeros from those simply failing to collect or report these data. For this reason, in this report, we do not calculate national or state rates, and what follows does not constitute an attempt to construct a nationally representative sample. Instead, this report focuses just on those districts that did report at least some data.

Besides questions regarding the lack of oversight for the data collection, the data regarding referrals and arrests of students with disabilities that we can see leave us seeking answers to the following important questions regarding the use of procedural protections and the involvement of police:

- Did the misconduct warrant a referral of students with IEPs to law enforcement? Those inclined to trust the system will be surprised to learn that the Chief of the Oakland School Police stated in an interview that of the roughly 2,000 calls he receives in a given year, only about 400 (30%), warranted sending a police officer.[103]

- Did students with disabilities (IDEA) that were referred to law enforcement ever have functional behavioral assessments and/or a behavioral intervention plan? Were these conducted before or after the referrals? Unfortunately, these data are not reported publicly.
- What is the number and percentage of students with disabilities (IDEA) that have had a manifestation determination meeting? What were the determinations from those meetings? What are the referral and arrest rates for students who have had such meetings? These data are also not reported publicly.

In other words, whether we are concerned about out-of-school suspensions or the over-reliance on police to respond to normal non-dangerous misconduct, there are no data on the extent to which the IDEA's procedural safeguards were used and, therefore, one cannot determine whether the procedural protections helped reduce disciplinary removals or arrests of students with disabilities (IDEA).

The district analyses that follow only examined the subset of districts from across the country that reported at least one student referred to law enforcement and at least one arrest. Each district also had to have at least 100 secondary students with an IEP.

Of the 5,678 districts meeting our IDEA enrollment criteria of at least 100 secondary students, only 2,079 (37%) reported at least one school-related arrest at the secondary level. By definition, all arrests should be counted as referrals, too. Therefore, to report arrests but no referrals indicates an error in reporting.[104] This left us with just those districts reporting at least one student referred to law enforcement and at least one student arrested for school-related misconduct. However, we are also concerned that there are many incentives to under-report these data. We know from our firsthand experience consulting with districts that even among those districts that report some policing data, often, some schools within the district fail to report.

The 2,049 districts that met our initial minimum enrollment and policing data criteria represented 1,462,121 secondary students with disabilities (IDEA). Out of these 2,049 districts, we chose to focus on just those districts with rates of referrals for students with disabilities (IDEA) that were higher than the referral rates of the population as a whole. From the initial 2,049 districts, we found 811 districts that had rates of referral to law enforcement for secondary students with disabilities (IDEA) that were at least 2%, and districts which had referrals rates from students with disabilities (IDEA) greater than referral rates from all secondary students.[105] Altogether, these 811 districts enrolled 619,372 secondary students with disabilities (IDEA) from 48 states and the District of Columbia.

The 811 districts selected for the purpose of this report represent the subset of districts that we determined had relatively high rates of referral to law enforcement for enrolled students with disabilities (IDEA) among the 2,049 districts that met our first criteria. The referral rates for the 811 districts ranged from 2.0% to 45.3% of all enrolled secondary students with disabilities (IDEA), and had a per-district mean of 5.2%. It should be noted that a referral to law enforcement does not

necessarily mean that the student was arrested. In fact, of the districts on this list referring over 2% of secondary students with disabilities (IDEA) 130 districts reported an arrest rate of 0% for students with disabilities (IDEA) yet had an all-students arrest rate that was greater than zero.

On average, the districts on this list referred secondary students with disabilities (IDEA) at a rate that was 2.8 percentage points higher than it was for all students. However, in 102 of these districts, the referral rate for students with disabilities was five or more percentage points higher than it was for all students in the district. Although not nationally representative, these 811 districts include Los Angeles Unified School District, the second largest in the nation, and the City of Chicago, the third largest. The data do suggest that the vast majority of states have at least one district with unusually high rates of referral to law enforcement for secondary students with disabilities. Among the most noteworthy findings is that each met the criteria to be included among the 811 districts. In Figure 8, we illustrate the size of these disparities by race with disability status in several of the highest referring districts in the sample. (All can be found in the spreadsheets that accompany this report).

State profiles of policing and students with disabilities reveal excessive rates of referral to law enforcement for school misconduct: The following seven state profiles highlight our district findings for many of the nation's largest districts in the context of their respective states. Many of the 48 states had, like California, numerous districts meeting our criteria.[106] The high rates for the districts on this list emphasize the need to consider increasing the federal and state role with regard to the monitoring and enforcement of the IDEA, both substantive and procedural protections. Based on our descriptive reporting, it is clear that most states should be concerned about high rates of students with disabilities who are referred to law enforcement in at least one district,[107] as well as the likely failure to collect or report the required data on school policing on many others.

In California: Despite limited data, we find that 69,849 secondary students with disabilities (IDEA) attended school in one of the 44 districts where their risk for being referred to law enforcement exceeded 2%. The range for rates of referrals to law enforcement in these 44 California districts went as high as 12.38% of all enrolled students with disabilities (IDEA) in Apple Valley Unified. This literally means that 1 in 8 students with disabilities (IDEA) were referred at least once. The per-district mean for the 44 districts was just over 4%. Among California's largest districts included on this list was *San Diego*, with a referral rate of 3.29%, and *Capistrano Unified* at 7.49%.

Los Angeles: Among the most noteworthy findings is that of Los Angeles Unified School District, which referred 2.71% of all secondary students with disabilities to law enforcement. LAUSD's referral rate for students with disabilities (IDEA) was almost one percentage point higher than the rate for all students. However, in Los Angeles, the rate of referral to law enforcement for all students was higher than the district's out-of-school suspension rate. That disturbing pattern, where referrals to law enforcement outnumbered out-of-school suspensions was shared with 56 districts on this list. (See our Excel spreadsheets released alongside the report for a complete list.)

In Florida: 23 districts serving 94,445 secondary students with disabilities (IDEA), the majority of Florida's districts, referred 2% or more of the secondary students with disabilities (IDEA) to law enforcement in 2017-18. *Polk County*, with a referral rate of 8.74% of students with disabilities (IDEA) was the highest. The mean referral rate per the 23 districts in Florida that met our criteria for students with disabilities (IDEA) was 3.8%.

In Illinois: 37 districts serving 35,020 secondary students with disabilities (IDEA) met the criteria for this list. The *City of Chicago*, the third largest district in the U.S., referred over 6% of all secondary students with disabilities (IDEA) to law enforcement. The *Fenton CHSD 100* had the highest referral rate at 18%. The per-district mean for those districts meeting our criteria in Illinois was just over 5%.

In Pennsylvania: 135 districts met our criteria, serving 54,038 students with disabilities. The range of referral rates for students with disabilities went as high as 38.9% in *Colonial Intermediate Unit 20.* Pennsylvania had 15 districts where students with disabilities (IDEA) were referred at rates of between 10% and 39% of their total enrollment. Among those meeting the criteria, the per-district mean in Pennsylvania was over 6%.

In Texas: 40 districts serving 39,226 secondary students with disabilities (IDEA) met our criteria. The largest of these was *Austin, Texas* which referred 16.6% of all secondary students with disabilities (IDEA) to law enforcement and had a referral rate for all students that was higher than the districts out-of-school suspension rate. Austin's referral rate was the second highest rate for students with disabilities (IDEA) in Texas, with only *East Central ISD* higher, at 18.6%.

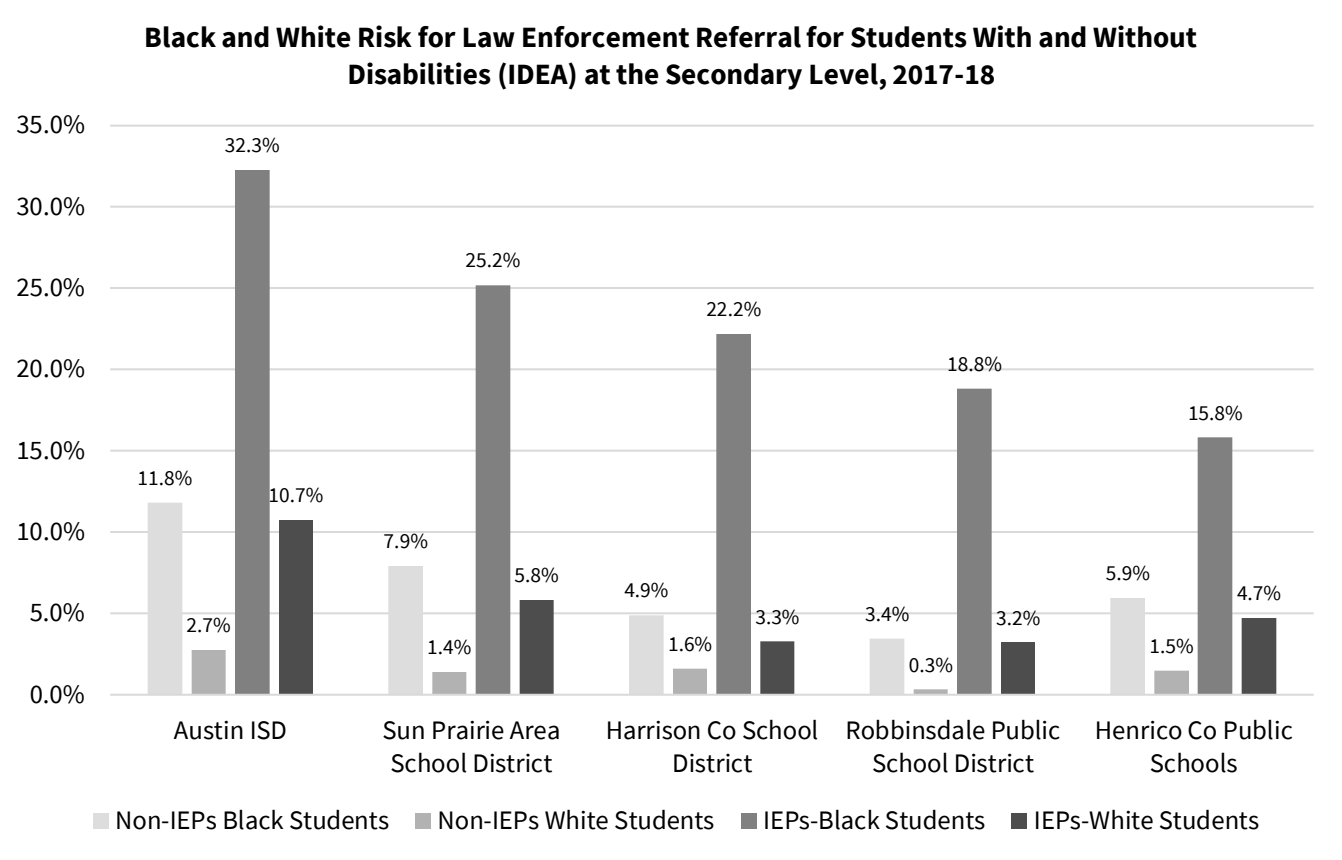
In Virginia: 66 districts serving 51,309 secondary students with disabilities (IDEA), the majority of Virginia's districts, referred 2% or more of secondary students with disabilities (IDEA) to law enforcement in 2017-18, with *Halifax Public Schools'* referral rate of 18% of students with disabilities (IDEA) at the high end, and a mean per-district rate of referral for students with disabilities (IDEA) of 6.6%.

In Wisconsin: 46 districts serving 23,307 secondary students with disabilities (IDEA) met our criteria. Districts on this list include *Milwaukee* and *Kenosha*. The highest was 19.4% of secondary students with disabilities (IDEA) referred to law enforcement in the *Rhinelander School District* with a mean average of 4.4%.

Stark racial disparities in rates of referral to law enforcement among students with disabilities attending large districts: In order to capture the impact of school policing on Black students with disabilities, we further limited our sample to a subset of the 811 that enrolled at least 100 Black secondary students with disabilities (IDEA). This narrowed our sample to 213 large districts serving 126,115 Black students and a per-district mean referral rate for Black secondary students with disabilities (IDEA) of 6.8%.

To conduct the comparison and minimize distortion, we removed an additional 13 districts that had fewer than 100 White secondary students enrolled.[108] In these 200 districts, the Black referral rate ranged from 0.8% to 32.3% in *Austin, Texas*. 38 districts had a Black referral rate among secondary students with disabilities (IDEA) of at least 10%. In seven of these 200 districts, the overall rate of referral to law enforcement exceeded the district's out-of-school suspension rates (for all students).

Figure 8: Selected Districts with High Rates and Large Disparities in Referrals to Law Enforcement



Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

For White secondary students with disabilities (IDEA) in these same districts, rates of referral to law enforcement ranged from 0% to 16.5% in Halifax County Public Schools in Virginia.[109] There were eight districts where the referral rates for White students with disabilities (IDEA) exceeded 10%. In four districts, no White secondary students with disabilities (IDEA) were referred to law enforcement.[110] For Black students with disabilities (IDEA), the per-district mean rate of referral to law enforcement was more than 3.5 percentage points higher than the 3.24% per-district mean referral rate for White secondary students across these same districts. In 191 of these districts, Black secondary students with disabilities had a higher referral rate than their White peers.[111] And in 111 districts (52%), the rate of referral to law enforcement for Black secondary students with disabilities

was at least three full percentage points higher than their White counterparts. In 53 of these, the risk for referral for Black students with disabilities (IDEA) was at least five percentage points higher that it was for their White counterparts. Figure 8 features five of these districts and compares the referral rates for Black and White students with disabilities (IDEA) and without, in the referral rate (risk for referral) between Black and White secondary students.[112]

In addition, besides the use of harsh and punitive discipline, there are concerns that districts may not do nearly enough to encourage students with disabilities to attend school. Missing school not only harms their academic learning, but it also means they are not receiving the supports and services that they need to be successful. For this reason, the high rates of chronic absenteeism among students with disabilities also raise questions about the adequacy of current resources for students with disabilities.

High rates of chronic absenteeism raise questions about special education adequacy

Students with disabilities that receive inadequate services might act up in ways that result in an involuntary transfer or arrest, or they might simply stop coming to school. There are also concerns that some districts that have come under scrutiny for discipline disparities might find ways to keep certain students out of school without issuing suspensions or disciplinary removals. Others remove children with disabilities from school without coding these removals as suspension or expulsions, as a matter of common practice. In fact, according to Diane Smith Howard, Managing Attorney for Criminal and Juvenile Justice at the National Disability Rights Network (NDRN), in reviewing the most common education issues handled by the 57 Protection and Advocacy organizations/attorneys that represent people with disabilities, among the most common complaints are that children with disabilities are removed from school by district administrators without the issuance of a suspension, often for weeks or months at a time. These “off the books” or "informal" removals involve children placed out on shortened days for long periods of time resulting in significant lost instructional time, children sent home from school partway through the school day on a daily or regular basis or being placed in out-of-school tutoring for 1-5 hours per week, with the remainder of the time spent at home without educational services. The resulting days of instruction missed due to such disciplinary actions would not show up in the data on suspensions or disciplinary removals. Sometimes these informal removals are reported as unexcused absences, in which case they would be reflected in the attendance and potentially reflected in the rates of chronic absenteeism.[113]

Other losses are also potentially captured in measures of absenteeism. Students with worsening mental health may miss increasing amounts of school due to deepening depression or may need to receive more intensive help which would be considered excused absences. In some cases, had students received adequate support in school initially, these extended losses might have been avoided. Therefore, discipline rates do not fully capture unhealthy or inadequately supportive school environments. For these reasons, policymakers often consider rates of chronic absenteeism, as they are among the broadest overarching metrics which can help evaluate the health and welfare of

students enrolled in public schools. Therefore, it should raise concerns about the adequacy of public schools in meeting the needs of students eligible for special education if there are large differences in rates of chronic absenteeism between students with and without disabilities (IDEA).[114]

Chronic absenteeism is a measure of the number of students who have missed a large amount of instructional time in a given year, for any of a number of reasons.[115] Most definitions cover all absences including unexcused ones and the lost days of instruction due to school discipline, but definitions vary, as does the number of days missed that makes a student count as "chronically" absent. When the federal government last collected the data pursuant to the CRDC the absences included all reasons including excused absences. Any student that missed more than 15 days was considered chronically absent.[116]

Chronic absenteeism is a problem that most states recognize and one that the majority of states have identified as one of the non-academic indicators to track and use in their statewide accountability systems pursuant to ESSA.[117]

Overall, K-12, 16% of all students are chronically absent: In 2015-16 this was much higher, reaching 22.5% of all students with disabilities (IDEA), compared to 14.9% for those without IEPs. Of course, like discipline rates, the rates of chronic absenteeism rise to an average of 21.1% for all students in high school, before any disaggregation. The elementary school rates were approximately 13.6%.

Nationally, according to DoED's analyses, high school students with disabilities (IEPs) had a chronic absenteeism rate of over 27.8% in 2015-16, while it was 20.1% for those without IEPs.[118] Unfortunately, the Trump administration discontinued the CRDC's review of data on chronic absenteeism and so none were reported for 2017-18. These data, which could partially help make up for the lack of accurate reporting of incidents of referrals and arrests, are no longer available. In this way, deficiencies in data collection and reporting contribute to the inadequacy of civil rights oversight in education.

Table 4: California's Pre-Pandemic Chronic Absenteeism Rates for High School Students With (SWD) and Without (SWOD) Disabilities

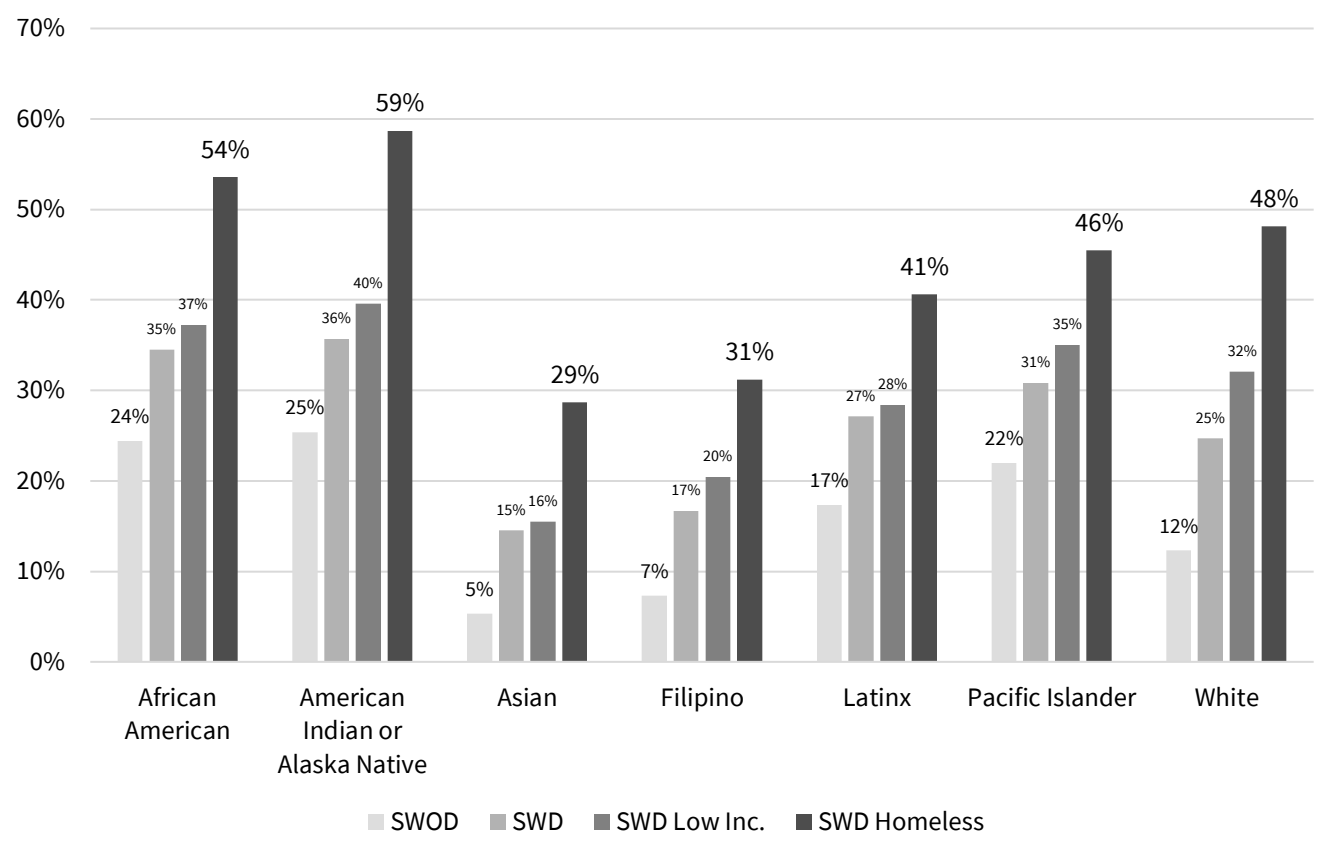
Academic Year	Chronic Absenteeism Rate SWD	Chronic Absenteeism Rate SWOD
2018-19	26.8%	14.9%
2017-18	25.6%	14.4%
2016-17	25.3%	14.2%

Source: California Department of Education, DataQuest, 2018-19.

From Table 4 one can see that the most recent data reported, pre-pandemic, shows that rates of chronic absenteeism among high school students were increasing slightly for both students with and those without disabilities. However, the increase for students with disabilities of 1.5 percentage

points was more than double the seven-tenths of a point increase for students without disabilities during the same periods. When we disaggregate these high school absenteeism data by race/ethnicity, the disparities become clearer with Asian students without disabilities showing the lowest rate at 5.3% and Native American students with disabilities showing the highest at 35.7%.

Figure 9: Rates of Chronic Absenteeism by Race, Disability, Poverty and Homelessness



Source: California Department of Education, DataQuest, 2018-19.

While all students have experienced increased stress and a risk for exposure to trauma, in Figure 9, from 2018-19, although pre-pandemic, one can see how there are students in every racial group who have a disability, come from a low-income family, or are homeless.

California's data from 2018-19 show large disparities in chronic absenteeism: More recent data from California for the 2018-19 academic school year provide a clear sense of the disparities in chronic absenteeism, especially because we can see the different rates by disability status and race. As risk factors for students with disability are added, the average absenteeism rates increased.

As one can see from the racially disaggregated chronic absenteeism data from the state of California, within each racial/ethnic group, the chronic absenteeism rates for students with disabilities were consistently higher than for students without disabilities. Within each racial group, having a disability corresponded to a rate that was between 8 to 14 points higher. However, among those with disabilities, Black and Native American students had the highest rates and each were over 9.5 percentage points higher than the rates among White students with disabilities.

Figure 9 further enables us to see how rates of chronic absenteeism for students with disabilities compare by race when we add the risk factors of being low-income or homeless to the rates for high school students with disabilities. These pre-pandemic rates were already extraordinarily high among the groups and are most likely to increase due to the economic fallout from the pandemic, especially for Black and Native American students with disabilities.

In California, in 2018-19, homeless high school students with disabilities had the highest rates of chronic absenteeism, which was 41% overall. However, as one can see in Figure 9, there were stark racial disparities in the rates among these high-need students.

Education data deficiencies suggest continuation of inadequate review of school climate conditions on students with disabilities

We count what we care about. One clear sign that any educational agency cares about racial inequity in education is that they review inequity indicators at least annually. The fact that we do not count, or count but do not carefully review many of the data on eligibility or regarding the quantity or quality of services provided, or outcomes like referrals to law enforcement or suspensions of students with disabilities is, in and of itself, an example of a resource inequity. It is worth noting that the IDEA provides the Secretary of Education the authority to collect this information and to report it publicly.[119]

OSEP data are also limited because they do not include any of the information on students without disabilities, nor do they provide data at the district level, which is critical to fully comprehend the degree of variation and the extent to which some groups are actually impacted by local disciplinary actions. Therefore, in Appendix B, readers will find estimates of days lost due to all removals of students with disabilities (IDEA) at the national and state levels based on data from 2018-19. Because *all* removals should include days lost as a result of referrals to law enforcement and school related arrests, even if they are not suspended, it is possible that the estimates reflect the impact from when students are referred to police that we turn to next.

Data deficiencies outlined thus far fall into two categories that overlap. On the one hand, we often do not collect sufficient data to flag problems. On the other hand, we aren't very effective at using data we do collect to track our efforts at solving the problems. A prime example that fits both categories is that the only reporting of the identification of students with disabilities pursuant to Section 504-

only, one of the fastest growing groups, is collected every other year, at best. The lack of timely information applies to all the data collected through the CRDC. It is hard to imagine any other policy area where we do not review the most relevant data at least annually. Moreover, it usually takes 18 months from the close of the school year (August) before the public can see the data from that year.[120] However, if the current plan to delay the CRDC another year is implemented, there will not be any new data collected on the enrollment or lack thereof, or on school policing, until the 2021-22 school year, and those data will not become public until the winter or spring of 2024 at the earliest.[121]

The potential for the next CRDC to be delayed is also troubling because it is currently the only required state or federal collection of school policing data. Further, these school policing data were recently required to be part of every state and school district's annual report card by the Every Student Succeeds Act, yet CCRR's recently published national report, *Lost Opportunities,* documents widespread non-compliance with the reporting on state- and district-level report cards, and found that most states chose to rely entirely on the CRDC to publish the data.[122]

Moreover, the data quality concerns result in part because there are no consequences for states or districts that fail to report their data to the public. There are also insufficient technical aids and resources to assist districts with their reporting. IDEA has annual discipline collection and reporting requirements, and 20 U.S.C. § 1418(a) requires that states annually report the data to the public as well as to the Secretary. However, CCRR's review found that not one state had fully complied with the reporting requirements. In fact, data reporting was at one time an indicator created by the DoED as part of the Office of Special Education Programs' monitoring, but was dropped during the Bush or Clinton administrations despite the objections of numerous civil and disability rights groups.[123]

PART III. FEDERAL AND STATE POLICYMAKERS NEED TO ADDRESS THE GROWING NUMBER OF STUDENTS WITH MENTAL AND BEHAVIORAL HEALTH NEEDS

Bolster civil rights enforcement and the capacity to bring about substantive change where responding to systematic discrimination

The term 'crisis in public education' is an understatement for the nation's mid-pandemic conditions. Albeit difficult to measure, most would agree that the fallout from the current public education crisis is unprecedented in its magnitude. Not since the early 1900s have such large segments of the population had to confront so many challenges at once. While the threat of an insufficient response from federal and state legislatures who have resisted funding public education at adequate levels in the past looms on our horizon, public school communities are experiencing challenges to mental well-being, the shortcomings of virtual schooling, and the impact from the vast inequality regarding connectivity and technology. Large segments of the student population have fallen off track, some because they struggle to attend school virtually or respond to online assignments, while others are helping their family overcome lost housing, lost income, and untold impacts from the rise in racism. Schools are planning to re-open despite having to cope with a myriad of issues from poor ventilation, to staffing shortages, to large scale layoffs. At best, we are muddling through traumatic times. If our pre-existing inadequate responsivity is any predictor, we are wholly unprepared to meet the challenges that trauma will soon impose.

Adverse childhood experiences and rates of trauma were already rising: According to the Centers for Disease Control and Prevention, prior to the pandemic, there was a rising concern about the inadequacy of resources to address adverse childhood experiences (ACEs). Any ACE can lead to negative outcomes. However, when they occur in combination and in locations which lack resources, as is happening during the pandemic, they are more likely to take on more serious and lifelong implications. "Adverse childhood experiences, or ACEs, are potentially traumatic events that occur in childhood (0-17 years). For example:

- experiencing violence, abuse, or neglect
- witnessing violence in the home or community
- having a family member attempt or die by suicide."[124]

According to the CDC:

> "ACEs and associated conditions, such as living in under-resourced or racially segregated neighborhoods, frequently moving, and experiencing food insecurity, can cause toxic stress (extended or prolonged stress). Toxic stress from ACEs can change brain

> development and affect such things as attention, decision-making, learning, and response to stress. .... Some children may face further exposure to toxic stress from historical and ongoing traumas due to systemic racism or the impacts of poverty resulting from limited educational and economic opportunities."[125]

Scholars have called attention to the need for earlier appropriate care for youth exposed to trauma, including those involved in the child welfare system.[126] Ignoring this reality and returning to a "normal" post-pandemic world would "ignore and potentially exacerbate the trauma that many children are experiencing."[127] The findings from a 2018 report called, *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth,* pointed out the increase in trauma and the corresponding need for resources. "The number of 6- to 11- year-old children in placement has increased 13% since 2015 .... Research shows that starting at age 12 untreated symptoms of complex trauma experienced during childhood can become acute with the onset of puberty, and trauma during childhood can become aggressive and/or delinquent during adolescence and lead to juvenile justice system involvement." The report suggests that, "Children involved in the child welfare system have experienced trauma that affects brain development and can lead to behaviors as they get older that are punished in school, and eventually by law enforcement. Behavior related to trauma during childhood—particularly on the ability to regulate emotions and behavior—must be distinguished from other mental health needs and from delinquent behavior."[128]

The research specific to the incidence of childhood trauma and effective remedies is an emerging field, but there are sufficient data and expertise to indicate the growing needs and that many traumatized youth should be deemed eligible for mental and behavioral supports pursuant to Section 504. Further, the reality that exposure to racism is considered an ACE is not just an abstract theory.[129] Courts have recognized the traumatizing impact on children living in Compton, California and attending Compton Unified Schools,[130] as well as recently recognizing the impact of historical oppression as traumatizing and a contributing factor to consider when evaluating students for eligibility pursuant to Section 504. Specifically, a federal court ruled that the Bureau of Indian Education (BIE) had neglected to recognize the disability-related needs of Native American children in *STEPHEN C., v. BUREAU OF INDIAN EDUCATION*.[131] In each case the plaintiffs showed that the impact went beyond the general disadvantages associated with poverty. As summarized in the ruling:

> "[The case was] brought by Nine Havasupai students and the Native American Disability Law Center ("NADLC") to address alleged longstanding educational deprivations at Havasupai Elementary School ("HES")—a school operated by the Bureau of Indian Education on the Havasupai Indian Reservation. The plaintiffs alleged that BIE "knowingly failed to provide basic general education, a system of special education, and necessary wellness and mental health support to Havasupai students, resulting in indefensible deficits in academic achievement and educational attainment." (Doc. 60 at 1-2.) .... the Second Amended Complaint is replete with allegations relating each student

> Plaintiff's unique exposure to complex trauma and adverse childhood experiences to their ability to read, think, and concentrate—i.e., how their brains' physical response to trauma substantially limits their ability to learn. (Doc. 60 at 13-36.) Thus, the Court finds that Plaintiffs have adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities within the meaning of Section 504 of the Rehabilitation Act."[132]

Similarly, DoED's OCR has acknowledged that students who have experienced trauma should be evaluated for disability eligibility and may be entitled to receive supports, services and accommodations, and that failure to provide these can contribute to discipline disparities.[133] In OCR's 2016 Report to Congress, it described the following:

> "In October 2015, OCR resolved a complaint that alleged that the school district discriminated on the basis of disability (Post Traumatic Stress Disorder, or PTSD) when it failed to provide a student with a free appropriate public education (FAPE) by not providing her related aids and services for her disability .... the district had evidence that the student might have a disability requiring special education or related aids and services, yet did not provide such aids and services until December 2014 at the earliest and therefore failed, in violation of Section 504 and Title II, to provide timely special education or related aids and services during the 2014-15 school year."[134]

Therefore, schools not only need to respond more effectively to children who have experienced trauma, but their failure to attend to the educational needs of youth with disabilities can cause or exacerbate trauma. Schools are both morally and legally obligated to act.

Inappropriate school-policing can be traumatizing: It is worth reiterating that students of color may be mentally traumatized as a result of interactions with school police, especially the use of excessive force, such as in the recent incident captured on video in Osceola County, Florida.[135] The frequency of video captures of abusive treatment of students of color indicates that school policing concerns cannot be disconnected from concerns about racist and abusive policing in general.[136] Moreover, while the fact that students with mental health issues are seriously overrepresented among incarcerated youth is disturbing, we must acknowledge that an inappropriate referral to law enforcement and students who are diverted from entering the juvenile justice system may still be traumatized. Moreover, a student's involvement in the system increases their risks. According to the National Disability Rights Network Report: "... at least 75 percent of youth in the juvenile justice system have experienced traumatic victimization, leaving them at-risk for mental health disorders such as posttraumatic stress syndrome."[137] Unfortunately, there are no federal data collections that report the number of such incidents nor does the federal government collect data on the numbers of complaints filed against campus police.

Finally, the concerns raised by Lowenstein about the lack of early attention for youth in Massachusetts are also reasons to be concerned that this unaddressed problem will be far more pronounced in many states, due to the *reduction* in the quantity and quality of mental health supports and services that, most acknowledge, characterizes the current mid-pandemic reality.[138] As Lowenstein points out, "Many children in Massachusetts, ... are unable to access culturally competent mental and behavioral health care before their behavioral health deteriorates significantly."[139]

It is important to note that trauma is often very different from other mental illnesses and therefore may require attention from those who have the appropriate training and experience. Although having adequate staff to appropriately respond to pandemic-traumatized youth is perhaps the most obvious growing need, the concerns Lowenstein raises about the impact from failing to intervene early are similar to research that looked more generally at the impact of having unidentified and untreated behavioral and emotional problems.[140] ACEs, might also impair learning in ways that are not associated with mental or behavioral health needs. And recent mid-pandemic research found that the isolation from COVID-19 increased the risk of depression and possibly anxiety for up to nine years.[141]

Expand federal funding to eliminate the shortage of counselors, social workers, nurses, school psychologists and well trained and fully certified special education teachers

The percentages of youth with behavioral and mental health needs have been rising:
The CDC recently released these "Facts About U.S. Children" which describes a rise in the numbers of children with ADHD, behavior problems, anxiety, and depression. These are the most commonly diagnosed mental disorders in children and the CDC described the incidence as follows:

- 9.4% of children aged 2-17 years (approximately 6.1 million) have received an ADHD diagnosis.
- 7.4% of children aged 3-17 years (approximately 4.5 million) have a diagnosed behavior problem.
- 7.1% of children aged 3-17 years (approximately 4.4 million) have diagnosed anxiety.
- 3.2% of children aged 3-17 years (approximately 1.9 million) have diagnosed depression."[142]

According to the same CDC source, pre-pandemic, the percentage of children diagnosed with either anxiety or depression grew from 5.4% in 2003 to 8.4% in 2011-12.[143] Further stating, "Among children living below 100% of the federal poverty level, more than 1 in 5 (22%) had a mental, behavioral, or developmental disorder."[144]

The most recent CDC data suggest that mental health problems among children are, in fact, rising amidst the pandemic: As reported by the Washington Post, "Mental health problems account for a growing proportion of children's visits to hospital emergency rooms, according to the Centers for Disease Control and Prevention. From March, when the pandemic was declared, to October, the

figure was up 31 percent for those 12 to 17 years old and 24 percent for children ages 5 to 11 compared with the same period in 2019."[145]

The need for early interventions was rising even before the pandemic: It is fairly well accepted today that early detection and intervention to help students with mental health needs can reduce the likelihood of more serious disorders and long-term negative repercussions. As stated in one study from 2009, "Within the school setting there is emerging evidence that early identification, combined with early and comprehensive prevention and intervention, can decrease the likelihood of academic failure and future life difficulties (Lane & Menzies, 2003; Walker & Shinn, 2002). Thus, as schools aim to serve all students regardless of risk level, through both special and general education supports, early identification via screening is a means for increasing the likelihood that more students are healthy, thriving, and progressing toward optimal development."[146]

Schools often lack the kind of mental health and behavioral supports and services that students need when they are first showing signs of trouble: The need to provide quality supports and services to address children who have more than their fair share of ACEs and those who may be at risk for PTSD and other mental health problems, rather than to respond with punitive discipline, is related to the need to provide necessary supports well *before* educators can determine eligibility under disability law. Unfortunately, despite the need for early intervention, in some districts, gaining access to *adequate* support may require first being deemed eligible by having to undergo a costly evaluation procedure. The need for early interventions is one of many reasons why it is critically important to address the inadequacy of federal and state funding for general education.

Relatedly, there is a serious problem if schools have police but no counselors: As the ACLU's report "Cops and No Counselors" has pointed out, there is a risk of criminalizing student behavior, especially in schools that employ police and/or security guards but have no counselors on staff.[147] Specifically, whereas a properly staffed school could prevent or effectively de-escalate a problematic disability-caused behavior, a school lacking sufficient support staff may instead respond by calling police. Our prior report, *Are California's Schools Doing Enough to Close the Discipline Gap?* documented how there were many complaints against districts in California that had taken state funding specifically earmarked to meet the needs of "high needs" students and spent it instead on police and custodial services.[148] Moreover, CCRR has documented that there is not only a positive correlation in California's high schools between higher ratios of security staff to students and higher rates of lost instruction, generally; the same study found that for Black high school students, higher ratios of student support staff to students was associated with lower rates of lost instruction.[149]

The lack of adequate 504 and IDEA funding undoubtedly contributes to inadequate numbers of psychologists, counselors and other support providers. Specifically, the National Association of School Psychologists have pointed to large shortages, such that in order to meet the recommended ratio of psychologists to students, many more people would need to enter the field.[150] School counselors are similarly in short supply.[151] Not only were school resources inadequate to support the

continuum of students' mental health and behavioral needs pre-pandemic, it will likely take many years of budget increases, and collaboration from institutions of higher education before there are enough well-trained staff to meet the professional standards for educational adequacy.

Unfortunately, despite the rising awareness of students' increased risk of trauma during the pandemic, there has not been an urgent call to also boost the numbers of counselors, social workers, nurses, and psychologists in time for the resumption of in-person schooling, and only some governors have prioritized spending in this area when they received the first relief package.[152]

Meeting the increasing percentage of children experiencing trauma, or other mental health needs requires an increase in resources: Amidst the disagreements about the criteria for re-starting full in-person education, there have been just a few mentions of the likely increase in trauma and mental health needs among students. Many had unidentified or poorly addressed needs pre-pandemic while many more are predicted to need supports and services for the first time when they return to school. It is hard to predict how many won't need to be deemed eligible under 504 or IDEA if they receive appropriate high-quality early intervention. However, to meet all the anticipated growth in needs, schools should be preparing now to provide a full continuum of supports and services when they restart in-person classes, if not sooner.

The pandemic has hindered the identification of students with special needs: As mentioned, core aspects of both the IDEA and Section 504 is the obligation to identify all students with disabilities. This includes responding to requests for evaluations from parents, as well as teachers. In a survey conducted during the pandemic by American Institutes of Research, administrators were asked about their ability to comply with the evaluation for IDEA eligibility and over half of them indicated that compliance with the referral and evaluation requirements was more difficult during the pandemic.[153] These survey results are a clear indication that the delays and challenges to identifying students with these needs during the pandemic will contribute to a backlog of students needing evaluations and only add to the difficulty in identifying and meeting these needs in the near future.

Estimates of learning losses during the pandemic are dire and harming some groups more than others: Although it is hard to estimate the pandemic's full impact on any group of students, those engaged in predictive research have issued dire predictions, especially for students with disabilities. Specifically, researchers at Stanford University used prior research on learning loss to predict learning losses in terms of grade levels of achievement that differ by state, and for different subgroups of students, and estimated that students with disabilities have lost even more learning than others.[154] Disability advocates have often pointed to poor achievement levels to raise concerns about the quality and quantity of special education instruction.[155] Unfortunately, mid-pandemic reports indicate that for many students with disabilities (IDEA) the quality of special education has diminished, as has the access to instruction, especially for students who can't benefit from online instruction without additional support from an in-person assistant or technical support from

assistive technology.[156] One concrete example is that many students who were blind or deaf might be able to log into Zoom instruction, but without the necessary technical assistance, they could not actually gain sufficient access to the instruction to make meaningful sense of the instruction. In addition, 73% of special education administrators responding to AIR's national October 2020 survey reported, "that it was more or substantially more difficult to provide appropriate instructional accommodations."[157] In some cases, access might be shut down entirely, but in others, the strength of the internet could not support the competing demands.[158]

Other studies have indicated that low-income students and students of color, especially Black and Latinx students and homeless students, have lost more instruction than their White and non-poor counterparts.[159] There are a wide number of reasons for the disparities of losses, including differences in access to the internet due to low bandwidth or internet dead-zones, and differences in access due to living conditions. Other concerns that are hard to quantify include the possibility that some students have had access to online instruction cut off for disciplinary reasons.[160]

Some mid-pandemic studies that were designed to give us a more precise, albeit still limited, sense of the pandemic losses have reported out their findings. One study called, "Student Engagement Online During School Facilities Closures: An Analysis of L.A. Unified Secondary Students' Schoology Activity from March 16 to May 22, 2020," summarized online activity of the program Schoology (the district's course management system), and concluded, "Compared to more advantaged students, fewer middle and high school students who are Black, Hispanic, living in low-income households, classified as English learners, [or] have a disability…participated across all measures of online activity. Low participation may show lost learning which could take students years to recoup."[161] For example, their report graphically illustrates how students with disabilities and students that are homeless or in foster care were the least likely (78%) to participate at least once. And among high school students, where participation rates tended to be higher, those with disabilities had the lowest participation rate (82%) of any of the groups tracked in the study.[162]

Another study used the pre-pandemic findings to approximate the impact of the pandemic after estimating current levels of absenteeism in five districts in California.[163] The researchers concluded that students with disabilities and low-income students would be harmed the most by absences caused by the pandemic.[164] Similarly, studies conducted by California researchers on student engagement in online learning found that students with disabilities had participation rates that were much lower than their peers.[165] Moreover, in Connecticut, where the state conducted a comparison of chronic absenteeism in the fall of 2020 and the pre-pandemic fall of 2019, students with disabilities showed the largest increase in absenteeism.[166] And as studies have shown, chronic absenteeism results in increased risks of falling behind academically and even dropping out entirely.[167]

Students have been losing untold amounts of special education instructions and related services during the pandemic: Although precise logs of lost instruction are generally not available,

New York requires reporting on the services received throughout the year. According to an investigative reporter from Chalkbeat who requested and received the reports, "Nearly a quarter of New York City's students with disabilities have not received all of the services they're entitled to this school year."[168] A recent survey by the Hechinger Institute of school districts' personnel and advocates who represent students with disabilities documented massive delays in the evaluation of students who may be eligible.[169] Disability rights advocates have been particularly vocal with concerns about delays in identification and their long-term impact. Meghan Whittaker of the National Center for Learning Disabilities listed the backlog of evaluations, concerns with the accuracy of tests administered under new conditions, and the difficulty of measuring learning loss in asserting the need for compensatory education post-COVID-19.[170]

Moving forward, some disability advocates will seek to document the lost hours of instruction and related services, and pursue compensatory instruction. While every bit helps, as the evidence presented in Part I and Part II indicate, returning to the pre-pandemic status quo would be unjust. Many believe that raised awareness of the serious inadequacy of the online instruction that was provided should serve as a springboard to also addressing the myriad of pre-existing inadequacies. With that much larger purpose shared by this report, the focus of the following conclusion is how to meet the serious needs suggested by the data presented herein.

New knowledge and understanding of the problem will not end the scarcity of resources:[171] Thus far, this report has described a deep and growing inequity in our nation's public schools along the intersecting lines of disability and race that many policymakers have overlooked for years, even before the COVID-19 pandemic-induced online education brought about a greater awareness of the value of in-person education and the harm students incur when they are denied access to school. This report now turns to some of the specifics of funding inequity that have only been referenced thus far but will be critically important to address to make progress in the future.

In their forthcoming book, *Embedding Mental Health as Schools Change*, on the school's role in addressing mental health needs, researchers Adelman and Taylor summed up the current overlapping concerns for students with mental health needs well:

> "Unfortunately, the COVID-19 pandemic and the pandemic of racial injustices are increasing the opportunity gap, and this will increase the achievement gap. Some students are not thriving under current conditions, and those students who have not done well in school previously are falling further behind…If education professionals fail to take time to plan innovatively, the number of dropouts and the related personal and societal costs will exacerbate the health and economic consequences."[172]

The pre-existing condition of inadequate federal funding for special education, exacerbated by the pandemic's economic impact, calls for an equitable remedy: In passing the IDEA, Congress anticipated that to ensure the right to an education was met, they would have to provide substantial

additional funds to cover the costs associated with providing all students with free appropriate public education (FAPE).[173] Congress thus promised to provide states with an additional source, covering up to 40% above what states allocate to educate students without disabilities.[174] Technically, this is expressed as 40% of the annual average per pupil expenditure (APPE).

To be eligible for this funding, each state had to agree to a system of federal and state oversight and to implement extensive procedural safeguards. Because students with disabilities have an equal right to be educated, even if there were no funds with strings attached from the federal government, states would still have the legal obligation to provide special education as well as the supports and services some students need to succeed in regular education.[175] Therefore, providing sufficient funding to educate students with disabilities should be regarded by states as central and integral to their obligation to educate all children, rather than as an added expense.[176]

The reality is that every state relies heavily on the federal IDEA funds to deliver special education. Although the federal funds are supposed to supplement and not supplant state and local funding, it is logical to infer that some supplanting occurs, especially in those states where the legislatures have resisted providing sufficient funds to meet their obligation to educate students as expressed in their State Constitution.[177]

Congress, however, has never provided more than 20% of the additional costs.[178] What is worse is that the percentage allocation of the APPE has been declining since 2005. In 2018-19, it was just 14.3% of the authorized amount.[179] According to the National Council on Disability (NCD), "[T]he federal funding provided to states—to offset the cost of special education to preschool age children ages three to five—has consistently declined. This has occurred despite the fact that the number of preschool children served by states has nearly tripled."[180] Given that special education resources have always been scarce, it is not surprising that some students are denied FAPE, or that FAPE denial burdens students of color with disabilities more than their White counterparts.

The IDEA is filled with procedural protections enabling the filing of mostly individual administrative complaints to remedy concerns that FAPE is not being provided. The IDEA also provides a detailed administrative complaint process and other supports to children and their parents when concerns about FAPE arise. However, the federal government does not devote many resources to the oversight of IDEA's implementation at the state or district levels.[181]

Annually, the Office of Special Education Programs reviews state implementation plans with a detailed review of approximately 17 performance and compliance indicators that the Secretary can add to or modify. However, the National Council on Disability, which evaluates the implementation of special education, has consistently criticized the level and efficacy of federal oversight.[182] Although states do receive funds for administrative support, the burden of ensuring proper implementation at the local district level falls disproportionately on parents of children with disabilities. As the NCD reported in 2000, "Enforcement of the law is too often the burden of parents who must invoke formal

complaint procedures and request due process hearing to obtain the services and supports to which their children are entitled under law."[183]

Many advocates suggest that the high degree to which parents bear the burden of ensuring proper implementation of the IDEA might have been avoided had the funds that were promised to ensure proper implementation been provided at the maximum level authorized.

This burden on parents has a stratifying impact along the lines of race and class such that the quality of special education supports and services a given child receives may differ in accord with the amount of "cultural capital" the child's parents bring to table. In this way, the heavy reliance on parents to exercise their rights to ensure IDEA compliance works against all children having equitable access.[184] Given the absence of federal funding for 504-only students, the same access and enforcement issues likely apply to the protection of the rights of students with disabilities who are only eligible under Section 504.

Many state expenditures have the effect of reducing their special education budgets in adjusted dollars: In addition to the complaints that parents can file, the IDEA has several requirements "known collectively as maintenance of effort" that are intended to prevent states from decreasing their special education expenditures from one year to the next. However, this does not mean that states are required to spend more when costs are rising, as they have been.

One specific example is from Pennsylvania, where a recent report by the Education Law Center of Pennsylvania shows how the state's education funding for special education, after adjusting the expenditures for inflation, has declined steadily in relationship to rising costs.[185]

Insufficient funding for students with disabilities very likely impacts the quality of special education and supports and services provided. Furthermore, there are many ways that inadequate funding of both general and special education can contribute to incentives to identify more students for special education, especially where special education is the only source for getting additional help. On the other hand, if an important resource is shrinking, or is insufficient to meet the needs, it stands to reason that the deficiency creates an incentive not to identify as many students as eligible either for special education, or eligible pursuant to Section 504.

Insufficient federal IDEA implementation oversight and inadequate state funding of public education can combine to shortchange students with disabilities: Perhaps the most explicit example is from Texas, whose state legislature charged its House Committee on Public Education in 2004 to “make recommendations for reducing state and local administrative costs to increase resource allocation for direct services to students.” In their report back, the Committee brought attention to one method that at least nine states were using at the time to keep special education costs at bay—setting a cap on the number of students enrolled in special education programs.[186] Shortly after, the Texas Education Agency adopted this very method and set a special education

enrollment target of 8.5% of total enrollment, causing many districts to follow suit and significantly lower their special education enrollments.[187] This, of course, meant that many students across the state who were receiving services lost services, and that many more students who had the right to be identified as needing services were not rightfully identified.

This practice continued largely undetected *for 12 years* until an investigative article revealed it to the public in 2016. Subsequently, the U.S. Department of Education deemed the cap an IDEA violation and the capping practice was ended, but "many continue to be concerned about access to [special education] programs in Texas."[188] This example suggests that even though 45 years have passed since the IDEA was enacted in 1975, some state and local education policymakers still treat meeting their legal and moral obligation to educate children with disabilities as an optional expense.[189] As the totality of the evidence presented in this report suggests, there are likely hundreds of thousands of other students in districts all across America who receive no supports and services, or where funding shortfalls have likely left properly identified children with far less than what they need and have a right to receive.

It is worth noting that the state of Texas has historically been at the epicenter of education finance litigation. There is a great deal of evidence to suggest that public education in Texas, in general, is not equitably funded today. In Texas, the battles to increase funding, and most notably the *San Antonio v. Rodriguez* case, involve lower income districts with relatively high percentages of non-White students seeking funding in proportion to a wide array of educational needs.[190] A strong argument can be made that public education in most states, in general, is inadequately funded.[191]

The economic impact from the pandemic will exacerbate inadequate support for public education from state governments: Equally important to consider are the IDEA and 504 funding issues in light of the fact that in states all across America, funding for education in general has been declining at least since the recession in 2008. Students with disabilities have been among the most affected. According to analysis by the Center for American Progress:[192]

> "Recent research looking into the impacts of the Great Recession have shown that the lack of education funding negatively affected student performance, as most states were forced to make major cuts to education spending in the years following 2008. In many states, these cuts have persisted for a decade or more. As of 2016, education funding had still not returned to pre-recession levels in 24 states. A study into the impact of the Great Recession on math and English language arts achievement found that each year of the recession reduced student achievement scores by an average of 0.02 to 0.03 standard deviations. They found that this downturn in achievement scores was even greater in districts with a higher concentration of economically disadvantaged students, students with disabilities, English language learners, and Black students."[193]

Meanwhile, school finance experts such as David Baker at Rutgers University and David Sciarra at the Education Law Center of New Jersey point out that since the recession of 2008, many states, including Texas and New York, reduced the share of their state revenues devoted to public education. Similarly concerning, other states' investments in education did not keep pace with their respective state's economic growth. In their report, *$600 Billion Lost: State Disinvestment in Education Following the Great Depression*, the Education Law Center report states that after reducing education budgets in 2007, "...states failed to restore those investments."[194]

While funding stagnates, the percentage of students that are identified pursuant to the IDEA have been increasing over each of the last five years:[195]

Table 5: Children 3 to 21 Years Old Served Under Individuals with Disabilities Education Act (IDEA), All Disabilities: Selected Years, 1976-77 Through 2018-19

Number of children served as a percent of total enrollment													
1980-81	1990-91	2000-01	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
10.1	11.4	13.3	13.2	13.1	13.0	12.9	12.9	12.9	13.0	13.2	13.4	13.7	14.1

Source: National Center for Education Statistics, Table 204.30.

Concerns about inadequate funding for general education dovetail with those raised about the efficacy of special education. According to the DoED's report to Congress for 2016, two-thirds of students with disabilities are educated in "general" education classrooms for 80% or more of their day, and just over a third spend varying degrees in more restrictive settings.[196] Given that in most schools, students with disabilities mostly receive special education in an inclusive setting with general education peers, resources dedicated to improving the quality of education received by students with disabilities has reportedly helped improve the quality of education for all students.[197]

Economists describe continuing disproportionate pandemic harms: When funds are scarce, it's not hard to imagine that students with disabilities from historically disadvantaged groups will experience greater harms with longer-lasting impact. For example, a June 2020 report from McKinsey & Company outlines the long-term effects that the loss of instruction will have on children's long-term economic well-being, as well as that of the U.S. economy—an estimated $61,000-82,000 loss in lifetime earnings per K-12 student. Specifically, in line with the findings of our report, their report predicts that loss of instruction and its related negative effects will likely be significantly greater for low-income, Black, and Hispanic students.[198] Other studies also examine how schooling during COVID-19 has exacerbated gaps in education, food security, housing, health, and more that already existed between students from low socio-economic backgrounds and/or students of color, and their peers. One such study by the Economic Policy Institute highlights how remote

schooling has likely decreased learning time, leading to decreased learning, as well as whole-child development.[199]

The Economic Policy Institute report recommends an increase in federal funding for resources to provide high-quality remote instruction, and to meet the "unique needs [of students] including those of special-needs students and English learners." They also advocate for a more personalized approach for addressing the needs of students who experienced the most interruption in their learning during the pandemic. The McKinsey & Company report also highlights the need to prioritize the identification and support of these particular students.[200] García and Weiss promote increased training resources for teachers who had to suddenly and haphazardly adapt to remote instruction, which could include how to effectively teach and assess students requiring specific supports and services. The McKinsey & Company report also recommends providing teachers with more resources regarding best practices for our current situation.[201]

The context for concerns is that we are entering a period of scarce education resources due to pandemic-related costs and the impact the pandemic is having, and will continue to have, on state and local education budgets, even after we get COVID-19 under control. The Education Law Center of Pennsylvania tracks education resources in every state and recently documented their concerns:

> "As the COVID-19 crisis extends into the 2020-21 school year… what is already clear is that every state is experiencing sharp revenue declines due to business closures, the economic slowdown, and sharp increases in layoffs and unemployment.
>
> For K-12 education, two key dynamics are in play as states enact FY21 budgets and respond to the pandemic. The first is the likelihood of cuts in state school aid and the harsher impact of those cuts on higher poverty districts. Because these aid cuts are *recurring*, they can cause structural deficits in state support for public education over the longer term.
>
> The second is the infusion of *non-recurring* federal emergency funds appropriated by Congress to address the impacts of COVID-19 on public schools. How states use and distribute federal funds will not only affect the resources available to tackle issues created by the pandemic, including the digital divide and a safe return to in-person instruction, but can also set the stage for structural deficits in state budgets when these federal funds are depleted."[202]

With even greater budget shortfalls anticipated from the winter COVID-19 spike, and considering the spike in deaths during the fall and winter, the additional needs this report suggests are unmet will be even more challenging to meet once schools return to full in-person instruction. It is expected that the economic situation will be even more dire than experienced after the Great Recession.[203]

As the limited review of outcomes for students with disabilities that are identified under the IDEA suggests, the high and racially disparate rates of discipline, absenteeism, and rates of referral to law

enforcement indicate that the supports and services and safeguards are either not adequate, or they are not being provided. Due to shrinking proportion of federal funds and/or diminishing state special education funds, amidst rising costs and increases in childhood exposure, every year, special educators and student support staff are expected to do more with less.

There is no reason to believe that simply identifying more children with disabilities to share the already inadequate resources provided by the federal government pursuant to the IDEA, as well as ESSA and other grant programs, will make a difference if identifying needs only results in all students receiving smaller and smaller pieces of an inadequate pie. If there were sufficient resources for the full funding of IDEA, as well as a resource stream to serve 504-only students, perhaps schools would be able to provide the training and support to teachers and administrators and hire the needed support staff to dramatically improve the conditions of learning in both general and special education.

Addressing systemic racism must be part of remedies moving forward: On top of the ways underfunding limits educators' capacity to meet the needs of school children with disabilities, is the well-recognized need to address the impact of systemic racism in both regular and special education. Dismantling deeply ingrained discrimination, in its many permutations, includes responding to a host of issues not covered or just touched on briefly in this report such as entrenched segregation, implicit bias, the need for more educators of color, unjustified policies and practices that have a racially disparate impact, and structural racism. There is clearly a need for a deeper commitment to provide additional resources that districts will need to address these problems. If left as is, these harmful factors will continue to contribute to the disproportionate representation of youth with disabilities of color in the juvenile justice system.[204]

CONCLUSION

In this report, we highlight the confluence of race and disability disparities with regard to identification rates, rates of lost instruction due to out-of-school suspensions as well as all disciplinary removals, referrals to law enforcement, and rates of chronic absenteeism among students with several risk factors, to encourage greater awareness of the inequitable outcomes. There are many causes, but two factors are common to all the pre-pandemic inequities: inadequate resources, and insufficient monitoring and oversight of state and district implementation of both the IDEA and civil rights protections.

Despite our limited ability to measure the impact of the current pandemic, the evidence we can see has expanded the reasons for deep concerns that pre-dated COVID-19. The aforementioned survey data and reports from advocates indicate that there has been a marked reduction during the pandemic of identification of children with disabilities, a reduction in supports and services, and a reduction in the quantity and quality of education for students with special needs. Expected COVID-19 federal relief funds might be used to address some of these issues in the short term, but without a more permanent infusion of federal education funding, the details of the efforts to recover from the 2008 recession suggest that public education funding could fail to return to current levels even when the economy does.

Further, there is a major COVID-19 relief package that will soon provide a big boost to states. The funding will leave states with a great deal of discretion. However, as the FutureEd analyses of governors' spending of education relief dollars thus far, 11 states used funds to address the growing emotional needs and to provide student support staff and only six states spent money on students with special education needs.[205]

Unfortunately, the future of the education of students with disabilities is best characterized as continuously inadequate and increasingly inequitable along the lines of race and poverty. If the post-pandemic near future does not address the glaring and intensifying inequities, the unjust burdens will be carried forward transforming the harms of the last year into lifelong damage, especially for a generation of students of color with disabilities.

Although the research presented did not evaluate the possible remedies, there is enough known to say that the remedial resources that are available are insufficient. We know the harm from the denial of special education supports and services has long-lasting implications.[206] Although necessary, identifying more 504-only students and providing compensatory services to students who experienced a COVID-19-induced cutback in services they were entitled to receive pursuant to the IDEA will not be sufficient. And while fully funding the IDEA is a necessary part of the solution, it, too, will not suffice as a remedy to the intense problems revealed by this report.

We must count what we care about: Although they may be invisible students to some, we know that students who are denied access to educational opportunity are more likely than not children of color, with disabilities. We can catch a glimpse of our failure to meet their needs in the data reports on children who are removed from school, referred to police, educated in restrictive settings, or reported absent, over and over. However, far too often when the adults fail to meet the needs of children, fail to provide appropriate responses, or violate their rights, all we see are zeros.

Many hidden challenges will confront us when schools re-open: Improving the collecting and public reporting of data on aspects of IDEA might help, but even when there are sufficient data to reveal problems or evaluate efforts to meet student needs, the districts often lack the staff to put the data to use. The same can be said of agencies charged with oversight of the IDEA and of anti-discrimination law.

The current data resource deficiency spells trouble for our capacity to prepare for what lies ahead, and especially for efforts to eliminate systemic racism and to provide truly equitable remedies. We have done a poor job of tracking the number of students with disabilities and their needs thus far. Unfortunately, in some cases, the pandemic influenced the decision to delay the CRDC data on the federal level for at least a year, and many states have suspended a large amount of their data collection and reporting as well.[207] Ironically, because many of the areas of concern are reflected in data germane to in-person schooling, attention to high and racially disparate rates of out of school suspension, disciplinary removals, absenteeism, and school-policing has mostly disappeared since most districts went fully online, during the pandemic.[208] Data on the homeless students are similarly scarce because so much of that information was gathered from student interactions while they were attending in person.[209]

The incomplete data may be giving false signals that the situation is not as bad as expected. For example, according to Teresa Huizar, executive director of the National Children's Alliance, "Based on the trend over 20 years of tracking cases, tens of thousands of abused children have not come to the attention of authorities during the pandemic, said an accrediting body for the country's 900 children's advocacy centers."[210] This is primarily due to the fact that a large proportion of suspected child abuse reports comes from teachers who see children in person; those who serve as "mandated reporters" must report all instances of suspected abuse.[211] The point is that the current data could present a false sense of lower rates and lead to poor staffing and budgeting decisions that could leave schools even less prepared to support children when they return in person. The current data desert means that schoolchildren that have been experiencing these pre-pandemic inequities, and disproportionately children of color, will likely need far more than responses to the COVID-19-induced damage that we can see and quantify.

Ultimately, we must pay closer attention to data on students with disabilities including their rates of lost instruction caused by disciplinary removals, rates of referral to police, rates of chronic absenteeism, and view these data, racially disaggregated, alongside data, disaggregated by race

with disability, on achievement and graduation in order to increase awareness of the many ways we fail to meet the needs of these children attending our public schools. We will know we are creating equitable systems when even those children who are disproportionately exposed to adversities have their educational and mental and physical health needs adequately met. As their numbers and needs rise from the disorder that the pandemic has wrought on their lives, we must first open our eyes wide and count them all, but also take careful notice of the glaring omissions. Counting children and taking care of children must go hand in hand.

Law and policy recommendations

For the above reasons, we start our recommendations by addressing the concerns about inadequate funding but conclude with recommendations for improving civil rights enforcement.

1. Recommendations for federal funding and use of COVID-19 relief funds

A. **Provide federal funding for 504-only and trauma-exposed children:** Because no federal or state funds are earmarked to support the needs of either 504-only eligible students or students who have been exposed to trauma, and considering the anticipated rise in the numbers of students with these needs, Congress should develop a way to assess their numbers and the costs of meeting their needs, and then provide federal funding to help ensure their needs are met. Therefore, we recommend that between one and two billion dollars be allocated annually to address their unique needs, which should include support for additional research to better assess their numbers, disaggregated by race, as well as the costs of meeting their needs.

To accomplish this, the federal government should provide a mechanism in either the Every Student Succeeds Act, or in a stand-alone law, that would appropriate funds for three years. Congress should also consider creating incentives for states to target state funding to meet the needs of these two groups. In the long-term, once the numbers of students and costs are better understood, policymakers should consider funding the additional supports and services.

B. Fully fund the IDEA: In fiscal year 2021, only $13.8 billion was allocated for the IDEA, which is approximately 13% of the total additional costs based on the APPE. A truly equitable remedy would begin by fulfilling the original promise of meeting 40% of the additional costs, which would be an additional 20 billion, for a total of approximately $34 billion annually. Ideally these funds would be appropriated by the next school year. However, this report recommends increasing funding of the IDEA by increments, which would be more practical, politically. A goal of reaching full funding within 8 years might be more workable. That would entail increases of three to five percentage points each year. Further, the amount should be adjusted annually to reflect rising costs. For example, by fiscal year 2029, some advocates estimate the "full funding" federal special education budget will be $43.3 billion.

Incremental increases might also better ensure that the infusion of resources includes both increasing the numbers of teachers and support staff but also funds for training for teachers and staff in areas like restorative justice and social emotional learning. Along these lines it is critically important to increase the number and diversity of staff to better meet the mental and behavioral health needs of students. Schools need more people of color in leadership positions as well as teachers and support staff. Further, incremental funding should help districts explore ways to distribute IDEA resources more equitably, develop strong safeguards against supplanting IDEA funds, and to provide sufficient focused monitoring so that the increase is put toward improving the quality of instruction, supports and services and also provide early interventions for students of color, with and without disabilities, who have been disproportionately exposed to trauma.

Full funding should also be allocated so that OSEP has the resources it needs to effectively monitor and enforce the IDEA, including the current priority area of racial disproportionality in special education, which could include using grant-making authority to helps states improve their efforts to remedy racially disparate placement and discipline at the district level.

C. Provide additional resources to districts as part of states' use of COVID-19 relief funds to do the following:

- Train teachers and administrators to implement more effective alternatives to punitive and exclusionary forms of school discipline, and to ensure that there are sufficient support personnel to address the needs of students with disabilities as well as students with mental health needs, including youth who have experienced trauma.
- Hire additional counselors, school-psychologists, restorative justice coaches, nurses and other student support staff and boost efforts to improve staff diversity.
- Add state- and district-level research-based technical assistance to develop more effective policies and practices to replace disciplinary removals of students with disabilities in particular, and to address racial disproportionality in discipline.
- Increase protection and advocacy services, especially in offices best located to serve communities of color and low-income students with disabilities.
- Improve annual state- and district-level reporting of disaggregated discipline data, including days of lost instruction, and the required reporting on referrals to law enforcement and school-based arrests.

2. Recommendations to improve civil rights enforcement and DoED oversight

Generally, we recommend a large increase in federal funding for federal civil rights enforcement agencies to the extent additional funding is necessary to implement the following recommendations:

A. Federal civil rights enforcement agencies should review the CRDC data for potentially obvious areas of non-compliance: In each of the following areas, review the data for disparities by disability status as well as data further disaggregated to reveal the cross-section of race with disability together, and intervene as needed to deter violations of civil rights law including:

- Investigate where 504-only and IDEA identification rates show a failure to identify any students. Start with districts with at least 1,000 students enrolled, and prioritize those districts that consistently identify zero 504-only students.
- Review the disaggregated data on restrictiveness of setting of students with disabilities, including racially disparate rates of placement in correctional institutions.
- Review discipline trend data alongside absenteeism data and investigate districts with unusually high rates and possible use of "informal" suspensions.
- Hold districts accountable for submitting inaccurate school-policing data including by investigating districts with at least 1,000 secondary students that report zero school-based arrests and/or referrals to law enforcement that are contradicted by other reliable sources.
- Supplement the review of the CRDC data with review of the data collected annually by OSEP pursuant to the IDEA to coordinate monitoring and enforcement efforts, especially in years when the CRDC does not occur.

B. Commit to improving OCR's enforcement protocol and boosting the agency's oversight capacity: This will require reviewing all the changes made to OCR's enforcement protocol made during the Trump administration and re-instating the Obama/Biden administration's policies that encouraged investigators of complaints to review additional data for evidence of systemic discrimination.

C. Reinstate the U.S. Department of Education and U.S. Department of Justice's 2014 guidance on school discipline: [212]

- Update and improve the package of technical assistance that was attached to the joint DOJ/OCR guidance on school discipline by addressing the impact of discriminatory policing and how the disparate impact disability regulations also apply.
- Add an explanation that failure to meet disability law obligations can also implicate Title VI if the non-compliance burdens students from some racial/ethnic groups more than others.
- Provide incentives through grant programs to states and districts to take systemic actions and to replicate efforts that have proven to be effective.
- Add a section on disparate impact pursuant to Section 504 and a distinct guidance on how anti-discrimination law applies to school policing.

D. Congress should add a private right of action for Section 504 and for Title VI pursuant to disparate impact regulations: This would ensure that, when necessary, individuals can take recourse in a court of law when asserting systemic forms of discrimination, including policies and practices that may fall afoul of the disparate impact regulations pertaining to race, national origin, gender, and disability discrimination.

E. Increase OSEP's capacity to monitor IDEA implementation:[213] Resources to improve the capacity of OSEP to monitor IDEA implementation should be included as part of the full funding of the IDEA. This should also include grants that OSEP may make to states to improve their IDEA oversight and enforcement, including but not limited to, providing technical assistance to help reduce the high and racially disparate rates of discipline among students with disabilities in districts that states have identified with this issue pursuant to 20 U.S.C. Section 1418(d).

F. Respond to states that have been found out of compliance with their own state constitutional mandates:

- Adding restrictions for fund distribution or create incentives to ensure that states who currently have an unconstitutional distribution of state funds according to their own state laws come into compliance.
- Enforce supplement not supplant requirements.

3. Improve the collection, reporting and use of department of education data

A. Improve the collection, reporting and utility of the Civil Rights Data Collection:

- **Collect and report the 2019-20 data:** Collecting the 2019-20 data now will help avoid entering a civil rights data desert. These enrollment data provide vitally important information, and are the only source for counting students who are only eligible for supports and services under Section 504. The implications of skipping 2019-20, given that the 2020-21 data will likely be in worse shape, would mean that there would not be any useful data for at least another three years.
- **Turn the CRDC into an annual collection:** The value of an annual collection has been overlooked by prior administrations. Collecting data every other year sends a weak message about the administration's plan to boost civil rights enforcement and redress racism. An annual collection will dramatically increase the capacity of enforcement agencies and outside civil rights advocates to monitor systemic racism, along with the efficacy of the responses.
- Add back the items removed from the collection in 2015-16 including chronic absenteeism and counts of children suspended from pre-school.
- Provide additional incentives and technical support to ensure that accurate data are reported to the public and used by policymakers.
- Include trend data on all discipline data items on OCR's CRDC website.

B. Expand the CRDC:

- Disaggregate the 504-only data regarding discipline outcomes further by race/ethnicity to allow observations of racial breakdown for all outcomes.
- Develop ways to efficiently and uniformly collect and report discipline data by type of offense leading to the disciplinary action.

- Report days of lost instruction further disaggregating the disability data by race and category of disability.
- Collect financial data on the dollars and percentages of the annual district budget allocated for police and security, as well as for student support personnel, especially with regard to mental and behavioral supports and services.

C. Expand the collection and reporting of "618" data: The IDEA authorized the Secretary of Education to collect and review data deemed necessary to ensure the proper implementation of the IDEA, and DoED should therefore *annually* collect and publicly report the 618 data at *district* levels for the following:

- Counts of students who have had a functional behavioral assessment, and a behavioral intervention plan.
- Counts of the number of manifestation determination meetings and their outcomes at the district level: the data collection should specify whether the meeting members determined the behavior was a manifestation and, if not, whether the team members found that the behavior was caused by a failure to provide FAPE.
- Days of lost instruction, and counts of students for each type of disciplinary action.
- Counts of school-related arrests and referrals to law enforcement: Where possible the data collected should indicate the initial reason for the referral along with the outcome of the response (i.e., arrest, suspension, expulsion, disciplinary transfer).
- Data on chronic absenteeism: This should include further disaggregation by type of removal including disciplinary removals as well as all informal removals.
- The corresponding discipline data by race and gender for students without disabilities for comparison purposes: OSEP's annual collection should include comparisons to students without IEPs each year and not depend on the CRDC's biennial data collection to determine whether districts are treating students with disabilities differently than their non-disabled peers, or whether policies or practices may be having a disparate impact based on disability.

APPENDICES

Appendix A. Methods and data cleaning

Data:

For the first time, using the publicly available U.S. Department of Education Civil Rights Data Collection (CRDC), this report analyzed data regarding enrollment and disability identification rates, rates of days lost per 100 students and referrals to law enforcement. The CRDC is a biennial (i.e., every other school year) survey required by the U.S. Department of Education's Office for Civil Rights (OCR) since 1968. Similar to the 2011–12, 2013–14, and 2015–16 CRDCs, the 2017–18 CRDC collected data from a universe of all public local educational agencies (LEA) and schools, including long-term secure juvenile justice facilities, charter schools, alternative schools, and schools serving students with disabilities."[214] The CRDC also collected information on student enrollment, demographics, discipline, and other institutional and educational services. The data from 2017-18 and prior years are published on OCR's website, but as described in the text, were further cleaned and filtered to produce the graphs and tables original to this report.

In addition, this report draws on the California Department of Education (CDE) data for our discussion of chronic absenteeism. These were copied from the state's Dataquest website. In particular, we used CDE's tool called DataQuest, which is a "web-based data reporting system for publicly reporting information about California students, teachers, and schools. Dataquest provides access to a wide variety of reports, including school performance, test results, student enrollment, English learner, graduation and dropout rates, school staffing, course enrollment, and student misconduct data."[215] All analysis presented in the report using DataQuest can be replicated in the online tool. For estimates of days of lost instruction for low-income students with disabilities by race for grades 7-8 in California, we relied upon our recent prior report released in 2020.[216]

Finally, data from the DoED's Office of Special Education Programs (OSEP) for the 2018-19 school year are referenced regarding the following: identification rates by disability category, restrictiveness of placement including placement in a correctional institution, and the risk for disciplinary removal which covers all forms of removal. These data are examined in Part II, and alternatively referenced as "Section 618 data." These data are collected and reported at the national and state levels pursuant to the requirements of Section 618 of the IDEA. 618 is a reference to the section of the public law before being codified as 20 U.S.C Section 1418.

Definitions and identification rates for Section 504-only, IDEA, and students without disabilities

To get a more accurate sense of the widespread inadequacy in resources for students with disabilities, this section of the report focused on students recognized under Section 504 of the Rehabilitation Act of 1973 but who are not eligible for special education pursuant to the IDEA. This report is the first of its kind to describe an estimate of students that are likely under identified as

eligible pursuant to section 504-only, although those data were first collected and reported for the 2000-01 academic year.

Definitions

"504-only": The CRDC refers to 504-only students as having a "disability, who receive regular or special education and related aids and services solely under Section 504 of the Rehabilitation Act of 1973, as amended, and not under the Individuals with Disabilities Education Act (IDEA)."[217] Ultimately an IEP team or 504 team makes an individualized determination of eligibility. These students receive a Section 504 Plan but do not receive specially designed instruction pursuant to IDEA eligibility and therefore do not receive an IEP. Unlike IDEA eligible students, 504-only student enrollment counts are not reported pursuant to any particular disability category. Because under most circumstances, 504-only students do not receive specially designed instruction, they are typically counted among the "general education" population.

"Students with disabilities (IDEA)"
Those students with disabilities who are deemed eligible for special education pursuant to the IDEA receive an "Individualized Education Plan (IEP)." Some will find this distinction confusing because Section-504 references anti-discrimination law that covers all students with disabilities, including those eligible pursuant to the IDEA, yet students with disabilities who are eligible under Section 504-only are considered part of the general education population, and receive a 504 Plan not an "IEP."

"Students without disabilities"
For enrollment counts and for calculating rates by race, students without disabilities were not counted among 504-only or students with disabilities (IDEA). For each group we divide by the total enrollment of the specified group to get identification rates because these two, disability and without disability, groups are mutually exclusive in the data counts for enrollment purposes. (See discipline data for the exception.)

Sample and Data Omissions

Starting with the total OCR data base we conducted some additional cleaning and filtering as described in the text of the report and repeated and elaborated upon herein.

Our analysis for K–12 enrollment data included all of these districts. We excluded approximately 403 schools from all analyses because we either identified reporting errors or they were categorized as virtual schools.

Virtual schools: We removed the majority of virtual schools (n=305). When most students are attending school from their own homes, the term "out-of-school suspension" has an entirely different meaning. For this reason, we exclude any virtual schools that had an out-of-school

suspension risk less than or equal to 1% or a total count of out-of-school suspensions less than or equal to one. We include virtual schools that have more than one suspension, given the possibility that they had some degree of on-campus student attendance.

National rates of identification

As of 2017-18, Section 504 students constituted 2.7% of all enrolled students based on the CRDC. In this report, we highlight the national trend in 504-only eligibility since 2011-12 and show how it has nearly quadrupled since 20 years ago in 2000. Given the prevalence of students with ADHD and anxiety disorders and increases in the numbers of students who have PTSD, one would think that most districts would identify at least some 504-only students. However, out of the 17,498 districts in the CRDC, 3,434 districts serving over 1.8 million students identified zero 504-only eligible students.

The 2017-18 CRDC includes data from every public school district and public school in the nation[218] (after cleaning, the number was 17,498 school districts). Our analysis for K–12 included all of these districts. We excluded approximately 1,332 schools from all analyses because we either identified reporting errors or they were categorized as virtual schools or districts. (See "Procedure" section below for the specific breakdown of errors.)

504-only identification rates based on reported enrollment:
Our analysis further limited our sample to just those districts with 1,000 students or more. There were 306 districts that reported having not one 504-only student enrolled. Moreover, 54 of these districts also reported identifying zero students in 2015-16.

State and district analyses:

Although every state identified some 504-only students, in this report, we describe the rates in the highest five and lowest five states. We found there was a wide variation compared to the national average, with rates ranging from 0.65% in Missouri to 6.32% in New Hampshire. Given the very low identification rates and the wide span, these overarching state level data raise concerns about the sufficiency of state oversight of 504 child find practices in many states and also highlight the importance of looking at district-level disparities within states in order to contextualize this variation. Of the 306 districts with at least 1,000 students where we found zero students eligible for 504, 26 were in Michigan; 27 were in Arizona; 25 were in Mississippi; 21 were in Georgia; 21 in Illinois; 20 were in California; and 18 were in Missouri. Each of these states had mean 504 rates for all students that were below the national average, even though Michigan, Georgia and Illinois didn't rank among the bottom five.

District analyses of low rates and 0% districts

Under-identification of 504-only Students: To explore indicators of possible non-compliance with 504-only supports and services, we limited our sample in different sections in the report to help

eliminate inaccuracies. For our initial examination of districts, we began by only looking at those districts enrolling 1,000 students or more (K-12). Limiting the enrollment size to at least 1,000 students ensured that in such districts at least some 504-only students would be expected. In fact, we found that after adding this restriction only 1 percent of all districts had reported 0 percent 504-only enrollment (306 districts). In addition, we also removed any school that was equal to or greater than 100% IDEA enrollment. When evaluating the underrepresentation of Section 504-only students, we wouldn't expect any students in schools designed to only serve students with disabilities (such as a school for the deaf) all of whom were eligible pursuant to the IDEA, and therefore those 100% IDEA districts were removed from this analysis. Otherwise districts with 0 percent 504-enrollement were identified as serving no Section 504-only students.

Under-identification of 504 students by race/ethnicity: The race/ethnicity Section 504-only student analysis is slightly different from the procedure for the analysis conducted above. First, we did not limit to districts with a minimum of 1,000 students because of our focus on racial differences. That is, if we had required 1,000 students as the minimum enrollment for each subgroup as the threshold for inclusion in our sample, we would have excluded most districts, and for some groups, for example, for Native American students, our analyses would have excluded over 99.7% of all districts. Therefore, for each racial group analysis, we restrict each district to at least 100 students from each racial group instead of the previously the 1,000 minimum student requirement.

In addition, to define "low" 504-only student identification rates in this analysis we chose districts that had an identification rate of 0.4% or below 504 student enrollment for each racial group. This marker for "low" was chosen because 0.4% is one standard deviation below our sample's per district average for all students. That is, the district mean for the 504 total enrollment percent when restricting to districts with at least 1,000 students and at least one 504-only student was 2.85% with a standard deviation of 2.45% (2.85-2.45%=0.4% which is one standard deviation below the mean). Our analysis of each racial group's attendance in "low-identifying" districts relies on a very conservative estimate. Similarly, like the previous analysis, we also removed any school that was equal to or greater than 100% IDEA enrollment. These districts are exclusive to providing education to students with disabilities (IDEA) and therefore they do not raise the concern that the district might have failed to identify students. It should be noted that, as mentioned in the text and endnotes, there may be some districts that are very low for 504-only identification but have higher-than-average numbers of students who are eligible pursuant to the IDEA. We caution readers not to assume that if a district's 504-only numbers are low or zero that one can dismiss the unusually low rates as not problematic simply because the IDEA rates of identification are higher than average.

Enrollment: All enrollment counts presented in this report refer to the unduplicated student enrollment, including students both present and absent, excluding duplicate counts of students within a specific school or students whose membership is reported by another school.

Removals: When the districts reported their data to OCR, each district superintendent was required to certify that the data were accurate and that the certifications were checked before OCR published the data. In our independent review, we discovered obvious collection or reporting errors in several school districts that forced us to remove them from our analyses. Some schools may have accidentally overreported their data (i.e., reported suspending more students than they enrolled), some may have underreported their data, and others may have failed to report baseline enrollment data or reported nothing at all in some categories, essentially ignoring the federal requirement that they respond. The removal types that led to schools being removed from our analyses include:

• 60 schools were removed because they reported suspension rates of over 100% for all students or for any racial/ethnic group and their total enrollment was greater than or equal to 10.

• 27 schools were removed because a single type staff (e.g., counselor) FTE number was greater than the total enrollment of the school. It is not possible to have more counselors than students.

• 11 schools were dropped for reporting no student enrollment. That is, these schools reported 0 students attending the school.

Discipline analysis at national, state and district levels using CRDC data

To get a more accurate sense of the use of exclusionary discipline and its impact on the opportunity to learn, this report focuses on days of lost instruction due to out-of-school suspensions. The 2017-18 CRDC is the second time days of lost instruction due to out-of-school suspension is reported. It is important to note that OCR does not collect any discipline data for students identified as having disabilities under "Section 504 only" disaggregated by race/ethnicity.

This report also calculates out-of-school student suspension rates distinctly from rates of lost instruction. Out-of-school suspension (OSS) is defined by OCR as distinctly for students with and without disabilities. That is, for students with disabilities served under IDEA, OSS is an instance in which a child is temporarily removed from their regular school for at least half a day for disciplinary purposes to another setting (e.g., home, behavior center). OSS includes both (1) removals in which no individualized family service plan (IFSP) or individualized education plan (IEP) services are provided because the removal is 10 days or less and (2) removals in which the child continues to receive services according to their IFSP or IEP. OSS includes removals in which no educational services are provided and removals in which educational services are provided (e.g., school provided at home instruction or tutoring).[219]

In efforts to further understand the school-to-prison pipeline, this report also looks at students referred to law enforcement. CRDC defines referrals to law enforcement as an action by which a student is reported to any law enforcement agency or official, including a school police unit, for an incident that occurs on school grounds, during school-related events, or while taking school transportation, regardless of whether official action is taken. Citations, tickets, court referrals, and

school-related arrests are considered referrals to law enforcement. The CRDC defines school-related arrest as an arrest of a student for any activity conducted on school grounds, during off-campus school activities (including while taking school transportation), or due to a referral by any school official. Note that all school-related arrests are considered referrals to law enforcement, but not all referrals to law enforcement lead to an arrest.[220] It is critical to note that both referrals and arrests reported to the CRDC are based on unduplicated counts; that is, a student is only counted one time regardless of how many times that student got arrested or referred to police.

In this report, when examining discipline disparities, a greater emphasis has been given to districts with schools at the secondary level. The analysis reported here also provides estimates for the national, state, and district level. In alignment with our previous research and other findings, we know that the largest inequities and disparate impact happen within this level. The district estimates were calculated by selecting just those schools within each district that conformed to the specific grade-span configuration associated with each level of schooling. The following table summarizes how we categorized the schools into elementary-level and secondary-level schools:

Table A1: Definitions for Grade Level Categorization on CRDC

Category	Grade-Span Configurations
Elementary Level	Any school with any combination of kindergarten through 5th and without a 7th or 8th grade
Secondary Level	5–8, 6–8, 7–9, 6–12, 9–12, 10–12, and 9th grade academies
K–12	All elementary and secondary schools, and K–8 and K–12 schools

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection.

Sample

In this specific analysis, additional cleaning procedures were applied when looking at discipline disparities. After cleaning, a total of 17,453 school districts were included in our analysis for K–12. However, not every district had all grade levels. At the elementary level, 11,622 school districts were included in the district-level calculations of discipline rates. At the secondary level, 12,972 school districts were included in the district-level calculations of the discipline rates. Note that K–8 schools were only included in the K–12 analyses. We excluded approximately 2,054 schools from all analyses because we either identified reporting errors or they were categorized as juvenile justice centers or virtual schools.

Data Omissions

Juvenile justice centers/facilities: Students in state-run, long-term juvenile justice facilities were excluded (666 centers composed solely of students in juvenile justice facilities) from all discipline estimates. We believe that, although this information is very valuable, these educational settings are different enough from regular schools that the data on them deserved separate treatment. Most of

these schools reported no out-of-school suspensions, but that may mean that, in some cases, the students did not actually attend school while in the facility or that the responding correctional district did not regard disciplinary removal from a classroom as an out-of-school suspension. Furthermore, the out-of-school suspension of students attending a correctional facility has different implications, as the students remain under adult supervision. Moreover, all the students in these settings are there for disciplinary reasons, although not necessarily for misbehaving at school. We believe that some of the students in these facilities may have been disciplined at some point during the 2017–18 school year in a regular school district; thus, there is a high risk that such students would have been counted twice in the same sample. There was no way to check, so we omitted these facilities.

Virtual schools: The same number of virtual schools were removed (n=305) as the Section 504-analysis.

Procedure

Days of lost instruction due to out-of-school suspension: We calculated the days of lost instruction per 100 enrolled by dividing the total days of lost instruction by the enrollment. We then multiplied that result by 100. This method allowed us to compare the impact that lost instruction had across racial groups and across districts.

Risk for out-of-school suspension: For suspension risk, we divided the number of suspended students by the total enrollment and multiplied the result by 100 to arrive at the percentage suspended. We describe this percentage throughout the report as either the student suspension rate or the risk for out-of-school suspension. Readers should note that the CRDC included the number of students suspended out-of-school one time and, separately, the number of students suspended out of school two or more times. We added these mutually exclusive categories together to report the unduplicated number of students suspended one or more times. This sum represents the total number of students suspended.

Referral to law enforcement rates: The number of student referrals is divided by each subgroup's enrollment to provide the rate of referrals to law enforcement. All numbers reported are in percentage form. In the report, we feature 12 state profiles that highlight our district findings for many of the nation's largest districts in the context of their respective states. The high rates for the districts on the list emphasize the need to consider increasing the federal and state role with regard to the monitoring and enforcement of the IDEA, both substantive and procedural protections. Based on our descriptive reporting it is clear that most states should be concerned about high rates of students with disabilities who are referred to law enforcement in at least one district. In some cases, we also highlight some extremely alerting districts where we found the number of referrals to law-enforcement were greater than the number of suspensions. For example, in Los Angeles the rate of referral to law enforcement for all students was higher than the district's out-of-school suspension

rate. That disturbing pattern, where referrals to law enforcement outnumbered out-of-school suspensions was shared with 56 districts on the list featured.

Enrollment/discipline gaps: This measure is calculated by taking the rate of suspensions/enrollment differences value from one group and subtracting it from the rate of another group.

- *Black-White Differences in Rates of Referral to Law Enforcement for Secondary students with disabilities (IDEA):* To conduct the comparison and minimize distortion we removed 13 districts that had fewer than 100 White secondary students enrolled. We did not adjust the sample further but should mention that, in many of these districts, there were not 100 White secondary students with disabilities (IDEA).

Data cleaning: removals of schools and districts: The following removals replicate some of the cleaning in the Section 504-only analysis. The removal types that led to schools being removed from our analyses include:

• 60 schools were removed because they reported suspension rates of over 100% for all students or for any racial/ethnic group and their total enrollment was greater than or equal to 10.

• 56 alternative schools were removed because they reported suspension rates of over 150% for all students or for any racial/ethnic group and their total enrollment was greater than or equal to 10.

• 27 schools were removed because a single type staff (e.g., counselor) FTE number was greater than the total enrollment of the school. It is not possible to have more counselors than students.

• 11 schools were dropped for reporting no student enrollment. That is, these schools reported zero students attending the school.

Please note: Our data cleaning efforts are designed to remove only the most likely errors, despite this certification. In most states, we found no alternative source to reference that would have helped us flag grossly underreported data. Moreover, it is worth noting that most of the errors districts removed were those with large overreporting errors. To the extent that the overreporting districts also may have been high-suspending districts, their removal may have lowered the national and state estimates.

Disciplinary removals using 2018-19 DoED collected by OSEP:
The 2018-19 data from OSEP enables a review of "disciplinary removals" by race and/or disability category. For the nation and for each state, OSEP reports the numbers of students in several categories including the following: students suspended or expelled for 1-10 days; students

suspended or expelled for more than ten days; students removed for just 1 day; students removed for 2-10 days; students removed for more than 10 days. These student counts are unduplicated across these two ranges. Therefore, we can calculate the risk for suspension or expulsion for each range, as well as for all suspensions and expulsions. The methods for these calculations are identical to the calculations of risk based on the CRDC data.

In our report we also presented the rates of lost instruction due to out-of-school suspensions based on the CRDC data because there is no estimation or rounding to the values provided. However, the data on all disciplinary removals conveys a broader understanding because it includes *all* removals. In addition to out-of-school suspensions, this rate of lost instruction also counts expulsions, in-school suspensions, involuntary disciplinary transfers, and therefore possibly reflects the impact from referrals to law enforcement and arrests. The days lost due to removal can be estimated simply by supplying a value where OSEP reports a range, multiplying the unduplicated students in the given range by the value, adding up the total days lost for each range, dividing that total by the group's respective total enrollment and multiplying by 100. OSEP provides the unduplicated number of students within each of the following ranges: 1 day; 2-10 days; and greater than 10 days. For the number of students removed for one day no substitution was needed as the number of students is equal to the number of days. For the number of students who lost 2-10 days we supplied the value of 6 days, which is the mean value for the range, and for removals cumulatively of more than 10 days we supplied the smallest value possible of 11 days.

The reason this report focuses on absolute differences to measure disparities:
When the subject of a comparison is something negative, the actual magnitude makes a profound difference in the lives of children. Therefore, the chosen measure should reflect the magnitude of the harm, as reducing harm is the most important factor. Rates of days of lost instruction are a prime example. Assuming the quality of instruction is the same, the differences in lost instruction equate to differences in the opportunity to learn. Any parent or teacher or administrator knows that missing 20 days of school is worse than missing 10 days because instruction is valuable, and there are only 182 days in a school year. Expressed as a ratio, one group missing twice as much instruction as another tells us nothing about how much instruction was actually lost. Twice as much can mean 2 days versus 1 day, with a difference of just 1 day, or 40 days versus 20 days, with an absolute difference of 20 days. Thus, the disparity described in relative terms does not reflect the magnitude of the difference in harm.

A focus on relative risk ratios rather than risk differences is similarly problematic when comparing the risk for suspension. The risk is a simple percentage calculation. For comparing racial groups, that begins by dividing the unduplicated number of one group's students suspended at least once by the group's enrollment. Then repeating that for each group to derive the "risk" for suspension. If 10 Black students were suspended one or more times and 50 were enrolled, the risk would be 20%. If Whites were the comparison group and their risk for suspension was 10%, the relative risk ratio calculation entails dividing 20% by 10%, which equals a ratio of 2.0. In this case, it means that Blacks

were twice as likely to be suspended as White students. However, a risk ratio of 2.0 can be found in low-suspending districts or in high-suspending ones. For example, the statement that Blacks are suspended at twice the rate of Whites is no less true if the Black rate is just 0.4% and the White rate is 0.2%. Yet in this second example, the Black-White racial gap is just two tenths of 1 percentage point, whereas in the first example, the difference was 10 percentage points.

Appendix B. Data referenced in the report expanded upon

IDEA Part B, Section 611

The following chart and description describes the Part B IDEA funding with no adjustment for cost of living.

The following table shows the history of federal appropriations from fiscal years 1988 through 2021 for IDEA Part B, Section 611 (children ages three to 21) in both dollars and as a percentage of the APPE. This table shows that in over 30 years (1988-2021), the offset of federal funding provided by Congress to states for the APPE for IDEA-eligible children ages three to 21 has only once been funded above 18 percent. In the last eight years, funding has remained flat at about 14 percent.

Table B1: Federal Appropriations for IDEA Part B, Section 611 (Children, Ages 3-21)

Fiscal year	Children served (in thousands)	Appropriation (in thousands of dollars)	Federal share per child served (dollars)	Percentage of APPE
1988	4,236	1,431,737	338	9%
1989	4,347	1,475,449	339	8%
1990	4,419	1,542,610	349	8%
1991	4,567	1,854,186	406	9%
1992	4,727	1,976,095	418	8%
1993	4,896	2,052,728	419	8%
1994	5,101	2,149,686	421	8%
1995	5,467	2,322,915	425	8%
1996	5,629	2,323,837	413	7%
1997	5,806	3,107,522	535	9%
1998	5,978	3,807,700	636	11%
1999	6,133	4,310,700	701	11%
2000	6,274	4,989,685	793	12%
2001	6,381	6,339,685	991	14%
2002	6,483	7,528,533	1,159	15%
2003	6,611	8,874,398	1,340	17%
2004	6,723	10,068,106	1,495	18%
2005	6,820	10,589,746	1,558	18%
2006	6,814	10,582,961	1,551	18%
2007	6,796	10,782,961	1,584	17%
2008	6,718	10,947,511	1,609	17%
2009	6,599	22,805,211*	3,453	33%
2010	6,614	11,505,211	1,736	16%
2011	6,558	11,465,960	1,745	16%
2012	6,543	11,577,855	1,766	16%
2013	6,574	10,974,866**	1,674	15%
2014	6,593	11,472,848	1,743	16%
2015	6,697	11,497,848	1,715	15%
2016	6,814	11,812,848	1,745	15%
2017	6,808	12,002,848	1,760	15%
2018	6,904	12,277,848	1,775	14%
2019	7,130	12,364,392	1,731	13%
2020	7,239	12,764,392	1,762	13%
2021	7,389	12,864,392	1,739	13%

*2009 includes funds made available under the ARRA (P.L. 111-15).
**2013 reflects the impact of sequestration required under the Budget Control Act of 2011.
Source: U.S. Department of Education. "Special Education Fiscal Year 2021 Budget Request." https://www2.ed.gov/about/overview/budget/budget21/justifications/i-specialed.pdf**. (Accessed March 1, 2021.)**

Table B2: State-Level 504-Only Identification Rates

Section 504-Only State-Level Identification Rates for 2015-16 and 2017-18 (Ranked High to Low for 2015-16)		
State	**15-16 Percent of 504 Students**	**17-18 Percent of 504 Students**
NH	5.84%	6.32%
LA	5.37%	5.65%
TX	4.94%	6.07%
VT	4.94%	5.48%
CT	4.66%	5.35%
MA	4.18%	4.56%
AR	3.79%	4.05%
ME	3.77%	4.86%
DE	3.09%	3.11%
MD	3.07%	3.20%
RI	2.93%	3.72%
FL	2.93%	3.40%
WA	2.62%	2.94%
IL	2.55%	3.15%
NJ	2.52%	2.85%
ID	2.46%	3.11%
OH	2.16%	2.79%
NY	2.13%	2.37%
ND	1.99%	2.31%
PA	1.99%	2.40%
KY	1.90%	2.13%
HI	1.83%	2.26%
SC	1.80%	2.29%
OR	1.77%	2.53%
CO	1.77%	2.33%
IN	1.75%	2.25%
WY	1.68%	2.19%
WV	1.67%	1.93%
MO	1.60%	2.03%
GA	1.60%	2.51%
NC	1.56%	1.70%
VA	1.55%	2.08%
MN	1.54%	1.87%
IA	1.54%	1.90%
MT	1.51%	2.35%
SD	1.45%	1.83%
DC	1.41%	2.07%
NV	1.35%	1.56%
TN	1.34%	1.68%
MI	1.29%	1.67%
AK	1.28%	1.49%
NM	1.28%	1.01%
AZ	1.19%	1.47%
OK	1.14%	1.47%
CA	1.14%	1.37%
AL	1.13%	1.51%
UT	0.96%	1.58%
KS	0.95%	1.50%
NE	0.93%	1.26%
WI	0.77%	1.10%
MS	0.34%	0.65%

Table B3: Students with Disabilities (IDEA) Risk for Out-of-School Suspension By Race/Ethnicity at the Secondary Level

State	All	Latinx	Native American	Asian	Hawaiian/Pacific Islander	Black	White	Two or More Races
AK	15.3	13.2	13.4	5.6	18.0	29.3	15.3	17.5
AL	15.4	7.1	9.8	2.2	9.8	27.0	9.2	3.5
AR	19.4	22.1	17.9	22.3	35.8	30.8	13.8	34.5
AZ	11.9	11.3	17.7	5.2	7.1	19.4	10.4	13.5
CA	10.1	9.2	15.8	4.4	10.1	19.7	9.5	11.3
CO	14.6	14.4	14.4	5.5	13.2	23.1	13.5	18.6
CT	11.8	16.4	13.6	2.9	3.0	20.4	7.2	12.1
DE	25.6	18.0	12.7	6.4	10.0	35.2	17.9	36.4
FL	13.9	9.7	14.0	3.4	7.8	20.4	12.7	17.6
GA	15.8	10.8	12.6	5.0	12.5	23.2	10.0	15.4
HI	13.7	15.6	9.1	7.2	17.0	11.0	12.1	13.2
IA	12.1	10.9	11.2	3.5	20.5	29.2	9.3	20.4
ID	8.7	7.8	11.1	3.5	3.6	12.4	8.9	8.9
IL	11.4	8.8	8.5	2.9	3.4	22.9	7.7	14.6
IN	15.0	12.9	11.2	4.8	8.3	31.1	11.9	20.3
KS	11.9	11.3	13.0	4.2	7.1	22.4	10.1	15.8
KY	16.2	14.0	12.3	2.4	5.9	33.9	13.1	21.8
LA	25.3	16.0	27.2	2.2	7.7	32.6	17.3	18.2
MA	9.7	15.1	9.9	3.2	9.6	15.1	7.2	12.1
MD	14.3	8.3	11.8	2.6	10.3	19.5	11.0	16.4
ME	11.9	12.8	6.1	5.1	20.0	19.0	11.7	9.9
MI	17.0	16.1	18.1	5.8	5.5	25.5	14.7	19.7
MN	11.6	10.8	18.5	4.0	10.9	26.4	8.3	17.0
MO	14.8	10.1	11.4	7.5	12.6	28.4	11.4	16.9
MS	22.2	13.0	17.6	5.0	0.0	29.1	13.7	24.4
MT	9.2	11.3	17.3	4.3	5.6	7.7	7.5	11.7
NC	20.3	13.7	26.3	6.3	14.5	30.1	14.8	23.5
ND	7.4	7.4	13.2	6.0	0.0	11.1	6.1	0.8
NE	15.7	14.1	23.6	8.2	15.8	39.4	11.5	26.5
NH	15.1	23.5	10.2	5.6	20.0	21.8	14.4	18.4
NJ	10.6	11.8	7.4	4.0	8.3	21.1	6.8	12.9
NM	14.8	15.8	12.9	5.6	4.2	22.1	11.9	15.9
NV	15.5	12.4	17.1	6.2	12.0	30.9	12.2	17.9
NY	7.9	5.3	8.4	2.4	1.8	11.2	8.6	13.1
OH	16.5	16.9	13.7	6.4	3.7	29.9	12.6	22.0
OK	12.4	10.6	11.6	3.3	9.3	25.0	10.6	10.1
OR	11.6	10.6	14.1	3.5	9.1	20.7	11.5	13.2
PA	13.3	16.9	16.1	4.7	7.5	25.9	9.6	17.9
RI	14.0	16.0	19.5	3.8	23.1	18.4	12.2	16.5
SC	25.7	15.2	19.8	3.9	23.1	34.6	18.7	25.1
SD	9.9	14.5	15.2	3.6	20.0	20.1	7.7	13.8
TN	11.8	8.1	6.9	3.4	5.8	20.1	9.1	11.9
TX	13.7	12.3	10.4	3.1	6.3	24.7	10.1	13.8
UT	6.1	7.9	7.6	3.1	9.4	10.7	5.2	6.1
VA	15.5	10.6	11.9	3.8	7.4	25.8	11.5	16.5
VT	12.5	5.9	6.8	3.5	0.0	13.4	12.7	14.7
WA	13.7	13.6	18.1	6.3	13.1	23.1	12.6	16.5
WI	15.3	15.8	17.4	3.8	10.3	37.1	10.5	23.3
WV	19.3	14.3	13.6	9.8	0.0	30.3	18.7	23.3
WY	10.1	12.9	11.6	0.0	0.0	19.5	9.4	10.4

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

Table B4: Black-White Disparities (from Table B3) Rank Ordered by 10 States with Largest Gaps, Students with Disabilities (IDEA)

	Risk for Student Suspension		
State	**Black**	**White**	**Risk Difference**
NE	**39.4**	11.5	27.9
WI	**37.1**	10.5	26.6
KY	**33.9**	13.1	20.8
IA	29.2	9.3	19.9
IN	**31.1**	11.9	19.2
NV	**30.9**	12.2	18.7
MN	26.4	8.3	18.1
AL	27.0	9.2	17.8
DE	**35.2**	17.9	17.3
OH	29.9	12.6	17.3
AR	**30.8**	13.8	17.0
MO	28.4	11.4	17.0
PA	25.9	9.6	16.3
SC	34.6	18.7	15.9
MS	29.1	13.7	15.4
LA	**32.6**	17.3	15.3
NC	**30.1**	14.8	15.3
IL	22.9	7.7	15.2
TX	24.7	10.1	14.6

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

Table B5: Comparing Rates of Lost Instruction of Students with and without Disabilities: 30 Districts with the Largest Gaps

State	District Name	17-18 Days Lost due to Suspension OSS Per 100 IDEA Students	17-18 IDEA-SWOD Gap-Days of Lost Instruction due to OSS Per 100	17-18 Days Lost due to Suspension OSS Per 100 SWOD Students
VA	Richmond City Pblc Schs	498.00	303.61	194.39
WA	Tacoma School District	303.93	194.18	109.75
CA	Victor Valley Union High	225.61	188.12	37.49
NE	Omaha Public Schools	273.11	179.77	93.34
WI	Milwaukee School District	245.09	149.30	95.79
AZ	Glendale Union High School District	198.96	144.99	53.97
SD	Sioux Falls School District 49-5	186.72	134.66	52.05
NC	Harnett County Schools	205.99	131.68	74.31
DC	District Of Columbia Public Schools	215.22	127.24	87.98
MO	Springfield R-Xii	203.23	126.02	77.21
OK	Tulsa	205.07	121.95	83.11
NC	Durham Public Schools	214.05	120.77	93.27
FL	Bay	193.46	119.34	74.12
MD	Harford County Public Schools	170.04	117.61	52.43
WV	Kanawha County Schools	212.42	115.92	96.50
VA	Stafford Co Pblc Schs	245.69	111.53	134.16
NC	Pitt County Schools	242.03	109.13	132.90
VA	Spotsylvania Co Pblc Schs	178.86	108.52	70.34
MO	Ft. Zumwalt R-Ii	157.03	108.10	48.94
NC	Wake County Schools	128.79	100.38	28.41
NC	New Hanover County Schools	149.64	98.03	51.61
SC	Greenville 01	160.96	97.78	63.18
OH	Cleveland Municipal	224.36	97.76	126.60
MN	St. Paul Public School District	141.95	97.25	44.70
VA	Norfolk City Pblc Schs	277.99	96.95	181.04
SC	Horry 01	149.85	95.95	53.91
WA	Everett School District	122.99	92.21	30.79
VA	Henrico Co Pblc Schs	134.21	91.01	43.20
FL	Hernando	153.02	90.88	62.14
NC	Alamance-Burlington Schools	183.45	90.16	93.29
IL	Rockford Sd 205	203.86	88.62	115.24
VA	Newport News City Pblc Schs	310.82	88.48	222.33
NC	Cabarrus County Schools	140.34	87.81	52.54
NE	Millard Public Schools	115.15	86.71	28.44
IN	Fort Wayne Community Schools	148.49	85.58	62.91
WI	Kenosha School District	119.83	85.27	34.56
NC	Charlotte-Mecklenburg Schools	150.83	82.13	68.70
NC	Johnston County Public Schools	122.05	81.76	40.29
MO	St. Louis City	143.19	81.49	61.70
NC	Wayne County Public Schools	154.94	79.66	75.27
OK	Oklahoma City	184.09	79.22	104.87
NE	Lincoln Public Schools	107.61	79.07	28.54
VA	Chesterfield Co Pblc Schs	128.08	79.01	49.06
MD	Prince George's County Public Schools	129.89	73.67	56.21
NC	Gaston County Schools	153.76	73.67	80.09
NC	Davidson County Schools	115.08	72.02	43.05
CO	Colorado Springs School District No.11 In The County Of El Paso	124.15	71.25	52.89
MO	North Kansas City 74	98.12	69.68	28.44
CA	Visalia Unified	100.28	68.71	31.57
AK	Anchorage School District	111.05	68.66	42.39

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2017-18.

Table B6: Comparison of 504-Only and IDEA Identification in the 10 States with the Lowest Rates for IDEA with Additional Comparisons for Selected Racial/Ethnic Groups, 2017-18

State	17-18 Percent of 504 Students	17-18 Percent of IDEA Students	17-18 Percent 504-Latinx Students	17-18 Percent IDEA-Latinx Students	17-18 Percent 504-Black Students	17-18 Percent IDEA-Black Students	17-18 Percent 504-White Students	17-18 Percent IDEA-White Students	17-18 Percent 504-Native American Students	17-18 Percent IDEA-Native American Students
TX	6.1%	9.1%	4.9%	8.9%	5.6%	11.1%	9.2%	9.2%	6.3%	10.3%
ID	3.1%	9.8%	2.4%	10.6%	3.2%	11.6%	3.3%	9.4%	1.8%	18.6%
HI	2.3%	10.5%	2.3%	11.9%	2.5%	12.0%	3.7%	10.8%	2.5%	15.2%
CO	2.3%	10.8%	1.2%	12.1%	1.5%	13.3%	3.1%	9.9%	1.8%	15.8%
MD	3.2%	11.4%	1.5%	10.5%	2.4%	13.9%	5.1%	10.7%	3.3%	10.8%
CA	1.4%	11.5%	0.9%	12.1%	1.3%	16.3%	2.8%	11.5%	1.9%	15.8%
LA	5.6%	11.5%	2.9%	7.3%	6.1%	12.7%	5.8%	11.2%	9.6%	11.6%
AR	4.0%	12.0%	1.6%	10.6%	3.0%	13.3%	5.0%	12.0%	4.6%	12.9%
AZ	1.5%	12.1%	0.8%	11.9%	1.2%	14.0%	2.4%	12.1%	0.6%	15.9%
IA	1.9%	12.1%	1.0%	13.4%	1.0%	19.7%	2.1%	11.4%	1.5%	20.0%

Source: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2015-16 and 2017-18.

Additional Policing Profiles

In Georgia: 19 districts serving 12,459 secondary students with disabilities (IDEA)s. *The Commerce City* district referred over 24% of enrolled secondary students with disabilities (IDEA) to law enforcement. *Cherokee County School District*, the largest on our list from Georgia, had a referral rate of 2.4% for students with disabilities (IDEA). The per-district mean among the 19 districts meeting our criteria was that 4.3% secondary students with disabilities (IDEA) were referred at least once to law enforcement in 2017-18.

In Maryland: 12 districts serving 9,110 students with disabilities (IDEA) met our criteria. *Wicomico* referring 15.9% of all secondary students with disabilities (IDEA) to law enforcement was the highest and the per district mean was over 6%.

In New Hampshire: 13 districts serving 4,345 secondary students with disabilities (IDEA) met the criteria for this list. The highest referral rate was *Lebanon,* NH where over 18% of secondary students with disabilities (IDEA) were referred to law enforcement.

In Arizona: 15 districts serving 13,293 secondary students with disabilities (IDEA), referred more than 2% to law enforcement in 2017-18. One district, *Camp Verde Unified*, referred over 12% of their secondary students with disabilities (IDEA) to law enforcement. *Phoenix Unified*, the largest in Arizona on our list, had a referral rate of 3.1% for students with disabilities (IDEA). The per district

mean rate of referral to law enforcement for students with disabilities (IDEA) in these 15 selected districts in Arizona was 4.5%.

Estimated days of lost instruction due to *all* disciplinary removal of students with disabilities (IDEA): The 2018-19 data from OSEP enables a review of "disciplinary removals" by race and/or disability category that are presented as numbers of students in each range of days of removal. DoED defines a disciplinary removal as follows: "Any instance in which a child with a disability is removed from their educational placement for disciplinary purposes, including in-school suspension, out-of-school suspension, expulsion, removal by school personnel to an interim alternative educational setting for drug or weapon offenses or serious bodily injury, and removal by hearing officer for likely injury to the child or others."[221]

By supplying a single value to each range, we can estimate the numbers of days lost for each group. OSEP provides the unduplicated number of students within each the following ranges: one day; two to 10 days; and greater than 10 days. For the number of students removed for one day, no substitution was needed as the number of students is equal to the number of days. For the number of students who lost two to 10 days, we supplied the value of six days, which is the mean value for the range; and for removals cumulatively of more than 10 days, we supplied the smallest value possible of 11 days.

While the IDEA created a host of procedural protections to help prevent the discriminatory exclusion of students with disabilities, both the protections and the oversight provisions in the IDEA were originally focused on suspensions of more than 10 days (including cumulative).[222] However, in 2004, Congress amended the IDEA and required that states review district-level disparities in discipline, including the incident and duration of all suspensions of just one day or more.[223] Congress required each state to report these to the public, and also included these discipline disparities in the section of the IDEA that requires states to review districts for large disparities. And if the disparities exceed a state-created threshold, the districts must act to find the root cause of the differences and use part of their federal funds to take remedial action.

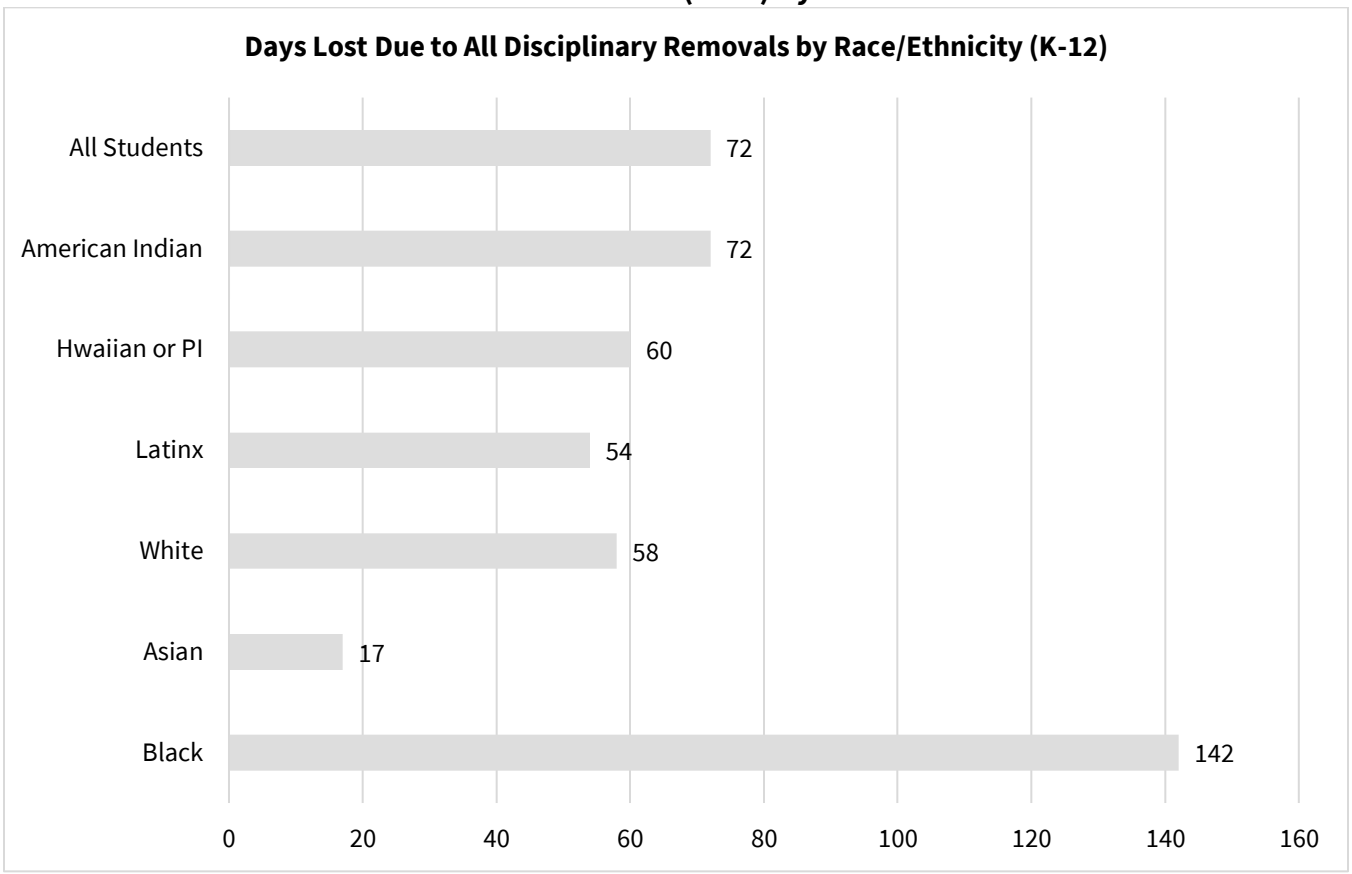
One of the advantages to looking at broader categories like all disciplinary removals is that when districts fail to meet the needs of students with disabilities, there may be a lot of exclusion and loss of services that are not captured by out-of-school suspensions. In fact, the risk for a disciplinary removal across all disability types was 13.5%, but the risk for a suspension or expulsion was 9.1%. In other words, out-of-school suspensions and expulsions capture only two-thirds of all the students with disabilities experiencing a removal. Other categories covered by the removal category included here are expulsions, in-school suspensions, removals to interim educational settings, removals by a hearing officer and unilateral removals by school personnel.[224]

When CCRR analyzed those data disparities from 2015-16 next to the information on states that had flagged districts for discipline disparities, we found, "Although the IDEA requires every state to

observe district-level racial disparities in discipline, the U.S. Department of Education's (DoED) own monitoring reports over the last two years reveal that not one of the eight states with the largest racial discipline disparities identified a single district as having a problem in 2015-16."[225] The 2018-19 data were released just as this report was being completed for publication and they provide a sound basis for the following national estimate of the days of lost instruction for all students with disabilities disaggregated by race/ethnicity and for students in each disability category (but without the racial breakdown).

The following analyses capture differences in lost instruction from suspensions combined with lost instruction due to expulsions, involuntary transfers, and possibly arrests. Figure B1 shows the breakdown for all students with disabilities disaggregated by race/ethnicity. Figure B2, below, shows the disciplinary removal rates for all students by disability category.

Figure B1: National Estimate of Days Lost per 100 Enrolled Due to All Disciplinary Removals for Students with Disabilities (IDEA) by Race in 2018-19



Source: U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, 2018–19.

The rate of days lost due to removals for Black students with disabilities (IDEA) is surprising because of how high the rates are, as well as the fact that their rate was 84 days greater than their White

peers. Latinx and Asian American students with disabilities (IDEA) lost less time than White students, and Native Americans' rate was 14 days higher. But even more than the racial difference, the fact that the national average for Blacks with disabilities (IDEA), across all grades and disability types, was 142 days lost per 100 should demand far more attention than it has thus far. Moreover, there were four states where Black students with disabilities (IDEA) across all grades lost more than 200 days per 100 enrolled! Table B7 provides the breakdown of the five states where Black students experienced the highest rates and the largest disparities. Three other states, Kentucky, North Carolina and Tennessee arguably should have been included as each had racial gaps of over 100 days. Kentucky was tied with Kansas for the size of the discipline gap and Blacks there lost 191 days per 100 due to all disciplinary removals. Each of the three did identify many districts pursuant to the IDEA for a combined total of 42 districts flagged. In each case, the district was notified and required to use 15% of its Part B federal IDEA funds on early intervening services. This means that each district must conduct a root-cause analysis and create a plan of how it will use the funds to address the contributing factors it identifies that the district can influence.

Table B7: The 5 States with the Largest Black-White Difference in Days of Lost Instruction (per 100) Due to Disciplinary Removals and Number of Identified Districts

State 2018-19	Black Days Lost	White Days Lost	Black-White Disparity in Days of Lost Instruction (per 100) due to Disciplinary Removal	Districts Identified for Significant Racial Disproportionality in Discipline in 2018-19
Nebraska	256	54	202	1
Nevada	245	85	160	0
Missouri	233	103	130	0
Arkansas	216	92	125	1
Kansas	176	55	121	0

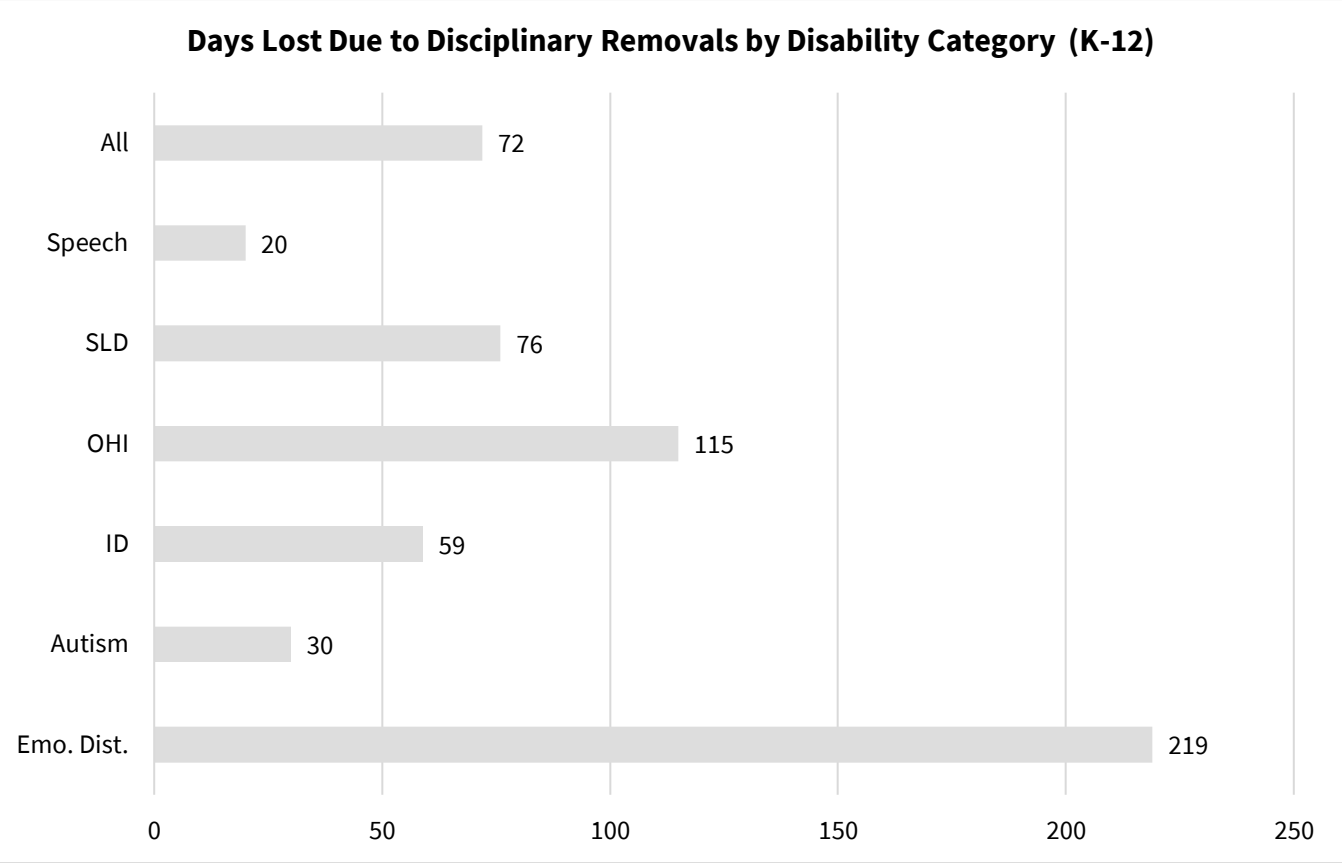
Source: U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, 2018–19.

Although the data are not published at the district level, federal law, pursuant to the IDEA at 20 U.S.C. 1418(d) requires that states identify significant racial disproportionality for the incidence and duration of discipline at the district level. For the 2018-19 school year, 22 states identified at least one district and, altogether, states identified 181 districts with discipline disproportionality. However, most states identified zero districts including three of the five with the largest disparities in Table B7. This suggests that there is a lack of civil rights oversight. Under the IDEA, states are allowed to set the benchmark for disproportionality and historically many have been allowed to set the bar so high that no districts are identified. The discipline disparities in some state, although not sufficient proof of discriminatory conduct, are certainly large enough to prompt an investigation at the state as well as district levels.

The discipline data can be disaggregated by category of disability, but it is not available by race with disability category. Although there is not a parallel requirement that states review district data for

large differences in discipline by disability category, the following national data suggest the need for such oversight.

Figure B2: National Estimate of Days Lost per 100 Due to All Disciplinary Removals for Students with Disabilities by Selected Category in 2018-19



Source: U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, 2018–19.

Disciplinary removal rates are much higher for students with emotional disturbance than for students with disabilities (IDEA) in any other category.[226] In twelve states, the rate of lost instruction exceeded 300 days per 100 students enrolled, and in two states, North and South Carolina, the rate for students with ED exceeded 400 days per 100 students with ED. Emotional disturbance, also called emotional/behavioral disorder, is the one category where, by definition, one would expect students to have had functional behavioral assessments and behavioral intervention plans and receive additional behavioral supports and services such as regular support sessions with school counselors. Currently, the IDEA does not track or publicly report the supports, service hours or behavioral improvement plans. However, where prior research has examined differences researchers have reported that Black students with Emotional Disturbance received lower quantity and quality of services among students with such needs. For example, "Overall, white students sampled in the NLTS study received counseling and therapy services more often than did African American students

(77.6% and 64%, respectively). Moreover, significantly more parents of African American students (45.7%) than of White students (29.8%) reported that their children *never* received counseling and therapy services. The racial disparities...merit particular concern, since the nature of the EBD disability renders these services integral to meeting the student's educational needs."[227]

The researchers' conclusions from that review suggest a serious post-pandemic burden on African American students who have ED or are at risk of developing emotional and behavioral disorders if they do not receive early intervention. The pre-pandemic data and review of the current and funding concerns suggest that African American students today still confront several risk factors researchers identified 20 years ago, including, "1) the dearth of schoolwide programs and strategies for preventing the development of emotional and behavioral disorders; 2) the under-identification of many children in need of behavioral supports; and... 3) the failure to provide appropriate supports and services to students identified as having EBD."[228]

Although some might think that most of the removals of EBD students are for dangerous behavior, of the 128,000 students with ED that were removed for at least one day, only 122 were by a hearing officer because the student posed a serious danger to self or others.[229]

Although beyond the scope of this report, it is important to note that in 2004, when Congress re-authorized the IDEA it expressed concerns with three areas of racial over-representation: identification, restrictive placement, and discipline, which are distinct areas of analysis for racial disproportionality at the district level pursuant to the IDEA. Of these three, the disparities in discipline (which can be impacted by inappropriate eligibility and placement) is the area where CCRR has documented the most extreme racial disparities and is the one area of the three where the degree of disparity unequivocally indicates a higher exposure to harm.

Data from 2018-19 from the data published by the federal government known as 618 data:[230] In an ideal world, identification and placement in an educational setting are well-informed decisions that reflect information from parents and teachers and are carefully designed to meet the individualized needs of each student.

There is no question that higher risks for negative life outcomes are associated with being suspended, placed in a more restrictive educational setting, or for being referred to the police for misconduct in school. Therefore, the racial differences in disciplinary removal from school, which reduce access to the classroom as well as to needed supports and services, translates into stark racial differences among students with disabilities in the opportunity to learn.[231]

Among the most notable data points is that students with emotional disturbance lose a tremendous amount of time due to disciplinary removal at a rate that is nearly twice the rate for "other health impairment" which is the next highest category. The differences in disciplinary removal are not well explained simply because their disability may cause them to misbehave more. Instead, one should

assume that the students with emotional/behavioral disorders have disability-caused problem behaviors that educators know or should know about. These students should be receiving supports and services to address behavioral health that help them succeed, along with individually designed behavioral improvement plans that should describe educationally sound responses to disability-caused misconduct.[232] Further, although we cannot see the racial data by disability type, the high and disparate rates for Black students with disabilities (IDEA) raise similar questions about the sufficiency of the behavioral supports and services that Black students with disabilities receive.[233]

If the needs for special education are determined accurately and if it is provided with high quality supports and services, it should benefit those students that are appropriately diagnosed as eligible and placed in the least restrictive settings to the maximum extent appropriate. Moreover, there are some districts, such as Flint, Michigan, where large numbers of children of color were exposed to lead contaminated water, causing many to have development delays and likely more permanent disabilities but may have been shortchanged to the extent that they were denied access to special education altogether. The variety of concerns go well beyond identification rates, it is important to consider how the patterns of disproportionality in special education are nested within our broader understanding of inequity in general education, and further with a close analysis of district level data. Just as with general education, where districts show wide variance on many outcomes, districts do differ dramatically in terms of their rates of identification, use of restrictive settings, and their discipline of students as well as in the quality of special education supports and services they provide. This is why IDEA's requirement that states review district level racial disproportionality in identification, restrictive placement and discipline is such an important aspect of federal monitoring and enforcement of the IDEA pursuant to 20 U.SC. 1418(d). However, in light of the findings in this report, and in our 2018 report *Disabling Punishment: : The need for remedies to the disparate loss of instruction experienced by Black students with disabilities*[234] the fact that when states conduct this review approximately half identify no districts with sufficient racial disparities in discipline is highly problematic and a persistent problem.

List of districts that states identified in 2018-19 as having disproportionality in discipline and were required to reserve 15% of their Part B. IDEA funds for coordinated early intervening services (CEIS) based on state efforts pursuant to the IDEA at 20 U.S.C. 1418(d): Less than half of all states identified at least one district. Several among the highest for racial differences in disciplinary removals when Black and White students' rates were compared failed to identify a single district in either 2017-18 or 2018-19, including the following: Delaware, Alabama, Illinois, Missouri, Mississippi, Kansas, Arizona, New Mexico, and Nevada.

These 22 states did identify at least one district as having racial disproportionality in discipline. However, as one can tell from the more detailed state and district data, some states were more actively engaged than others.

Table B8. States with Districts Identified in 2018-19 as Having Disproportionality in Discipline

1. Arkansas	9. Maryland	17. Rhode Island
2. California	10. Michigan	18. South Carolina
3. Florida	11. Minnesota	19. Tennessee
4. Georgia	12. New Jersey	20. Virginia
5. Indiana	13. New York	21. Washington
6. Iowa	14. North Carolina	22. Wisconsin
7. Kentucky	15. Ohio	
8. Louisiana	16. Pennsylvania	

Source: U.S. DoED, 2018 Maintenance of Effort Files: https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html
Note: The specific racial group(s) that were over-represented were not identified.

It is important to note that of the 417 districts that were required to reserve 15% of their Part B IDEA funds for coordinated early intervening services (CEIS), 181 were identified because of racially disproportionate discipline.

Table B9: Districts Identified for Racial Disproportionality in Discipline in 2017-18 and 2018-19

2018-19		2017-18	
State	**LEA Name**	**State**	**LEA Name**
Arkansas	BLYTHEVILLE SCHOOL DISTRICT	Arkansas	BLYTHEVILLE SCHOOL DISTRICT
California	WEAVER UNION ELEMENTARY	California	WASHINGTON UNIFIED
California	FRESNO UNIFIED	California	ANTELOPE VALLEY UNION HIGH
California	OROVILLE UNION HIGH	California	FAIRFIELD-SUISUN UNIFIED
California	PALM SPRINGS UNIFIED	California	FRESNO UNIFIED
District of Columbia	CAPITAL CITY PCS	California	JEFFERSON UNION HIGH
District of Columbia	SOMERSET PREPARATORY ACADEMY PCS	California	KERN UNION HIGH
Florida	ALACHUA	California	LODI UNIFIED
Florida	GLADES	California	MORONGO UNIFIED
Florida	SUMTER	California	PALM SPRINGS UNIFIED
Georgia	BIBB COUNTY	California	SAN JUAN UNIFIED
Georgia	BROOKS COUNTY	California	VICTOR VALLEY UNION HIGH
Georgia	CARROLLTON CITY	California	STOCKTON CITY UNIFIED
Georgia	CLARKE COUNTY	California	WHEATLAND UNION HIGH
Georgia	CRISP COUNTY	California	Sacramento Charter High (St Hope)
Georgia	DECATUR CITY	Connecticut	EAST HARTFORD SCHOOL DISTRICT
Georgia	DOOLY COUNTY	District Of Columbia	DISTRICT OF COLUMBIA PUBLIC SCHOOLS
Georgia	PUTNAM COUNTY	District Of Columbia	D.C. PREPARATORY ACADEMY PCS
Georgia	SUMTER COUNTY	Florida	MANATEE
Georgia	TALBOT COUNTY	Florida	PINELLAS
Georgia	TATTNALL COUNTY	Florida	SARASOTA
Georgia	TELFAIR COUNTY	Florida	ST JOHNS
Georgia	THOMASVILLE CITY	Georgia	ATLANTA PUBLIC SCHOOLS
Georgia	VALDOSTA CITY	Georgia	BEN HILL COUNTY
Georgia	WASHINGTON COUNTY	Georgia	CARTERSVILLE CITY
Georgia	WHEELER COUNTY	Georgia	COFFEE COUNTY
Indiana	Evansville-Vanderburgh Sch Corp	Georgia	DECATUR CITY
Iowa	COLLEGE COMM SCHOOL DISTRICT	Georgia	DEKALB COUNTY
Iowa	DAVENPORT COMM SCHOOL DISTRICT	Georgia	DODGE COUNTY
Iowa	WATERLOO COMM SCHOOL DISTRICT	Georgia	DOOLY COUNTY
Kentucky	Bowling Green Independent Schools	Georgia	DOUGHERTY COUNTY
Kentucky	Fayette County Schools	Georgia	EARLY COUNTY
Kentucky	Jefferson County Schools	Georgia	EMANUEL COUNTY
Kentucky	Jessamine County Schools	Georgia	FULTON COUNTY
Kentucky	Kenton County Schools	Georgia	MITCHELL COUNTY
Kentucky	Oldham County Schools	Georgia	PUTNAM COUNTY
Kentucky	Shelby County Schools	Georgia	RANDOLPH COUNTY
Louisiana	Zachary Community School District	Georgia	TATTNALL COUNTY
Louisiana	Bienville Parish	Georgia	THOMASVILLE CITY
Louisiana	Joseph S. Clark Preparatory High School	Georgia	VALDOSTA CITY
Louisiana	Abramson Sci Academy	Georgia	VIDALIA CITY
Louisiana	Paul Habans Charter School	Georgia	WHEELER COUNTY
Louisiana	Caddo Parish	Indiana	Evansville-Vanderburgh Sch Corp
Louisiana	Grant Parish	Indiana	M S D Washington Township
Louisiana	Jefferson Parish	Iowa	CEDAR FALLS COMM SCHOOL DISTRICT
Louisiana	Lafayette Parish	Iowa	DAVENPORT COMM SCHOOL DISTRICT
Louisiana	Morehouse Parish	Iowa	DUBUQUE COMM SCHOOL DISTRICT
Louisiana	Rapides Parish	Iowa	FORT DODGE COMM SCHOOL DISTRICT
Louisiana	St. James Parish	Iowa	FORT MADISON COMM SCHOOL DISTRICT
Louisiana	St. Tammany Parish	Iowa	IOWA CITY COMM SCHOOL DISTRICT

Table B9 (Continued)

2018-19	
Louisiana	Washington Parish
Louisiana	Arthur Ashe Charter School
Louisiana	Akili Academy Of New Orleans
Louisiana	Arise Academy
Maryland	BALTIMORE CITY PUBLIC SCHOOLS
Maryland	PRINCE GEORGES COUNTY PUBLIC SCHOOLS
Michigan	Ann Arbor Public Schools
Michigan	Dearborn City School District
Michigan	Grand Rapids Public Schools
Michigan	Kenowa Hills Public Schools
Michigan	Mona Shores Public School District
Michigan	Mount Clemens Community School District
Michigan	Grosse Pointe Public Schools
Michigan	Plymouth Canton Community Schools
Michigan	Royal Oak Schools
Michigan	Saginaw Township Community Schools
Michigan	Swartz Creek Community Schools
Michigan	Traverse City Area Public Schools
Michigan	Van Buren Public Schools
Michigan	Van Dyke Public Schools
Minnesota	ROBBINSDALE PUBLIC SCHOOL DISTRICT
Minnesota	ST. PAUL PUBLIC SCHOOL DISTRICT
Nebraska	OMAHA PUBLIC SCHOOLS
New Jersey	EAST WINDSOR REGIONAL
New Jersey	SOUTH ORANGE-MAPLEWOOD
New York	SOUTH COUNTRY CENTRAL SCHOOL DISTRICT
New York	ALBANY CITY SCHOOL DISTRICT
New York	AMITYVILLE UNION FREE SCHOOL DISTRICT
New York	AMSTERDAM CITY SCHOOL DISTRICT
New York	BALDWIN UNION FREE SCHOOL DISTRICT
New York	BINGHAMTON CITY SCHOOL DISTRICT
New York	BUFFALO CITY SCHOOL DISTRICT
New York	CHEEKTOWAGA CENTRAL SCHOOL DISTRICT
New York	COPIAGUE UNION FREE SCHOOL DISTRICT
New York	DEER PARK UNION FREE SCHOOL DISTRICT
New York	ELMIRA CITY SCHOOL DISTRICT
New York	FREEPORT UNION FREE SCHOOL DISTRICT
New York	GATES-CHILI CENTRAL SCHOOL DISTRICT
New York	GLEN COVE CITY SCHOOL DISTRICT
New York	GREECE CENTRAL SCHOOL DISTRICT
New York	GREENBURGH CENTRAL SCHOOL DISTRICT
New York	PORT JERVIS CITY SCHOOL DISTRICT
New York	RIVERHEAD CENTRAL SCHOOL DISTRICT
New York	ROCHESTER CITY SCHOOL DISTRICT
New York	SCHENECTADY CITY SCHOOL DISTRICT
New York	SODUS CENTRAL SCHOOL DISTRICT
New York	SOUTH COLONIE CENTRAL SCHOOL DISTRICT
New York	EAST RAMAPO CENTRAL SCHOOL DISTRICT (SPRING VALLEY)
New York	TROY CITY SCHOOL DISTRICT
New York	WALLKILL CENTRAL SCHOOL DISTRICT
New York	WHITE PLAINS CITY SCHOOL DISTRICT
New York	WYANDANCH UNION FREE SCHOOL DISTRICT
New York	YONKERS CITY SCHOOL DISTRICT

2017-18	
Iowa	LINN-MAR COMM SCHOOL DISTRICT
Iowa	SERGEANT BLUFF-LUTON COMM SCHOOL DISTRICT
Iowa	URBANDALE COMM SCHOOL DISTRICT
Iowa	WAUKEE COMM SCHOOL DISTRICT
Kentucky	Daviess County Schools
Kentucky	Hardin County Schools
Kentucky	Jefferson County Schools
Kentucky	Shelby County Schools
Louisiana	Cohen College Prep
Louisiana	Crescent Leadership Academy
Louisiana	City Of Bogalusa School District
Louisiana	Lake Area New Tech Early College High School
Louisiana	Calcasieu Parish
Louisiana	East Feliciana Parish
Louisiana	Lincoln Parish
Louisiana	Morehouse Parish
Louisiana	Natchitoches Parish
Louisiana	Tangipahoa Parish
Louisiana	Union Parish
Maryland	BALTIMORE CITY PUBLIC SCHOOLS
Maryland	PRINCE GEORGES COUNTY PUBLIC SCHOOLS
Michigan	Ann Arbor Public Schools
Michigan	Berrien Springs Public Schools
Michigan	Chippewa Valley Schools
Michigan	Dearborn City School District
Michigan	Forest Hills Public Schools
Michigan	Kelloggsville Public Schools
Michigan	Mount Clemens Community School District
Michigan	Grosse Pointe Public Schools
Michigan	Troy School District
Mississippi	MOSS POINT SEPARATE SCHOOL DIST
Nebraska	OMAHA PUBLIC SCHOOLS
New York	SOUTH COUNTRY CENTRAL SCHOOL DISTRICT
New York	ALBANY CITY SCHOOL DISTRICT
New York	AMITYVILLE UNION FREE SCHOOL DISTRICT
New York	BUFFALO CITY SCHOOL DISTRICT
New York	CHEEKTOWAGA CENTRAL SCHOOL DISTRICT
New York	CLEVELAND HILL UNION FREE SCHOOL DISTRICT
New York	COHOES CITY SCHOOL DISTRICT
New York	COPIAGUE UNION FREE SCHOOL DISTRICT
New York	ELMIRA CITY SCHOOL DISTRICT
New York	UNION-ENDICOTT CENTRAL SCHOOL DISTRICT
New York	FAIRPORT CENTRAL SCHOOL DISTRICT
New York	FREEPORT UNION FREE SCHOOL DISTRICT
New York	GENEVA CITY SCHOOL DISTRICT
New York	GLEN COVE CITY SCHOOL DISTRICT
New York	GREECE CENTRAL SCHOOL DISTRICT
New York	GREENBURGH CENTRAL SCHOOL DISTRICT
New York	HAVERSTRAW-STONY POINT CSD (NORTH ROCKLAND)
New York	HEMPSTEAD UNION FREE SCHOOL DISTRICT
New York	HUDSON CITY SCHOOL DISTRICT
New York	HUNTINGTON UNION FREE SCHOOL DISTRICT
New York	HYDE PARK CENTRAL SCHOOL DISTRICT

Table B9 (Continued)

2018-19		2017-18	
New York	HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT	New York	ITHACA CITY SCHOOL DISTRICT
New York	HEMPSTEAD UNION FREE SCHOOL DISTRICT	New York	KENMORE-TONAWANDA UNION FREE SCHOOL DISTRICT
New York	HUNTINGTON UNION FREE SCHOOL DISTRICT	New York	KINGSTON CITY SCHOOL DISTRICT
New York	HYDE PARK CENTRAL SCHOOL DISTRICT	New York	LAFAYETTE CENTRAL SCHOOL DISTRICT
New York	WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT	New York	EVANS-BRANT CENTRAL SCHOOL DISTRICT (LAKE SHORE)
New York	KENMORE-TONAWANDA UNION FREE SCHOOL DISTRICT	New York	LAWRENCE UNION FREE SCHOOL DISTRICT
New York	KINGSTON CITY SCHOOL DISTRICT	New York	LIBERTY CENTRAL SCHOOL DISTRICT
New York	LAWRENCE UNION FREE SCHOOL DISTRICT	New York	LIVERPOOL CENTRAL SCHOOL DISTRICT
New York	LIBERTY CENTRAL SCHOOL DISTRICT	New York	LOCKPORT CITY SCHOOL DISTRICT
New York	LIVERPOOL CENTRAL SCHOOL DISTRICT	New York	LONG BEACH CITY SCHOOL DISTRICT
New York	WILLIAM FLOYD UNION FREE SCHOOL DISTRICT	New York	WILLIAM FLOYD UNION FREE SCHOOL DISTRICT
New York	LONGWOOD CENTRAL SCHOOL DISTRICT	New York	MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT
New York	VALLEY CENTRAL SCHOOL DISTRICT (MONTGOMERY)	New York	LONGWOOD CENTRAL SCHOOL DISTRICT
New York	MONTICELLO CENTRAL SCHOOL DISTRICT	New York	MIDDLETOWN CITY SCHOOL DISTRICT
New York	NEW ROCHELLE CITY SCHOOL DISTRICT	New York	VALLEY CENTRAL SCHOOL DISTRICT (MONTGOMERY)
New York	NYC CHANCELLOR'S OFFICE	New York	MOUNT VERNON CITY SCHOOL DISTRICT
New York	NEWBURGH CITY SCHOOL DISTRICT	New York	NEW ROCHELLE CITY SCHOOL DISTRICT
New York	NIAGARA FALLS CITY SCHOOL DISTRICT	New York	NYC CHANCELLOR'S OFFICE
New York	NORTH BABYLON UNION FREE SCHOOL DISTRICT	New York	NEWBURGH CITY SCHOOL DISTRICT
New York	NORTH SYRACUSE CENTRAL SCHOOL DISTRICT	New York	NORTH BABYLON UNION FREE SCHOOL DISTRICT
New York	NYACK UNION FREE SCHOOL DISTRICT	New York	NORTH SYRACUSE CENTRAL SCHOOL DISTRICT
New York	OSWEGO CITY SCHOOL DISTRICT	New York	NYACK UNION FREE SCHOOL DISTRICT
North Carolina	ALAMANCE-BURLINGTON SCHOOLS	New York	OSWEGO CITY SCHOOL DISTRICT
North Carolina	ANSON COUNTY SCHOOLS	New York	PEEKSKILL CITY SCHOOL DISTRICT
North Carolina	BEAUFORT COUNTY SCHOOLS	New York	RIVERHEAD CENTRAL SCHOOL DISTRICT
North Carolina	HARNETT COUNTY SCHOOLS	New York	ROCHESTER CITY SCHOOL DISTRICT
North Carolina	NASH-ROCKY MOUNT SCHOOLS	New York	SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT
North Carolina	NEW HANOVER COUNTY SCHOOLS	New York	SODUS CENTRAL SCHOOL DISTRICT
North Carolina	NORTHAMPTON COUNTY SCHOOLS	New York	SOUTH COLONIE CENTRAL SCHOOL DISTRICT
North Carolina	ROBESON COUNTY SCHOOLS	New York	SOUTH HUNTINGTON UNION FREE SCHOOL DISTRICT
North Carolina	ROWAN-SALISBURY SCHOOLS	New York	EAST RAMAPO CENTRAL SCHOOL DISTRICT (SPRING VALLEY)
North Carolina	VANCE COUNTY SCHOOLS	New York	TROY CITY SCHOOL DISTRICT
North Carolina	WARREN COUNTY SCHOOLS	New York	UNIONDALE UNION FREE SCHOOL DISTRICT
North Carolina	WILSON COUNTY SCHOOLS	New York	WALLKILL CENTRAL SCHOOL DISTRICT
Ohio	Northwest Local	New York	WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT
Ohio	Springfield City School District	New York	WEST SENECA CENTRAL SCHOOL DISTRICT
Pennsylvania	Lower Merion SD	New York	WESTBURY UNION FREE SCHOOL DISTRICT
Pennsylvania	Steel Valley SD	New York	WHITE PLAINS CITY SCHOOL DISTRICT
Rhode Island	Burrillville	New York	WYANDANCH UNION FREE SCHOOL DISTRICT
South Carolina	BEAUFORT COUNTY SCHOOL DISTRICT	New York	YONKERS CITY SCHOOL DISTRICT
South Carolina	FLORENCE COUNTY SCHOOL DISTRICT 02	North Carolina	ANSON COUNTY SCHOOLS
South Carolina	MARION COUNTY SCHOOL DISTRICT	North Carolina	BEAUFORT COUNTY SCHOOLS
Tennessee	ACHIEVEMENT SCHOOL DISTRICT	North Carolina	EDGECOMBE COUNTY SCHOOLS
Tennessee	SHELBY COUNTY	North Carolina	HARNETT COUNTY SCHOOLS
Tennessee	COLLIERVILLE	North Carolina	JOHNSTON COUNTY SCHOOLS
Tennessee	BARTLETT	North Carolina	MARTIN COUNTY SCHOOLS

Table B9 (Continued)

2018-19	
Tennessee	CLEVELAND
Tennessee	FAYETTEVILLE
Tennessee	HAMILTON COUNTY
Tennessee	HARDEMAN COUNTY
Tennessee	HENDERSON COUNTY
Tennessee	HUMBOLDT
Tennessee	KNOX COUNTY
Tennessee	LAUDERDALE COUNTY
Tennessee	MADISON COUNTY
Tennessee	MAURY COUNTY
Tennessee	MONTGOMERY COUNTY
Tennessee	DAVIDSON COUNTY
Tennessee	ROBERTSON COUNTY
Tennessee	RUTHERFORD COUNTY
Tennessee	SUMNER COUNTY
Tennessee	TIPTON COUNTY
Tennessee	UNION CITY
Tennessee	WILLIAMSON COUNTY
Tennessee	WILSON COUNTY
Virginia	CHESTERFIELD CO PBLC SCHS
Virginia	DANVILLE CITY PBLC SCHS
Virginia	HALIFAX CO PBLC SCHS
Virginia	HENRICO CO PBLC SCHS
Virginia	MECKLENBURG CO PBLC SCHS
Virginia	NORFOLK CITY PBLC SCHS
Virginia	PETERSBURG CITY PBLC SCHS
Virginia	RICHMOND CITY PBLC SCHS
Washington	Seattle
Wisconsin	Milwaukee Academy Of Science
Wisconsin	Racine Unified
Wisconsin	Verona Area
Wisconsin	Wauwatosa

2017-18	
North Carolina	NASH-ROCKY MOUNT SCHOOLS
North Carolina	NEW HANOVER COUNTY SCHOOLS
North Carolina	NORTHAMPTON COUNTY SCHOOLS
North Carolina	RICHMOND COUNTY SCHOOLS
North Carolina	ROBESON COUNTY SCHOOLS
North Carolina	SCOTLAND COUNTY SCHOOLS
North Carolina	STANLY COUNTY SCHOOLS
North Carolina	VANCE COUNTY SCHOOLS
North Carolina	WARREN COUNTY SCHOOLS
North Carolina	WILSON COUNTY SCHOOLS
Ohio	Springfield City School District
Ohio	Warren City
Ohio	Westerville City
Ohio	Reynoldsburg City
Ohio	Northwest Local
Pennsylvania	Lower Merion SD
Pennsylvania	Steel Valley SD
Rhode Island	South Kingstown
Rhode Island	Warwick
Rhode Island	Woonsocket
Texas	ALTO ISD
Texas	BURTON ISD
Virginia	CHESTERFIELD CO PBLC SCHS
Virginia	HENRICO CO PBLC SCHS
Washington	Seattle
Wisconsin	Milwaukee Academy Of Science
Wisconsin	Milwaukee Scholars Charter School
Wisconsin	Wauwatosa

Source: U.S. DoED, 2017 and 2018 Maintenance of Effort Files: https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html
Note: The specific racial group(s) that were over-represented were not identified.

Table B10: Restrictiveness of Placement by Disability Category in 2018-19

Type of disability	Regular school, time inside general class			Separate school for students w/disabilities	Separate residential facility	Parentally placed in regular private school	Home-bound/hospital placement	Correctional facility
	< 40%	40 – 79%	80 % or more					
All students w/disabilities	13.1	18.0	64.0	2.7	0.2	1.4	0.4	0.2
Autism	33.2	18.5	40.0	6.8	0.3	1.0	0.3	n/a
Deaf-blindness	35.7	12.6	25.7	17.8	4.5	0.8	2.8	n/a
Developmental delay	14.4	18.5	65.6	0.8	#	0.5	0.1	n/a
Emotional disturbance	17.2	17.4	49.6	12.1	1.1	0.4	1.1	1.1
Hearing impairment	10.5	14.7	63.3	7.8	1.9	1.6	0.2	n/a
Intellectual disability	48.5	27.5	17.3	5.4	0.3	0.3	0.5	0.1
Multiple disabilities	44.9	17.6	14.2	17.8	1.2	0.7	3.6	0.1
Orthopedic impairment	22.1	15.6	54.3	3.8	0.1	1.3	2.8	n/a
Other health impairment\2\	8.5	20.2	67.3	1.7	0.2	1.3	0.6	0.2
Specific learning disability	4.6	21.4	72.2	0.4	#	1.1	0.1	0.2
Speech or language impairment	3.9	4.6	87.8	0.2	#	3.5	0.1	n/a
Traumatic brain injury	19.7	21.5	51.0	4.7	0.5	0.9	1.6	0.1
Visual impairment	8.9	12.4	68.2	5.6	2.7	1.3	0.8	n/a

Source: U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, 2018–19.[235]

Table B11: Percent of All Public-school Enrollment by Race

Percentage distribution, fall 2017							
Total	**White**	**Black**	**Hispanic**	**Asian**	**Pacific Islander**	**American Indian/ Alaska Native**	**Two or more races**
100.0	47.6	15.2	26.7	5.2	0.4	1.0	3.9

Source: NCES Fall 2017 available at: https://nces.ed.gov/programs/digest/d19/tables/dt19_203.70.asp

Table B12: National Data Showing Students By Race and By Disability Category and with Educational Placement: Total for U.S. And Outlying Areas for 2018-19, Age 6-21

	Disability Category	Ages 6-21	American Indian or Alaska Native	Black or African American	Hispanic/Latino	White
Total, Age 6-21	All Disabilities Ages 6-21	6,315,228	85,534	1,129,554	1,716,195	2,951,864
	Percentage of All SWD (IDEA)s Enrolled	100%	1.4%	**17.9%**	27.2%	47%
Total, Age 6-21	Specific learning disability	2377739	37469	443,831	774287	990176
	Percentage of All SLD Enrolled	100%	1.6%	18.7%	32.6%	41.6%
Total, Age 6-21	Other health impairment	1025953	11084	182,731	217624	551581
	Percentage of All OHI enrolled	100%	1.0%	17.8%	21.2%	53.8%
Total, Age 6-21	Emotional disturbance Distribution Share of All	344473	4645	80,600	63105	172545
	Share of all ED enrolled	100%	1.3%	**23.4%**	18.3%	50%
Number and Percentage of Students with disabilities (IDEA) Educated in Correctional Facilities in 2018-19 By Race						
		Ages 6-21	American Indian or Alaska Native	Black or African American	Hispanic/Latino	White
Correctional Facilities	All Disabilities Number of Those in Correctional Facility	10,375	164	**5,054**	1,984	2,866
	Risk for Being Educated in Correctional Facility Among Students with disabilities (IDEA)	0.164% (0.312% of students aged 11-21)	0.192%	0.45%	0.12%	0.097%
	Percentage of Those in Correctional Facilities	100%	1.6%	**49%**	19.1%	27.6%

Source: IDEA 618 data for 2018-19
https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc

Table B13: Rates of Chronic Absenteeism for California's High School Students with and without Disabilities by Race/Ethnicity in 2018-19

Ethnicity	Chronic Absenteeism Rate SWD	Chronic Absenteeism Rate SWOD
African American	34.5%	24.4%
American Indian or Alaska Native	35.7%	25.4%
Asian	14.5%	5.3%
Filipino	16.7%	7.3%
Latinx	27.1%	17.3%
Pacific Islander	30.8%	22.0%
White	24.7%	12.3%
Two or More Races	27.8%	14.3%

Source: California Department of Education, DataQuest, 2018-19.

As one can see from the racially disaggregated chronic absenteeism data from the state of California, within each racial/ethnic group, the chronic absenteeism rates for students with disabilities were consistently higher than for students without disabilities. Within each racial group, having a disability corresponded to a rate that was between 8 to 14 points higher. However, among those with disabilities, Black and Native American students had the highest rates and each were over 9.5 percentage points higher than the rates among Whites with disabilities.

When we compare rates of chronic absenteeism for low-income and homeless high school students with disabilities, which are among the groups most likely to increase in number due to the economic fallout from the pandemic, we can see in Table B13 that the hardship for students in these high needs groups, measured by chronic absenteeism, was higher for students with disabilities, but extraordinarily high for Black and Native American students with disabilities.

Table B14: Racial Breakdown for Chronic Absenteeism for California's High School Students with Disabilities That Are Also Socioeconomically Disadvantaged and Homeless in 2018-19

Ethnicity	Chronic Absenteeism Eligible Enrollment	Chronic Absenteeism Count	Chronic Absenteeism Rate
African American	17,835	6,642	37.2%
American Indian or Alaska Native	1,480	586	39.6%
Asian	4,834	750	15.5%
Filipino	1,464	298	20.4%
Hispanic or Latino	115,180	32,680	28.4%
Pacific Islander	666	233	35.0%
White	23,706	7,618	32.1%
Two or More Races	3,861	1,351	35.0%

Source: California Department of Education, DataQuest, 2018-19.

In California, in 2018-19, homeless high school students with disabilities had the highest rates of chronic absenteeism, which was 41% overall. However, there were stark racial disparities in the rates among these high need students.

Table B15: Racial Breakdown for California's Homeless High School Students (Grades 9-12) with Disabilities in 2018-19

Ethnicity	Chronic Absenteeism Eligible Enrollment	Chronic Absenteeism Count	Chronic Absenteeism Rate
African American	1,719	921	53.6%
American Indian or Alaska Native	150	88	58.7%
Asian	129	37	28.7%
Filipino	93	29	31.2%
Hispanic or Latino	7,865	3,196	40.6%
Pacific Islander	66	30	45.5%
White	1,870	900	48.1%
Two or More Races	351	180	51.3%

Source: California Department of Education, DataQuest, 2018-19.

Appendix C. Further discussion of disproportionality in the identification of students for special education

504 under-identification is a distinct issue from IDEA under-identification: Many districts identified no students from any group as 504-only eligible.[236] It is important to reiterate that 504 eligibility, which entails supports and services, does not entail removal from the classroom, or use stigmatizing labels like "emotionally disturbed" or the previously used term "mentally retarded" now referred to as a student with "intellectual disability."[237] These differences raise more complicated questions regarding resource needs and are discussed briefly below.

Under-identification for 504 eligibility does not suggest Black under-identification for special education pursuant to IDEA. There are well-established overarching concerns with the over-representation of Black children in special education pursuant to the IDEA recognized in the statement of purpose and findings section of the IDEA, especially the concern with the most subjectively determined and stigmatizing categories of emotional disturbance and intellectual disability. In contrast, it is also well established in the administrative reports that Black students are identified as having autism at rates that are below the national average for all students.[238]

For neither type of eligibility is there a definitive or established expected rate. The same can be said of each of the 13 categories used for reporting disabilities pursuant to the IDEA. On an individual basis, it would be worth investigating whether districts with no identified students pursuant to 504 and no students pursuant to the IDEA might be failing in their duty to enforce the child find requirements under the IDEA as well. Besides those extremes, there are some aspects of the over- and under-identification that implicate concerns about inadequate resources such as deficiencies in the quality of reading instruction. The IDEA eligibility rates of English learners and the shortage of experienced and certified general education and special education teachers are additional areas of concern.[239]

English learners may be both over and under-identified:
The Civil Rights Project, in prior publications, has documented the even deeper concerns that underlie some of the concerns with racial over-identification. Namely, that the quality of special education and related supports and services that IDEA is supposed to provide, and what students of color receive, may be worlds apart. In the edited volume of research we published, *Racial Inequity in Special Education,* one chapter described a pattern of under-identification of English learners in elementary school followed by over-identification by high school. Dr. Artiles points out how the earlier failure likely contributed to the over-identification of these students, as well as their being educated in more restrictive settings. Many researchers have suggested that the failure to appropriately fund a variety of instructional approaches and to train sufficient numbers of teachers to work with English learners, along with the insufficient special education resources for ELs is reflected in patterns of both over and under-identification.[240]

In a more recent example, in 2016 the DoED resolved an OCR investigation into the over-representation of ELs in the Salt Lake City school district where the investigation discovered that EL students were getting special education in some cases instead of having their language needs met, and in others EL students with special education needs were only getting special education without the needed language supports and services.[241] Assuming the facts in the case are true as summarized by DoED, this case demonstrates how a district's inadequate supports for ELs in the general education classroom likely contributed to inappropriate over-identification of ELs for special education, but also that the lack of EL supports had the effect of denying FAPE to EL students with disabilities. It should also be noted that although ELs with disabilities have lower suspension rates than most students without, their risk for suspension is higher if they also have a disability.

In this report, we advise readers not to misconstrue the findings from analyses where the evidence suggests that children of color are not sufficiently identified or eligible for supports and services in regular education under Section 504-only, or where we suggest that in some districts low identification rates pursuant to the IDEA may indicate a discriminatory denial of services. The fact that under-identification problems do exist in some districts, and for certain disability categories, in no way means that the problem of racial over-identification for special education generally, and especially for categories such as intellectual disability and emotional disturbance or the disparities in restrictive placement, are not still serious concerns in many districts across the nation. CCRR has been highly critical of a line of studies with deep flaws in their design, where researchers have made broad overgeneralizing statements and suggested changes to federal policy based on nationally and regionally sampled data. Design flaws include ignoring the ways in which multiple causes of serious inequities in education, including implicit racial bias and systemic forms of race discrimination in schools, have likely contributed to racial differences in student achievement, as well as behavioral ratings making both inappropriate for use as controls in the studies. More generally the studies do not consider conditions unique to individual districts, the local and historical evidence of racism, and fail to examine any of the districts that states have actually flagged for high and disparate rates pursuant to federal policy.

Although a full exploration of this line of studies is beyond the scope of this report, the use of these studies is problematic when the national and regional findings are generalized to imply that district level problems are unlikely serious ones.[242] Most states use risk ratios that are orders of magnitude higher than the baseline disparities found in the national samples used in these studies. The issues of over and under-identification are highly contextual and often reflect school and district policies and practices.[243] Moreover, in several cases, courts have found that the pattern of over-identification of Black children, followed by their removal from the mainstream classroom was a vestige of prior de jure segregation.[244] In fact, there are many districts that are still under consent decrees. Whether an observed disparity is a serious problem requires a close review of district and school data along with other information specific to the local context.

[1] None of the additional funding that Congress has suggested for COVID-19 relief has been specifically earmarked for students with disabilities who are not eligible for special education, but still entitled by law to receive supports and services. See email correspondence with Ron Hager, Managing Attorney for Education and Employment, and Eric Buehlmann, Deputy Director for Policy Director, National Disabilities Rights Network (2021, January 12) [on file with author].

[2] Along with the legal obligation to educate students with disabilities, there is an obligation to identify them. The process of evaluating children for eligibility for special education and/or supports and services has costs associated with it. Conducting the evaluation and convening an IEP or 504 team to determine eligibility and placement is time-consuming. Of course, implementing a student's IEP or 504 plan entails time and increases the education budget. Most of the requirements of special education call for more time from educators, teachers, specialists and administrators, all of whom need to have had some training regarding providing special education.

[3] Although there can be exceptions, in most cases, if the IEP/504 team determines that a student needs "specially designed instruction" in order to receive FAPE, the student would be deemed eligible for special education pursuant to IDEA. For this reason, 504-only students are regarded as part of the general education population. According to the U.S. Department of Education's Office for Civil Rights, "Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating." U.S. Department of Education, Office for Civil Rights (2020, January 10). *Protecting students with disabilities*. https://www2.ed.gov/about/offices/list/ocr/504faq.html. OCR uses the term "504-only" to describe the obligation of charter schools to meet the educational needs of students. See U.S. Department of Education, Office for Civil Rights (2016, December 28). *Frequently asked questions about the rights of students with disabilities in public charter schools under Section 504 of the Rehabilitation Act of 1973* (p. 8). https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faq-201612-504-charter-school.pdf. "504-only" is also the term used by the CRDC in collecting and reporting the data on students in this category. In the DoED's document, *Master List of CRDC Definitions*, this definition is provided: "Students with Disabilities (Section 504 Only) refers to students with a disability, who receive regular or special education and related aids and services solely under Section 504 of the Rehabilitation Act of 1973, as amended, and not under the Individuals with Disabilities Education Act (IDEA). The "Section 504 Only" column in the survey items always refers to students with disabilities who receive regular or special education and related aids and services under Section 504 of the Rehabilitation Act of 1973, as amended, and not under IDEA." Available at https://crdc.grads360.org/services/PDCService.svc/GetPDCDocumentFile?fileId=37034.

[4] 2000 State and National Estimates available at ocrdata.ed.gov (go to tab 2).

[5] See Table 5 for more details. We do not have any data on the number or percentage of 504-only students for 2018-19, but the percentage for IDEA eligible students continued to rise to 14.1%. The percentage for IDEA students did not rise consistently since 2000 as it was at 13.3% of all enrolled that year. However, IDEA enrollment has increased in the last five consecutive years.

[6] In comparison, the IDEA uses 13 categories for reporting those eligible pursuant to the IDEA and most states use similar definitions (although these vary by state law and regulation). The statute requires annual reporting of identification rates, further disaggregated by race, disability category, gender and English learner status. See 20 U.S.C. Section 1418(a). It should be noted that a good deal of subjectivity enters into the determination of whether an individual student is eligible under Section 504-only, and that the distinction is often not an easy one to make. Moreover, The Americans with Disabilities Act Amendments of 2008 (ADA) broadened the definition of disability in the ADA as well as in Section 504, and with regard to IDEA eligibility. One key change was that in determining whether a student has a physical or mental impairment, the school district must not consider the improvement of a disability caused by a "mitigating measure" such as medication, hearing aids, prosthetics, mobility devices, or other means. See ADA (2008).

[7] U.S. Department of Education, Office for Civil Rights (2016, July 26). *Dear colleague letter and resource guide on students with ADHD*. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf.

[8] Id. at 15, stating: "If a student is evaluated for the provision of services under the IDEA and is found ineligible because he or she does not need special education and related services because of the disability, the school district must still consider if the student could be covered by Section 504. This means the school district must determine whether or not the student has a disability for which he or she still might need regular education and related aids and services in order to receive FAPE under Section 504.29. This determination could require an evaluation under Section 504.30." The 504-only/IDEA distinction is not as clear as one might hope. Some may regard the distinction as to whether the disability is impairing the student's academic performance, but that is not stated clearly in the statute. DoED guidance entitled, *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Students with Disabilities*, adds some clarity in the response to FAQ 32-34 as follows: "[Question:] 32. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504? [Answer:] The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or another major life activity and, if so, make an individualized determination of the child's educational needs for regular or special education or related aids or services. For example, such a student may receive adjustments in the regular classroom. [Question:] 33. How should a recipient school district view a temporary impairment? [Answer:] A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected

individual. In the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. [Question:] 34. Is an impairment that is episodic or in remission a disability under Section 504? [Answer:] Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504."

[9] It is important to note that as of January 1, 2009, the scope of disabilities covered pursuant to Section 504 did expand in accord with the Americans with Disabilities Amendments Act. According to the U.S. Department of Education's Office for Civil Rights, "Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating." See Id.

[10] For some students, their disability only impacts their behavior or thinking under certain conditions, or when exposed to certain triggers. Some students might only struggle to perform at a normal level in the classroom if they lose access to mental health providers and/or stabilizing medication. Many students with these types of disabilities could wind up needing special education if their disability becomes more severe, which could be triggered by an adverse/traumatic experience, or a change in medication. Some researchers argue that an effective universal screening tool, could help students receive earlier interventions that would help prevent deeper issues and in some cases diminish the need for special education among students of color. See Raines, T.C. (2012). Universal screening as the great equalizer: Eliminating disproportionality in special education referrals [Doctoral dissertation, Georgia State University]. https://scholarworks.gsu.edu/cps_diss/83/. This dissertation suggests that the use of student self-report universal screening instruments may diminish the overrepresentation of students of color in special education programs and guide early intervention for students at risk for behavioral and emotional disorders.

[11] It should also be noted that some have raised concerns that districts are using Section 504-only identification as a means to lower the numbers of students to whom they are obligated to provide special education. See Wright, P. & Wright, P. (2015, April 27). My child with a 504 plan is failing, school won't help: Your eligibility game plan. https://www.wrightslaw.com/info/sec504.idea.eligibility.htm (accessed January 8, 2021). On the other hand, others have suggested that meeting the needs of 504-only students in the general education classroom and providing earlier interventions to help students who are struggling academically have the potential to reduce the numbers of students who eventually are identified for special education with emotional disabilities or ADHD. See text in Part III and corresponding endnotes.

[12] The DoED guidance on ADHD explains the child find requirements further as follows: "It is important that school districts appropriately train their teachers and staff to identify academic and behavioral challenges that may be due to a disability so a student is referred for an evaluation under Section 504, if needed. Once a school district believes a student has a disability and needs special education or related services because of that disability, it must evaluate the existence of a disability by considering whether the student is substantially limited in his or her unmitigated state. This means, for example, that the school district cannot consider the ameliorative effects of any mitigating measures, for instance the ameliorative effects of the school district's intervention strategies, such as improved grades resulting from peer-tutoring in math, in determining whether the student has a disability but could consider them in determining the individual educational needs." U.S. Department of Education, Office for Civil Rights, *Dear colleague letter*, *supra* note 7, at 24.

[13] Id.

[14] Id. OCR's resource guide on Section 504 and ADHD and Section 504 provides the following example on page 15: "If a student is evaluated for the provision of services under the IDEA and is found ineligible because he or she does not need special education and related services because of the disability, the school district must still consider if the student could be covered by Section 504. This means the school district must determine whether or not the student has a disability for which he or she still might need regular education and related aids and services in order to receive FAPE under Section 504....".

[15] See U.S. Department of Education, Office of Civil Rights, *Protecting students with disabilities*, *supra* note 8, FAQ 33-34.

[16] Centers for Disease Control and Prevention (last reviewed 2021, January 28). Why act early if you're concerned about development? https://www.cdc.gov/ncbddd/actearly/whyActEarly.html. See also Harvard University Center on the Developing Child. Early childhood mental health. https://developingchild.harvard.edu/science/deep-dives/mental-health/. See also National Scientific Council on the Developing Child (2008/2012). *Establishing a level foundation for life: Mental health begins in early childhood: Working paper no. 6.* https://developingchild.harvard.edu/resources/establishing-a-level-foundation-for-life-mental-health-begins-in-early-childhood/.

[17] Historically, UCLA's Center for Civil Rights Remedies (CCRR) has explored racial inequity for students with disabilities, but never before has CCRR examined the data on students eligible only pursuant to Section 504. In our prior research CCRR has raised concerns about the over-identification and misidentification of certain racial groups for special education, especially with regard to district level over-identification for categories of disabilities associated with a higher risk for being removed from the mainstream, their placement in overly restrictive classrooms and disparities in discipline. These are featured in the edited volume of research published as the book entitled, *Racial Inequity in Special Education,* Losen & Orfield eds., Harvard Education Press, Cambridge, MA, 2001. Increasingly, the focus of our special education disproportionality concerns included legal challenges to the racially disparate disciplinary rates among students with and without disabilities. Kim, C., Losen, D.J., & Hewitt, D. (2012). *The School To Prison Pipeline: Structuring Legal Reform*. New York: New York University Press. In recent years, our reports have focused more attention documenting the much higher rates at which Black students with disabilities, identified pursuant to IDEA in particular, are subjected to high rates of disciplinary removal and lost instruction and large disparities when compared to their White peers. See Losen, D.J. (2018). *Disabling punishment: The need for remedies to the disparate loss of instruction experienced by Black students with disabilities.* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles. Based on the recent GAO analysis (U.S. Government Accountability Office (2018). *Discipline disparities for Black*

students, boys, and students with disabilities. Washington, DC: Author. https://www.gao.gov/assets/700/690828.pdf.) and our ongoing review of the disability discipline data (Losen, D.J, & Martinez, P. (2020). *Is California doing enough to close the school discipline gap?* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles. https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/is-california-doingenough-to-close-the-school-discipline-gap/.) However, the concerns with disparate identification, especially in the most subjectively determined and stigmatizing categories, as well as with racial disparities in restrictive placement remain very serious in many schools and districts across America.

[18] U.S. Department of Education, Office for Civil Rights (2014, March). *Data snapshot: School discipline*. https://time.com/wp-content/uploads/2015/02/crdc-school-discipline-snapshot.pdf. See also The Advocacy Institute, *Complete 504 analysis for 2011-12*. https://www.advocacyinstitute.org/resources/Overall.504StudentsCRDC2012.pdf.

[19] In a forthcoming report that will be posted at perryzirkel.com, attorney Perry Zirkel reviewed the individual school-level data and calculated the percentage of total enrollment for every school with at least 250 students in the CRDC for 2017-18. Using his posted file, we found that 10,952 schools enrolling 5,557,910 students identified no students as 504 eligible. However, the analysis in this report highlights mid- to large-sized districts where identifying zero students is far more unlikely to occur by chance.

[20] Originally there were 308, but we eliminated 2 districts that enrolled 100% students eligible pursuant to the IDEA. It is worth noting that 35 of these districts were charter school districts and enrolled 58,651 students.

[21] A charter school district could be comprised of one or more schools, all of which were flagged as charter schools in the CRDC database. Pursuant to many state laws charter schools are also independent districts, however in many jurisdictions their data are reported to the CRDC as if they were part of the school district in which they are located.

[22] Malkus, N. & Hatfield, J. (2017, February). Differences by design? Student composition in charter schools with different academic models. https://www.aei.org/wp-content/uploads/2017/02/Differences-by-Design.pdf?x88519.

[23] Recently, the state of Texas was found to have unlawfully capped IDEA eligibility at 8.5% of total enrollment. U.S. Department of Education, Office of Special Education and Rehabilitative Services (2016, October 3). *Letter to Commissioner Mike Morath of the Texas Education Agency*. https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/letter-to-mike-morath-10-03-2016.pdf.

[24] Although not depicted, according to the CRDC from 2017-18, it is worth noting that identification rates for eligibility under IDEA ranged from the high end of Maine and Massachusetts, each above 16.7%, to the low end of Texas and Idaho, both between 9 and 10%. Similar to the increasing numbers of 504-only rates, since 2015-16, state IDEA identification rates rose in all but three states, Alaska, Tennessee and Delaware, and none of the declines were more than half of one percentage point.

[25] Based on the CRDC data set, but analyzed by the Advocacy Institute in 2011-12, the White identification rate was 1.9% and 1.3% for Black students, while the mean that year was 1.5%.

[26] Our preliminary descriptive analyses might lend support to the theory that higher rates of IDEA eligibility for Black students could be related to low to zero rates of Black 504-only identification, or low rates for other groups for that matter, but further research is needed. We also observe that in many large districts, Blacks had low rates of 504 identification as well as low rates of IDEA identification. In others, Black students had higher-than-average rates for both 504-only and IDEA. Most importantly, when examining the possible over-representation for special education, researchers should consider 504-only identification rates along with many district-specific factors that might suggest reasons for the observed patterns including differential access to experienced and certified teachers, differential access to effective reading instruction, differences in eligibility for gifted and talented programs and access to AP classes, and school discipline disparities. In addition, researchers should also consider whether the district has a prior history of segregation or racial hostility, as well as other district-level factors that research suggests may contribute to inequities in educational opportunity. See Pearman, F.A., Curran, F.C., Fisher, B., & Gardella, J. (2019). Are achievement gaps related to discipline gaps? Evidence from national data. *AERA Open*, *5*(4). https://doi.org/10.1177/2332858419875440. Therefore, we caution against assuming that large districts with high IDEA identification rates are meeting the needs of all the students with disabilities, even if their identification rate for 504-only students is zero.

[27] See e.g., D.D. v LAUSD December, 2020, (9th Cir. 2020) Docket # No. 19-55810,
stating, "Three different federal statutes may come into play when a child with disabilities and his family assert education based claims of unlawful treatment: the IDEA, 20 U.S.C. §§ 1400–51; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("§ 504"); and Title II of the ADA, 42 U.S.C. §§ 12131–34…A federal remedy for school-based disability discrimination also may be available via 42 U.S.C. § 1983, which protects every "citizen of the United States or other person within [its] jurisdiction" against deprivations of federally secured rights effected by persons acting under the color of state law." See, e.g., Fry, 137 S. Ct. at 750 (noting a § 1983 claim brought under the Equal Protection Clause of the Fourteenth Amendment for the denial of a FAPE). Available at https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/31/19-55810.pdf.

[28] However, readers can use the spreadsheet that comes with this report to review the incidence of 0% rates for each group.

[29] In some cases, these districts had fewer than 1,000 students enrolled, so the analyses that follow for each subgroup often included more than 306 districts.

[30] For the racial analysis, we did not also apply a 1,000-student minimum. We also eliminated from the racial group analyses all schools enrolling 100% students identified pursuant to the IDEA.

[31] U.S. Department of Justice & U.S. Department of Education (2014, January 8). *Dear colleague letter on the nondiscriminatory administration of school discipline*. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf. See also U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions*, *supra* note 3.

[32] See e.g. See Baldwin Clark, L. (2018, November 7). Beyond bias: Cultural capital in antidiscrimination law. *Harvard Civil Rights-Civil Liberties Law Review (CR-CL)*.

[33] It is possible that in some districts, especially those with higher-than-average IDEA identification rates, districts were compensating for not offering any students services pursuant to Section 504 by using special education. That is certainly a possibility worthy of further investigation, but conducting that analyses is beyond the scope of this report. We did not detect any consistent pattern. As described herein, some of the states and many districts with lower-than-average 504 rates were also lower than average for IDEA. Higher-than-average 504 rates were among those with below-mean identification rates for IDEA.

[34] See García, E. & Weiss, E. (2020, October 16). Policy solutions to deal with the nation's teacher shortage—a crisis made worse by COVID-19. *Economic Policy Institute*. https://www.epi.org/blog/policy-solutions-to-deal-with-the-nations-teacher-shortage-a-crisis-made-worse-by-covid-19/. See also Bauerlein, V. & Koh, Y. (2020, December 15). Teacher shortage compounds Covid-19 Crisis in Schools. *Wall Street Journal.* https://www.wsj.com/articles/teacher-shortage-compounds-covid-crisis-in-schools-11608050176 (accessed January 14, 2021). See also Singer, N. (2021, January 19). Pandemic teacher shortages imperil in-person schooling. *The New York Times*. https://www.nytimes.com/2021/01/19/us/pandemic-substitute-teacher-shortages.html (accessed January 20, 2021).

[35] English learners, students with disabilities, and the major racial and ethnic groups all appear in the reporting and accountability requirements of the Every Students Succeeds Act (ESSA). In the accountability subsection of ESSA, Section 1111(d) of Public Law 129 does not specifically exclude students with disabilities eligible under Section 504-only. However, there is no requirement that this subgroup be explicitly reported on. At best, they are combined with students with disabilities identified pursuant to the IDEA. When ESSA was signed into law in 2016, this subgroup was only approximately 1.5% of all students enrolled. However, 504-only students are often included among those reported as students "without disabilities."

[36] For a complete discussion of the process available for challenging discipline pursuant to the IDEA see Kim, C., Losen, D., & Hewitt, D. (2010). "Students with disabilities" in *The School-to-Prison Pipeline* (pp. 51-77). New York, NY: New York University Press.

[37] U.S. Department of Education, Office of Special Education and Rehabilitative Services (2016, August 1). *Dear colleague letter on the inclusion of behavioral supports in Individualized Education Programs*. https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf. Although it is always discriminatory to punish students for behavior that is known to be caused by their disability, and although students with disabilities are entitled to a manifestation determination meeting to ensure this possibility is explored, the procedural safeguard of such a review is only triggered if the student is suspended for more than ten days in a given year. However, unlike the IDEA, the specific procedures pursuant to Section 504 students are not explicit in the federal statute. Along these lines, schools need to train teachers to ensure these students receive effective accommodations. Moreover, students with 504-only are, like those identified pursuant to IDEA, protected against disability discrimination, including methods of administration that "have the purpose or effect of defeating or substantially impairing accomplishment of the recipients program with respect to handicapped persons....." See 34 C.F.R. Section 104.4(b)(4).

[38] See 20 U.S.C. Section 1416. https://www.law.cornell.edu/uscode/text/20/6311.
Following the IDEA procedures will satisfy Section 504, but the 504 regulations are not as specific. A critical difference is that all states must have an administrative review process as is specified in the statute. But that procedural system is not available for Section 504-only students if they are not claiming that they should be eligible pursuant to the IDEA. Therefore, the appeals process for 504-only could entail filing a federal complaint with OCR or filing a lawsuit in federal court.

[39] Patel, P. & Clinedinst, M. (2019). State-by-state students-to-counselor ratio maps by school district. National Association for College Admission Counseling & American School Counselors Association. Available at:
https://www.nacacnet.org/globalassets/documents/publications/research/researchstateratiosreport.pdf.

[40] In an ideal district, students eligible for Section 504 supports and services, where appropriate, also receive nearly identical functional behavioral assessments and, behavioral intervention plans that students eligible under IDEA are entitled to receive. In addition, 504 protects all students from disability discrimination and that includes nearly identical manifestation determination hearings that can help students avoid punitive removal for behaviors caused by their disability.

[41] See U.S. Department of Education, Office for Civil Rights (2016). *Securing equal educational opportunity: Report to the President and Secretary of Education*, p. 10. https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf.

[42] Just as the data highlighted in Part I of this descriptive report do not prove that districts are failing identify to provide needed supports and services to students with disabilities under 504, the high rates and large disparities in disciplinary exclusion and chronic absenteeism described in Part II do not definitively prove that civil rights laws have been violated.

[43] Hilliard, A.G. (1992, October 1). The pitfalls and promises of special education practice. *Exceptional Children*, *59*(2), p. 168-172. https://doi.org/10.1177/001440299205900210.

[44] Fabelo, T., Thompson, M. D., Plotkin, M., Carmichael, D., Marchbanks III, M. P., & Booth, E. A. (2011, July). Breaking schools' rules: A statewide study of how school discipline relates to students' success and juvenile justice involvement. New York, NY: Council of State Governments Justice Center and Public Policy Research Institute. https://knowledgecenter.csg.org/kc/system/fles/Breaking_School_Rules.pdf. See also Skiba, R. J., Trachok, M., Chung, C. G., Baker, T., Sheya, A., & Hughes, R. (2015). "Where should we intervene? Contributions of behavior, student, and school characteristics to suspension and expulsion" in Losen, D. J. (Ed.). *Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion* (pp. 132–146). New York, NY: Teachers College Press.

[45] U.S. Government Accountability Office, *Discipline disparities*, *supra* note 17.

[46] Fabelo et al., *supra* note 44.

[47] Rosenbaum, J. (2018). Educational and criminal justice outcomes 12 years after school suspension. *Youth & Society, 00*(0). https://doi.org/10.1177/0044118X17752208.

[48] Pearman et al., *supra* note 26.

[49] Id.

[50] Morris, E. W., & Perry, B. L. (2016). The punishment gap: School suspension and racial disparities in achievement. *Social Problems*, *63*(1), pp. 68–86. https://academic.oup.com/socpro/article/63/1/68/1844875.
[51] Pearman et al., *supra* note 26.
[52] National Disability Rights Network (2019, October). *Probation referral: A model for diversion of children and youth with disabilities from the juvenile justice system*. https://www.ndrn.org/wp-content/uploads/2019/10/Probation_Referral_Report_FINAL_w_Appendices.pdf.
[53] Mittleman, J. (2018). A downward spiral? Childhood suspension and the path to juvenile arrest. *Sociology of Education*, *91*(3), pp. 183–204. https://doi.org/10.1177/0038040718784603.
[54] Balfanz, R., Byrnes, V., & Fox, J. (2015). "Sent home and put off track: The antecedents, disproportionalities, and consequences of being suspended in the 9th grade" in Losen, D.J. (Ed.). *Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion*. New York, NY: Teachers College Press. See also Rumberger, R.W., & Losen, D.J. (2017). *The hidden costs of California's harsh school discipline: And the localized economic benefits from suspending fewer high school students*. Los Angeles, CA: UCLA Civil Rights Project-Proyecto Derechos Civiles. https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-hidden-cost-of-californias-harsh-discipline/CostofSuspensionReportFinal-corrected-030917.pdf.
[55] Rumberger & Losen, *supra* note 54. As described in two recent economic analyses conducted by Russell Rumberger, when school administrators suspend a student from school, that action increased the risk for dropping out. Using individual student data and advanced statistical methods, Rumberger produced conservative estimates of how much the use of suspension was lowering graduation rates, nationally, as well as for several states, including California. Once Rumberger quantified the impact of suspensions on graduation rates, he was able to use the established economic research on the costs associated with not graduating high school to estimate what the costs savings would be if we suspended far fewer students. Rumberger found that suspensions lowered the graduation rate by approximately 7 percentage points, nationwide, for just one cohort, and the economic impact in social and governmental costs over the lifetime of one cohort of non-graduates is an estimated $35 billion.
[56] U.S. Government Accountability Office, *supra* note 17.
[57] Spreading out the days lost among all those enrolled, including the non-suspended and calculating the rate of lost instruction as a per-student rate, even though most students are not suspended would distort one's understanding of the impact of discipline on the entire group. Further, when districts record the days lost, they do not count suspensions of less than half a day and they only report the days in increments of whole days. Conceptually, therefore, reporting the loss of instruction in terms of the number of lost days per student would likely make the impact of suspensions seem trivial. Instead, this report provides a rate of lost instruction, as the days lost per 100 students, to illustrate that the direct impact on a group's educational opportunity is often greater than that conveyed by more common measures such as the risk for suspension or even the suspensions per 100.
[58] The spreadsheet for this report does provide rates of lost instruction and enables a comparison of these rates among three groups: students with disabilities identified for special education (IDEA); students with disabilities identified pursuant to Section 504-only; and students without disabilities. In general, students identified as 504-only, like students with disabilities (IDEA), lost more instructional time due to out-of-school suspension than their non-disabled peers. Specifically, for 504-only students in 2017-18, the rate of lost instruction across all K-12 grades was 30 days per 100 enrolled. This rate means they lost 11 more days per 100 than students without disabilities. Readers can find the Section 504 rates of lost instruction further broken down by gender for every district in the nation, with additional disaggregation at the elementary and secondary levels.
[59] Readers can find more information on rates of lost instruction for 504-only students, including data for every district in the spreadsheets published with this report. Unfortunately, the CRDC does not disaggregated any outcome data for race with disability for Section 504.
[60] If one were to use a rate ratio and ignore the absolute size of the differences, they might be inclined to think that the disability disparity was larger at the elementary level because 16/6 = 2.6 and that is a larger rate ratio than at the secondary level (65/31 = 2.1). We caution against using ratios to describe disparities when examining exposure to harmful practices like disciplinary exclusion as, undoubtedly, the disparity difference in real terms at 34 days per 100 at the secondary level is 3.4 times larger than the 10-day difference at the elementary level. For more on why we don't use ratios to describe these differences, please see the appendix.
[61] See Appendix B for a full explanation of how the IDEA was passed in response to successful lawsuits finding that districts that cited differences behavior and additional costs as grounds for denying students access to public schools were in violation of the Equal Protection Clause of the U.S. Constitution.
[62] See Appendix B.
[63] This is well established in the *PARC v. Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D. PA 1971), https://www.clearinghouse.net/chDocs/public/ED-PA-0002-0001.pdf and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), https://law.justia.com/cases/federal/district-courts/FSupp/348/866/2010674/, which led to the federal law known today as the Individuals with Disabilities Education Act. See also: Kim, C., Losen, D., & Hewitt, D. (2010). "Students with disabilities" in *The School-to-Prison Pipeline* (pp. 51-77). New York, NY: New York University Press.
[64] *Honig v. Doe*, 484 U.S. 305 (1988). https://supreme.justia.com/cases/federal/us/484/305/.
[65] See U.S. Department of Education (2017, December 7). *Questions and answers (Q&A) on U. S. Supreme Court case decision Endrew F. v. Douglas County School District Re-1*. https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf. Citing 20 U.S.C. 1414(d)(3)(B)(i) and 34 CFR §300.324(a)(2)(i) and (b)(2), and 20 U.S.C. 1414(d)(1)(A)(i)(I)-(IV) and 34 CFR §300.320(a)(4).
[66] Any intentional denial of a free appropriate public education on the basis of disability is unlawful discrimination. Technically, the structure of the IDEA's procedural protections would make it difficult to hold a school district liable for suspensions of less than 10 days with regard to any individual student. As the Supreme Court discussed in *Honig v. Doe*, *supra* note 64, the 10 days are meant to provide the schools and the parent(s) time to discuss a possible change of placement. However, if a district routinely suspended students for behavior caused by their disability, ignoring their own

knowledge, this systemic discriminatory treatment would likely be challengeable as a denial of FAPE. See *Mills v. Board of Education of District of Columbia*, *supra* note 63.

[67] See U.S. Department of Education, Office of Special Education and Rehabilitative Services, *supra* note 37. OSERS issued guidance in August 2016 on the legal obligations of educators to provide behavioral supports and services, including behavioral intervention plans for students with disabilities stating, on p. 2, "In keeping with this goal, this letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of the child's behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE." The letter lists many examples, such as described in the following excerpt: "A set of circumstances that may indicate that the child's IEP is not reasonably calculated to provide a meaningful educational benefit include, but are not limited to, the following:

- The child is displaying a pattern of behaviors that impede his or her learning or that of others and is not receiving any behavioral supports;
- The child experiences a series of disciplinary removals from the current placement of 10 days or fewer (which do not constitute a disciplinary change in placement) for separate incidents of misconduct that impede the child's learning or that of others, and the need for behavioral supports is not considered or addressed by the IEP team; or
- The child experiences a lack of expected progress toward the annual goals that is related to his or her disciplinary removals or the lack of behavioral supports, and the child's IEP is neither reviewed nor revised."

The letter provides numerous examples of how insufficient behavioral supports would likely be considered a denial of FAPE. DoED explicitly addresses a common misinterpretation of the law, stating, "We are concerned, however, that some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs. It has come to the Department's attention that there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as "free days.""

[68] There are several exceptions spelled out explicitly in the IDEA. See 20 U.S.C. § 1400. https://www2.ed.gov/policy/speced/leg/idea/idea.pdf.

[69] U.S. Department of Education, Office for Civil Rights, *Dear colleague letter*, *supra* note 7. As we noted earlier, the use of exclusionary disciplinary measures may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE, include or revise needed behavioral supports in the child's IEP. Such behavioral supports also may include supports for school personnel, so that teaching staff are trained in best uses of such behavioral supports.

[70] For example, in one recent study, the researchers relied on a very limited set of parental recall survey responses about discipline to assert that they "found no evidence" of disability discrimination which they defined as treating otherwise similarly situated students differently based on disability. The study design did not account for the possibility of disability discrimination that occurs when the behavior that is punished is known to be disability-caused, or resulted because of a failure by the district to provide FAPE. See Morgan, P.L., Farkas, G., Hillemeier, M.M., Wang, Y., Mandel, Z., DeJarnett, C., & Maczuga, S. (2019). Are students with disabilities suspended more frequently than otherwise similar students without disabilities? (2019). *Journal of School Psychology*, *72*, pp. 1-13. This study is deeply flawed in its design for many reasons with regard to students with disabilities and, therefore, its conclusions regarding students with disabilities should be totally disregarded. For another example, only a close read reveals the fact that, by design, the researchers assigned approximately half of all students with disabilities in their sample to be regarded as "students without disabilities." Therefore, when the researchers claim to have paired similarly situated students except for disability status, in some cases, these comparisons would likely have compared earlier identified students with disabilities to later-identified students with disabilities. Unfortunately, the authors fail to mention that the "without" disabilities group had about as many students with disabilities included in it as the "with" disabilities group had in total. Although the authors do not make the volume of reassigned students clear to readers, they took approximately half of the students with disabilities and re labeled them as belonging to the non-disabled group before conducting their comparisons. Moreover, the parental survey researchers relied upon did not ask about the provision of procedural safeguards, or whether the student needed or received mental health or behavioral supports and services (such as a behavioral intervention plan) although failing to do so would have been discriminatory in some cases. The sample Morgan and colleagues chose to use instead had no actual administrative discipline records. Further, the analysis was not designed to consider district-level policy differences or the possibility that some number of suspensions may have been issued pursuant to unjust or unsound disciplinary policies such as suspension for truancy or tardiness. Depending on the district context, such policies can be regarded as discriminatory under the disparate impact regulations pursuant to Section 504. In drawing their conclusions, the authors did not consider the possibility that some students in the sample may have been subjected to this type of discrimination. Another shortcoming is the fact that the sample collected no data on duration and therefore overlooked all differences in the total days of lost instruction, which, as this descriptive report demonstrates, are often quite profound. Cumulative days missed due to discipline is also the element that triggers mandatory procedural protections to protect against discriminatory discipline on the basis of disability, but the parental survey did not ask whether these protections or other behavioral supports and services were provided. However, it should be noted that, as part of the same study, the researchers found that Black students were 1.6 times more likely than similarly situated White students to be suspended and thereby repudiated a nearly identical study (Wright, J.P., Morgan, M.A., Coyne, M.A., Beaver, K.M., & Barnes, J.C. (2014). Prior problem behavior accounts for the racial gap in school suspensions. *Journal of Criminal Justice*, *42*, pp. 257-266), which was often cited to support the argument that Black students are not discriminated against in discipline. The fundamental difference was that the Wright et al. study failed to account for differences in the number of suspensions that the more recent study did count.

[71] Students with 504-only are, like those identified pursuant to IDEA, protected against disability discrimination, including methods of administration that "have the purpose or effect of defeating or substantially impairing accomplishment of the recipients program with respect to handicapped

persons....." See 34 C.F.R. Section. For a full discussion of disparate impact challenges pursuant to Section 504, see Kim, Losen & Hewitt, *supra* note 17 at 67-68 discussing federal case law with citations in corresponding endnotes 126 and 127. The analyses would not differ substantially from that provided in the aforementioned joint discipline guidance pertaining to Title VI issued in 2014, but rescinded under the Trump administration. See U.S. Department of Justice & U.S. Department of Education, *supra* note 31, which suggests the application of the framework under Title VI applies to discrimination on the basis of disability in footnote 4.

[72] To a limited extent, our analyses of California, and prior studies of discipline data in Massachusetts, do describe the extent to which questionable grounds for suspension contribute to the observed disparities along the lines of race and disability status.

[73] Losen, D. J., & Martinez, P. (2020). *Lost opportunities: How disparate school discipline continues to drive differences in the opportunity to learn.* Palo Alto, CA/Los Angeles, CA: Learning Policy Institute; Center for Civil Rights Remedies at the Civil Rights Project, UCLA. As we stated in that report, "If these alternative schools were better at meeting the needs of the students than traditional schools, the fact that they disproportionately enroll Black students and those with disabilities would not be troubling. However, students in these schools are losing far greater amounts of instruction than students are on average, and that is true even when we compare the alternative schools for grades K-12 to traditional schools only serving students at the secondary level."

[74] Whitaker, A., Torres-Guillen, S., Morton, M., Jordan, H., Coyle, S., Mann, A., & Sun, W.L. (2019). *Cops and no counselors: How the lack of school mental health staff is harming students.* New York, NY: American Civil Liberties Union. https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf. See also Juszczak, L., Melinkovich, P., & Kaplan, D. (2003). Use of health and mental health services by adolescents across multiple delivery sites. *Journal of Adolescent Health*, *32*(6), pp. 108-403. https://www.sciencedirect.com/science/article/abs/pii/S1054139X03000739.

[75] Losen & Martinez, *supra* note 73.

[76] Other studies have demonstrated that students with disabilities and Black students who are suspended are more likely to have received at least two suspensions than just one for a given year. Losen, D. J., & Gillespie, J. (2012). *Opportunities suspended: The disparate impact of disciplinary exclusion from school.* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles. https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-toprison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf.

[77] But it is instructive to note that very large racial disparities are found at the elementary level in some districts. Readers can look at the rates for students with disabilities for elementary and secondary students distinctly or across all grades using the spreadsheet available with this report.

[78] In Appendix B Table B3, readers can find a table with the secondary risk for suspension for each racial group for secondary students with disabilities (IDEA) for each of the 50 states for the 2017-18 school year. It is worth noting that in 2018-19, only 21 states identified at least one district for racial disproportionality among students with disabilities. However, in many of the states with the highest risk for suspension and the largest Black-White disparities, not a single district was identified. This same concern was highlighted regarding the 2015-16 school year in CCRR's report, *Disabling Punishment*. See Losen, *supra* note 17.

[79] We do not use risk ratios to describe racial differences in suspension rates because ratios do not reflect how high or low the underlying risks are for the groups being compared and therefore the risk difference gives a clearer sense of the additional risk experienced by the group suspended more often. For example, the same ratio of 2 to 1 describes a district where the higher suspended group, A, has a risk of 2% and the lower group, B, is only 1%. But the ratio of 2 to 1 does accurately describe a district where group A has a risk of 50% and group B has a 25% risk. The difference in the risk for suspension in absolute terms in group A is just 1 percentage point, but in group B, it is 25 percentage points, a disparity that is 25 times greater! If we agree that suspensions are harmful, then describing the 25-percentage-point difference in the risk for suspension is far superior at conveying the magnitude of the difference as it relates to children's exposure to harm.

[80] Because these disparities are racial as well as impacting SWDs, the U.S. DOED's OCR also has jurisdiction to review the data and initiate and investigation.

[81] In their most recent annual review under the subheading, Addressing the Inappropriate Use of Restraint and Seclusion on Students with Disabilities, OCR summarized two cases illustrating how inadequate psychological services and failing to provide or implement FBAs and BIPs can lead to inappropriate and traumatic discipline. In the first case, "OCR found that the district was in violation of Section 504 and Title II based on evidence that it had failed to implement the student's IEP (e.g., its provisions on behavioral support and counseling); consider whether compensatory education or counseling services were necessary; re-evaluate the student, despite evidence of which it was aware indicating that he was not receiving FAPE; initiate a Functional Behavioral Assessment for the student until 15 months after he entered the school; provide the student with psychological services; or remedy the traumatic effects of its restraint and seclusion of the student." In the second case, "OCR found that the district violated Section 504 and Title II based on evidence establishing that it denied the student FAPE when it repeatedly subjected him to seclusion, which traumatized the student; failed to reevaluate the student after his parents expressed concerns on several occasions about the traumatic impact of the seclusions on him; and failed to implement the student's IEP (including his Behavioral Intervention Plan), the complete implementation of which would likely have reduced the student misconduct that prompted the use of seclusion." See U.S. Department of Education, Office for Civil Rights. (2021, January). *Annual report to the Secretary, the President, and the Congress*, p. 38. https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf. See also Bauer, L., Liu, P., Schanzenbach, D.W., & Shambaugh, J. (2018). *Reducing chronic absenteeism under the Every Student Succeeds Act*. Washington, DC: The Hamilton Project, Brookings Institution. https://www.atendanceworks.org/wp-content/uploads/2018/04/Hamilton_project_-reducing_chronic_absenteeism_under_the_every_student_succeeds_act.pdf. See also Whisman, A., & Hammer, P. C. (2014). *The association between school discipline and mathematics performance: A case for positive discipline approaches*. Charleston, WV: West Virginia Department of Education. https://fles.eric.ed.gov/fulltext/ED569903.pdf. For low achievement scores, one will find that among students with disabilities, there are large and persistent racial disparities in achievement scores for math and reading in grades 4 and 8 on the National Assessment of Educational Progress (NAEP)

and that for most groups, including students with disabilities, the scores on the 2019 NAEP were lower than in previous years. See National Center for Education Statistics. The nation's report card: Students with disabilities and NAEP assessments. https://www.nationsreportcard.gov/focus_on_naep/#/reports/students-with-disabilities/closerlook. For example, for grade 4 reading, the average scale score for Black students with disabilities was 170 and 197 for Whites: a difference of 27 points. That same year, there was a difference in scale score of 27 points for their non-disabled peers, but larger racial gaps were found for their non-disabled peers in other subjects and grade levels.

[82] Okonofua, J.A. & Eberhardt, J.L. (2015). Two strikes: Race and the disciplining of young students. *Psychological Science*, 26, pp.617–624. https://doi.org/10.1177/0956797615570365. See also Okonofua, J.A., Paunesku, D., & Walton, G.M. (2016). Brief intervention to encourage empathic discipline cuts suspension rates in half among adolescents. *Proceedings of the National Academy of Sciences*, 113(19), pp. 5221–5226. https://doi.org/10.1073/pnas.1523698113. See also Gilliam, W.S., Maupin, A.N., Reyes, C.R., Accaviti, M., & Shic, F. (2016). *Do early educators' implicit biases regarding sex and race relate to behavior expectations and recommendations of preschool expulsions and suspensions?* New Haven, CT: Yale University, Yale Child Study Center. https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_fnal_9_26_276766_5379_v1.pdf. See also Starck, J.G., Riddle, T., Sinclair, S., & Warikoo, N. (2020, April 14). Teachers are people too: Examining the racial bias of teachers compared to other American adults. *Educational Researcher*, *49*(4). https://doi.org/10.3102/0013189X20912758.

[83] As this article indicates, this is especially problematic for Blacks. See Rauf, D. (2020, June 21). Black Americans have been hit hardest by COVID-19—here's why. *Everyday Health*. https://www.everydayhealth.com/infectious-diseases/coronavirus/black-americans-have-been-hit-hardest-by-covid-19/. However, the impact is also true for Latinx. See Upham, B. (2021, January 21). COVID-19 projected to shorten life expectancy in the U.S. by over a year, researchers say. *Everyday Health*. https://www.everydayhealth.com/coronavirus/covid-19-projected-to-shorten-life-expectancy-in-the-us/.

[84] Treiman, S.K. (2018, November 5). Racism's chronic stress effects start early in children, study finds. *Everyday Health*. https://www.everydayhealth.com/wellness/united-states-of-stress/racisms-chronic-stress-effects-start-early-children-new-study-finds/.

[85] The data can be found online on the DoED's website under "618 Data, Part B." There are no district level files. https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html

[86] Fierros, E.G. & Conroy, J.W. (2002). "Double jeopardy: An exploration of restrictiveness and race in special education" in Losen, D.J. & Orfield, G. (Eds.). *Racial Inequity in Special Education*. Cambridge, MA: Harvard Education Press.

[87] Osher, D.M., Woodruf, D., & Sims, A. "Schools make a difference: The over-representation of African American youth in special education and the juvenile justice system" in Losen, D.J. & Orfield, G. (Eds.). *Racial Inequity in Special Education*. Cambridge, MA: Harvard Education Press.

[88] There are separate data reported for students with disabilities, disaggregated for each state and the nation. See Losen, D., Hodson, C., Keith II, M.A., Morrison, K., & Belway, S. (2015). *Are we closing the school discipline gap?* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles. http://www.schooldisciplinedata.org/ccrr/docs/AreWeClosingSchoolDisciplineGap_UCLA_219.pdf.

[89] Osher et al., *supra* note 87. See also Osher, D.M., Poirier, J.M., & Jarjoura, G.R. (2015). "Avoid quick fixes: Lessons learned from a comprehensive districtwide approach to improve conditions for learning" in Losen, D.J. (Ed.). *Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion* (pp. 192–206). New York, NY: Teachers College Press. There are data for each disability type by educational environment and in 2018-19, according to data published separately by the DoED pursuant to section 618(a) of the IDEA, 2% of all students with ED were educated in a correctional facility.

[90] 618 references the public law section number of the IDEA which is identical to 20 U.S.C. Section 1418. U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, *supra* note 85.

[91] Id.

[92] Cross, C.T. & Donovan, M.S. (Eds.) (2002). *Minority Students in Special and Gifted Education*. Washington, DC: The National Academics Press. https://doi.org/10.17226/10128; Fierros & Conroy, *supra* note 86.

[93] (2019). "G: The Miseducation of Larry P." *Radiolab.* https://www.wnycstudios.org/podcasts/radiolab/articles/g-miseducation-larry-p. See also Vaughn G. v. Mayor and City Council of Baltimore (1984). https://www.clearinghouse.net/detail.php?id=10959. See also Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967). https://law.justia.com/cases/federal/district-courts/FSupp/267/458/1895721/.

[94] Fierros & Conroy, *supra* note 86.

[95] See U.S. Department of Education, in U.S. Department of Education, Office of Special Education Programs (2016). *38th annual report to Congress on the implementation of the Individuals with Disabilities Education Act, 2016*Table 70 on page 153 available at www.ideadata.org.

[96] See Table 71, Id., at 156. When concerns about overrepresentation of children of color in special education are raised, many contextual factors are then explored alongside the numerical differences. For exa mple, it is more problematic if Black children are overidentified in the most subjective and stigmatizing disability categories, and where over-identification for such categories also entails a high risk of removal from the classroom. Concerns are elevated when Black children who attend schools in wealthy and mostly White suburbs are also relegated to restrictive settings that are also disproportionately populated by Black children.

[97] U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, *supra* note 85.

[98] Osher et al., *supra* note 87.

[99] U.S. Department of Health and Human Services & U.S. Department of Education (2014, November). *Policy statement on expulsion and suspension policies in early childhood settings*, p. 3. https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf.

[100] See Every Student Succeeds Act. (2015). 20 U.S.C. Section 6311(h). https://www.law.cornell.edu/uscode/text/20/6311.

[101] See U.S. Department of Education, *Data Snapshot*, *supra* note 18.

[102] See e.g., Elliott, K., Goodkind, S., Makoshi, G., & Shook, J. Disrupting pathways to juvenile justice for youth in Allegheny County. Black Girls Equity Alliance. https://www.endzerotolerance.org/disrupting-jj-pathways.
[103] Losen & Martinez, *supra* note 73.
[104] Therefore, we removed 30 additional large districts because they reported arrests but no referrals, a clear reporting error.
[105] We have made a spreadsheet available with more details on all the policing data for these 811 districts.
[106] Because so many districts reported zeros, CCRR does not believe accurate national or state averages can be calculated, and therefore we also provide no state rankings.
[107] On the other hand, these district data should not be confused with state averages or be regarded as statistically representative samples from each state.
[108] We did not adjust the sample further but should mention that in many of the remaining districts there were less than 100 White secondary students with disabilities (IDEA).
[109] It is worth reiterating that all the districts in this subsample met the original conditions for the 811 districts which included that students with disabilities (IDEA) had a referral rate of at least 2%.
[110] We reviewed the data for all White students in these 4 districts and found that Whites without disabilities were referred to law enforcement that same year. A downloadable spreadsheet with the referral rates for the 811 districts will be posted along with this report. The secondary data was pulled in accord with the methods described in the appendix and follows the same exact process as our prior peer-reviewed reports used for the CRDC data from 2015-16. Losen & Martinez, *supra* note 73.
[111] In 17 districts, their referral rate was lower than their White peers. In an additional 18 districts, the racial difference in referral rates showed Black rates were less than 1 percentage point higher.
[112] Each of these featured districts had to meet the following additional criteria: 1) at least 1,000 students enrolled, 2) at least 100 Black students with disabilities (IDEA) enrolled, 3) at least 100 White students with disabilities (IDEA) enrolled.
[113] See email correspondence with Diane Smith-Howard, February 17, 2021.
[114] For more information on this topic, see Cortiella, C. & Boundy, K.B. (2018). *Chronic absenteeism and students with disabilities: Health status of students with disabilities: Impact on attendance*. https://nceo.umn.edu/docs/OnlinePubs/ChronicAbsenteeismHealthIssuesSWD.pdf; Cortiella, C. & Boundy, K.B. (2018). *Chronic absenteeism: Recognizing child find obligations*. https://nceo.umn.edu/docs/OnlinePubs/ChronicAbsenteeismChildFindObligations.pdf; Cortiella, C. & Boundy, K.B. (2018). *Chronic absenteeism and students with disabilities: Frequently asked questions*. https://nceo.umn.edu/docs/OnlinePubs/ChronicAbsenteeismFAQ.pdf.
[115] Bauer et al., *supra* note 81.
[116] U.S. Department of Education, Office for Civil Rights, *Master list of 2015–2016 CRDC definitions*, *supra* note 3.
[117] Batel, S., Sargrad, S., & Jimenez, L. (2016, December 8). Innovation in accountability. Center for American Progress. https://www.americanprogress.org/issues/education-k-12/reports/2016/12/08/294325/innovation-in-accountability/.
[118] See U.S. Department of Education. Chronic absenteeism in the nation's schools. https://www2.ed.gov/datastory/chronicabsenteeism.html?src=pr. Although chronic absenteeism was dropped from the CRDC in 2017, the data from the prior year were presented for every district in map format. We highlight Florida because most of the state's districts enrolled at least 1,000 students.
[119] See 20 U.S.C. Section 1418.
[120] The CRDC for the 2017-18 school year was released to the public in October of 2020, which was 2 years and 2 months after the close of the 17-18 school year. U.S. Department of Education (2020, October 15). U.S. Department of Education releases 2017-18 Civil Rights Data Collection. https://www.ed.gov/news/press-releases/us-department-education-releases-2017-18-civil-rights-data-collection.
[121] Technically, the IDEA at 20 U.S.C. Sec 1418(c) specifically authorizes the Secretary to collect any data not described in Section 1418(a) that the Secretary deems necessary. Part of fully funding the IDEA would include providing sufficient resources to the federal DoED to more effectively monitor and enforce the law.
[122] Losen & Martinez, *supra* note 73.
[123] St. George, D. & Strauss, V. (2021, January 21). Partly hidden by isolation, many of the nation's schoolchildren struggle with mental health. *Washington Post*. https://www.washingtonpost.com/local/education/student-mental-health-pandemic/2021/01/21/3d377bea-3f30-11eb-8db8-395dedaaa036_story.html.
[124] See U.S. Department of Health & Human Services, Centers for Disease Control and Prevention. Preventing adverse childhood experiences. https://www.cdc.gov/violenceprevention/aces/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Ffastfact.html.
[125] Id.
[126] See Lowenstein, K. (2018). *Shutting down the trauma to prison pipeline early, appropriate care for child-welfare involved youth*, p. 3. Citizens for Juvenile Justice. https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b47615e6d2a733141a2d965/1531404642856/FINAL+TraumaToPrisonReport.pdf.
[127] García, E. & Weiss, E. (2020, September 10). COVID-19 and student performance, equity, and U.S. education policy. *Economic Policy Institute*. https://www.epi.org/publication/the-consequences-of-the-COVID-19-pandemic-for-education-performance-and-equity-in-the-united-states-what-can-we-learn-from-pre-pandemic-research-to-inform-relief-recovery-and-rebuilding/.
[128] Id.

[129] American Academic of Pediatrics & American Public Health Association (2015, October 13). *Racism and its impact on children's health*. https://www.aap.org/en-us/Documents/cocp_racism_child_health.pdf.
[130] See *P.P. v. Compton Unified Sch. Dist.,* 135 F. Supp. 3d 1098, 1110-11 (C.D. Cal. 2015).

[131] See 2018 WL 1871457, United States District Court, D. Arizona. See also Benjamin C. Hattem, *Carceral Trauma and Disability Law, 72 STAN. L.REV. 995 (2020)* at 1019-1026, summarizing the research on ACEs and how the courts in *P.P. v. Compton Unified School District*, as well as in *Stephen C.,* decided that the previously unaddressed trauma in each case could establish that each plaintiff had a disability pursuant to Section 504, including the following summary of the *P.P.* case, "The plaintiffs argued that the hyperarousal that traumatized people often experience can degrade their ability to process verbal information and communicate, making it difficult or impossible to learn and participate in school [citation omitted]. Denying the school district's motion to dismiss, the district court found that the plaintiffs had 'adequately alleged, at least, that complex trauma can result in neurobiological effects constituting a physical impairment.' [citation omitted]. Notably, the court rejected the school district's argument that the alleged trauma amounted only to "environmental, cultural, and economic disadvantages" not covered by Title II or section 504, noting that the complaint 'alleges the impact of trauma, not the impact of economic disadvantages.' Citing *P.P. v. Compton Unified Sch. Dist.,* 135 F. Supp. 3d 1098, 1110-11 (C.D. Cal. 2015). at 1109 (quoting Memorandum of Points & Authorities in Support of Defendants' Motion to Dismiss Plaintiffs' Class Action Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 10, P.P., 135 F. Supp. 3d 1098 (No. 2:15-cv-03726), 2015 WL 7687767, ECF No. 41)."
[132] See 2018 WL 1871457, United States District Court, D. Arizona.
[133] See U.S. Department of Education, Office for Civil Rights (2016). *Report to the President and Secretary of Education*. https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf. OCR co-sponsored a conference called "Trauma-Informed Approaches in School: Supporting Girls of Color and Rethinking Discipline." The one-day convening brought together states and districts, key researchers and experts, and nonprofit partners to focus on improving school systems' approach to better serve girls of color who have experienced trauma.
[134] Id., at 34.
[135] Dahm, D. (2021, February 1). *FDLE seeks witnesses, videos after Liberty High School student slammed to ground*. Orlando.com. https://www.clickorlando.com/news/local/2021/02/01/fdle-seeks-witnesses-videos-after-liberty-high-school-student-slammed-to-ground/.
[136] See the following three recent video clips: *Police body cam video shows arrest of 6-year-old at Florida school*. (2020, February 27). https://www.nytimes.com/video/us/100000007002916/police-body-cam-video-shows-arrest-of-6-year-old-at-florida-school.html; *Video shows resource officer slam child to the ground*. (2019, December 15). https://www.cnn.com/videos/us/2019/12/15/north-carolina-body-slam-resource-officer-vpx.cnn; *Police officer resigns after video shows him using excessive force on an 11-year-old girl* (2019, October 24). https://www.vox.com/identities/2019/10/24/20929397/police-officer-excessive-force-school-11-year-old-girl-new-mexico. See also Goldstein, D. (2020, June 12). Do police officers make schools safer or more dangerous? *The New York Times*. https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html. See also Advancement Project. *We came to learn: A call to action for police-free schools*, pp. 70-74. https://advancementproject.org/wecametolearn/. This report chronicles school-based incidents of abusive/excessive actions by police on public school campuses.
[137] See National Disability Rights Network (2015, June). *Orphanages, training schools, reform schools and now this?* https://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_-_Juvenile_Justice_Report.pdf. See also Act 4 Juvenile Justice (2014, August). Juvenile justice and mental health and substance use disorders fact sheet. https://act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Mental%20Health%20Fact%20Sheet%20August%202014%20FINAL.pdf. See also Skowyra, K.R. & Cocozza, J.J. (2015, May). *Blueprint for change: A comprehensive model for the identification and treatment of youth with mental health needs in contact with the juvenile justice system*. National Center for Mental Health and Juvenile Justice. http://njjn.org/uploads/digital-library/resource_349.pdf. See also Teplin, L.A., Abram, K.M., Washburn, J.J., Welty, L.J., Hershfield, J.A., & Dulcan, M.K. (2013, February). The Northwestern Juvenile Project: Overview. *U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.* Washington, DC. http://www.ojjdp.gov/pubs/234522.pdf. See also The Mental Health and Juvenile Justice Collaborative for Change (2014, January 22). *Better solutions for youth with mental health needs in the juvenile justice system*. http://www.modelsforchange.net/publications/519.
[138] Sitrin, C. (2020, September 9). Proposed cuts to New Jersey school-based mental health services 'unconscionable,' educators say. *Politico*. https://www.politico.com/news/2020/09/09/new-jersey-mental-health-schools-410774.
[139] Lowenstein, *supra* note 126.
[140] Specifically, as one researcher summarized in her dissertation: "…students who suffer from behavioral and emotional problems are more likely to have lower academic achievement (NLST-2, 2004; Pastura, Mattos, & Prufer de Queiroz Campos Araujo, 2009), more social difficulties (Andrade, Brodeur, Waschbusch, Stewart, & McGee, 2009; NLST-2, 2004; Wahlstedt, Thorell, & Bohlin, 2008), higher rates of later mental health problems (Lewinsohn, Gotlib, & Seeley, 1995), and more involvement in the criminal justice system (Bradley et al., 2008)..."...early detection/intervention (is perhaps) the most powerful course of action in ameliorating lifelong problems associated with children at risk for emotional/behavioral disorders" (Hester et al., 2003, p. 363). Chin, J. (2012). *Examining and predicting longitudinal trajectories of behavioral and emotional risk in students* [Doctoral dissertation, University of California, Santa Barbara]. See also St. George & Strauss, *supra* note 123. The Washington Post article reviewed a prior meta-analysis. The review, published in November in the Journal of the American Academy of Child & Adolescent Psychiatry, looked at 63 relevant studies — including 51,576 children — between 1946 and 2020, including a retrospective investigation after an earlier pandemic." The meta-analysis concludes, "Clinical services should offer preventive support and early intervention where possible and be prepared for an increase in mental health problems." See also Loades, M.E., Chatburn, E., Higson-Sweeney, N., Reynolds, S., Shafran, R., Brigden, A., Linney, C., McManus, M.N., Borwick, C., & Crawley, E.

(2020, June 3). Rapid systematic review: The impact of social isolation and loneliness on the mental health of children and adolescents in the context of COVID-19. *J Am Acad Child Adoles Psychiatry*, *59*(11), pp. 1218-1239. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7267797/.

[141] St. George & Strauss, *supra* note 123.

[142] Centers for Disease Control and Prevention (n.d.). Facts about mental disorders in U.S. children. https://www.cdc.gov/childrensmentalhealth/data.html (accessed January 8, 2021).

[143] Id.

[144] Bitsko, R. H., Holbrook, J. R., Ghandour, R. M., Blumberg, S. J., Visser, S. N., Perou, R., & Walkup, J. T. (2018). Epidemiology and impact of health care provider-diagnosed anxiety and depression among US children. *Journal of Developmental and Behavioral Pediatrics, 39*(5), 395–403. https://doi.org/10.1097/DBP.0000000000000571.

[145] St. George & Strauss, *supra* note 123. See also Leeb, R.T., Bitsko, R.H., Radhakrishnan, L., Martinez, P., Njai, R., & Holland, K.M. (2020, November 13). Mental health–related emergency department visits among children aged <18 years during the COVID-19 Pandemic — United States, January 1–October 17, 2020. MMWR Morb Mortal Wkly Rep 2020;69:1675–1680. http://dx.doi.org/10.15585/mmwr.mm6945a3.

[146] Eklund, K., Renshaw, T. L., Dowdy, E., Jimerson, S. R., Hart, S. R., Jones, C. N., & Earhart, J. (2009). Early identification of behavioral and emotional problems in youth: Universal screening versus teacher-referral identification. *The California School Psychologist, 14*(1), pp. 89-95. https://doi.org/10.1007/BF03340954. See also Chin, *supra* note 140. However, it should be noted that early identification and provision of supports and services does not necessarily mean IDEA or Section 504 eligibility. Other researchers have expressed that by preventing more serious disorders, early intervention can help reduce over-identification pursuant to the IDEA.

[147] Whitaker et al., *supra* note 74.

[148] Although beyond the scope of this report, the data do suggest that there are federal and state funds being dedicated to having police on campus even when counselors and student support staff are in short supply. As CCRR pointed out in our recent national report, *Lost Opportunities,* "The effort to deter school shootings is likely one contributing factor to the increase in police on campus, but the research available does not indicate that armed security guards deter school shooters." See Yablon, A. (2019, April 6). Do armed guards prevent school shootings? *The Trace*. https://www.thetrace.org/2019/04/guns-armed-guards-school-shootings/. For example, Professor Aaron Kupchik, an expert on school policing, has argued that there is no evidence showing that school police prevent school shootings. Nor does research show that having police on campus reduces student crime. There is evidence that the presence of SROs results in criminalization of routine discipline issues, with students being sent to juvenile court rather than to the principal's office. See Kupchik, A. (2010). *Homeroom Security: School discipline in an age of fear*. New York, NY: NYU Press; Kupchik, A. (2016). *The Real School Safety Problem: The long-term consequences of harsh school punishment*. Oakland, CA: University of California Press. Losen & Martinez, *supra* note 73.

[149] Although our recent research on school policing did not examine the impact by disability status, CCRR was able to take a closer look at the data on security personnel and lost instruction for all of the high schools in California. Using the 2015-16 OCR data, we developed a way to detect whether having more security staff was related to higher rates of lost instruction for high school students in California. Specifically, in a recently released report called *Is California Doing Enough to Close the School Discipline Gap?*, CCRR examined the relationship between days of lost instruction and different levels of staffing in California high schools. That study found a positive relationship between security staff-to-student ratios and rates of lost instruction for all students, after controlling for poverty. That is, across the group of schools, an increase in the security staff-to-student ratio was related to an increase in the rate of lost instruction. In addition, the CCRR report contains a sub-analysis across all the high schools in California that had at least 100 Black students and found that there was an even stronger positive association between an increase in the security staff-to-student ratio and an increase in rates of lost instruction for Black students. Across this subset of high schools, the study also found that an increase in the support staff-to-student ratio was associated with a decrease in the rate of lost instruction for Black students. CCRR's recent study is the first to describe and association between higher rates of lost instruction and higher security staff-to-student ratios in California, but other national studies have had similar findings, suggesting that when police are in our schools, they either get directly involved in routine school discipline or their presence indirectly contributes to a harsher, more exclusionary climate. See Losen & Martinez, *supra* note 17. For additional discussion of additional research regarding potential harms from school policing see, Losen & Martinez, *supra* note 73. For additional research findings suggesting harms from adding police to school campuses, see Fisher, B.W., & Hennessy, E.A. (2016). School resource officers and exclusionary discipline in U.S. high schools: A systematic review and meta-analysis. *Adolescent Research Review*, 1, pp. 217–233; Weisburst, E. (2018). Patrolling public schools: The impact of funding for school police on student discipline and long-term education outcomes. *Journal of Policy and Management*, 38, pp. 338-365.

[150] National Association of School Psychologists (2020). https://www.nasponline.org/research-and-policy/policy-priorities/critical-policy-issues/shortage-of-school-psychologists

[151] Patel & Clinedinst, *supra* note 39.

[152] This observation is based on a preliminary unpublished summary of each state's education spending from COVID-19 relief funding, and may change before this report is published.

[153] See Figure 1a in Jackson, D. & Bowdon, J. (2020, October). *Spotlight on students with disabilities*, p. 5. American Institutes for Research. https://www.air.org/sites/default/files/COVID-Survey-Spotlight-on-Students-with-Disabilities-FINAL-Oct-2020.pdf.

[154] See Stanford University, The Center for Research on Education Outcomes (2020, October). *Estimates of learning loss in the 2019-2020 school year*. https://credo.stanford.edu/sites/g/files/sbiybj6481/f/short_brief_on_learning_loss_final_v.3.pdf. The researchers concluded, "...the recovery of the 2019-2020 losses could take years. Additional losses incurred in the current year further impact the timeline. The underlying variations in 2019-2020 learning losses highlight the fact that school closures had highly differentiated impacts, with disadvantaged students generally suffering much more than students from advantaged families." Id. at p.7

[155] See Advocacy Institute, *supra* note 18. See also National Center for Education Statistics, *supra* note 81.

[156] National Disability Rights Network (2012, March). *School is not supposed to hurt.* https://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf.
[157] Jackson & Bowdon, *supra* note 153.
[158] Homelessness and lawsuits over internet access. See GlobalData Technology (2021, January 6). Lawsuit puts focus on spotty cellular coverage in New York City. *Verdict*. https://www.verdict.co.uk/lawsuit-cellular-coverage-nyc/.
[159] Jones, C. (2020, May 4). California's homeless students at risk of falling through the cracks during pandemic. *EdSource*. https://edsource.org/2020/californias-homeless-students-at-risk-of-falling-through-the-cracks-during-pandemic/630638.
[160] Klein, R. (2020, August 11). The new school suspension: Blocked from online classrooms. *HuffPost*. https://www.huffpost.com/entry/school-discipline-remote-learning_n_5f329829c5b64cc99fde4d64.
[161] Los Angeles Unified School District Independent Analysis Unit (2020, July). *Student engagement online during school facilities closures: An analysis of L.A. Unified secondary students' schoology activity from March 16 to May 22, 2020*, p. 3. http://laschoolboard.org/sites/default/files/IAU%20Report%202020%200707%20-%20Student%20Engagement%20Online%20During%20Closures.pdf. This is the product of the Independent Analysis Unit of LAUSD.
[162] Id.
[163] See Santibañez, L. & Guarino, C. (2020, October). *The effects of absenteeism on academic and social-emotional outcomes: Lessons for COVID-19*. https://edpolicyinca.org/sites/default/files/2020-10/pb_santibanez_oct2020_12.pdf.
[164] Id., at 10.
[165] Los Angeles Unified School District Independent Analysis Unit, *supra* note 161.
[166] Blanco, A. (2020, November 27). Fewer high-needs and minority students showing up to School in Connecticut amid coronavirus surge. *Hartford Courant.* https://www.courant.com/news/connecticut/hc-news-connecticut-school-attendance-20201127-6dqpvzlrcneevccedzxw2fvr7q-story.html. Data available at http://edsight.ct.gov/relatedreports/Supporting%20Student%20Participation%20in%202020-21.html.
[167] García & Weiss, *supra* note 127.
[168]See Zimmerman, A. (2021, February 10). 1 in 4 NYC students with disabilities aren't getting mandated services this school year, new data shows. *Chalkbeat*. https://ny.chalkbeat.org/2021/2/10/22277334/special-education-coronavirus-nyc
[169] See Bamberger, C., Butrymowicz, S., Mader, J., & Preston, C. (2020, December 18). Thousands of families in special education limbo. *The Hechinger Report*. https://hechingerreport.org/thousands-of-families-in-special-education-limbo/.
[170] Whittaker, M. (2020, November). *Navigating special education evaluations for Specific Learning Disabilities (SLD) amid the COVID-19 pandemic*. National Center for Learning Disabilities & National Association of School Psychologists. https://www.ncld.org/wp-content/uploads/2020/11/Navigating-Special-Education-Evaluations-for-Specific-Learning-Disabilities-SLD-Amid-the-COVID-19-Pandemic.pdf.
[171] Gregory, A., & Evans, K.R. (2020). *The Starts and Stumbles of Restorative Justice in Education: Where Do We Go from Here?* Boulder, CO: National Education Policy Center. http://nepc.colorado.edu/publication/restorative-justice. See also Sugai, G. & Horner, R.H. (2019, July 2). Sustaining and scaling positive behavioral interventions and supports: implementation drivers, outcomes, and considerations. *Exceptional Children*, *86*(2). https://doi.org/10.1177/0014402919855331.
[172] Adelman, H.S. & Taylor, L. (in press). *Embedding Mental Health as Schools Change.*
[173] According to America's Superintendent's association AASA, in a letter to Congress dated July 3, 2020, and signed by 30 other organizations representing teachers, parents, principals, school board members, and students with disabilities,
"Since its inception in 1975, IDEA has protected students with disabilities by ensuring access to a free appropriate public education. At the time the sta tute was enacted, Congress promised to pay 40 percent of the National Average per Pupil Expenditure. While special education funding has received si gnificant increases over the past 17 years, federal funding has leveled off recently and has even been cut. The closest the federal government has com e to reaching its 40 percent commitment was 18 percent in 2005." Available at: https://www.aasa.org/uploadedFiles/AASA_Blog(1)/FY21%20IDEA%20Full%20Funding%20Letter%20FINAL%20070320(1).pdf.
[174] When Congress signed the IDEA into law, there was a general belief that the per pupil expenditures to educate an IDEA-eligible student was approximately double that of a student without disabilities and that federal funding would cover as much as 40% of the excess costs. As the late Vermont Senator James M. Jeffords points out in his foreword to the book, *Racial Inequity in Special Education:* In 1975, "We all believed that since this was a federal constitutional guarantee the federal government should bear a good portion of the cost." See Jeffords, J.M. (2002). "Foreword" in Losen, D.J. & Orfield, G. (Eds.) *Racial Inequity in Special Education*. Cambridge, MA: Harvard Education Press. When the IDEA was reauthorized in 2001, Senator Jeffords, who was the Republican Chair of the Senate HELP committee, faced strong opposition from President Bush and Republicans on his own committee who blocked the Bill he sponsored which would have appropriated enough funds to reach 40% of full funding by 2007. Republicans cynically claimed that the full funding should be withheld until racial disproportionality in special education was fixed. In response to this rebuke and cynical attempt by some Republicans in the House to use the concerns about racial inequity highlighted in the book to peel off Democrats, most of whom supported the full funding Bill opposed by Sen. Jeffords' fellow party members, the Senator declared himself an independent. Nothing in the book, a product of the Civil Rights Project, suggested limiting federal funds for special education.
[175] Wright, P.W. & Wright. P.D. (2007). "A short history of special education law" in *Wrightslaw: Special Education Law*. Hartfield, VA: Harbor House Law Press.
[176] Once one acknowledges that all students have a right to an education, at least under state constitutions, and that each child comes to school with different levels of needs that must be met in order to have an opportunity to learn, the total cost of meeting the full spectrum of needs is the cost of educating the children. Unfortunately, in the public discourse, the cost of meeting the needs of students with disabilities is often discussed as an "added" cost. From a human rights perspective, the obligation to meet the fundamental human rights of all children to be educated is an equitable

concept. See UN General Assembly (1989, November 20). *Convention on the rights of the child*. United Nations, Treaty Series, vol. 1577, p. 3. https://www.refworld.org/docid/3ae6b38f0.html.

[177] See Kim, C., Losen, D.J., & Hewitt, D. (2012). "The Right to Education" in *The school to prison pipeline: Structuring legal reform*. New York, NY: New York University Press (describing how pursuant to the DeRolph litigation the Ohio State legislature has failed to enforce the finding that Ohio's distribution of education funding violates the state's Constitution). See also United Teachers Los Angeles (2016, May). *Review: Fiscal Impact of Charter Schools on LAUSD.* Tallahassee, FL: MGT of America. http://thecostofcharterschools.org/ccs/eir/.

[178] Senator Jeffords switched his party affiliation from Republican to Independent because he could not get his Republican colleagues to meet the 40% "full funding" promise when he was the Chairman of the Senate Health Education Labor and Pensions committee. One exception is that after the recent recession Congress made a one-time infusion under ARRA that pushed this to 33%.

[179] Dragoo, K.E. (2019, August 29). *The Individuals with Disabilities Education Act (IDEA) funding: A primer*, p. 21. Congressional Research Service. https://fas.org/sgp/crs/misc/R44624.pdf.

[180] See National Council on Disability. (2018, February 7). *Broken promises: The underfunding of IDEA*, p. 22. Washington D.C. https://ncd.gov/publications/2018/individuals-disabilities-education-act-report-series-5-report-briefs.

[181] Id., at 44.

[182] The National Council on Disability issued a series of oversight briefs in 2018. In its letter of transmittal NCD summarized the concern about inadequate special education funding as follows, "NCD has repeatedly called on Congress to fully fund IDEA. The Federal Government's failure to meet its promised funding obligation has stressed many state and local budgets to the point where many districts routinely struggle to meet student needs." See National Council on Disability., *supra* note 180. In one of its prior reports, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind,* the National Council on Disability in its Letter of Transmittal, summarized its review of more than two decades of federal monitoring and enforcement, concluding "Overall...federal efforts have been inconsistent and ineffective." National Council on Disability (2000, January 25). *Back to school on civil rights*. Washington, D.C. https://www.ncd.gov/rawmedia_repository/7bfb3c01_5c95_4d33_94b7_b80171d0b1bc.pdf.

[183] Id.

[184] See Baldwin Clark, L. (2018, November 7). Beyond bias: Cultural capital in antidiscrimination law. *Harvard Civil Rights-Civil Liberties Law Review (CR-CL)*, *53*, p. 393. Baldwin-Clark discusses how differences in how parents can work within the system to get the education and services their child is entitled to are driven by many cultural factors, such as—communication patterns, knowledge, behavioral strategies, and dispositions—and describes how these are shaped by cultural constraints that influence cultural capital, but yet this capital is needed to successfully navigate the system. Baldwin-Clark describes how remedies need to recognize the differences in cultural capital…Being attentive to cultural capital can help legal scholars and policy makers reimagine laws meant to combat stratification, not just discrimination. Stratification "refers to the unequal distribution of people across social categories that are characterized by differential access to scarce resources" (pp. 383-390). See also Wakelin, M. (2008). Challenging disparities in special education: Moving parents from disempowered team members to ardent advocates. *Northwestern Journal of Law and Social Policy*, *3*(2). https://scholarlycommons.law.northwestern.edu/njlsp/vol3/iss2/6.

[185] See The Education Law Center-PA & PA Schools Work (2018). *Shortchanging children with disabilities: State underfunding of special education in Pennsylvania*. https://www.elc-pa.org/wp-content/uploads/2018/10/Special-Education-Report-Online.pdf. See also Wisconsin Policy Forum (2019). Special education funding in Wisconsin: how it works and why it matters. *The Wisconsin Taxpayer*, *87*(1). https://wispolicyforum.org/wp-content/uploads/2019/02/Taxpayer_19_01.pdf, which describes a lack of state funding for special education forcing schools to make up a gap of up to $1 billion per year. See also Isaacs, J.B., Lou, C., Hahn, H., Hong, A., Quakenbush, C., & Steuerle, C.E. (2018, July 18). *Report on federal expenditures on children through 2017 and future projections*. Urban Institute. https://www.urban.org/sites/default/files/publication/98725/kids_share_2018_0.pdf, which projects spending on K-12 (including special education) to decline steeply in real dollars relative to GDP.

[186] House Committee on Public Education, Texas House of Representatives (2004, December 8). *Interim report*, p. 6, 48. https://house.texas.gov/_media/pdf/committees/reports/78interim/public_education.pdf.

[187] Ballis, B. & Heath, K. (2020, December 18). *The long-run impacts of special education*, p. 10. https://brianaballis.weebly.com/uploads/4/0/3/9/40392931/lr_impacts_se_-_12-18-2020.pdf.

[188] Id.

[189] Even after the U.S. Department of Education stepped in to order an end to the cap, an estimated 250,000 children were unable to access the supports and services they needed each year, for many years. See Hawkins, B. (2019, September 23). 250,000 kids. $277 million in fines. It's been 3 years since feds ordered a special ed reboot in Texas—why are students still being denied? *The 74*. https://www.the74million.org/article/250000-kids-277-million-in-fines-its-been-3-years-since-feds-ordered-a-special-ed-reboot-in-texas-why-are-students-still-being-denied/.

[190] See e.g., *San Antonio Independent School v. Rodriguez*, 411 U.S. 1 (1973). https://supreme.justia.com/cases/federal/us/411/1/. See also reports by Intercultural Development Research Association (IDRA) (2009). *The status of school finance equity in Texas: 2009 update*. San Antonio, TX: Author. https://files.eric.ed.gov/fulltext/ED510074.pdf.

[191] Law Center (n.d.). School funding. https://edlawcenter.org/issues/school-funding.html (accessed January 8, 2021).

[192] See Sargrad, S., Partelow, L., Yin, J., & Harris, K.M. (2020, October 8). Public education opportunity grants increasing funding and equity in federal K-12 education investments, p. 4. *Center for American Progress*. https://www.americanprogress.org/issues/education-k-12/reports/2020/10/08/491255/public-education-opportunity-grants/#fn-491255-48.

[193] Id.

[194] Farrie, D. & Sciarra, D.G. (2021, January). $600 billion lost: state disinvestment in education following the Great Depression. *The Education Law Center*. https://edlawcenter.org/research/$600-billion-lost.html.

[195] See available at https://nces.ed.gov/programs/digest/d19/tables/dt19_204.30.asp

[196] See Table 68 in U.S. Department of Education, Office of Special Education Programs (2016). *38th annual report to Congress on the implementation of the Individuals with Disabilities Education Act, 2016*, pp. 147-148. Washington D.C. https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf.
[197] Author Daniel Losen experienced these mutual benefits during the ten years of teaching in the MA public schools. See also Hehir, T., Grindal, T., Freeman, B., Lamoreau, R., Borquaye, Y., & Burke, S. (2016, August). *A summary of the evidence on inclusive education*. https://www.abtassociates.com/sites/default/files/2019-03/A_Summary_of_the_evidence_on_inclusive_education.pdf.
[198] Dorn, E., Hancock, B., Sarakatsannis, J., & Viruleg, E. (2020, June 1). COVID-19 and student learning in the United States: The hurt could last a lifetime. *McKinsey & Company.* https://www.mckinsey.com/industries/public-and-social-sector/our-insights/COVID-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime.
[199] García & Weiss, *COVID-19*, *supra* note 127.
[200]Id.
[201] Dorn et al., *supra* note 198.
[202] See McKillip, M. (2020, August 25). Tracking state school aid cuts in the pandemic. *Education Law Center*. https://edlawcenter.org/news/archives/school-funding-national/tracking-state-school-aid-cuts-in-the-pandemic.html.
[203]García & Weiss, *COVID-19*, *supra* note 127.
[204] National Disability Rights Network (2018, April 2). *Civil rights imperiled: Discussions must focus on practical solutions to school violence civil rights roundtable*. https://www.ndrn.org/wp-content/uploads/2019/03/CRRT_White_Paper_Misinformation_Campaign_Final_for_Distribution.pdf.
[205] See Jordan, P.W. & Siddiqi, J. (2020, September 9). How governors are using their CARES Act education dollars. future-ed.org/how-governors-are-using-their-cares-act-dollars/.
[206] Hart, A. (2019, November 6). Texas ended its special education cap in 2017, but the policy has had long-lasting effects. *Kut 90.5.* https://www.kut.org/texas/2019-11-06/texas-ended-its-special-education-cap-in-2017-but-the-policy-has-had-long-lasting-effects.
[207] Collecting and reporting data is very different that continuing to apply data driven accountability metrics, which arguably should be waived, such as California's decision to allow all students who were "on track" to graduate in March of 2020 to earn a bona fide diploma. On the other hand, there are a lot of data that were collected that should continue to enable educators and the public to fully understand the impact of the pandemic on educational outcomes. In some cases, like attendance, the change in collection methods during the pandemic will make for comparisons of questionable validity, but the data are still important to monitor. In many cases it may be better to continue to improve the accuracy of mid-pandemic collection rather than cease collection and reporting, as it is possible that a new virus strain could cause yet another wave of school closures.
[208] See Dusseault, B. & Makori, A. (2021, January 5). Analysis: What does 'attendance' mean for remote learners in a pandemic? How 106 districts are dealing with absenteeism, student engagement & grades. The*74.* https://www.the74million.org/article/analysis-what-does-attendance-mean-for-remote-learners-in-a-pandemic-how-106-districts-are-dealing-with-absenteeism-student-engagement-grades/?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202021-01-06%20K-12%20Dive%20%5Bissue:31732%5D&utm_term=K-12%20Dive. Although less visible, instances of inappropriate discipline have received attention in the press including online behaviors related to violations of the dress code (Wright, W. (2020, August 8). No pajama pants allowed while learning from home, Illinois district says. *The New York Times*. https://www.nytimes.com/2020/08/08/us/pajamas-school-springfield-dress-code.html.) and interactions with tech support (see Klein, *supra* note 160), as well as instances where toy guns were seen momentarily and police were sent to young children's homes (Jones, C. (2020, November 17). How school discipline — and student misbehavior — has changed during the pandemic. *EdSource*. https://edsource.org/2020/how-school-discipline-and-student-misbehavior-has-changed-during-the-pandemic/643758.).
[209] NPR (2020, November 30). "The education crisis facing homeless students." https://www.nprillinois.org/post/education-crisis-facing-homeless-students#stream/0. See also Murphy, J.F., & Tobin, K.J. (2011, November 1). Homelessness comes to school. *Phi Delta Kappan*, *93*(3). https://doi.org/10.1177/003172171109300308.
[210] St. George & Strauss, *supra* note 123.
[211] Id. The findings in this report and the commentary herein should not be misconstrued to support an argument that teachers should return to in-person teaching any sooner than leading scientists recommend. This report does suggest that we are not preparing to meet the needs of students well enough, and those concerns will remain relevant whenever in-person education resumes.
[212] U.S. Department of Justice & U.S. Department of Education, *supra* note 31, at 11.
[213] The National Council on Disability has issued several reports criticizing the Office of Special Education Program's poor track-record of monitoring and enforcement and also acknowledged that OSEP'S budget is insufficient for the task. See National Council on Disability (2018, February 7). (IDEA Series) Federal monitoring and enforcement of IDEA compliance. https://ncd.gov/sites/default/files/NCD_Monitoring-Enforcement_Accessible.pdf.
[214] See U.S. Department of Education. (2020, September 14). *About the Civil Rights Data Collection.* Washington, D.C. https://ocrdata.ed.gov/assets/downloads/About%20the%20CRDC.9-14-20.pdf.
[215] For more information on DataQuest, please visit: https://www.cde.ca.gov/ds/sd/cb/dataquest.asp
[216] Losen, D., & Martinez, P., *supra* note 73.
[217] Id.
[218] U.S. Department of Education, *About the CRDC*, *supra* note 214.
[219] U.S. Department of Education, Office for Civil Rights (2017). *Master list of 2017–2018 CRDC definitions*. Washington, D.C. https://ocrdata.ed.gov/Downloads/Master-List-of-CRDC-Definitions.pdf.
[220] Id.

[221] See U.S. Department of Education, Office of Special Education Programs (2019, November). IDEA Part B discipline for school year 2017-2018: OSEP data documentation. https://www2.ed.gov/programs/osepidea/618-data/collection-documentation/data-documentation-files/part-b/discipline/idea-partb-discipline-2017-18.pdf.
[222] While there have been several improvements, the procedural protections and oversight requirements, although very detailed, are obviously not preventing excessive disciplinary exclusion. One reason is that there are insufficient funds for monitoring, and no funds provided for individual behavioral supports or to address systemic school climate issues, including racism, that may be equally if not more harmful to an equitable opportunity to learn in general education. Ideas of how to strengthen the law are discussed briefly in Part III.
[223] See 20 U.S.C. § 1418(a) (2004).
[224] U.S. Department of Education, Office of Special Education Programs, IDEA Part B discipline, *supra* note 221. The data cover "any" removal for disciplinary purposes, and therefore could conceivably include referrals to law enforcement and arrests. The description of the list categories can also be found in the DOED's EDFacts Submission System, FS143-Children with Disabilities (IDEA) Total Disciplinary Removals File Specifications SY 2017-18, which did not change with regard to these categories for 2018-19. The last two categories are for drug or weapon offenses (not including tobacco or alcohol), causing serious bodily injury, as ordered by school personnel, or when a hearing officer determines that a child poses a likely risk of injury to self or others. Because many of the removal categories could include minor misbehaviors, one should not assume that the higher rates reflect more serious misconduct. Further, by supplying a value of just 11 days for the count of students in the over 10 categories, our estimate is very conservative.
[225] Losen, *supra* note 17.
[226] Although it is noteworthy that Black students are over-represented in the category of emotional disturbance, as well as OHI, one cannot assume from these observations that one is causing the other. CCRR's prior efforts to determine whether Black discipline rates were related to over-representation in ED were inconclusive. See Losen et al., "Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education and Discipline" in *Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion* (pp. 89-106). New York, NY: Teachers College Press. However, our detailed review did find that Whites with Ed were also far more likely than Whites in other disability categories. That prior research, like these observations raised serious questions about the adequacy/quality of supports and services for students with ED. Id.
[227] Osher et al., *supra* note 87.
[228] See Osher et. al., *supra* note 87 at p.103.
[229] U.S. Department of Education, Office of Special Education Programs, IDEA Section 618 Data Products, *supra* note 85.
[230] 618 references the public law section number of the IDEA which is identical to 20 U.S.C. Section 1418.
[231] Rumberger & Losen, *supra* note 54. See also U.S. Government Accountability Office, *supra* note 17; Fabelo et al., *supra* note 44. See also Rumberger, R.W., & Losen, D.J. (2016). *The high cost of harsh discipline and its disparate impact.* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles. https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harshdiscipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf.
[232] It is also worth noting that the U.S. Supreme Court's ruling in the *Endrew* decision, specifically as it addressed the impact of the school district's failure to address a student's behaviors in his IEP. It is very likely that the current degree to which school districts address the needs of students with emotional and behavioral disorders falls short of what the law requires. See Yell, M.L. (2019, August 18). Endrew F. v. Douglas County School District (2017): Implications for educating students with emotional and behavioral disorders. *Behavioral Disorders*. https://doi.org/10.1177/0198742919865454.
[233] Although beyond the scope of this report, these data on the high and disparate discipline rates of Black students with disabilities (IDEA) also raise questions of inappropriate placement and possible misdiagnosis as well as the role of several types of racism, including the disparate impact of unjustifiable policies, implicit bias and other factors that contribute to the observed disparities. See Losen et al., *Disturbing Inequities, supra* note 226.
[234] Losen, D. J. (2018). *Disabling Punishment: The need for remedies to the disparate loss of instruction experienced by Black students with disabilities.* Los Angeles, CA: UCLA Center for Civil Rights Remedies at The Civil Rights Project/Proyecto Derechos Civiles, http://www.schooldisciplinedata.org/ccrr/docs/disabling-punishment-report.pdf (accessed 11/11/20).
[235] See, U.S. Department of Education, Office of Special Education Programs, Individuals with Disabilities Education Act (IDEA) database, retrieved February 20, 2020, from https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc. (This table was prepared February 2020.)
[236] On the other hand, only 23 districts serving at least 1,000 students failed to identify any students as eligible for special education pursuant to the IDEA. Those with zero IDEA students represented a total of 35,085 students. 11 of the 23 also identified zero 504 students.
[237] Moreover, because 504 students are educated as part of the general education population, 504 identification has not been associated with efforts to circumvent desegregation orders. Finally, unlike the categories of emotionally disturbed and intellectual disability, the 504 rates show no consistent pattern of over-identification of Black students or other children of color. That said, it is very possible that unusually high rates and large racial disparities in rates of 504 eligibility at the district level may justify a closer look for inappropriate causes. The Section 504-only rates described here show consistent patterns of under-identification when comparisons are made to rates for White students. The low identification rates and large disparities raise the possibility that many children are being denied FAPE. Moreover, our district analyses of 504 identification rates by race is the first of its kind. These descriptive findings suggest that the burden of FAPE denial, although a concern for all children in districts with no students identified, is one that is shown to be true and disproportionately harming children of color. It is important to note that these data alone, raise questions that deserve further investigation. The data alone are not sufficient proof of FAPE denial. It is important to note that although some districts make errors in reporting their data, each district superintendent is required to review and certify their data as accurate before OCR publishes them as final.
[238] A further exploration of identification rates by disability category is beyond the scope of this report. However, it should be noted that the baseline data on the incidence of autism as reported by schools to the U.S. Department of Education suggests that Black students are far less likely than White

students to be identified for this category of special education. The identification for autism has been rising steadily for all racial groups for more than ten years. See Exhibit 22 in the 41st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (showing the percentage of the population aged 6-21 served under the IDEA, Part B, by year and disability Category: Fall 2009 through fall, 2018 with autism grew from 0.5% to 1.0%. The category of OHI grew from 1.0% to 1.5% during this same period. Autism is a category associated with less stigma because some autistic children demonstrate very high rates of achievement academically and in society at large. According to reports that track expenditures by disability categories, educating students with autism entail greater resources than most other categories. U.S. Department of Education (2020, February). *41st annual report to Congress on the implementation of the Individuals with Disabilities Education Act, 2019*, p. 77. Washington, D.C. https://www2.ed.gov/about/reports/annual/osep/2019/parts-b-c/index.html.

[239] See Lambert, D. (2020, January 10). Amid shortages, schools settle for underprepared special education teachers. *EdSource*. https://edsource.org/2020/amid-shortages-schools-settle-for-underprepared-special-education-teachers/621656 (accessed January 14, 2021).

[240] Artiles, A. J., Rueda, R., Salazar, J. J., & Higareda, I. (2002). "English-Language Learner representation in special education in California urban school districts" in Losen, D. J. & Orfield, G. (Eds.). *Racial Inequity in Special Education.* Cambridge, MA: Harvard Education Press.

[241] Salt Lake City School District (UT): In August 2016, OCR resolved this complaint alleging that the district discriminated on the basis of national origin and disability. Specifically, the complainant alleged that the district discriminated against EL students at a middle school by implementing policies and procedures that do not consider language in the special education evaluation and placement processes, thereby resulting in an overrepresentation of the students in special education. During the investigation, staff acknowledged the use of the phrase "special education trumps EL services" by some district staff, and that some EL students with disabilities were not provided EL and special education services. OCR also had concerns that special education-related matters were not consistently interpreted or translated for EL parents, that the district's EL policies and procedures include a process for early exiting of students from EL services despite their not being proficient in the four English skill areas, and that several EL students should have been but were not monitored following their exit from the EL program. To resolve the complaint, the district entered into a resolution agreement committing the district to: update its policies and procedures regarding the evaluation and placement of EL students to ensure that EL students are not overrepresented in special education and are not placed in special education solely based on English language ability; evaluate whether EL students already receiving special education have been appropriately placed in special education and, if not, return them to the regular education setting; ensure that EL students with disabilities who did not receive appropriate instruction from qualified teachers are assessed for and receive compensatory services; ensure meaningful communication with parents, especially with limited English proficient (LEP) parents related to special education matters; and review its EL plan to ensure that students are not exited from the EL program prematurely." U.S. Department of Education, Office for Civil Rights (last modified 2020, January 15). *Resolution agreement: Salt Lake City School District: OCR Case Number 08-16-1193.* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161193-b.pdf.

[242] See Skiba, R.J., Artiles, A.J., Kozleski, E.B., Losen, D.J., & Harry, E.G. 2016. Risks and Consequences of Oversimplifying Educational Inequities. *Educational Researcher*, *45*(3), pp. 221-225. http://journals.sagepub.com/doi/full/10.3102/0013189X16644606. See also Losen, D. J. (2019). *Written testimony of Daniel Losen before the U.S. Congress House of Representatives, Full Committee on Education and Labor Hearing: "Brown v. Board of Education at 65: A promise unfulfilled."* Los Angeles, CA: UCLA Center for Civil Rights Remedies at the Civil Rights Project/Proyecto Derechos Civiles.

Specifically, in several cases, courts have found that the pattern of over-identification of Black children, followed by their removal from the mainstream classroom and was a vestige of prior de jure segregation. See Kim, C., Losen, D. J., & Hewitt, D. (2012). "Students with Disabilities" in *The school to prison pipeline: Structuring legal reform*. New York: New York University Press. In fact, there are many districts that are still under consent decrees.

[243] See Barnum, M. (2019, May 28). How school segregation affects whether a black student gets labeled as having a disability. *Chalkbeat.* https://www.chalkbeat.org/2019/5/28/21108254/how-school-segregation-affects-whether-a-black-student-gets-labeled-as-having-a-disability (summarizing some of the most recent research).

[244] Id.