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The School to Prison Pipeline: How Public Schools Continuously Fail and Isolate Society's Most Vulnerable Children

Hailey Berry

I. INTRODUCTION

The school-to-prison pipeline “funnel[s] students out of public schools and into the juvenile and criminal legal systems” while disproportionately impacting students who are Black, have experienced poverty, or have disabilities.¹ During the 2017-2018 school year, school-related arrests increased by 5% nationally, and referrals to law enforcement increased by 12% nationally.² Black children account for 15% of the total enrollment of K-12 public schools yet make up 38.8% of expulsions with educational services and 33.3% of expulsions without educational services.³ Similarly, students with disabilities represent 16% of the total enrollment of K-12 public schools but make up nearly 30% of school arrests.⁴ Black students receiving services represent 2.3% of the student body but account for 9.1% of student arrests.⁵ Both students of color and students with disabilities are being over-disciplined and discriminated against across the country.

¹ *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline> (last visited Aug. 17, 2022) [<https://perma.cc/DFD7-EFDV>].

² U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., AN OVERVIEW OF EXCLUSIONARY DISCIPLINARY PRACTICES IN PUBLIC SCHOOLS FOR THE 2017-2018 SCHOOL YEAR (Jun. 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf> [<https://perma.cc/9EAK-39P8>].

³ *Id.*

⁴ Sarah Hinger, *Safe and Healthy Schools Lead With Support, Not Police*, ACLU (Aug. 31, 2021), <https://www.aclu.org/news/disability-rights/safe-and-healthy-schools-lead-with-support-not-police> [<https://perma.cc/2VFH-42K2>].

⁵ U.S. Dep't of Educ. Off. For Civ. Rts., *supra* note 2.

The combination of race and disability compounds these effects. For example, J.W., a Black high school student with emotional and intellectual disabilities, was unable to access the space that he used to calm down at school.⁶ Unable to find a safe space to escape from his bullies, J.W. attempted to leave campus by walking home.⁷ The school responded by blocking J.W. from exiting and calling the school police officer who tased and handcuffed J.W.⁸ Since this incident, J.W. has “missed several months of school while experiencing intense anxiety and PTSD.”⁹ The Fifth Circuit made a dangerous ruling when they decided that “the tasing of J.W. was an act of school discipline that couldn’t be challenged under the Fourth Amendment.”¹⁰ This ruling opened the door to the use of harsh discipline and excessive force on students with disabilities, effectively stripping them of a safe school environment.

The harsh disciplinary practices and lack of resources for students with disabilities in public school systems disproportionately funnel certain groups of children into the juvenile justice system, which perpetuates systemic harm. Without reform of the current educational system, students with disabilities—especially indigent Black students—will continue to be funneled through the school-to-prison pipeline in violation of their civil rights.¹¹ The federal government must create a safety net for students with disabilities to disrupt their trajectory toward the juvenile justice system.

The federal government must require all public schools to provide free assessments for students who may have disabilities and mental health issues before schools can expel or send students into the juvenile justice system. The students should be assessed and, if they qualify for accommodations,

⁶ Hinger, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ School-to-Prison Pipeline, *supra* note 1.

be given time to receive the support they need before any disciplinary actions are taken against them. School systems should be required to offer assessments for accommodations as an alternative to disciplinary action against all K-12 students. This safety net would then inform the student and the school system of the necessary resources needed to support the student's needs. Regardless of the visibility of a student's disability, students still have the right to access the necessary resources they need to support their success.

To understand how this current educational system is failing students with disabilities, we must examine 1) federal education laws, 2) the ADA, 3) the evolution of discipline within the public education system, and 4) harm reduction methods. Although this article acknowledges the impacts that the school-to-prison pipeline has on students of color, the focus of this article will be on students with disabilities.

II. HISTORICAL OVERVIEW OF FEDERAL EDUCATION REGULATIONS

In 2015, President Obama signed the Every Student Succeeds Act (ESSA), which reauthorized the Elementary and Secondary Education Act (ESEA) of 1965.¹² ESEA was the first piece of federal education legislation in the United States, followed by the No Child Left Behind Act (NCLB) of 2002.¹³ ESSA, ESEA, and the NCLB are all national education laws intended to promote “*equal opportunity*” and access to education.¹⁴ NCLB faced criticism from parents and teachers¹⁵ for placing too much emphasis on test scores. Due to the emphasis on test scores, many schools had to

¹² Laurie A. Sharp, *ESSA Reauthorization: An Overview of the Every Student Succeeds Act*, 4 TEX. J. OF LITERARY EDUC. 9, 9-11 (2016) (discussing an overview of the Every Student Succeeds Act).

¹³ *Id.*

¹⁴ *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., <https://www.ed.gov/essa?src=policy> [<https://perma.cc/7Y9Y-ZPH9>].

¹⁵ Kelli Randolph & Dylinda Wilson-Younger, “IS NO CHILD LEFT BEHIND EFFECTIVE FOR ALL STUDENTS?” PARENTS DON'T THINK SO (Oct. 22, 2012), <https://files.eric.ed.gov/fulltext/ED536444.pdf> [<https://perma.cc/PJ89-E224>].

prioritize test preparation and cut other subjects such as social studies, health, and science.¹⁶ Thus, when students with disabilities were struggling, the emphasis on test scores provided an incentive for schools to push children with disabilities out to bolster school test score averages.¹⁷ Some critics of NCLB claim that the policies requiring students to take standardized tests at their age-related grade level conflict with Individualized Education Plans (IEPs) protected by the Individuals with Disabilities Education Act (IDEA).¹⁸ Proponents of NCLB's rigid objectives failed to consider flexible educational goals and standards at the expense of students with disabilities. ESSA's eligibility for reauthorization began at the end of the 2020-2021 school year¹⁹ and needs to be reevaluated to improve education for all. At the time of writing this article, the ESSA has yet to be reevaluated.

The ESSA was implemented as a response to the criticisms of the NCLB Act.²⁰ To address the criticisms, the ESSA significantly reduced federal oversight of state school systems, limited the reliance on standardized testing, and gave school systems federal funding at fixed rates.²¹ The enactment of the ESSA significantly reduced federal oversight, thus limiting reliance on standardized testing.²² State governments now have the authority to determine how to implement standardized testing without the threat of punitive action under NCLB.²³ This positive shift reduces rigid testing regulations that fail to provide flexibility for students who learn at

¹⁶ No Child Left Behind Act of 2001, H.R.1, Pub. L. No. 107-110, 155 Stat. 1425 (2002) (emphasis added).

¹⁷ School-to-Prison Pipeline, *supra* note 1.

¹⁸ Randolph & Wilson-Younger, *supra* note 15.

¹⁹ Every Student Succeeds Act (ESSA), *A Comprehensive Guide*, U.S. DEP'T OF EDUC., <https://www.everystudentsucceedsact.org> [<https://perma.cc/9G9A-5SVT>].

²⁰ Randolph & Wilson-Younger, *supra* note 15.

²¹ Derek W. Black, *Abandoning the Federal Role in Education*, 5 CAL. L. REV. 1309, 1309-1324 (2017) (critiquing the Every Student Succeeds Act).

²² ESSA, *supra* note 14.

²³ Black, *supra* note 21.

different rates. Additionally, the ESSA provided \$1.6 billion towards student support grants, which can be used for dropout prevention.²⁴ While the ESSA made some improvements from the NCLB, there are concerning effects that disproportionately impact students with disabilities.

The main concern is that the federal government has significantly reduced its role in educational oversight, so there is little accountability for states that have historically failed to address educational inequity issues.²⁵ For example, in the groundbreaking case of *Brown v. Board of Education*, the Supreme Court held that segregation in public schools was unconstitutional.²⁶ The Court acknowledged the fallacy of the “*separate but equal*” doctrine and emphasized that separation is “*denoting the inferiority*” of the excluded group.²⁷ It was not until the Civil Rights Act (CRA) of 1964, ten years after the *Brown v. Board of Education* decision, that public schools were finally desegregated.²⁸ The CRA meaningfully initiated desegregation because it gave the federal government the power to withhold funding and bring legal action against school systems that refused to integrate.²⁹

Due to the historical context, there are valid concerns regarding the efficacy of the ESSA in protecting the educational rights of students with disabilities. While the ESSA does require school systems to provide “comprehensive support and improvement [to] the lowest performing 5% of all schools,” each school system is free to implement various support

²⁴ Anna J. Egalite et al., *Will Decentralization Affect Educational Inequity? The Every Student Succeeds Act*, 53 EDUC. ADMIN. Q. 757, 757–781 (2017) (discussing equity impacts of the Every Student Succeeds Act).

²⁵ *Id.*

²⁶ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

²⁷ *Brown*, 347 U.S. at 494 (emphasis added).

²⁸ Sarah Pruitt, *Brown v. Board of Education: The First Step in the Desegregation of America's Schools*, HISTORY, <https://www.history.com/news/brown-v-board-of-education-the-first-step-in-the-desegregation-of-americas-schools> (Sept. 7, 2023) [<https://perma.cc/27JQ-3S3Z>].

²⁹ *Id.*

techniques.³⁰ Additionally, the ESSA does not comprehensively address students with disabilities but merely acknowledges disability as “part of the human experience”³¹ in the amendment referencing the Individuals with Disabilities Education Act (IDEA).

IDEA, signed into law by President Ford in 1975,³² aims to ensure that all children with disabilities have access to a “free appropriate public education” (FAPE) within the “least restrictive environment.”³³ IDEA provides over 7.5 million students with early intervention resources, special education, and any additional necessary educational resources.³⁴ While the Department of Education’s Office of Civil Rights (OCR) does not enforce IDEA, it has the authority to enforce the educational rights of students with disabilities under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). Therefore, the OCR can and should enforce the educational rights of students with disabilities under Section 504 of the Rehabilitation Act and the ADA.³⁵

III. THE AMERICANS WITH DISABILITIES ACT

The ADA became law in 1990 to prevent discrimination against individuals with disabilities.³⁶ Congress recognized disability discrimination as a “pervasive social problem” that impacts critical areas of life including “employment, housing, public accommodations, education, [and] transportation.”³⁷ Congress intended for the ADA to be broadly interpreted to provide the most protection to people with disabilities.³⁸ The

³⁰ Egalite et al., *supra* note 24.

³¹ *About IDEA*, INDIVIDUALS WITH DISABILITIES EDUC. ACT (IDEA), <https://sites.ed.gov/idea/about-idea/> [https://perma.cc/J66X-LUMC].

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (1990).

³⁷ *See id.*

³⁸ *See id.* § 12102 (1990).

ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”³⁹

While Title I of the ADA provides protection from employment discrimination, Title II explicitly expands the broad protection against disability discrimination to public entities.⁴⁰ Public entities are defined as: “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or local government; and the National Railroad Passenger Corporation, and any commuter authority.”⁴¹ This definition includes protection against discrimination towards students in public school systems because public schools are funded through the government.⁴² Through this protection, students with disabilities have a right to schools that are physically, educationally, and socially accessible. Although students with disabilities have the right to a “Free and Appropriate Public Education,”⁴³ many discriminatory practices are still implemented in public schools.⁴⁴

IV. DISCRIMINATORY TREATMENT OF CHILDREN WITH DISABILITIES

During the 2017-2018 school year, students with documented disabilities made up 15.9% of the total K-12 public school student population.⁴⁵ This equates to approximately eight million students who were given accommodations for a disability during the school year.⁴⁶ Unfortunately, the prevalence of arrests, suspensions, and expulsions is significantly higher for

³⁹ *Id.*

⁴⁰ ADA, 42 U.S.C. § 12132 (1990).

⁴¹ *See id.* § 12131(1) (1990).

⁴² *See id.*

⁴³ IDEA, *supra* note 31.

⁴⁴ School-to-Prison Pipeline, *supra* note 1.

⁴⁵ U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., *supra* note 2.

⁴⁶ *Id.*

students with disabilities than for their peers.⁴⁷ School systems frequently engage in disciplinary policies such as zero tolerance, police presence, and isolation that disproportionately harm students with disabilities.⁴⁸ These harsh disciplinary practices push impacted students into the school-to-prison pipeline which both disrupts their education and creates trauma.⁴⁹

Students have a right to a safe and supportive environment, and to achieve this, many harmful disciplinary practices must be eliminated. The following disciplinary practices used in school systems are discussed to illustrate the various avenues of discipline that disproportionately harm students with disabilities. The discussion of zero tolerance policies, police presence, as well as restraint and seclusion, are necessary to understand the ways that school systems push students with disabilities into disciplinary action and eliminate the opportunity for a supportive educational environment. Each of these practices has compounding practical implications for students with disabilities.⁵⁰

A. Zero Tolerance Policies and Expulsion

Zero tolerance policies “automatically impose severe punishment” without consideration of the circumstances.⁵¹ As a result, students have been expelled at increasing rates.⁵² During the 2017-2018 school year, expulsions with educational services rose by 7% from the prior year.⁵³ Students have been expelled from school for something as insignificant as

⁴⁷ *Id.*

⁴⁸ School-to-Prison-Pipeline, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ Hinger, *supra* note 4; Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE (Oct. 2018), <https://www.prisonpolicy.org/reports/education.html#figure3> [<https://perma.cc/K53Y-RT2J>].

⁵¹ School-to-Prison-Pipeline, *supra* note 1.

⁵² U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., *supra* note 2.

⁵³ *Id.*

bringing nail clippers to school.⁵⁴ Of the students that are expelled each year, students with disabilities have been expelled from school at significantly higher rates.⁵⁵ For example, students who received disability accommodations under IDEA represent 13.2% of the total enrollment but represent 23.3% of the expulsions with educational services.⁵⁶ Zero tolerance policies not only have a discriminatory impact on students with disabilities but also disproportionately impact male students and students of color.⁵⁷ Male students make up approximately 50% of the school population yet account for 73% of the school expulsions.⁵⁸ Similarly, Black students are more than twice as likely as white students to be expelled.⁵⁹

This data unambiguously illustrates the discriminatory practice of zero tolerance policies. These policies are discriminatory against students with disabilities, students of color, and male students.⁶⁰ School systems need to eliminate zero tolerance policies because they violate many students' civil rights and push students into the juvenile justice system. Without change, students with disabilities will continuously be pushed out of school and into the criminal system, which will only decrease the likelihood that they will receive the proper support they need.⁶¹

⁵⁴ School-to-Prison Pipeline, *supra* note 1.

⁵⁵ U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *supra* note 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Orphanages, Training Schools, Reform Schools and Now This?*, NAT'L DISABILITY RIGHTS NETWORK 1, 15 (Jun. 2015), https://www.ndrn.org/wp-content/uploads/2019/02/NDRN_-_Juvenile_Justice_Report.pdf [<https://perma.cc/T7G8-T3R4>].

⁶¹ *Mental Health Treatment While Incarcerated*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Improving-Health/Mental-Health-Treatment-While-Incarcerated> (last visited Aug. 17, 2022) [<https://perma.cc/DJ6U-5QSL>].

B. Police Presence in Schools

Police officers have an increasing presence in schools.⁶² In 2020, the Department of Justice gave 50 million dollars to school systems for school police.⁶³ During the 2017-2018 school year, school-related arrests increased by 5%, and referrals to law enforcement increased by 12% from the prior school year.⁶⁴ It is a natural result that more police presence leads to increased arrests; however, police discipline is discriminatorily implemented. Students with disabilities and students of color are disproportionately represented in the juvenile justice system.⁶⁵ In this same school year, “students with diagnosed disabilities represented 16% of national enrollment, but nearly 30% of arrests in school.”⁶⁶ Black students make up approximately 30% of school-related arrests but are only approximately 15% of the total student population.⁶⁷ Similarly, male students account for approximately 50% of the total student population but account for nearly 70% of school-related arrests.⁶⁸

These statistics illustrate a pervasive pattern of discriminatory treatment towards students with disabilities and students of color. The education system is putting a heavy emphasis on discipline while ignoring other areas of school interventions. For example, there are “14 million students in schools with police and no nurses, social workers, or psychologists across our country.”⁶⁹ The school system’s reliance on the police for discipline is resulting in discriminatory treatment of students with disabilities and negatively impacting their graduation rates.⁷⁰ The school-to-prison pipeline

⁶² Hinger, *supra* note 4.

⁶³ *Id.*

⁶⁴ U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., *supra* note 2.

⁶⁵ NAT’L DISABILITY RIGHTS NETWORK, *supra* note 60.

⁶⁶ Hinger, *supra* note 4.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

is a violation of students' civil rights and police should be removed from schools.

C. Restraint and Seclusion in Schools

Restraint and seclusion are inappropriate methods of discipline that are too often used against students with disabilities. During the 2017-2018 school year, 70,833 students were subjected to physical restraint at school.⁷¹ A physical restraint is defined as “a personal restriction that immobilizes or reduces the ability of a student to move.”⁷² Students with disabilities were physically restrained at drastically higher rates than their peers. Despite representing only 13% of the total student population, students with disabilities served under IDEA received 80% of the physical restraints used in schools during the 2017-2018 school year.⁷³

Similarly, students with disabilities were subjected to 77% of school seclusions that year.⁷⁴ Seclusion is “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.”⁷⁵ For example, students across the country have been put into isolation boxes misleadingly referred to as “timeout rooms.”⁷⁶ These rooms are often very small, without windows, and often do not contain padding.⁷⁷ Many students and parents report that restraint and

⁷¹ U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools* 1, 5 (Oct. 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf> [<https://perma.cc/6LJ7-VSKH>].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Laura Dorwart, *The Trauma of Coercion: Disabled Elementary School Students and 'Isolation Boxes,'* PACIFIC STANDARD, <https://psmag.com/education/disabled-elementary-school-students-and-isolation-boxes> (Mar. 1, 2018) [<https://perma.cc/L94P-E6WU>].

⁷⁷ *Id.*

seclusion are more harmful than helpful.⁷⁸ The harmful effects of isolation boxes have been compared to those of solitary confinement.⁷⁹

Restraint and seclusion have serious and harmful consequences. Many students report feelings of intense school-related PTSD and anxiety after being subjected to one of these disciplinary measures.⁸⁰ Unfortunately, many students have suffered severe physical harm and even death because of restraints used as disciplinary measures. In 2020, sixteen-year-old Cornelius Frederick was restrained by staff members and, as a result, “went into cardiac arrest and died.”⁸¹ Cornelius was restrained and murdered for throwing a sandwich at a peer.⁸² Reports indicate that the staff used an “improper restraint.”⁸³ Not only was the use of force an extremely excessive response to the initial incident of merely throwing a sandwich, but the staff members also performed the restraint improperly, resulting in fatal consequences.⁸⁴

No child should be subject to this type of force regardless of their conduct. Restraint and seclusion have been acknowledged to “result in unlawful discrimination against individual students with disabilities in violation of Federal civil rights laws” by the Department of Education, yet these practices are still legal and widely used across the country.⁸⁵ These dangerous disciplinary practices disproportionately threaten the safety of students with disabilities.⁸⁶ It is unclear why restraint and seclusion

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Hinger, *supra* note 4.

⁸¹ Taylor Romine, *16-year-old Boy Goes Into Cardiac Arrest and Dies After Staff at Residential Facility Restrain Him, Lawsuit Says*, CNN (Oct. 7, 2021, 10:21PM), <https://www.cnn.com/2020/06/23/us/16-year-old-restraint-death-michigan-trnd/index.html> [<https://perma.cc/8QTM-RVNV>].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., *supra* note 71.

⁸⁶ *Id.*

continue to be popular disciplinary practices because there is no proof that they are effective at preventing or reducing problematic behavior.⁸⁷

The Federal government needs to take action to prevent the continued use of restraint and seclusion in schools because leaving this matter to the states has proven to be insufficient in protecting the rights and lives of students with disabilities. There are alternative methods that can be used to respond to students struggling with behavioral issues that do not cause mental and physical health issues.

D. Disciplinary Action of Preschoolers

The “entry way into the school-to-prison pipeline actually starts before children are out of the crib.”⁸⁸ Children as young as eight months old have been suspended and preschoolers are “three times more likely than K-12 children to be suspended or expelled.”⁸⁹ Many of these preschoolers have been suspended or expelled for behaviors that are typical of children at that age, such as biting.⁹⁰ Age-appropriate behaviors should be met with redirection and reflection, not with severe disciplinary action. Such early disciplinary exclusion sets children up to be labeled as a “bad kid” throughout their educational career. Early labels and characterizations of children as “bad” can be detrimental to their self-perception. This not only harms the child’s self-esteem, but also damages their relationship with school.⁹¹ When children are taught from an early age that the school system views them as a problem, they will likely continue to struggle throughout their educational career.

⁸⁷ *Id.*; U.S. DEP’T OF EDUC., *Restraint and Seclusion: Resource Document*, 1–2 (May 2012), <https://sites.ed.gov/idea/files/restraints-and-seclusion-resources.pdf> [<https://perma.cc/B2TR-LEFB>].

⁸⁸ At Liberty Podcast, *How to End the Preschool to Prison Pipeline*, ACLU, at 01:40 (Sept. 2021), <https://www.aclu.org/podcast/how-end-preschool-prison-pipeline-ep-172> [<https://perma.cc/SC63-6HKC>].

⁸⁹ *Id.*, at 02:11.

⁹⁰ *Id.*, at 02:08.

⁹¹ Hinger, *supra* note 4.

The expulsion and suspension rates of preschoolers have a similar pattern of disability discrimination as the aforementioned disciplinary actions.⁹² The Department of Education, in a civil rights data collection report, indicated that preschoolers represent 22.7% of the total student enrollment; however, students with disabilities account for almost 57% of the total preschool expulsions.⁹³ These statistics only represent students who have documented disabilities, so these troubling statistics likely underrepresent how many students with disabilities are truly impacted.⁹⁴ There is no reason that children as young as eight months old should be suspended or expelled. The current form of behavior management in the education system is inherently broken and eliminates the space for children to act like kids—to make mistakes, learn, and grow.

As outlined above, school systems use various disciplinary practices that are both harmful to children and discriminatorily imposed on students with disabilities. There is a clear pattern of excessive discipline for students served under IDEA, especially Black students.⁹⁵ Children with disabilities are extremely over-disciplined.⁹⁶ Starting in preschool, statistics show that children with disabilities are at an increased risk for expulsion, suspension, arrest, seclusion, and restraint than their peers.⁹⁷ Many of these practices have been acknowledged as ineffective and harmful, yet they are still used across the country.⁹⁸ In extreme— but not uncommon— circumstances, children have died due to these harsh disciplinary practices.⁹⁹ School should not be a place that traumatizes and scares children. Instead, school should be a place of inclusion, learning, and growth. Without fundamental change

⁹² U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *supra* note 71.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *supra* note 2.

⁹⁶ *Id.*

⁹⁷ At Liberty Podcast, *supra* note 88.

⁹⁸ Hinger, *supra* note 4; U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS, *supra* note 71; U.S. DEP'T OF EDUC., *supra* note 87.

⁹⁹ Romine, *supra* note 81.

and accountability, the public school system will likely remain stagnant in violation of children's right to a "Free and Appropriate Public Education."¹⁰⁰

E. Long-term effects on students' education success

The discriminatory use of zero tolerance policies, police presence, as well as restraint and seclusion have a compounding effect on a student's ability to reintegrate into the public school system successfully. Many students face emotional¹⁰¹ as well as systemic barriers¹⁰² to re-entering the educational system. For example, students have reported experiencing anxiety and PTSD after dealing with police and restraints at school.¹⁰³ Students are more likely to struggle with integrating back into the classroom if their experience with school has previously made them feel unsafe.¹⁰⁴ Students who have been expelled will likely have had an encounter with one of the previously addressed discriminatory disciplinary practices.¹⁰⁵

In addition to the emotional barriers that students experience, the public education system can make it challenging for students to get their education back on track after such substantial disruption.¹⁰⁶ Once students have been funneled into the school-to-prison pipeline, the educational system places numerous obstacles on the path to reintegration.¹⁰⁷ A few barriers to reintegration for students with a history of incarceration include a lack of accommodation resources, criminal history disclosures on school applications, and ineligibility for certain financial aid.¹⁰⁸ These barriers

¹⁰⁰ IDEA, *supra* note 31.

¹⁰¹ Hinger, *supra* note 4.

¹⁰² Couloute, *supra* note 50.

¹⁰³ Hinger, *supra* note 4.

¹⁰⁴ *Id.*

¹⁰⁵ Couloute, *supra* note 50.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

exacerbate the inaccessibility of higher education. Achieving an education is nearly impossible without resources to meet the needs of a disability, with limited school acceptances, and a lack of financial resources.

These discriminatory disciplinary practices in schools have been shown to have long-term impacts on a student's ability to get a GED (General Educational Development Test) or a high school diploma.¹⁰⁹ A study showed that of the individuals who were formerly incarcerated and did not have a high school diploma or GED, 58% had their high school education cut short.¹¹⁰ Without access to education, finding employment is increasingly difficult because the number of job opportunities for people without a high school diploma is dropping.¹¹¹ The inability to access a "free and appropriate education"¹¹² creates a cycle of discrimination and ultimately pushes children into the criminal justice system where their needs are continuously not met.

Of the incarcerated individuals with a disability, approximately 63% do not receive proper access to treatment or accommodations.¹¹³ It is estimated that "30 percent of people in jail have a cognitive disability and 60 percent have symptoms of a mental disorder."¹¹⁴ Furthermore, "about two in five people who are incarcerated have a history of mental illness," which is "twice the prevalence of mental illness within the overall adult population."¹¹⁵ Data illustrates a lifelong pattern of over-disciplining individuals with disabilities starting in preschool and continuing through

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² IDEA, *supra* note 31.

¹¹³ *Id.*

¹¹⁴ *You Can't Just "Tell,"* DISABILITY RTS. WASH. (Sept. 2016), <https://www.disabilityrightswa.org/reports/cant-just-tell/> [<https://perma.cc/7JKR-BFXS>].

¹¹⁵ *Mental Health Treatment While Incarcerated*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Improving-Health/Mental-Health-Treatment-While-Incarcerated> (last visited Aug. 17, 2022) [<https://perma.cc/DJ6U-5QSL>].

their adult life.¹¹⁶ The public school system is failing students with disabilities, and without systemic change in behavior management approaches, these students will continue to be discriminated against.

V. ALTERNATIVE APPROACHES

This section will highlight the proven positive alternatives to the harmful disciplinary system currently in place in many schools across the country. Specifically, these positive alternatives largely include therapeutic practices and eliminate the punitive model of discipline.

The education system must move away from harsh disciplinary practices that harm children and their futures, but we must also remember the students in the current system. Alternative approaches result in supportive, healthy, and inclusive school environments. Although these changes need to be made, students are still being actively funneled into the school-to-prison pipeline, and do not have the luxury of time to wait for the system to change. Schools must immediately implement harm reduction safety nets while more supportive alternatives are being developed, taught, and implemented nationwide.

While we need to work toward the large goal of the systemic overhaul of discipline in the education system, we must also take immediate action to protect the children currently in the school systems who are subject to discriminatory and criminalizing school disciplinary practices. For example, in Hawaii, there has been a “system wide effort to divert girls from the judicial system and into trauma-based care programs.”¹¹⁷ This effort has been in the making for decades, and in June 2022, the last girl imprisoned at the Hawaii Youth Correctional Facility (HYCF) was released.¹¹⁸ Mark

¹¹⁶ At Liberty Podcast, *supra* note 88; Couloute, *supra* note 50.

¹¹⁷ Claire Healy, *Hawaii has no Girls in Juvenile Detention. Here's How it got There*, THE WASHINGTON POST (Jul. 25, 2022), <https://www.washingtonpost.com/nation/2022/07/25/hawaii-zero-girls-youth-correctional-facility> [https://perma.cc/EC8E-KMQS].

¹¹⁸ *Id.*

Patterson, the administrator of HYCF, switched the facility from a punitive-based system to a therapeutic model in 2014.¹¹⁹ This shift made it possible to reach zero girls incarcerated in HYCF.¹²⁰ This questions the legitimacy of a punitive system by asking, “Do we really have to put a child in prison because she ran away? What kind of other environment is more conducive for her to heal and be successful in the community?”¹²¹

While HYCF is a correctional facility, the shift in focus from a punitive model to a therapeutic one is relevant and feasible to apply in the public education system as well. If schools replace zero tolerance policies and police with therapeutic activities and school counselors, children would be better supported and less likely to be forced into the juvenile criminal system.¹²² Children should not be sent to youth correctional facilities in the first place because a punitive system does not promote healing, growth, and learning. If the education system implemented therapeutic practices, there would be less need for youth correctional facilities.¹²³ This indicates a need for support, not punishment because many children who run away are dealing with trauma.¹²⁴ These changes would benefit all children, not just children with disabilities, and would specifically reduce the discrimination that children with disabilities face in schools.

A few alternative approaches to harsh disciplinary practices include Positive Behavioral Intervention and Support (PBIS), Safe and Responsive Schools (SRS), and Professional Development and Support for Teachers.¹²⁵

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Jenni Owen, Jena Wettach, & Katie Claire Hoffman, *INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE*, at 8–9 (2015), https://www.ednc.org/wp-content/uploads/2015/04/Alternatives_to_Suspension_3_2015.pdf [<https://perma.cc/JB7E-UDHU>].

A. Positive Behavioral Intervention and Support (PBIS)

PBIS is a “behavior management system that recognizes the function of misbehavior and develops interventions to discourage such misbehavior and encourage desired behavior,” based on behavioral psychology ideas.¹²⁶ This system of behavior management applies a community-based approach and allows parents and students to develop community behavioral expectations.¹²⁷ This system is used widely in North Carolina and has resulted in substantially positive results in schools.¹²⁸ For example, Bald Creek Elementary School implemented PBIS and, in the two years following its implementation, the school saw a 60% reduction in office referrals and a 72% reduction in school suspensions.¹²⁹

These positive changes are school-wide and would benefit all students but would specifically benefit students with disabilities since they are disproportionately suspended in schools.¹³⁰ Additionally, a school-wide program places more emphasis on the community as a whole and recognizes the ways that the environment can impact a student’s behavior, which therefore reduces the shame that students feel for struggling in school.¹³¹ Ideally, this shift in perspective would reduce the stigma and labeling of students as “bad kids” as well as move towards a more holistic approach of support and understanding rather than maintaining an approach based on exclusion.

B. Safe and Responsive Schools (SRS)

The SRS Project helps schools develop a process for improving student behavioral issues.¹³² This approach moves away from punitive practices and

¹²⁶ *Id.* at 13.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 14.

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

¹³² *Id.* at 16.

towards an “instructional approach,” which involves parents and community members who help to develop programs and strategies based on the specific needs of that school.¹³³ While it does expand the involvement of individuals who are implementing this plan, it would be even stronger if it also involved student input.

SRS takes a positive step towards a better, and more inclusive, education environment for all students. While SRS programs are largely aimed at violence prevention, this framework can be adapted to work with students who need a variety of supports.¹³⁴ One example of an SRS strategy is the Out of Class Intervention (OCI) which allows students to choose to take cooldown time instead of facing disciplinary action.¹³⁵ During their time in the cooldown room, students work on a problem-solving form.¹³⁶ Similarly, while the OCI rooms seem like a good alternative to disciplinary action, there would need to be certain safeguards and precautions in place to ensure OCI does not turn into another name for seclusion rooms.

As addressed above, seclusion rooms are damaging to students and disproportionately impact students with disabilities.¹³⁷ Overall, SRS seems to be moving towards inclusivity and creating a system that does not use punitive disciplinary measures, which is a positive step towards a safe and inclusive educational environment. Furthermore, SRS programs are supported by data from the schools that have implemented this type of program.¹³⁸ In a study of sixteen schools, students with disabilities have seen a reduction in suspensions by 63%.¹³⁹ While SRS programs have some improvements to make, they are a positive alternative to the punitive systems that are currently widely used in public schools.

¹³³ *Id.*

¹³⁴ *Id.* at 16–17.

¹³⁵ *Id.* at 17.

¹³⁶ *Id.*

¹³⁷ Hinger, *supra* note 4.

¹³⁸ Owen et. al., *supra* note 125, at 18.

¹³⁹ *Id.*

C. Professional Development and Support for Teachers

Teachers are heavily involved in students' daily lives and play a huge role in behavioral management; thus, it is imperative that teachers receive adequate support. Since students with disabilities are overrepresented in rates of suspension, expulsion, restraint, and seclusion, such data suggests that "teacher training on multicultural sensitivity could positively affect the classroom environment and reduce misbehavior."¹⁴⁰ One of the programs that provide teacher training is the "My Teacher Partner" (MTP) Program.¹⁴¹ MTP provides online coaching and workshops for teachers.¹⁴² This creates a space for teachers to build strategies and learn new methods to improve their abilities to engage with students as well as manage behavioral incidents.¹⁴³ MTP has been reported to improve student test scores, student-teacher relationships, and reduce suspension rates.¹⁴⁴ Unfortunately, these programs can be costly; so, without funding, many schools would not be able to afford training teachers.¹⁴⁵ The cost may be prohibitive, but it is extremely important to have teachers who are well-prepared to manage classroom behavioral incidents. Without teacher training, many students with disabilities will continue to be disciplined rather than supported in the classroom.

While PBIS, SRS, and teacher development each have obstacles to overcome, each approach significantly improves the conditions in the current school system. Each of these alternatives to behavior management in schools would reduce the exclusion and over-discipline of students with disabilities. Given the many available alternatives, schools lack the justification to persist with disciplinary practices that disproportionately

¹⁴⁰ *Id.* at 19.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 20.

¹⁴⁵ *Id.*

affect students with disabilities. Schools should abolish zero tolerance policies, police presence, and the reliance on restraints; however, as new behavioral management strategies take time to implement, school systems must immediately establish harm reduction measures to protect all minority students, especially students with disabilities, from further harm.

VI. THE NECESSITY OF FEDERALLY MANDATED HARM REDUCTION MEASURERS

Historically, when the federal government has taken a hands-off approach to protecting the civil rights of minority groups of people, the states have failed to protect their minority citizens.¹⁴⁶ This is widely recognized in the case of *Brown v. Board*.¹⁴⁷ Decided in 1954, *Brown v. Board* struck down the ‘separate but equal’ doctrine as a violation of the 14th Amendment. Despite this, ten years after this decision, over “98 percent of Black children in the South still attend[ed] segregated schools,” necessitating federal intervention.¹⁴⁸ This pattern of state failure to protect minority groups remains evident.

For example, in 2015, the United States Department of Justice (DOJ) found that the Georgia Network for Educational and Therapeutic Support (GNETS) violated the ADA by unnecessarily segregating students with disabilities from their peers.¹⁴⁹ GNETS is a program run by the State of Georgia that is supposed to provide support to students with disabilities; however, GNETS frequently segregates students with disabilities by “placing them in dirty, run-down schools – including some that Black

¹⁴⁶ See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

¹⁴⁷ *Id.*

¹⁴⁸ Pruitt, *supra* note 28.

¹⁴⁹ *After SPLC Complaint, DOJ Finds Georgia Program Violates Disabilities Act*, S. POVERTY L. CTR. (July 24, 2015), <https://www.splcenter.org/news/2015/07/24/after-splc-complaint-doj-finds-georgia-program-violates-disabilities-act> [https://perma.cc/DFD7-EFDV].

students attended during the Jim Crow era.”¹⁵⁰ The reality of these conditions is well described by the Southern Poverty Law Center:

These schools frequently lack gymnasiums, labs and playgrounds. Sometimes the classes aren’t even taught by a teacher. Instead, students may spend their day taking computer-based courses. Even when these students attend regular schools, they may be relegated to a wing of the school with a separate entrance – preventing them from interacting with other children. One school even had a metal detector in the entrance for the students with disabilities, but not the entrance for other students.¹⁵¹

Despite the DOJ’s 2015 findings of discrimination within the GNETS program, I have seen in my personal experience that students with disabilities are still widely segregated in the State of Georgia.

Similarly, in 2020, *United States v. Mississippi* held that the State of Mississippi had violated the integration mandate of the ADA by relying on institutionalization and failing to provide adequate community-based mental health resources.¹⁵² While the state has policies that are facially positive and supportive, the data illustrates how the mental health care system in Mississippi has failed individuals with disabilities.¹⁵³ Without the intervention of the federal government, the State of Mississippi was violating both the ADA and the civil rights of individuals with disabilities.¹⁵⁴ This case further illustrates the pattern of discrimination that states allow when the federal government does not require accountability.

Due to the pattern of discriminatory treatment of students with disabilities by state governments, the federal government must take affirmative action to remedy the situation. As addressed previously, the ESSA significantly reduced federal oversight of state educational systems

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *United States v. Mississippi*, 400 F.Supp.3d 546, 575–76 (2019).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

and provided substantial deference to the states on how to manage the public education system.¹⁵⁵ However, as illustrated by the GNETS program¹⁵⁶ and *United States v. Mississippi*,¹⁵⁷ states are failing people with disabilities. If the federal government fails to take action, it will be complicit in the violations of constitutionally protected civil rights under the 14th Amendment, the ADA, and the IDEA.¹⁵⁸ The first step in providing a truly “Free and Accessible Public Education”¹⁵⁹ to students with disabilities needs to be a federal mandate that includes harm reduction measures for the students who are currently at risk of being funneled into the school-to-prison pipeline.

While harm reduction measures are not going to solve a systemic problem, they will be a first step in the improvement and inclusion of the public education system and will also provide a way to start meaningful change. For instance, the federal government ought to mandate that public schools cannot expel, suspend, transfer to alternative settings, or refer students to law enforcement. Instead, schools should replace these harsh disciplinary measures with therapeutic resources like PBIS or SRS.

While the schools are developing and implementing programs like PBIS or SRS, a student who is at risk for harsh disciplinary action should be offered the opportunity to get an evaluation to determine if there are any disability-related resources that they could benefit from. If a student is found to have a disability through the evaluation, then the school system should engage in an interactive process with the student, parents, and teachers to help develop an individualized education plan (IEP) to improve

¹⁵⁵ Derek W. Black, *Abandoning the Federal Role in Education*, 105 CAL. L. REV. 1309, 1335–1361 (2017) (critiquing the Every Student Succeeds Act).

¹⁵⁶ S. POVERTY L. CTR., *supra* note 149.

¹⁵⁷ *Mississippi*, 400 F.Supp.3d at 575–76.

¹⁵⁸ See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); ADA, 42 U.S.C. § 12102; IDEA, *supra* note 31.

¹⁵⁹ U.S. DEP’T OF EDUC., *About IDEA*, <https://sites.ed.gov/idea/about-idea/> [<https://perma.cc/J66X-LUMC>].

the student's experience at school. Such IEPs should be continually adapted and regularly reassessed to align with the child's changing developmental needs.

Further, eliminating the funnel that sends kids into the school-to-prison pipeline will reduce the segregation and emotional harm that comes with being pushed out of local schools as a "problem child." Harm reduction is critical to help mitigate the detriment that students enrolled in the system will experience. Unfortunately, it will take years for a system-wide overhaul that transitions schools away from punitive-based punishment systems and towards therapeutic and supportive systems, so it is crucial to mitigate the harms faced by students who are currently enrolled in the broken education system.

While many schools are supposed to engage in the development of IEPs for students with disabilities, as previously addressed, these students lack access to proper support and are extremely overrepresented in the rates of harsh disciplinary actions.¹⁶⁰ Since the ESSA was enacted, state schools have had little to no accountability to the federal government regarding education standards.¹⁶¹ The federal government needs to amend the ESSA to implement more federal oversight in order to establish accountability in state schools. Without federal accountability—as seen in *Brown v. Board*,¹⁶² *U.S. v. Mississippi*,¹⁶³ and the Georgia GNETS program,¹⁶⁴—states will continue to disregard and violate students' constitutional rights. While NCLB was highly criticized for its ineffectiveness and for having school

¹⁶⁰ U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *An Overview of Exclusionary Disciplinary Practices in Public Schools for the 2017-2018 School Year* (Jun. 2021), <https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf> [<https://perma.cc/2REY-L828>].

¹⁶¹ Black, *supra* note 21.

¹⁶² See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

¹⁶³ See *Mississippi*, 400 F.Supp.3d 575–76.

¹⁶⁴ S. POVERTY L. CTR., *supra* note 149.

funding be contingent on test scores, it did ensure more state accountability for educational standards.¹⁶⁵

There are alternative ways to ensure that states are accountable for their treatment of students with disabilities that will not place heavy emphasis on test scores and threaten to pull federal funding. For example, the federal government could (1) eliminate certain disciplinary tactics that disproportionately harm minority students; (2) allocate additional funding specifically toward teacher development and pay; (3) reallocate funding from police presence and alternative schools to school counselors and support systems; and (4) implement a nationwide PBIS or SRS program which meets schools locally and helps them implement healthier alternatives to behavior management. There is a plethora of alternatives to harsh disciplinary practices that do not involve criminalizing children for having disabilities.

VII. CONCLUSION

We cannot stop short of making systemic changes and redesigning the discipline within the public education system. Education is an invaluable tool that everyone has a right to. Education imparts academic knowledge and vital life skills, helping children navigate the world.

The federal government needs to immediately mitigate the harmful disciplinary and exclusionary practices widely used in public schools. Specifically, harm reduction measures that make disability accommodations accessible and which replace expulsion, suspension, and referral to alternative schools or law enforcement need to be implemented. Students with disabilities are currently being discriminated against and funneled into the school-to-prison pipeline, and these discriminatory actions have lifelong impacts on these children. Action must be taken because discrimination and harmful practices are used in the public school system daily.

¹⁶⁵ Randolph & Wilson-Younger, *supra* note 15.

While harm reduction measures provide some relief to students with disabilities, this cannot be the end of the conversation surrounding the improvement of the education system. There are numerous alternative methods of behavioral management and accommodations that would create a healthy and safe school environment. Lasting alternatives that result in long-term positive change must be developed as soon as possible because it is not sufficient to rely on harm reduction recommendations. Harm reduction methods are intended as a temporary reaction to a crisis of discrimination and segregation. It is crucial that the development of these alternatives involve the students and their families. A key tenant of Disability Rights Advocacy is “nothing about us without us” which highlights the need to “empower persons with disabilities to take control over decisions affecting their lives.”¹⁶⁶

¹⁶⁶ Whitney Pfeifer, *From “Nothing About Us Without Us” to “Nothing Without Us,”* NAT’L DEMOCRATIC INST. (Mar. 28, 2022), <https://www.ndi.org/our-stories/nothing-about-us-without-us-nothing-without-us> [<https://perma.cc/32SN-52PG>].

