

Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

One of the defects in this report is that it starts from the assumption that disparate outcomes between groups of students are the consequence of discriminatory behavior on the part of teachers and school administrators. To put it another way, the report assumes that all children enter school on a trajectory of academic success and good behavior, but this trajectory is interrupted by teachers and administrators who discriminate against students on the basis of race, disability, and so on. The discriminatory behavior redirects a student's natural trajectory toward academic failure and eventual imprisonment.

The assumption is unsupported by the evidence.

Children do not enter school as blank slates. By the time a child enters kindergarten, she already has five years of life behind her during which she had a stable home life (or not), was able to learn to regulate her behavior (or not)⁹⁷⁷, had parents who read to her every night (or not), and a thousand other variations that occur in life.

Many of a child's characteristics are already apparent by kindergarten or early elementary school. These include characteristics that are due to a child's environment or simple bad luck⁹⁷⁸, but that nonetheless shape a child's temperament and abilities. Evidence suggest black children in kindergarten and first grade may, on average, have less-developed social skills than comparable

⁹⁷⁷ Michelle Anne Coyne, Jamie C. Vaske, Danielle L. Boisvert, John Paul Wright, *Sex Differences in the Stability of Self-Regulation Across Childhood*, *J. of Development and Life-Course Criminology*, 1(1), 4-20 (2015) ("The general findings from the literature are that self-regulation, like self-control and other traits, typically emerges early during toddlerhood and that the ability to self-regulate one's affect, behavior, and attention increases throughout early childhood and becomes moderately stable during middle childhood for the majority of individuals."), <https://link.springer.com/article/10.1007/s40865-015-0001-6>.

⁹⁷⁸ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, *Psy. Rev.* 100(4), 674-701, 681 (1993), http://users.soc.umn.edu/~uggen/Moffitt_PR_93.pdf.

Hertzog (1983) has described an empirical test of the proposed relationship between neurological damage and difficult behavior in infancy. She studied a sample of 66 low-birth-weight infants from intact middle-class families. Symptoms of brain dysfunction detected during neurological examinations were significantly related to an index of difficult temperament taken at ages 1, 2, and 3 (Thomas & Chess, 1977; the index comprised rhythmicity, adaptability, approach-withdrawal, intensity, and mood). The parents of the children with neurological impairment and difficult temperament more often sought help from child psychiatrists as their children grew up, and the most frequent presenting complaints were immaturity, overactivity, temper tantrums, poor attention, and poor school performance. Each of these childhood problems has been linked by research to later antisocial outcomes (cf. Moffitt, 1990a, 1990b). Importantly, the impairments of the children with neural damage were not massive; their mean IQ score was 96 (only 4 points below the population mean). Hertzog's study showed that even subtle neurological deficits can influence an infant's temperament and behavior, the difficulty of rearing the infant, and behavioral problems in later childhood.

white children.⁹⁷⁹ Black children are less likely to be raised by both their biological parents.⁹⁸⁰ Across all racial groups, black children are the second most likely to be abused (after Native Americans) and across all races, the youngest children are most vulnerable to abuse.⁹⁸¹ By the time a child even arrives at school, the die, to a large extent, has been cast.

Differences in Behavior

The report glosses over the very likely possibility that different behavior, rather than racial discrimination, results in different treatment. The report cites panelist Monique Morris from the National Black Women's Justice Institute, who said:

[B]ehaviors, particularly of black girls, are misinterpreted as defiant and violent and disruptive and sometimes those are just expressions of their critical thinking. But based upon some of the ways in which we have portrayed black femininity in our society, the way those words come out or the very act of dissent is perceived as an act of defiance.⁹⁸²

Notice that even Ms. Morris qualifies her statement by saying that "*sometimes*" these behaviors "are just expressions of their critical thinking." The obvious conclusion to draw is that sometimes – perhaps often – these behaviors really are just acting out. Even if the girl's intent is to politely disagree with the teacher, if the teacher reasonably interprets her behavior as defiant, it does the girl no favors to ignore that. If a teacher (who may be more inclined to be forgiving of a student's

⁹⁷⁹ Kevin M. Beaver, John Paul Wright, and Matt DeLisi, "The Racist Teacher Revisited: Race and Social Skills in a Nationally Representative Sample of American Children," in *CLASSROOMS: MANAGEMENT, EFFECTIVENESS, AND CHALLENGES* (Rebecca J. Newley, ed.), at 127 (2011).

Using the largest longitudinal sample of kindergarten and first grade students [the ECLS-K], we tested these two competing perspectives. We first addressed the question of whether black students engaged in more problematic behaviors than did white students. T-tests revealed substantial differences, wherein white students scored significantly higher on measured social skills than black students. We should also note that to corroborate this finding, we analyzed parental reports of child social skills. The results gleaned from the *t*-tests (using parental reports of child social skills) produced virtually identical results. . . In both instances, black children were characterized as having a limited set of social skills.

To test the possibility that white teachers are biased against black students, we examined whether the teacher's race had an appreciable effect on their evaluations of black and white students' social skills. In the multilevel tests, the ECLS-K data provided no evidence that white teachers differentially rate black students as demonstrating more deficient social skills. Indeed, the teacher characteristics did not have a measurable impact on the subjective appraisal of their students' social skills. The findings reinforce prior research showing that teachers provide accurate, reliable, and valid assessments of their students. . .

⁹⁸⁰ See *infra*, "Racial Disparities in Family Structure".

⁹⁸¹ *Child Maltreatment 2017*, Administration for Children and Families, Department of Health and Human Services, 2017, at 21-22 (nationally, more than one-quarter of abused children are younger than three years old, and African-American children have the second-highest rate of victimization – 13.9 per 1,000 children), <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf#page=30>.

⁹⁸² Report at n. 441.

poorly formulated response than many people would be) interprets a response as hostile, an average outside observer likely would as well. It is better for this girl to learn how to properly and politely interact with others now, at school, than for her to treat future supervisors and coworkers in a way that will be perceived as hostile.

A longitudinal study was conducted based on data from the Early Childhood Longitudinal Study, Kindergarten Class (ECLS-K) of 1998-1999. In addition to collecting other data, the ECLS-K asked kindergarten, first, and third grade teachers to rate problem behavior in students.⁹⁸³ Then, in eighth grade, the study's authors asked parents if their child had ever been suspended. As the authors of the study wrote, their results were straightforward:

The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspension between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by ***pre-existing*** behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials. Differences in rates of suspension between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom [citations omitted][emphasis added].⁹⁸⁴

⁹⁸³ John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver, and J.C. Barnes, *Prior problem behavior accounts for the racial gap in school suspensions*, *Journal of Criminal Justice* 42(3), 257-266, at 251, May-June 2014, available at http://c8.nrostatic.com/sites/default/files/pdf_article_040214_KC_HeatherMac.pdf.

To measure early and stable problem behavior, we employ Gresham and Elliott's (1990) widely used Social Skills Rating Scale (SSRS). The SSRS uses a Likert scale ranging from 1-4 (1 = Never exhibits this behavior; 4 = Very often/exhibits this behavior most of the time.) . . .

Our measure of teacher-reported prior problem behavior utilized data from kindergarten, first, and third-grades only and is the sum of the four SSRS scales: self-control, interpersonal skills, externalizing problem behaviors, and approaches to learning. These scales tap a wide range of behaviors such as controlling one's temper, responding appropriately to pressure from peers, expressing thoughts and feelings appropriately, attentiveness, impulsivity, unnecessary arguing, disturbing ongoing classroom activities, and fighting. While some of the items that compose the subscales of the SSRS are attitudinal, studies have shown that measuring traits and behaviors with attitudinal measures is appropriate (see Pratt & Cullen, 2000). The SSRS scales have been used in a number of prior studies examining self-control and analogous problem behaviors (Beaver & Wright, 2007; Lamont & Van Horn, 2013; Vaughn, DeLisi, Beaver, & Wright, 2009; Wright & beaver, 2005).

We note that the SSRS was administered to different teachers during kindergarten, first, and third-grade. Moreover, the parent report of the child ever being suspended was assessed in the eighth-grade. Thus, our measure of prior problem behavior was taken at least five years prior to the parental measure of child suspension. Additionally, we averaged the teacher-reported SSRS scores across kindergarten through third-grade and found no difference in our analyses when using the averaged versus the additive measure of teacher-reported prior problem behavior.

⁹⁸⁴ Id. at 264.

The report cites statistics regarding crime in schools, and then quotes former Department of Education official Anurima Bhargava for the proposition that “simply suspending or expelling these students does not make the school safer.”⁹⁸⁵ Bhargava did not present any evidence for this, instead stating that if disruptive students are suspended or expelled from school, the disruptive students do not have “the opportunity to learn how to behave in classrooms.”⁹⁸⁶ The strongest assertion that suspensions do not make schools less safe comes from a source cited by the report that says:

Punishing students by excluding them from school does not deter future misbehavior, and may in fact increase it, making the overall educational environment less safe. For example, students suspended in early middle school are more likely to be suspended again by the eighth grade, suggesting an increase in misbehavior. Overall, schools with higher suspension rates tend to have lower ratings in academic quality and school climate. Additionally, even when controlling for race and poverty, research has found that high-suspending districts have worse outcomes on standardized tests.⁹⁸⁷

None of this proves that suspensions are responsible for these problems in schools.⁹⁸⁸ It is unsurprising that a student who was suspended once would be suspended again. A suspension is an indication that this student has trouble following rules and respecting authority. It is hardly surprising that a suspension might not change that. Furthermore, it is unsurprising that the number of suspensions would increase overall as students age. “[I]t is now known that the steep decline in antisocial behavior between ages 17 and 30 is mirrored by a steep incline in antisocial behavior between ages 7 and 17.”⁹⁸⁹ According to the CDC, high school students are most likely to get into a physical fight at school in ninth grade.⁹⁹⁰ The prevalence of physical fighting declines each year after that. It appears that misbehavior increases as students reach puberty, and then decreases as they mature. In short, it is entirely likely that a student who was suspended in early middle school would have been suspended in eighth grade with or without the earlier suspension.

An earlier article by Russell Skiba “found that White students were more often referred to the office for offenses that appear to be more objective: *smoking, vandalism, leaving without permission, and obscene language*, while African American students were referred more often for *disrespect, excessive noise, threat, and loitering*, which are more subjective behaviors.”⁹⁹¹ All this

⁹⁸⁵ Report at n. 684.

⁹⁸⁶ Report at n. 686.

⁹⁸⁷ Jenni Owen, Jane Wettach, and Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family Policy and Duke Law School, 2015, at 42, https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

⁹⁸⁸ See *infra* on Restorative Practices.

⁹⁸⁹ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, *Psy. Rev.* 100(4), 674-701, 675 (1993), http://users.soc.umn.edu/~uggen/Moffitt_PR_93.pdf.

⁹⁹⁰ Laura Kann, Tim McManus, William et al., “Youth Risk Behavior Surveillance,” *Centers for Disease and Prevention, Morbidity and Mortality Weekly Report*, Vol. 65, No. 6, June 10, 2016, at 8, <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6506.pdf>.

⁹⁹¹ Russell Skiba, Megan Trachok, Choong-Geun Chung, Timberly Baker, Adam Sheya, & Robin Hughes, *When Should We Intervene? Contributions to Behavior, Student, and School Characteristics to Suspension and Expulsion*, Center for Civil Rights Remedies and the Research-to-Practice Collaborative, National Conference on Race and

tells us, if anything, is that white students and black students tend to engage in different types of misbehavior.

Additionally, students do not engage in all sorts of serious misbehavior (the type that is likely to result in a suspension or expulsion) proportionately by race. The report cites an article by John Wallace, Jr. and others that gives three examples of misbehavior that may result in a student being sent to the office or detention: “alcohol at school,” “drugs at school,” or “gun at school” to show that there are not racial disparities in behavior, but that there are racial disparities in punishment. The survey from which this information is drawn, however, did not ask what type of discipline the student experienced for engaging in the three listed types of behavior. The survey simply asked students how often, if ever, a student had been sent to the office or detention, or suspended or expelled, over the past year. Answers were then dichotomized into “yes” or “no.”⁹⁹² The same procedure was followed for offenses.⁹⁹³

Furthermore, the Wallace article characterizes its survey findings as “non-White youth are more likely than White youth to experience school discipline,” which as a matter of numbers may be correct. However, the white/non-white dichotomy is misleading, because Asian students are less likely to experience discipline than are white students.⁹⁹⁴ Rather, students of different races fall at different points on a continuum of misbehavior and discipline.⁹⁹⁵

The report also ignores other common types of misbehavior that may result in suspension or expulsion.⁹⁹⁶ The report cites statistics from the Department of Education that indicate that “in 2015 approximately 7.8 percent of students reported being in a physical fight in the prior 12 months before the survey was conducted.”⁹⁹⁷ The Commission’s report *does not* mention that there were pronounced disparities by race and sex among those who engaged in fights in school property. Males were far more likely to engage in fights on school property than females (10.3% vs. 5.0%).⁹⁹⁸ Racial disparities were so stark that in some cases they overwhelmed the sex disparities. Black females (9.4%) were more likely to report engaging in a physical fight on school property than were white males (8.0%). Overall, 12.6% of black students and 8.9% of Hispanic students had engaged in a physical fight on school property in the previous year, as opposed to 5.6% of white students.

Gender Disparities in Discipline, 2013, , citing Russell Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, *The Urban Review* 34(4), 317, 2002, <http://www.indiana.edu/~equity/docs/ColorofDiscipline2002.pdf>.

⁹⁹² John Wallace, Jr., Sara Goodkind, Cynthia Wallace, and Jerald Bachman, *Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005*, *Negro Educational Review*, 59(1-2), 2008, 47-62, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678799/>.

⁹⁹³ Id.

⁹⁹⁴ Id. (Asian-American 10th graders are 40% less likely than their white peers to be sent to the office or detention, and only half as likely to be suspended or expelled.)

⁹⁹⁵ Id. at Table 2 (Asian-American students are also the least likely to report that they engaged in any of the three offenses).

⁹⁹⁶ Report at n. 645.

⁹⁹⁷ Report at n. 682.

⁹⁹⁸ Laura Kann, Tim McManus, William et al., “Youth Risk Behavior Surveillance,” *Centers for Disease and Prevention, Morbidity and Mortality Weekly Report*, Vol. 65, No. 6, June 10, 2016, at 9, <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6506.pdf>.

This doesn't address whether the non-disruptive students – or, for that matter, those students whose misbehavior is particularly sensitive to peer influence – are safer and are better able to learn once the disruptive students have been removed. Studies and surveys of school districts that have reduced suspensions or implemented restorative practices suggest that non-disruptive students are *not* better off with their disruptive peers in the class.⁹⁹⁹ And another recent study suggests that attending school with “crime prone peers,” regardless of whether you share a neighborhood, reduces academic performance among non-crime-prone children by 0.016 standard deviations and increases antisocial behavior at the school level. Perhaps more importantly, the effect persists beyond school days, and “results in a 6.5 percent increase in the probability of being arrested, and a 4.5 percent increase in days incarcerated” at ages 19-21.¹⁰⁰⁰

Emotional Disturbance as Learning Disability

The report notes with apparent surprise that:

Other studies have found that teachers with over 20 years of experience reported more negative attitudes [regarding the placement of students with disabilities in general education classes], despite having experience with inclusive teaching, compared to newer teachers with no experience in inclusive classrooms. Further, additional studies suggest that the type of disability a student has may influence teacher biases. For example, these studies reflect that teachers held positive attitudes toward the inclusion of students with learning disabilities compared to negative attitudes toward students with behavioral disorders.¹⁰⁰¹

This suggests that teachers who actually have dealt with students with disabilities may have a less sanguine view of how feasible it is to educate students with behavioral disorders alongside those without behavioral disorders. The fact that teachers welcome the inclusion of students with learning disabilities but not those with behavioral disorders further suggests that this has more to do with the possibility of maintaining order in the classroom for all students than with the need to spend some extra time assisting a particular child.

The report states, “Nationally, over the 2011-2012 school year, 75 percent of students who were subjected to physical restraint were students with disabilities served by IDEA; and 25 states had higher percentages of restraint use than the national average.”¹⁰⁰² Well, yes. There are 50 states, so having 25 states with higher restraint use than the national average is roughly what you would expect (the median and the average are not the same thing, but the point holds).

⁹⁹⁹ See *infra* “Restorative Practices”.

¹⁰⁰⁰ Stephen B. Billings and Mark Hoekstra, *Schools, Neighborhoods, and the Long-Run Effect of Crime-Prone Peers*, NBER Working Paper Series, Working Paper 25730, March 4, 2019, at 3, <http://www.nber.org/papers/w25730>.

¹⁰⁰¹ Report at n. 602.

¹⁰⁰² Report at n. 455.

The report also fails to seriously consider the use of restraints, instead simply stating that children with disabilities are more likely to be physically restrained than are children without disabilities. Again, this is unsurprising because “disability” includes “severe emotional disturbance” and “intellectual disability”. When severe bad behavior is defined as a disability, it is unsurprising that children classified as having a disability are disciplined and restrained more often than others.¹⁰⁰³ Elsewhere, the report states, “Regarding discipline actions against students with disabilities, the researchers found that out of the 122,250 students with disabilities, nearly three-quarters of the students who qualified for special education services during the study period were suspended or expelled at least once.”¹⁰⁰⁴ However, once again, this obscures the type of disabilities that are at issue. According to the cited report:

Nearly three-quarters of the students who qualified for special education during the study period were suspended or expelled at least once. The level of school disciplinary involvement, however, varied significantly according to the specific type of disability. For example, *students coded as having an “emotional disturbance” were especially likely to be suspended or expelled. In contrast, students with autism or mental retardation – where a host of other factors was controlled for – were considerably less likely than otherwise identical students without disability to experience a discretionary or mandatory school disciplinary action.*¹⁰⁰⁵

This strongly suggests that teachers are not simply biased against students with disabilities and suspend them out of dislike or discriminatory intent. If students classified as having “emotional disturbance” – which essentially means idiopathic learning and behavioral problems – are particularly likely to be suspended or expelled, whereas those who have learning problems are particularly *unlikely* to be suspended or expelled, it suggests that the suspensions and expulsions are based upon student behavior. If bad behavior with no discernible cause is classified as a disability, of course children classified as having a disability will be particularly likely to be disciplined.

¹⁰⁰³ C.J.N. v. Minneapolis Public Schools, 323 F.3d 630, 634-35 (8th Cir. 2003).

C.J.N. is an eleven-year-old boy with lesions in his brain and a long history of psychiatric illness. A special education student in the Minneapolis Public Schools, Special School District No. 1 (District) since kindergarten, C.J.N. has consistently had behavioral difficulties while nonetheless progressing academically at an average rate. . . .

C.J.N. nevertheless misbehaved in Ms. Schroeder's classroom many times, leading to him being given “time-outs” and even to being physically restrained. Most episodes of restraint were for less than a minute, but there were six days on which C.J.N. was restrained for five or more minutes: Restraint was used after C.J.N. began kicking others, hitting staff with pencils, or banging his head against the wall. On one occasion in December, a behavioral outburst led to police intervention and a period of hospitalization for C.J.N. This was his last day at Keewaydin.

¹⁰⁰⁴ Report at n. 187.

¹⁰⁰⁵ Tony Fabelo, Michael Thompson, Martha Plotkin, Dottie Carmichael, Miner Marchbanks III, & Eric Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Justice Center The Council of State Governments & Public Policy Research Institute, July 2011, xi, .

Restorative Justice and Suspensions

“Restorative practices, as they are typically called in a school or community setting, include many specific program types and do not have one specific definition in the literature; **they are broadly seen as a nonpunitive approach to handling conflict** (Fronius et al., 2016)[emphasis added].”¹⁰⁰⁶ When we talk about “restorative justice,” as we see here, we are not talking about a clearly defined set of practices. We are talking about fuzzy muffles. Telling children to reflect upon the harm they have caused to others may be effective for children who are predisposed to empathize with others or to care about disappointing their teachers. But not all children care about the effects of their actions on others, or indeed, may be pleased that the harm they caused had its intended effect.¹⁰⁰⁷

Restorative Practices in Pittsburgh

When studying the results of “restorative practices” in Pittsburgh, the Rand Corporation’s researchers interviewed staff who “described disruptive behavior that frequently derailed well-intentioned circle discussions. . . A survey respondent wrote:

There are several students who have not benefitted from the use of restorative practices at all. Rather, they disrespect it and scoff at it as a lenient form of discipline. These students, however few they may be . . . are disruptive to other students’ learning and disruptive to their classroom, and the whole school in general. Because of these students, it becomes harder to implement restorative practices on the whole. . . I feel that restorative practices [don’t] address such students at all, rather it fails them entirely and ultimately is the foundation for all of the failings we have experienced with restorative practices as a whole.¹⁰⁰⁸

The report states that suspensions can still be given in certain instances. As I have often said, that message often does not filter down to the people who are supposed to implement these policies. The message they hear is, “Get your numbers right.” In Pittsburgh, about one-third of staff surveyed were confused about how to integrate “restorative practices” and discipline. “[A few interviewees] believed that, in theory, using restorative practices did not preclude disciplinary

¹⁰⁰⁶ Catherine H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*, Rand Corporation, Dec. 27, 2018, at 3, https://www.rand.org/pubs/research_reports/RR2840.html.

¹⁰⁰⁷ James Q. Wilson and Richard J. Herrnstein, *CRIME & HUMAN NATURE* 379.

Palmer showed that the monthly arrest rates of neurotic (what he called “conflicted”) delinquents were lower after treatment in an intensive probation program than were the rates of the “power-oriented” delinquents; indeed, the latter had *higher* arrest rates as a consequence of treatment, probably because they found that they could manipulate to their own advantage the therapeutic setting in which they had been placed.

¹⁰⁰⁸ Catherine H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*, Rand Corporation, Dec. 27, 2018, at 35, https://www.rand.org/pubs/research_reports/RR2840.html.

action; yet, the message from the district seemed to them to be that responses to incidents ought to be addressed through restorative practices only.”¹⁰⁰⁹

The most that can be said about Pittsburgh’s experiment with restorative practices is that there may have been some marginal improvements, but other aspects seem to have deteriorated. Elementary school students were less likely to be suspended. Racial disparities in suspensions decreased.¹⁰¹⁰ Teachers in schools that adopted restorative practices reported having a more positive perception of teaching and learning conditions.¹⁰¹¹ On the other hand, there was no change in suspensions among middle school students, and arrests did not decline.¹⁰¹² Academic performance declined among both black and white students in predominantly African-American middle schools.¹⁰¹³ Students in schools that implemented restorative practices also rated their teachers’ classroom management skills more negatively than did students in the control schools – in fact, the ratings trended downward more sharply than they had in previous years.¹⁰¹⁴ Students in schools that implemented restorative practices also reported feeling less peer support than did students in the control schools.¹⁰¹⁵

Ending Suspensions in California

Several school districts in California – Los Angeles, San Francisco, Oakland, and Pasadena – banned out-of-school suspensions for “defiance,” and the state instituted a statewide ban of out-of-school suspensions for defiance at the K-3 level.¹⁰¹⁶ A Boston University doctoral student conducted an analysis of academic performance in the Los Angeles Unified School District (LAUSD) by examining test results from the 2010-11, 2012-13, and 2014-15 school years.¹⁰¹⁷ LAUSD banned out-of-school suspensions for defiance in May 2013.¹⁰¹⁸ Out-of-school suspensions for defiance within LAUSD declined dramatically from 2,814 in 2012-2013 to 618 in 2013-14 and 305 in 2014-15.¹⁰¹⁹ Academic performance at middle schools (the only schools studied) within LAUSD *declined* after the ban. This seems to have been driven by declines in academic performance at middle schools that had suspended students for defiance prior to the ban.¹⁰²⁰ Although there was less data available for the San Francisco, Oakland, Pasadena, and K-

¹⁰⁰⁹ Id. at 35.

¹⁰¹⁰ Id. at 71.

¹⁰¹¹ Id. at 70.

¹⁰¹² Id. at 71.

¹⁰¹³ Id. at 55.

¹⁰¹⁴ Id. at 57.

¹⁰¹⁵ Id. at 57.

¹⁰¹⁶ Dominic Zarecki, *Banning Progress: Suspension Bans and Schoolwide Academic Growth*, May 3, 2018, at 13-14, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176650&download=yes.

¹⁰¹⁷ Id. at 10.

¹⁰¹⁸ Id. at 1.

¹⁰¹⁹ Id. at 7.

¹⁰²⁰ Id. at 11-12.

Looking within LAUSD reveals a linear relationship between the intent to treat and academic growth. Schools with no suspensions in 2013 had almost no change in growth. Schools with one to ten suspensions in 2013 experienced an 18% standard deviation drop, while schools with at least eleven suspensions in 2013 experienced a 30% decrease in growth. This pattern also perfectly fits the expectations of the second strand of the literature: suddenly reducing suspensions harms

3 bans because of when they were instituted, what data there is indicates that academic performance suffered as a result of those bans too.¹⁰²¹

Despite panelist Dan Losen's claims to the contrary, there is some evidence from LAUSD's annual school experience surveys that school climate has deteriorated since 2013. In 2013, 71 percent of LAUSD high school students said they felt safe on school grounds, and 44 percent said bullying was not a problem at their school.¹⁰²² In 2016, 63 percent of LAUSD high school students said they felt safe in school and the number of those who said bullying was not a problem at their school increased to 50 percent.¹⁰²³ Among middle-school students, 70 percent reported in 2013 that they felt safe on school grounds, which declined to 65 percent who said they felt safe in school in 2016.¹⁰²⁴ As with the high school students, middle school students reported bullying being less of a problem in 2016 than in 2013. Both middle-school and high school staff also reported a greater sense of safety on school grounds in 2016 than 2013, with 86 percent of middle-school staff and 88 percent of high school staff reporting in 2013 that they felt safe on school grounds increasing to 94 percent and 95 percent, respectively.¹⁰²⁵ The 2018 School Experience Survey has been partially released, but it appears that the middle school results are not yet available. 64 percent of high school students and 90 percent of high school staff reported feeling safe at school (the bullying question was changed to a series of questions about personal experience of bullying, so is not really comparable).¹⁰²⁶

Ending Suspensions in Philadelphia

Likewise, Philadelphia's official ban on out-of-school suspensions for "conduct offenses"¹⁰²⁷ had a deleterious effect on the academic progress of the most at-risk students, and had no effect on the

academic growth. The small numbers of schools in each category prevent any of the differences from being statistically significant. However, this comparison of schools within LAUSD is a natural experiment: the schools are very similar in observed and unobserved characteristics, with the exception of the extent to which they were impacted by the suspension ban (because they gave different numbers of defiance suspensions in 2013).

¹⁰²¹ Id. at 13-14.

¹⁰²² "Results of the 2013 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 6, <http://reportcardsurvey.lausd.net/surveys/reports.jsp>.

¹⁰²³ "Results of the 2016 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 7, <http://reportcardsurvey.lausd.net/surveys/reports.jsp>.

¹⁰²⁴ "Results of the 2013 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 6, <http://reportcardsurvey.lausd.net/surveys/reports.jsp>; "Results of the 2016 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 7, <http://reportcardsurvey.lausd.net/surveys/reports.jsp>.

¹⁰²⁵ "Results of the 2013 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 21; "Results of the 2016 School Experience Survey: LAUSD Middle Schools," Los Angeles Unified School District, at 15; "Results of the 2013 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 22; "Results of the 2016 School Experience Survey: LAUSD High Schools," Los Angeles Unified School District, at 15.

¹⁰²⁶ "LAUSD School Experience Survey Results 2018-19," Los Angeles Unified School District, <https://achieve.lausd.net/Page/15606>.

¹⁰²⁷ "Conduct offenses" are: failure to follow classroom rules/disruption; profane/obscene language or gestures; alteration of grade reporting/excuses/school documents; forgery of administrator, teacher, or parent/guardian's signature; inappropriate use of electronic devices; public display of affection/inappropriate touching.

academic progress of less vulnerable students. The policy was unevenly implemented, with some schools following it completely, others essentially ignoring it, and other schools falling somewhere in the middle.¹⁰²⁸ The schools that ended suspensions had student populations that were less disadvantaged, academically stronger, had the lowest percentage of black and Hispanic students, and already had the lowest suspension rates. The schools that did not comply with the suspension ban at all had the poorest student population, were overwhelmingly black and Hispanic, were the weakest academically, and had suspension rates that were higher than the “full compliers” but lower than the “partial compliers.” The “partial compliers” fell in the middle on each of these metrics except for suspensions – 16 percent of their students were suspended each year, as opposed to 13 percent of students at the non-complying schools.

Students who had been previously suspended under the old policy did not show any improvement in academic achievement under the new policy, but their attendance did improve.¹⁰²⁹ Unfortunately, students who had *not* been suspended prior to the policy change and who attended schools that previously had the highest suspension rates (the non-compliers and partial compliers) suffered academically.

Partial Compliers: These are the 60 percent of schools that reduced, but did not eliminate, conduct suspensions in the post-reform year. In contrast to non-suspended peers in full complier schools, peers in partial complier schools experienced a 0.06 standard deviation *decline in math achievement*, relative to their comparison school counterparts. Total absences increased by 0.44 days per student (or forty-four days per one hundred students), representing a 3 percent increase over 2011-12 levels. The increase in total absences was driven by an increase in unexcused absences, on the order of 0.76 days per student and representing an 8 percent increase over 2011-12 levels.

Non-compliers: These are the 17 percent of schools that (in all but one case) increased conduct suspensions in the post-reform year. Peers in non-complier schools experienced a 0.06 standard deviation *decline in math achievement* and a 0.03 standard deviation *decline in ELA achievement*, relative to their comparison school counterparts. We do not, however, find any change in total absences following the district’s policy change.¹⁰³⁰

Despite the damage done to Philadelphia’s already abysmal academic achievement, schools appear to be no safer than they were before the anti-suspension initiative. According to the Philadelphia school district’s own statistics, during the 2014-15 school year there were 5,509 “serious incidents” (e.g., assaults, harassment, drugs and alcohol, disorderly conduct).¹⁰³¹ That increased to 5,921 “serious incidents” during the 2017-18 school year. And Philadelphia teachers have been the

¹⁰²⁸ Matthew Steinberg and Johanna Lacoë, *The Academic and Behavioral Consequences of Discipline Policy Reform: Evidence from Philadelphia*, Thomas B. Fordham Institute, Dec. 15, 2017, at 23-24, <https://fordhaminstitute.org/national/research/academic-and-behavioral-consequences-discipline-policy-reform>.

¹⁰²⁹ *Id.* at 26.

¹⁰³⁰ *Id.* at 27.

¹⁰³¹ “Serious Incidents,” School Performance, District Performance Office, Philadelphia School District, https://www.philasd.org/performance/programsservices/open-data/school-performance/#serious_incidents.

victims of increasing violence at the hands of students *and* parents, leading to protests by the teachers and administrators unions.¹⁰³² According to district records, there were over 100 assaults on teachers and administrators each year during 2015-16, 2016-17, and 2017-18.¹⁰³³ It is also worth noting that if teachers and staff have to worry about being attacked by parents, it is hardly surprising that there would be discipline problems in schools.

Implementing Restorative Practices in Baltimore

The report approvingly cites the Baltimore Public School System as an example of the implementation of restorative justice practices.¹⁰³⁴ Perhaps this should be revisited, given the poor outcomes of restorative practices elsewhere.¹⁰³⁵ The Commission's Maryland State Advisory Committee held its briefing on "disproportionate discipline"¹⁰³⁶ in August. By late November, violence against teachers and staff in the Baltimore City schools had become so common and severe that the teachers' union created a School Safety Task Force. According to records obtained by a local news station, "there were 436 incidents in the 2017-2018 school year, and 126 incidents this year [2018-19] through Dec. 4 . . . That includes student contact with any adult, not just teachers. It also includes unintentional physical contact, such as during a fight between students."¹⁰³⁷

One teacher was assaulted by an 11th-grade male student. At another school, a high school student punched his teacher. A female teacher tried to break up a fight between two female students – which was apparently connected to another fight that had occurred earlier in the day – and was pepper-sprayed by one of the girls.¹⁰³⁸ And at yet another school, a cafeteria worker was attacked by two female students over a carton of milk and suffered a broken arm.

"She grabbed our fruit off the counter and started throwing it in the kitchen at us," said Hill, referring to one of the girls involved in the incident.

Hill said she was attacked by two female students who left her with injuries, including a broken wrist and shattered bones in her arm. "I was just doing my job

¹⁰³² Kristen A. Graham and Claudia Irizarry-Aponte, 'Enough is enough': Philly school unions boiling over assaults on staff, *The Inquirer*, June 15, 2018, <https://www.philly.com/philly/education/principals-teachers-assaults-violence-philadelphia-schools-20180615.html>.

¹⁰³³ *Id.*

¹⁰³⁴ Report at n. 496.

¹⁰³⁵ Baltimore City Public Schools are already extremely violent. According to the district's annual student survey, in 2017 only 41.5 percent of students said that students fighting was *not* a problem at their school, and only 42.3 percent said that bullying was *not* a problem at their school. On the other hand, 73.9 percent said they felt safe at school, presumably despite the aforementioned problems. *See* "District-level results for 2007 through 2018," Data, Baltimore City Public Schools, <https://www.baltimorecityschools.org/data>.

¹⁰³⁶ U.S. Commission on Civil Rights, "Briefing on Disproportionate Discipline in Maryland Schools," Aug. 24, 2018, <https://www.usccr.gov/press/2018/08-15-18a-IF.pdf>

¹⁰³⁷ Bryna Zumer, "Baltimore school system reports assaults by students against adults last year," Fox5 News, Dec. 10, 2018, <https://foxbaltimore.com/news/local/baltimore-school-system-reports-436-assaults-by-students-against-adults-last-year>.

¹⁰³⁸ Tim Tooten, "Dunbar teacher pepper-sprayed while trying to break up students' fight," WBAL, Nov. 29, 2018, <https://www.wbal.com/article/dunbar-teacher-pepper-sprayed-while-trying-to-break-up-students-fight/25351300>.

and they didn't want to follow the rules," said Hill. The confrontation was caught on camera and quickly posted to Instagram.

Hill said a milk carton triggered the violence. She said the students were upset because they only wanted milk, no food – which, according to Hill, is required under the free lunch program.

"Most of [the students] know that and follow the rules. This particular day, the young lady wanted to be disrespectful and not follow the rules. So, when I went to confront her about taking the milk, the girl jumped up and wanted to fight," said Hill.¹⁰³⁹

"School official[sic] say the students involved will receive appropriate consequences following an investigation."¹⁰⁴⁰ Apparently those consequences didn't even rise to the level of a slap on the wrist. Less than a month later, one of the girls attacked and injured a school nurse and an aide.¹⁰⁴¹ The Baltimore Teachers Union protested, "Under no circumstances should this student have been allowed to be readmitted to NAF after assaulting the cafeteria worker in November."¹⁰⁴² This is one of the problems with discouraging the use of suspensions and expulsions. Lip service is always paid to, "Of course, this does not apply to students who pose physical threats to students or teachers," but in reality, two ideas become dominant: 1) we must get our suspension and expulsion numbers down, even if that means not suspending or expelling students who are dangerous; 2) we effectively place a higher priority on keeping dangerous and disruptive students in school than on the safety and security of teachers and non-disruptive students.¹⁰⁴³

According to the city teachers union, media reports may understate the number of attacks on teachers and staff because of pressure not to report the attacks.

"It's sad to say, there have been people and there are people that may have been suffering through certain incidents like this and they're not reporting them. So that's something else that needs to be addressed," said Antoinette Ryan-Johnson, president of the City Union of Baltimore.¹⁰⁴⁴

In February, a special education assistant at Frederick Douglass High School in Baltimore was shot by Neil Davis, the 25-year-old brother of a student. Michael Marks, a special education

¹⁰³⁹ Keith Daniels, "School cafeteria worker describes being attacked in east Baltimore," Fox5 News, Nov. 28, 2018, <https://foxbaltimore.com/news/local/school-cafeteria-worker-describes-being-attacked-in-east-baltimore>.

¹⁰⁴⁰ Id.

¹⁰⁴¹ "Baltimore student arrested after allegedly assaulting, injuring school nurse and aide," WMAR, Dec. 20, 2018, <https://fox43.com/2018/12/20/baltimore-student-arrested-after-allegedly-assaulting-injuring-school-nurse-aide/>.

¹⁰⁴² Id.

¹⁰⁴³ Report at n. 436 ("we do ourselves a disservice and really sort of steer the conversation in the wrong direction when we try to say, [] what is the impact of the disruptive students on the non-disruptive students?").

¹⁰⁴⁴ Jenny Fulginiti, Karen Campbell, and Tim Tooten, "Poly teacher assaulted; Union creates task force amid rising student assaults against staff," Nov. 29, 2018, WBAL, <https://www.wbaltv.com/article/baltimore-teachers-union-creates-task-force-amid-rising-student-assaults-against-staff/25332333>.

assistant, had disciplined the shooter's sister.¹⁰⁴⁵ The sister was taking part in a mediation that stemmed from a prior bullying incident and called her brother. When the brother entered the school, he was approached by 56-year-old Marks. The brother shot Marks twice. Thankfully, there were extra armed police *on hand for the mediation*, and they were able to subdue the shooter. When a school needs extra armed police on hand for a mediation involving a bullying incident, and one of the students involved in the mediation calls in her own armed backup, this is more than just a simple trip to the principal's office.

Restorative Practices in Minneapolis

The report also cites a report which claims that restorative justice practices improved some outcomes for students in Minneapolis.¹⁰⁴⁶ This report tracked outcomes for children who were recommended for possible expulsion by comparing their school records for the year before they were referred to a Restorative Conference Program (RPC), the year they participated, and the year after they participated.

There are approximately 180 days in a school year. The students under observation already had a significant number of absences in year 1. High school students were at school for an average of only 117 days out of 180, and middle school students for only 115. In year 2, when they were referred to a restorative justice program, high school students were present for only 64 days out of the year and middle school students were present for only 56 days out of the school year. The researchers wanted to find out if student attendance improved after the RPC.

However, when the researchers examined school attendance for year 3, they decided to only examine attendance records for students they deemed "actively attending" Minneapolis Public Schools, which they defined as being present for at least 75 days.¹⁰⁴⁷ The reason was to ensure that they were only examining students who were still attending Minneapolis Public Schools and who had not been expelled or changed districts. However, this definition guarantees that an improvement will be seen, because the average number of days in school in year 2 is so low that these students would not have been deemed "actively attending." It also seems likely that this captured the students who were less troubled to begin with, because the students who were "actively attending" in year 3 had higher-than average attendance in year 1 (128 days versus 117 days for the group as a whole).

Racial Disparities in Family Structure

¹⁰⁴⁵ Keith Daniels, "Exclusive: Douglass High shooting victim speaks out," WBFF, Feb. 20, 2019, <https://foxbaltimore.com/news/local/exclusive-douglass-high-shooting-victim-speaks-out>.

¹⁰⁴⁶ Report at n. 16, citing Barbara J. McMorris, Kara J. Beckman, Glynis Shea, Jenna Baumgartner, and Rachel C. Eggert, "Applying Restorative Practices to Minneapolis Public Schools Students Recommended for Possible Expulsion: A Pilot Program Evaluation of the Family and Youth Restorative Conference Program," University of Minnesota, Healthy Youth Development/Prevention Research Center, Dec. 2013, http://www.legalrightscenter.org/uploads/2/5/7/3/25735760/lrc_umn_report-final.pdf.

¹⁰⁴⁷ Id. at 29.

The report relies heavily on research by Russell Skiba that found racial disparities in discipline rates even after controlling for socioeconomic status.¹⁰⁴⁸ However, a problem with relying on socioeconomic status when making racial comparisons is that it obscures differences in family structure. For example, Raj Chetty and his coauthors recently released a report on intergenerational mobility between white and black boys. However, “[A]s Chetty et al. note in the study, they found ‘two incomes for most white children but only one for most black children.’ So, by controlling for household income growing up, their reported findings minimized the effect of family structure.”¹⁰⁴⁹ The problem is that family structure plays an important role in children’s behavior. Children raised by single mothers are far more likely to have behavioral problems.¹⁰⁵⁰ In the 2014 Juvenile Offenders and Victims report, the Department of Justice wrote:

A 2004 study by McCurley and Snyder explored the relationship between family structure and self-reported problem behaviors. The central finding was that youth ages 12-17 who lived in families with both biological parents were, in general, less likely than youth in other families to report a variety of problem behaviors, such as running away from home, sexual activity, major theft, assault, and arrest. The family structure effect was seen within groups defined by age, gender, or race/ethnicity. In fact, this study found that *family structure was a better predictor of these problem behaviors than race or ethnicity. The family structure effect emerged among both youth who lived in neighborhoods described as “well kept” and those in neighborhoods described as “fairly well kept” or “poorly kept.”* [emphasis added]¹⁰⁵¹

Although the Juvenile Offenders report cautions that family structure itself may not be responsible for these outcomes, it seems fairly clear that whatever the unobserved variables might be, they tend to be present in two-parent biological families and absent in other family configurations. A father’s involvement with his child reduces the incidence of behavioral problems.¹⁰⁵² This is the case even for poor, unmarried fathers. However, when parents are not married, a father’s involvement with his child declines relatively quickly.¹⁰⁵³ The father’s reduced presence in his

¹⁰⁴⁸ Report at n. 447.

¹⁰⁴⁹ W. Bradford Wilcox, “For Black Boys, Family Structure Still Matters,” Institute for Family Studies, Mar. 22, 2018, <https://ifstudies.org/blog/for-black-boys-family-structure-still-matters>.

¹⁰⁵⁰ Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 55-56 (2014) (“The consequences of living in single-parent homes extend beyond the effects on household incomes and poverty rates. Children in such homes also suffer from cognitive, social, and emotional deficits relative to children raised in two-parent homes.”).

¹⁰⁵¹ National Center for Juvenile Justice, *Juvenile Offenders and Victims, 2014 National Report*, Office of Juvenile Delinquency and Prevention, December 2014, at 10, <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

¹⁰⁵² Jeong-Kyun Choi, Gina Kunz, and Minsung Kim, *Longitudinal relationships between unmarried fathers’ involvement and their children’s behavior problems: Using latent growth modeling*, 91 *Children and Youth Services Review* 424-430 (2018).

¹⁰⁵³ Id. (Fathers’ involvement also decreased from 1.75 (S.D. =1.11) at age 1 to 1.58 (S.D.=1.12) at age 3 and flattened to 1.51 9S.D. 1.15) at age 5.”).

See also Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 71 (over 80 percent of unmarried parents of children in the Fragile Families and Child Wellbeing study were romantically involved at the time of their child’s birth, but only one-third of them were still together when the child turned five, as opposed to 80 percent of married parents who were still together).

child's life may also be important because the child's mother will likely shoulder additional financial and childcare responsibilities.

We all know that black children are far more likely to be born out of wedlock than are white, Hispanic, or Asian children.¹⁰⁵⁴ Relationships between unmarried parents rarely endure, and mothers tend to serve as “gatekeepers” who control access to the children.¹⁰⁵⁵ Furthermore, statistics regarding how many children live with two parents tend to obscure that often, both adults are not the child's biological parents.¹⁰⁵⁶ Outcomes for children raised by a single mother and a biologically unrelated male are, if anything, worse than for children raised only by a single mother. Thus, if black children are more likely to be raised by single mothers and have little contact with their fathers, we should not be surprised at elevated rates of misbehavior among black children. Nor, then, should we be surprised that schools that have larger percentages of black students have higher rates of discipline.

Social Maladjustment and Learning Disabilities

a. Troubled Home Lives and Social Maladjustment

It is important to bear in mind that this report does not use the term “disability” in the way most Americans think of the term. This report is not about children who are, e.g., confined to wheelchairs, or who are blind, i.e., with manifest physical disabilities. This report is about children

¹⁰⁵⁴ Mitch Pearlstein, *BROKEN BONDS: WHAT FAMILY FRAGMENTATION MEANS FOR AMERICA'S FUTURE* xviii (2014)(almost 30 percent of white children, more than 50 percent of Hispanic children, and more than 70 percent of black children are born out of wedlock).

¹⁰⁵⁵ *Id.* (“[T]he level of father involvement overall – in other words, the extent to which fathers were allowed to be involved in child care and domestic activities – was heavily influenced by psychological and parenting functioning of unmarried mothers, as gatekeepers”).

See also Isabel V. Sawhill, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* 71-72 (2014).

Adding together the proportion of these children whose mothers had new boyfriends and the proportion whose parents have had additional children with new partners, that more than three-quarters (78 percent) of all the children initially born to unmarried parents experienced a major change in their household by the time they turned 5. . . .

The loss of a biological father or substitution of a “social” father for a biological one may also be upsetting to the child. Some of these children have not just nonresidential fathers, but fathers they rarely see or do not even know. Fathers sometimes gravitate toward children they have parented most recently or who are the offspring of their current girlfriend, depriving their older biological children of any meaningful contact.

¹⁰⁵⁶ Mitch Pearlstein, *BROKEN BONDS: WHAT FAMILY FRAGMENTATION MEANS FOR AMERICA'S FUTURE* xix (2014).

In 2009, for example, 75 percent of white, non-Hispanic children and 86 percent of Asian children lived with two parents. This was in comparison to 67 percent of Hispanic children and only 37 percent of black children. But keep in mind that significant number of two-parent teams are actually composed of a biological parent and a stepparent, or a biological parent and an adoptive parent. For instance, in 2009 again, among black children living with two parents, only 79 percent lived with both their biological mother and biological father. Completing the point, stepfamilies can be hard on children. They can be hard on everyone involved, in fact.

who do not behave in school. Some of these children have their behavior ascribed to a learning disability or to emotional disturbance. Learning disabilities and emotional disturbances are the disabilities with which this report is almost exclusively concerned.

This introduces an element of ambiguity into the report. Learning disabilities and emotional disturbances of course exist. But diagnosing them is a far more subjective endeavor than diagnosing a physical disability. A child may be angry and upset because he was recently moved to a foster home, or because his mother's new boyfriend just moved in with them. But this is not an emotional disturbance in the sense of having a mental disability. The report itself blurs these distinctions, approvingly quoting former Department of Education official Kristen Harper:

On any given day, a child could walk into a classroom on Monday, after having suffering some form of trauma out of, you know, in their home or out in their community . . . any child may have a behavioral incident that is due to trauma or due to the circumstances that life may throw at them. What we are asking here is that schools do not simply throw away, exclude children that come to school with those difficulties but are prepared to handle children that are coming to school with the highs and lows of emotion, the trials and tribulations of approaching adolescence. And I think we do ourselves a disservice and really sort of steer the conversation in the wrong direction when we try to say, [] what is the impact of the disruptive students on the non-disruptive students? Instead, our conversation really should focus on how we support educators and support schools in utilizing evidence-based practices that help schools to identify quickly when a child is having an emotional breakdown or having an emotional issue and seek to address it.¹⁰⁵⁷

We are all very concerned for children who have troubled home lives. But that is not a disability within the meaning of the IDEA.¹⁰⁵⁸ As the Fourth Circuit has written, "Courts and special education authorities have routinely declined, however, to equate conduct disorders or social maladjustment with serious emotional disturbance", and signs of social maladjustment include "a disregard for social demands or expectations. It appears that [the student] understands these expectations but that his behavior is not always guided by them."¹⁰⁵⁹

¹⁰⁵⁷ Report at n. 436.

¹⁰⁵⁸ 34 C.F.R. § 300.8(c)(4)(i).

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

¹⁰⁵⁹ *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 664 (4th Cir. 1998); *see also* *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007)(student who physically attacked staff and students, among other behavior, did not qualify as having an "emotional disturbance" because the inappropriate behavior did not take place under "normal circumstances").

Even children who are determined to have “emotional disturbances” within the meaning of the IDEA will pose serious problems for educators. They may not have unusual difficulty learning material, but their behavior makes it difficult to educate them and, in some cases, keep other students safe.¹⁰⁶⁰

b. Special Education

The report strongly suggests that the disproportionate placement of black children in special education classes is due to racial discrimination.¹⁰⁶¹ A disproportion does not equal racial discrimination. As the Third Circuit wrote in *Blunt v. Lower Merion School District*, these claims are “highly individualized” with “complex and varying facts asserted for the individual students”.¹⁰⁶² We know nothing about the individual facts of these disability determinations, and are in no position to suggest that these decisions are racially motivated. It is odd that the report says that the majority in that case “acknowledge[ed] the voluminous evidence in the form of data and testimony evincing racial discrimination and contending that, nonetheless, there was ‘no evidence that the educators and administrators responsible for placing students intended to discriminate against them because of their race.’”.¹⁰⁶³ But the majority did *not* say that there was voluminous evidence evincing racial discrimination. Rather, the majority said:

Appellants’ evidence of discrimination consists of statistical evidence that African American students were overrepresented in special education classes, testimony indicating that certain LMSD educators had discussed different learning styles and an email from a School Board member expressing concern about putting extra stress on black students. However, the record also reflects that each individual student’s education needs were assessed and satisfied through a thorough and individualized IEP process, and contains no evidence that the educators and administrators responsible for placing students intended to discriminate against them because of their race. Taking the record as a whole and drawing all inferences in appellants’ favor, there is no genuine issue of material fact that LMSD itself – or a third party under its control – engaged in intentional discrimination.¹⁰⁶⁴

¹⁰⁶⁰ *Simms v. District of Columbia*, 2018 WL 4761625, at *3, *7, *9 (D.D.C. 2018) (“A treatment plan . . . noted that M.S. had trouble with anger management, mood swings, and impulsivity. . . . M.S.’s final fifth grade report card from Orr Elementary, dated June 18, 2015, evaluated him as advanced or proficient in all graded subjects except for math, in which he scored at the “basic” level.” . . . “Plaintiff testified about M.S.’s educational history, noting that in pre-kindergarten, he stabbed a girl with a pencil who had criticized his art. . . . “Ms. Foster further testified about the incident in which .S. allegedly inappropriately touched a female student, which resulted in his suspension and the manifestation determination meeting.”); *see also* *Pohrecki v. Anthony Wayne Local School District*, 637 F.Supp.2d 547, 550 (N.D. Ohio 2009) (“The District . . . determined [J.C.] was eligible for special education under the category of “emotional disturbance.” . . . Although possessing a normal IQ, the Record shows that J.C. is prone to misbehavior, obstinance, and inattentiveness while at school.”).

¹⁰⁶¹ Report at n. 91-93.

¹⁰⁶² *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247,289 (3rd Cir. 2014).

¹⁰⁶³ Report at n. 94.

¹⁰⁶⁴ *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 301 (3rd Cir. 2014).

This is the crux of the problem. The majority objects to the disproportionately high percentage of black students in special education classes. The decision to place a student in a special education class is often a judgment call about which people can disagree. In the case of the Lower Merion School Board, all students were given the same evaluation to determine if they needed special education services, and presented no evidence other than statistical disparities and their opinions to support their contention of discrimination.¹⁰⁶⁵ In other contexts, notably the EEOC's criminal background check policy, an individualized assessment is strongly recommended in order to avoid charges of discrimination. Of course, as I have observed in the past, whenever you adopt an individualized assessment rather than a hard-and-fast rule, you run the risk of disparate *treatment* or perceived disparate treatment.

Furthermore, as the district court pointed out in its decision upheld by the Third Circuit, in their Third Amended Complaint the plaintiffs claimed that they were disabled students who had been denied an appropriate education. But in their brief opposing summary judgment, the plaintiffs stated that they were not disabled and had been wrongfully placed in special education classes.¹⁰⁶⁶ If the plaintiffs themselves equivocate as to whether they are disabled or not, it is difficult for a court or this Commission to determine whether or not they should have been placed in special education classes.

There will certainly be cases where a child is misclassified as either needing or not needing special education services. Dr. Paul Morgan testified at the Commission's briefing that white children are

¹⁰⁶⁵ *Id.* at 300.

In considering the statistics, it is critical to recognize that there was no evidence presented in the District Court that the LMSD applied different evaluation procedures for determining placement of African American students than for Caucasian students. After all, if the same evaluation procedures are used for all students regardless of their race there simply is no discrimination.

See also Blunt v. Lower Merion Sch. Dist., 826 F.Supp.749, 760-61 (E.D.Pa. 2011).

Several plaintiffs state that they were subject to racial discrimination. For instance, Quiana Griffin alleges that her educational placement was racially motivated. She asserted that Caucasian students in her instructional support lab class received more help from the teacher than African American students. Quiana also testified in her deposition that she believes she was placed into two special education programs because "a lot of African American kids were in [those classes]." However, she admitted that there is nothing else to support her belief that she was subject to racial discrimination. Lydia Johnson similarly believes that she was treated differently from Caucasian students. She stated that the School District "went on assumptions" when identifying her as disabled and that it placed her in special education because of her race. She offers no support for these assertions, except that: (1) she was told to do her school work while other Caucasian students were allowed more options for activities, such as playing or watching movies; and (2) she was told she could not participate in a vocational-technical program because she was in special education. She conceded that there is no other basis for her belief that the School District made decisions regarding her educational placement on the basis of race. Likewise, Jon Whiteman's mother commented that her son was placed in special education because of his race but that her only support for this conclusion was that "they do that with all African-Americans."

Plaintiffs' beliefs and conclusory assertions are insufficient to defeat summary judgment.

¹⁰⁶⁶ Blunt v. Lower Merion Sch. Dist., 826 F.Supp.2d 749, 752-53 (E.D.Pa. 2011).

more likely to be identified as disabled than are children of other races, and that children who are racial or ethnic minorities are *under-identified* as disabled and therefore do not receive special education services.¹⁰⁶⁷ Human error and good-faith differences of opinion are unavoidable. But it is also true that many parents may be understandably reluctant to accept that their child needs special education services, or that their child has only limited academic ability even if special education services are provided.¹⁰⁶⁸ It is also entirely possible that some parents are more likely to decide that their child's academic underperformance indicates that the child has a learning disability and push for such an identification than are other parents. This may happen even if the child does not have a learning disability, but is simply not academically gifted. Every academic career that falls below the median is not attributable to a learning disability.

Crime Across the Life Course

As mentioned above, the report takes the view that there is something in schools that redirects students' trajectory toward prison – the “school to prison pipeline”. The report suffers from failing to take a retrospective view of the life trajectory of prisoners. The Department of Justice has estimated that the percentage of individuals who have ever served time in prison may eventually

¹⁰⁶⁷ Paul Morgan, Professor of Education at Pennsylvania State University, Presentation to the U.S. Commission on Civil Rights, Dec. 8, 2017 (on file with the Commission).

¹⁰⁶⁸ *Jaccari J. v. Bd. of Educ. of City of Chicago*, Dist. No. 299, 690 F.Supp.2d 687, 702-03 (N.D. Ill. 2010) According to Plaintiffs, Jaccari is a student of “low-average to average cognitive skills.” Given this level of cognitive skill, Plaintiffs argue that Jaccari's poor performance on standardized tests indicate that the District is failing to provide him with a FAPE. In contrast, the District emphasizes portions of the record indicating that Jaccari is cognitively impaired. Therefore, they contend, Jaccari's standardized test scores cannot be the sole or dispositive indicators of progress.

In support of their characterization of Jaccari's potential, Plaintiffs point to a March 2004 psychological evaluation which classified Jaccari's overall level of intelligence as “Low Average.” Additionally, they emphasize the testimony of a school psychologist who, based on a standardized intelligence test she conducted in May 2006, stated that Jaccari's potential for achievement was in the “low-average to average” range. The Court finds that these pieces of evidence are outweighed by other portions of the record indicating that Jaccari possesses below average cognitive skills. First, the aforementioned school psychologist also testified that the composite IQ score of 66 identified in the May 2006 test would fall in the “mild cognitive impairment range” and that Jaccari's “achievements would be commensurate with [his] overall IQ level.” Two subsequent psychological reports further support the May 2006 findings. A psychological evaluation conducted on January 30, 2008 indicates that his level of cognitive ability is “within the mentally deficient range with a Full Scale IQ of 64.” (*Id.* at 628.) Further, another psychological evaluation administered on February 14, 2008 diagnosed Jaccari as suffering from “mild mental retardation” and also noted “cognitive deficits.” While Plaintiffs make much of the disparity between Jaccari's verbal and non-verbal scores on the May 2006 exam and the timing of the January and February 2008 examinations, their attempts to undermine the evidence fail to persuade the Court that Jaccari is a student of average intellectual potential who should be performing in the vicinity of his grade level on standardized tests. Thus, based on the preponderance of evidence in the record, the Court finds that Jaccari possesses below average academic potential.

reach 6.6%.¹⁰⁶⁹ This percentage is very similar to the percentage of males who engage in life-course-persistent antisocial behavior. As Terrie Moffitt wrote in her influential article on the topic:

As implied by the label, continuity is the hallmark of the small group of life-course-persistent antisocial persons. Across the life course, these individuals exhibit changing manifestations of antisocial behavior: biting and hitting at age 4, shoplifting and truancy and age 10, selling drugs and stealing cars at age 16, robbery and rape at age 22, and fraud and child abuse at age 30; the underlying disposition remains the same, but its *expression* changes form as new social opportunities arise at different points in development. This pattern of continuity across age is matched also by cross-situational consistency: Life-course-persistent antisocial persons lie at home, steal from shops, cheat at school, fight in bars, and embezzle at work. [emphasis added]¹⁰⁷⁰

Since at least the middle of the 20th century, it has been known that certain individuals display criminal or antisocial characteristics at an early age, and that behavior persists across their life course. In the 1930s, Sheldon and Eleanor Glueck conducted a longitudinal study of 500 seriously delinquent white boys who they matched with 500 non-delinquent white boys of similar age, low socioeconomic status, intelligence, and ethnic background.¹⁰⁷¹ Despite the two groups' general similarities, the delinquents tended to have more chaotic and troubled family histories.¹⁰⁷² When the Gluecks followed up with the two groups of boys in adulthood, the non-delinquent group had largely avoided criminal activity.¹⁰⁷³ The delinquent group had racked up hundreds, if not thousands, of arrests, and over twenty percent of the delinquent group had served at least five years in prison.¹⁰⁷⁴

¹⁰⁶⁹ Equal Employment Opportunity Commission, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 2012, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹⁰⁷⁰ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, *Psy. Rev.* 100(4), 674-701, 679 (1993).

¹⁰⁷¹ James Q. Wilson and Richard J. Herrnstein, *CRIME & HUMAN NATURE* 175 (1985).

¹⁰⁷² *Id.* at 176.

¹⁰⁷³ *Id.* at 177-78.

Of the 442 non-delinquents who were located in adulthood, 62 were convicted for crimes by the age of thirty-one. The crimes were, on the whole, minor, involving mostly drunkenness, violations of license laws, and offenses within the family, plus a few serious crimes – an armed robbery, an assault with a dangerous weapon, an abuse of a child, and the like.

¹⁰⁷⁴ *Id.* at 178-79.

[T]he delinquent group proved prolifically criminal: By the age of thirty-one, they had committed fifteen homicides, hundreds of burglaries, hundreds of larcenies (greater than petty), hundreds of arrests for drunkenness, over 150 robberies, dozens of sex offenses, and so on. Four hundred and thirty-eight of the original 500 in the delinquent sample were located, of whom 354 were arrested between the ages of seventeen to twenty-five. From twenty-five to thirty-one, only 263 were arrested, perhaps showing the characteristic decline of crime with age, or perhaps only the shrinking numbers not in prison. One hundred and forty-seven men from the delinquent sample spent five or more years in jails or prisons during the eight years from seventeen to twenty-five, and 45 did so

More recently, a longitudinal study was conducted based on data from the Early Childhood Longitudinal Study, Kindergarten Class (ECLS-K) of 1998-1999. In addition to collecting other data, the ECLS-K asked kindergarten, first, and third grade teachers to rate problem behavior in students.¹⁰⁷⁵ Then, in eighth grade, the study's authors asked parents if their child had ever been suspended. As the authors of the study wrote, their results were straightforward:

The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspension between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials. Differences in rates of suspension between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom [citations omitted].¹⁰⁷⁶

It is not surprising, then, that students that are disruptive in school are more likely to end up in prison. Behavior at school is, to a considerable degree, a manifestation of a person's general

during the six years from twenty-five to thirty-one. Despite the hundreds of man-years spent in correctional institutions, the delinquents had ample time outside for scores of arrests.

¹⁰⁷⁵ John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver, and J.C. Barnes, *Prior problem behavior accounts for the racial gap in school suspensions*, *Journal of Criminal Justice* 42(3), 257-266, , at 251, May-June 2014, available at http://c8.nrostatic.com/sites/default/files/pdf_article_040214_KC_HeatherMac.pdf.

To measure early and stable problem behavior, we employ Gresham and Elliott's (1990) widely used Social Skills Rating Scale (SSRS). The SSRS uses a Likert scale ranging from 1-4 (1 = Never exhibits this behavior; 4 = Very often/exhibits this behavior most of the time.) . . .

Our measure of teacher-reported prior problem behavior utilized data from kindergarten, first, and third-grades only and is the sum of the four SSRS scales: self-control, interpersonal skills, externalizing problem behaviors, and approaches to learning. These scales tap a wide range of behaviors such as controlling one's temper, responding appropriately to pressure from peers, expressing thoughts and feelings appropriately, attentiveness, impulsivity, unnecessary arguing, disturbing ongoing classroom activities, and fighting. While some of the items that compose the subscales of the SSRS are attitudinal, studies have shown that measuring traits and behaviors with attitudinal measures is appropriate (see Pratt & Cullen, 2000). The SSRS scales have been used in a number of prior studies examining self-control and analogous problem behaviors (Beaver & Wright, 2007; Lamont & Van Horn, 2013; Vaughn, DeLisi, Beaver, & Wright, 2009; Wright & beaver, 2005).

We note that the SSRS was administered to different teachers during kindergarten, first, and third-grade. Moreover, the parent report of the child ever being suspended was assessed in the eighth-grade. Thus, our measure of prior problem behavior was taken at least five years prior to the parental measure of child suspension. Additionally, we averaged the teacher-reported SSRS scores across kindergarten through third-grade and found no difference in our analyses when using the averaged versus the additive measure of teacher-reported prior problem behavior.

¹⁰⁷⁶ *Id.* at 264.

temperament and personality. Individuals who are troublesome at school tend to be troublesome elsewhere, both before they enter school¹⁰⁷⁷ and after they leave. There is no “school-to-prison pipeline” except in the sense that school precedes prison. Wherever these individuals happen to be at a certain point in their lives, whether it is home, school, or the workplace, they are more likely to cause conflict with peers and authority figures.¹⁰⁷⁸

The Futility of Reducing Disparities by Relaxing Discipline

The report cites Russell Skiba for the proposition that a principal’s view of discipline is an important factor in how often suspension and expulsion are used.¹⁰⁷⁹ It is hardly a surprise that some principals would suspend students more often than others. What we are really seeing is that some schools have tougher discipline policies than others, not that principals are treating students within a school more harshly on the basis of race. The report concludes that “the data suggest that closing racial disparities in discipline rates would require structural changes such as focusing on responding to behavioral infractions in more productive ways for all students.”¹⁰⁸⁰

The Commission seems to have paid no attention to James Scanlan’s testimony at our briefing, which addressed this very issue. To put it simply, there is no way to have a neutrally-applied standard that has the same effect upon different groups when those groups have different characteristics. Think of it this way. You have a test, and 20 students are taking the test. 10 of the

¹⁰⁷⁷ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, *Psy. Rev.* 100(4), 674-701, 682 (1993).

Numerous studies have shown that a toddler’s problem behaviors may affect the parents’ disciplinary strategies as well as subsequent interactions with adults and peers. For example, children characterized by a difficult temperament in infancy are more likely to resist their mothers’ efforts to control them in early childhood. Similarly, mothers of difficult boys experience more problems in their efforts to socialize their children. Maccoby and Jacklin (1983) showed that over time these mothers reduce their efforts to actively guide and direct their children’s behavior and become increasingly less involved in the teaching process. [citations omitted]

¹⁰⁷⁸ Matt DeLisi, “A Window Into the Life-Course Persistent Offender,” in Chad R. Trulson, Darin R. Haerle, Jonathan W. Caudill, and Matt DeLisi, *LOST CAUSES: BLENDED SENTENCING, SECOND CHANCES, AND THE TEXAS YOUTH COMMISSION 167-68* (2016).

The third group, life-course-persistent offenders, accounts for the remaining 10 percent of the population [as opposed to the 10 percent comprised of “abstainers” and 80 percent comprised of adolescence-limited offenders]. As their label indicates, these youths begin displaying pronounced problem behaviors very early in life, even before entering kindergarten. During elementary school, they are discrepant from their peers in terms of their aggressiveness, their deficits in self-control, their deficits in attending to school, and their cognitive problems. They also are more likely to have a poor home life characterized by high parental abuse, low parental involvement, low parental warmth, and poverty, among other deleterious circumstances. Their neuropsychological deficits create countless negative interactions with their parents, their siblings, their peers, their teachers, other adults, and ultimately with social work and juvenile justice officials. Unlike the relatively trivial delinquency of adolescence-limited youths, these children engage in more serious forms of problem behaviors and are more inclined to use interpersonal violence. They are children who will mature into full-fledged delinquents and often career criminals.

¹⁰⁷⁹ Report at n. 445-447.

¹⁰⁸⁰ Report at n. 454.

students wear blue shirts, and 10 of the students wear red shirts. 8 of the blue shirt students pass the test, and 7 of the red shirt students pass the test. This means that the blue shirt students make up 53% of those who passed the test, and 40% of those who did not pass the test. The red shirts make up 47% of those who passed the test, and 60% of those who did not pass the test. We don't like the disproportionality, so we lower the score required for a passing grade. Now 9 of the blue shirts pass the test, and 8 of the red shirts. The blue shirts now make up 52% of those who pass the test, but they only make up 33% of those who did not pass the test. The red shirts now make up 48% of those who passed the test, but they are 67% of those who did not pass the test. Or, to use the charts that Scanlan used:

Table 2. Illustration of effect of lowering test cutoff on (a) relative difference between pass rates and (b) relative difference between failure rates of advantaged group (AG) and disadvantaged group (DG)

Cutoff	AG Pass Rate	DG Pass Rate	AG Fail Rate	DG Fail Rate	AG/DG Pass Ratio	DG/AG Fail Ratio
1 High	80%	63%	20%	37%	1.27	1.85
2 Low	95%	87%	5%	13%	1.09	2.60

Table 3. Illustration of effect of lowering test cutoff on (a) relative difference between pass rates and (b) relative difference between failure rates of advantaged group (AG) and disadvantaged group (DG) and proportion DG makes up of (c) persons who pass the test and (d) persons who fail the test (where DG makes up 50% of test takers)

Cutoff	AG Pass Rate	DG Pass Rate	AG Fail Rate	DG Fail Rate	AG/DG Pass Ratio	DG/AG Fail Ratio	DG Prop of Pass	DG Prop of Fail
1 High	80%	63%	20%	37%	1.27	1.85	44%	65%
2 Low	95%	87%	5%	13%	1.09	2.60	48%	72%

As Scanlan wrote:

These patterns are not peculiar to test score data or the numbers I used to illustrate them. Rather, changing the frequencies of virtually any outcome and its opposite tends to cause the relative difference in the increasing outcome to decrease and the relative difference in the decreasing outcome to increase (with related effects on the proportions groups more susceptible to the outcomes make up of persons who experience the increasing outcome and the decreasing outcome).

This will not invariably happen with the consistency that will be observed with hypothetical test score data. For many factors are at work. But it will typically happen, especially when the changes in the prevalence of an outcome are substantial. In the school discipline context in particular, generally reducing discipline rates, while tending to reduce relative racial differences in rates of avoiding discipline (analogous to test passage), will tend to increase relative racial differences in rates of being disciplined (analogous to test failure). And in fact that

is being observed all across the country as school districts have been generally reducing discipline rates while mistakenly believing that doing so should reduce relative racial differences in discipline rates (or the proportions racial minorities make up of students who are disciplined).¹⁰⁸¹

Conclusion

The best that can be said for “restorative practices” and reducing suspensions is that in some school districts, students who would otherwise have been suspended are in school for more days. This is a paltry return for the price of increased classroom violence and disrupting the education of students who are there to learn.

¹⁰⁸¹ Scanlan Statement at 3.