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## No Excuses for Charter Schools: How Disproportionate Discipline of Students with Disabilities Violates Federal Law

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## No Excuses for Charter Schools: How Disproportionate Discipline of Students with Disabilities Violates Federal Law

[Senator Tim] Kaine: "Should all K-12 schools that receive taxpayer funding be required to meet the requirements of the Individuals with Disabilities Education Act?"

[Betsy] DeVos: "I think that is a matter that's best left to the states."

Kaine: "So some states might be good to kids with disabilities, and other states might not be so good. And then, what? People can just move around the country if they don't like how their kids are being treated?"

DeVos: "I think that's an issue that's best left to the states."

Kaine: "What about the federal requirement? It's a federal law — the Individuals with Disabilities Education Act. Let's limit it to federal funding. If schools receive federal funding should they be required to follow federal law — whether they're public, public charter, or private?"

DeVos: "I think that is certainly worth discussion."<sup>1</sup>

It became abundantly clear during the Senate confirmation hearing of Secretary of Education Betsy DeVos that certain federal laws regulating public schools are easily “confused.”<sup>2</sup> One such law is the Individuals with Disabilities Education Act (IDEA), which was the focus of Senator Kaine’s questioning.<sup>3</sup> The IDEA’s self-proclaimed purpose is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>4</sup>

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1. Cory Turner, *School Vouchers, Oligarchy and Grizzlies: Highlights from the DeVos Hearing*, NPR ED (Jan. 18, 2017, 5:12 PM), <http://www.npr.org/sections/ed/2017/01/18/510417234/the-devos-hearing-in-their-own-words>.

2. After her conversation with Senator Kaine, DeVos was asked by Senator Maggie Hassan whether she was aware that the IDEA was a federal law. *Id.* DeVos responded that she “may have confused it.” *Id.*

3. *Id.*

4. 20 U.S.C. § 1400 (d)(1)(A) (2012).

But the IDEA was not the first act of Congress intended to protect individuals or students with disabilities.<sup>5</sup> In addition to the IDEA, two other major pieces of federal legislation aim to protect individuals with disabilities: the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973, as amended (“section 504”).<sup>6</sup> All three of these laws apply to public schools, including public charter schools.<sup>7</sup>

Public charter schools have become increasingly popular over the last decade, accounting for the education of approximately six percent of all students enrolled in public education across the nation.<sup>8</sup> As of 2015, the National Alliance for Public Charter Schools reported a sixty-two percent growth in the number of students attending public charters since 2010.<sup>9</sup> In recent years, charter schools have received a great deal of support from

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5. Person-first language will be utilized throughout this Comment as opposed to “disabled persons” or “differently abled persons.” This is due, in part, to the fact that person-first language is utilized by the language of the statutes discussed. Likewise, the “purpose of people-first language is to promote the idea that someone’s disability label is just a disability label—not the defining characteristic of the entire individual.” Alex Umstead, *An Introductory Guide to Disability Language and Empowerment*, SYRACUSE UNIV. DISABILITY CULTURAL CTR. (2012), <http://sudcc.syr.edu/LanguageGuide/>.

6. See *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP’T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last modified Oct. 16, 2015) [hereinafter *Frequently Asked Questions About Section 504*].

7. In two recent publications from the U.S. Department of Education Office for Civil Rights, the OCR clarified that section 504 of the Rehabilitation Act of 1973, Title II of the ADA, and the IDEA apply to public charter schools just as they would to any other publicly funded educational institution. *U.S. Department of Education Releases Guidance on Civil Rights of Students with Disabilities*, U.S. DEP’T OF EDUC. (Dec. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-students-disabilities> (citing Office for Civil Rights, *Frequently Asked Questions Regarding About the Rights of Students with Disabilities in Public Charter Schools Under Section 504 of the Rehabilitation Act of 1973*, U.S. DEP’T OF EDUC. (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faq-201612-504-charter-school.pdf>; Office for Civil Rights, *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools Under the Individuals with Disabilities Education Act*, U.S. DEP’T OF EDUC. (Dec. 28, 2016), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-charter-school.pdf>).

8. Lauren Camera, *Charter School Enrollment on the Rise*, U.S. NEWS & WORLD REP. (Nov. 10, 2015, 12:01 AM), <http://www.usnews.com/news/blogs/data-mine/2015/11/10/charter-schools-continue-to-flourish>.

9. *Id.*

advocates of the growing “school choice” movement, such as Secretary DeVos.<sup>10</sup>

The rules governing charter schools vary from state to state, however all charters have a few basic principles in common.<sup>11</sup> Generally, charters are “privately managed, taxpayer-funded schools exempted from some rules applicable to all other taxpayer-funded schools.”<sup>12</sup> Charter schools operate under a “charter,” or contract, between the Charter Management Organization (CMO) and the authorizer (usually the state’s department of education or a local university).<sup>13</sup> The contract between the CMO and authorizer usually determines the details of the school’s operation, such as how it will be managed, the curriculum that will be taught, and how the school’s performance will be measured when it comes time to reevaluate the charter.<sup>14</sup>

Another important distinction between traditional public schools and charter schools is the “regulatory freedom and autonomy from state and local rules (in terms of staffing, curriculum choices, and budget management) [charter schools] receive in exchange for having their charter reviewed and renewed (or revoked) by the authorizing agency every few years.”<sup>15</sup> Despite the greater level of autonomy most charters share, they are still required to follow state testing requirements and federal laws, such as those governing the treatment of students with disabilities.<sup>16</sup>

A number of charter schools,<sup>17</sup> such as KIPP Academy and Achievement First, became well-known not only for their purportedly high success

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10. Chris Weller, *Trump’s Pick for Education Secretary Loves ‘School Choice’—Here’s What that Means*, BUS. INSIDER (Jan 26, 2017, 4:34 PM), <http://www.businessinsider.com/difference-between-charter-magnet-and-private-schools-2017-1>.

11. See *50-State Comparison: Charter School Policies*, EDUC. COMM’N OF THE STATES (Jan. 25, 2016), <http://www.ecs.org/charter-school-policies/>.

12. *Charter Schools 101*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/60831.htm> (last visited Dec. 3, 2017).

13. Weller, *supra* note 10.

14. Eileen M. O’Brien & Chuck Dervarics, *Charter Schools: Finding Out the Facts: At a Glance*, CTR. FOR PUB. EDUC. (Mar. 2010), <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance>.

15. *Id.*

16. *Id.*

17. Examples include KIPP, YES Prep, Uncommon Schools, Achievement First, Success Academy, and Aspire. Jeff Bryant, *A New LawsUIT Challenges the Legality of ‘No Excuse’ Charter Schools*, OURFUTURE.ORG (Jan. 26, 2016), <https://ourfuture.org/20160126/a-new-lawsuit-challenges-the-legality-of-no-excuse-charter-schools>.

rates,<sup>18</sup> but also for their use of unique zero-tolerance disciplinary practices commonly referred to as the “No Excuses” or “Broken Windows” discipline model.<sup>19</sup> At their core, these disciplinary models are punitive in nature and aim to hold students strictly responsible for even minor infractions of school rules.<sup>20</sup> While the consequence largely depends on the rule infraction, evidence suggests that these zero-tolerance schools have higher rates of suspension and expulsion than their more traditional, less severe counterparts.<sup>21</sup> The effectiveness of this pedagogy fixed in a strict and unforgiving disciplinary approach has been questioned and criticized as not just ineffective, but potentially damaging.

In 2008, the American Psychological Association created a Task Force dedicated to studying and reviewing the efficacy of zero-tolerance disciplinary approaches in schools.<sup>22</sup> The Task Force found that many of the assumptions behind the implementation of such punitive policies were largely unbacked by data, and that such policies “appear to conflict to some degree with current best knowledge concerning adolescent development.”<sup>23</sup> Ultimately, the Task Force recommended abandoning zero-tolerance, one-size-fits-all policies in favor of a tiered disciplinary system in which consequences are based on the seriousness of the rule infraction.<sup>24</sup> Despite

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18. While charter schools often promote themselves as highly successful in achieving outcomes for students, some studies suggest they are no more successful than traditional public schools. See DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 138-44 (2010) (providing a summary of the vast results regarding charter school efficacy); BRIAN GILL ET AL., RAND CORP., *RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS* 105 (2007), [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2007/RAND\\_MR1118-1.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/RAND_MR1118-1.pdf) (concluding that charter school achievement results are unpredictable and mixed).

19. Daniel J. Losen et al., *Charter Schools, Civil Rights and School Discipline: A Comprehensive Review*, CTR. FOR CIV. RTS. REMEDIES AT THE CIV. RTS. PROJECT (Mar. 2016), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/charter-schools-civil-rights-and-school-discipline-a-comprehensive-review/losen-et-al-charter-school-discipline-review-2016.pdf>. This type of discipline does not have an official title, but is commonly referred to by the following names: “No Excuses,” “Broken Windows,” “Sweating the Small Stuff,” “paternalistic,” and/or “punitive.”

20. *Id.*

21. *Id.*

22. Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852 (2008), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

23. *Id.*

24. *Id.* at 858.

these recommendations, a number of charters have continued their use of zero-tolerance policies.<sup>25</sup>

This Comment examines the potential for disciplinary practices commonly implemented by charter schools to run afoul of federal law where such practices significantly impact the opportunity for students with disabilities to access education. Unless charter schools abandon the harsh disciplinary approaches associated with No Excuses, they run the risk of violating federal law protecting students with disabilities.

Thus, this Comment proceeds as follows: Part I provides background information, including examples of zero-tolerance disciplinary practices that have been utilized in charter schools over the last decade, and analyzes the proven ineffectiveness of such discipline strategies overall. Part I also discusses the connection between charter schools and their increased suspension rates of students with disabilities when compared to traditional public schools. Part II discusses the similarities and differences in the federal laws governing education of students with disabilities. Specifically, this section will focus on the potential for charter schools to be held liable for the disparate treatment of students with disabilities under section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act. Finally, Part III recommends several changes charter schools (and even traditional schools) can make in order to better balance discipline and appropriate accommodation of students with disabilities.

### *I. Background*

#### *A. Implementation of Zero-Tolerance Discipline*

No Excuse charter schools grew in popularity with the creation of KIPP Academy.<sup>26</sup> KIPP, which stands for Knowledge is Power Program (but is commonly referred to by its opponents as “Kids in Prison Program”), began in 1995 and focused on “enforcing a strict set of mandates and laws for

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25. Losen et al., *supra* note 19. While it is true that not every charter school utilizes zero-tolerance discipline and it is certainly possible that a number of traditional public schools might use such practices, evidence suggests that charter schools, on average, have higher rates of suspension than traditional public schools, indicating harsher disciplinary practices. *Id.*

26. Alix Liss, Senior Thesis, *A Failure in Social Responsibility: Preserving Privilege and Educational Injustice in New Orleans*, 85 WESLEYAN UNIV.: THE HONORS COLL. (Apr. 2016), [http://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=2607&context=etd\\_hon\\_theses](http://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=2607&context=etd_hon_theses).

each and every student.”<sup>27</sup> As charter schools grew in highly urban, low-income areas, the idea among No Excuse backers was that too many students “used poverty as a reason to accept less-than-excellent academic results. They made excuses.”<sup>28</sup> Students’ behavior became a central focus of many such schools, and supporters argued that

learning was regularly undermined by chaos, from physical fights to a refusal to follow even basic directions. To create dramatically different academic results, they needed to create dramatically different behavior. With that goal . . . some members of the group turned to a newly ascendant philosophy for fighting crime: broken-windows theory, the idea that very serious infractions, like robbery and violent crime, could be avoided by zealously policing seemingly un-serious ones, like . . . broken windows.<sup>29</sup>

According to the 2003 school plan produced by KIPP Academy in Fresno, California, these charters “believe that like crime, poor behavior in a school is also contagious; it starts with minor details and spreads through both people and the environment like an epidemic.”<sup>30</sup> Some of these schools describe their approach as a devotion to “sweating the small stuff,” and all of them “share an aversion to even minor signs of disorder and a pressing need to meet the test-based achievement standards of the No Child Left Behind era or else find themselves shuttered.”<sup>31</sup> Ultimately these schools believe that, where students are allowed to get away with minor rule infractions or brief distractions from the learning process, the entire curriculum may be derailed and students will continue violating more and more extreme rules.

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27. *Id.* at 84-85 (citing Leonie Haimson, *Why Students Call KIPP the Kids in Prison Program*, SCHOOLS MATTER (Mar. 22, 2012), <http://www.schoolsmatter.info/2012/03/why-students-call-kipp-kids-in-prison.html>).

28. Elizabeth Green, *Beyond the Viral Video: Inside Educators’ Emotional Debate About ‘No Excuses’ Discipline*, CHALKBEAT (Mar. 8, 2016), <http://www.chalkbeat.org/posts/ny/2016/03/08/beyond-the-viral-video-inside-educators-emotional-debate-about-no-excuses-discipline/>.

29. *Id.* (second ellipsis in original) (quoting KIPP Fresno’s 2003 school plan).

30. *Id.*

31. Sarah Carr, *How Strict Is Too Strict: The Backlash Against No-Excuses Discipline in High School*, ATLANTIC (Dec. 2014), <https://www.theatlantic.com/magazine/archive/2014/12/how-strict-is-too-strict/382228/>.

Although there is no official list of factors to determine whether a charter school is of the No-Excuses variety, such schools share a number of characteristics.<sup>32</sup> These characteristics can include:<sup>33</sup>

- High expectations for students' behavior and academics;<sup>34</sup>
- Strict disciplinary code with "little room for ambiguity or inconsistency";<sup>35</sup>
- Additional time spent on academics;
- "An extended school day";<sup>36</sup>
- "Weekend classes and tutoring for struggling students";
- Curriculum focused on college preparation for all students;
- Data-driven instruction;
- "Elaborate rewards for high-performing or hard-working students";<sup>37</sup>
- A focus on building and teaching school culture and community values; and
- Policies to hire and keep high-performing teachers.<sup>38</sup>

No-Excuses approaches are best understood by example. According to the 2003 KIPP Fresno school plan, a few illustrations of small stuff the school "sweats" include: "messy binders and desks, crooked lines, trash on the floor, untucked shirts, slouching, note passing, loud talking, deep

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32. Max Bean, *Dewey to Delpit: The No-Excuses Charter School Movement*, ED COMMENTARY (Sept. 2010), <http://edcommentary.blogspot.com/p/no-excuses-charter-movement.html>.

33. *Id.*

34. *Id.* These expectations are maintained with no concern for a student's extenuating circumstances, and "no student will receive special treatment, be exempted from punishment, or granted a passing grade when she has not mastered class material." *Id.*

35. *Id.* ("In many schools, for example, lateness, even by a couple of minutes, and uniform violation . . . lead to automatic detentions; cursing in class or telling a teacher to shut up often spell automatic suspension.").

36. *Id.* ("[U]sually from around 7:30am until around 5pm.").

37. *Id.* ("[C]amping trips, skiing trips, ice-cream and pizza parties, special events with students' favorite teachers, and even multi-day visits to foreign countries.").

38. *Id.* ("[H]igher salaries, bonuses tied to performance, rigorous teacher assessment based on student achievement and observations, large amounts of time devoted to teacher-training.").

sighing, whining, laughing at others, eye rolling, teeth sucking, gum chewing, yawning, pen tapping, doodling, feet dragging, running in the hallways, and sloppy bulletin boards.”<sup>39</sup> While none of these infractions alone may lead to a serious out-of-school punishment (such as suspension or expulsion), in Fresno’s KIPP Academy, engaging in any of these can lead to a deduction in points from the classroom reward system or being asked to stand for the remainder of the class period.<sup>40</sup>

Similar practices are implemented in charters outside of the KIPP network. For example, at Carver Collegiate Academy in New Orleans, a fifty-one page rulebook lays out the daily requirements of Carver high school students.<sup>41</sup> There are rules at Carver that govern how students talk, such as the requirement to say “thank you” when students are given the “opportunity” to answer a question in class.<sup>42</sup> Students are required to engage in “scholar talk,” which was defined as “complete, grammatical sentences with conventional vocabulary.”<sup>43</sup> Students’ movements are also regulated—students receive demerits for leaning against the wall, placing their heads on their desks, and falling asleep.<sup>44</sup> In fact, if students are caught sleeping in class, he or she incurs an automatic detention (ten demerits), and a failure to attend detention results in an out-of-school suspension.<sup>45</sup> If, however, students are not asleep and merely have their eyes closed, they receive two demerits instead of ten.<sup>46</sup> Likewise, between classes, Carver high school students are required to walk in single-file lines from one class to the next.<sup>47</sup> Like most charter schools, Carver also had a strict dress code students are expected to follow.<sup>48</sup> Carver scholars are expected to wear:

khaki pants pulled up to the hip; a black or brown leather (or imitation-leather) belt; a school-issued polo shirt with the collar turned down; a white or black undershirt; and no hats, sunglasses, sparkles, flash, or bling of any kind. Students could be barred from class for wearing the wrong kind of shoe, such as

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39. Green, *supra* note 28.

40. *Id.*

41. Carr, *supra* note 31.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

the popular Air Jordans; the code mandated specific colors, styles, and brands, Adidas and Chuck Taylor among them.<sup>49</sup>

The idea is that, so long as students follow these rules, the school will be able to avoid any “broken windows”; consequently, there will be fewer major disciplinary infractions for the school to deal with.

*B. The Ineffectiveness of Zero-Tolerance Discipline*

Despite the popularity of No-Excuses practices, there is little concrete evidence to suggest that such punitive strategies benefit students in the long term.<sup>50</sup> Admittedly, some evidence exists to suggest that certain charter schools<sup>51</sup> have higher graduation rates than their traditional counterparts—but these studies did not account for disciplinary practices used in the schools and only compared a small sample of charters in two states.<sup>52</sup> One study found that students enrolled in Florida and Chicago charter schools “are 7 to 11 percentage points more likely to graduate compared to their peers in district-run schools.”<sup>53</sup> Likewise, their chances of enrolling in college were ten to eleven percentage points higher, and they were more likely to remain in college once they were enrolled.<sup>54</sup> Other studies, however, cast doubt on the overall effectiveness of charter schools:

The Center for Research on Education Outcomes (CREDO) at Stanford University found in a 2009 report that 17% of charter schools outperformed their public school equivalents, while 37% of charter schools performed worse than regular local schools, and the rest were about the same. A 2010 study by Mathematica Policy Research found that, on average, charter middle schools that held lotteries were neither more nor less successful than

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49. *Id.*

50. Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 22.

51. See generally Nina Rees & Andrew Broy, *Study: Charter High Schools Have 7-11% Higher Graduation Rates Than Their Public School Peers*, FORBES (Mar. 17, 2014), <http://www.forbes.com/sites/realspin/2014/03/17/study-charter-high-schools-have-7-11-higher-graduation-rates-than-their-public-school-peers/#4eee6f132551>. While the article refers to charter schools broadly, the study the article is based on does not disaggregate scores based on disciplinary practices used in the charter schools they studied. Consequently, it is difficult to know whether these success rates are correlated directly with No-Excuses disciplinary practices or other factors associated with charter schools (such as smaller class sizes, more funding, different qualifications of teachers, etc.). *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

regular middle schools in improving student achievement, behavior, or school progress. Among the charter schools considered in the study, more had statistically significant negative effects on student achievement than statistically significant positive effects. These findings are echoed in a number of other studies.<sup>55</sup>

Aside from the varying results studies have found on students' academic performance, No-Excuses discipline negatively affects students in a number of other ways. Despite the stated purpose of such policies, there is no evidence to suggest that zero-tolerance discipline practices have increased the consistency of school discipline.<sup>56</sup> Likewise, findings suggest that zero-tolerance schools have higher rates of suspension and expulsion, and have been found to "have *less* satisfactory ratings of school climate, to have less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters."<sup>57</sup> Furthermore, school suspension in general is "moderately associated with a higher likelihood of school dropout and failure to graduate on time."<sup>58</sup> There is also some concern that the use of zero tolerance policies may have an effect on students' mental health.<sup>59</sup> The APA Task Force noted that, although few studies of sufficient rigor have been conducted, some researchers are concerned that "zero tolerance policies may create, enhance, or accelerate negative mental health outcomes for youth by creating increases in student alienation, anxiety, rejection, and breaking of healthy adult bonds."<sup>60</sup>

Whether punitive disciplinary practices achieve their goals is certainly still up for debate—but not dispositive of their overall legality. There is

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55. Sue Legg, *Charter School Achievement: Hype Vs. Evidence*, LEAGUE OF WOMEN VOTERS: EDUC. ISSUES (June 22, 2015), <http://www.lwveducation.com/charter-school-achievement-hype-vs-evidence>.

56. Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 22, at 854.

57. *Id.* (internal citations omitted).

58. *Id.*; see also Losen et al., *supra* note 19, at 7 ("[T]here is a wealth of research indicating that the frequent use of suspensions is harmful to all students, as it contributes to chronic absenteeism, is correlated with lower achievement, and predicts lower graduation rates, heightened risk for grade retention, delinquent behavior, and costly involvement in the juvenile justice system.").

59. Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 22, at 856.

60. *Id.* (citing ALVIN F. POUSSAINT & JAMES P. COMER, *RAISING BLACK CHILDREN: TWO LEADING PSYCHIATRISTS CONFRONT THE EDUCATIONAL, SOCIAL, AND EMOTIONAL PROBLEMS FACING BLACK CHILDREN* (1992)).

little dispute that such practices have a significant impact on students with disabilities.<sup>61</sup>

*C. Suspension Rates in Charter Schools Compared to Traditional Schools*

Evidence suggests that charter schools, especially those that implement zero-tolerance discipline practices, are suspending certain populations at a significantly higher rate than non-charters.<sup>62</sup> During the 2011-2012 school year, the Department of Education Office for Civil Rights administered a survey, the Civil Rights Data Collection (CRDC), to every public school in the nation.<sup>63</sup> The schools surveyed included both traditional public schools and charters,<sup>64</sup> and the survey obtained data regarding disciplinary practices in schools—specifically, the number of suspensions and expulsions handed out across demographics.<sup>65</sup> Unfortunately, the data collected did not provide for further disaggregation among disabilities; thus, rates of suspension of students with varying levels of disability are currently unknown.<sup>66</sup>

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61. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 659 (2012) (“One thing is certain—charter schools struggle to enroll and appropriately serve students with disabilities such as mental retardation; serious emotional disturbance; autism; specific learning disabilities; and hearing, speech, language, or orthopedic or visual impairments.”).

62. Losen et al., *supra* note 19, at 7. Although this Comment focuses on the disparate impact such disciplinary practices have on students with disabilities, there is also evidence of disproportionate suspension rates of African American students in charter schools compared to traditional public schools. *See infra* app. A.

63. Losen et al., *supra* note 19, at 26.

64. Notably, the survey did not gather information from virtual schools, alternative schools, or those serving the juvenile justice system. *Id.* at 18. Still, there is the potential for civil rights violations against students with disabilities in such schools despite a lack of data collection in that area, especially where similar disciplinary practices exist.

65. *Id.* at 26.

66. *Id.* at 18. (“[T]hus the concern that charter schools are suspending an even higher percentage of students with mild disabilities than non-charter schools remains unexplored.”). Additionally, according to the OCR report, the data collected identified students as “Students with Disabilities (IDEA)” or “Students with Disabilities (Section 504)”. Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline*, U.S. DEP’T OF EDUC. (Mar. 2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [hereinafter *Data Snapshot*]. According to the OCR, survey items that state “students with disabilities” are referring to IDEA students, whereas survey items stating “Section 504 only” are those students who receive special education but are not IDEA students. *Id.* at 21. It is unclear whether the Civil Rights Project analysis combines all of these students into one broad category of “students with disabilities” or if section 504 students were not accounted for at all. *See id.*; Losen et al., *supra* note 19.

The findings from the OCR data collection provide a few startling pieces of information, though. Not only did charter schools enroll fewer students with disabilities, they were also more likely to suspend students with disabilities than traditional public schools.<sup>67</sup> The following chart<sup>68</sup> demonstrates the overall enrollment of students with disabilities in charter schools compared to non-charters.

Enrollment Percentage for Students with Disabilities in 2011-12	All School Levels	Elementary	Secondary
Charter	8.9	7.8	9.7
Non-Charter	11.9	11.3	11.7

Of the students with disabilities who are enrolled in charter schools, their chances of being removed from school via suspension are higher than their peers in traditional public schools.<sup>69</sup> Of the 4752 charter schools analyzed in the study, 1093 of them (about twenty-five percent) suspended students with disabilities at a rate that was ten or more percentage points higher than students without disabilities in those schools.<sup>70</sup> Alarming, 235 charter schools across the nation suspended fifty percent of all their enrolled students with disabilities.<sup>71</sup> Thus, in some charter schools, a student with a disability has a fifty-fifty chance of being suspended at some point during the year.<sup>72</sup>

Unlike the Civil Rights Project analysis, the OCR Data Collection evaluated disciplinary practices other than suspension utilized by public schools. The OCR provided an important insight into the treatment of students with disabilities in public schools: students with disabilities are more likely to be subjected to physical restraint or subjected to seclusion in school than students without disabilities.<sup>73</sup> Although no comparison was made by the OCR between charters and non-charters with regard to

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67. Losen et al., *supra* note 19, at 18.

68. *Id.* (reprinted with permission).

69. *Id.* at 8.

70. *Id.* at 6.

71. *Id.*

72. *See id.*

73. *Data Snapshot*, *supra* note 66, at 9. This data refers only to students identified as IDEA disability status, it does not include section 504 students. *Id.*; *see infra* app. B.

restraint and seclusion of students with disabilities, it is certainly possible, based on suspension rate data, that charters engage in restraint and/or seclusion at the same or slightly higher rate than non-charters.<sup>74</sup>

The overall trend in both charter and non-charter schools is startling—students with disabilities are being disciplined and suspended at a higher rate than students without disabilities.<sup>75</sup> According to the report, “it appears that, instead of providing needed behavioral supports, the school is suspending these students because of behavior that is a manifestation of their disability.”<sup>76</sup> The data indicates that the average gap between suspension of students with disabilities and suspension of those without is larger among charter schools.<sup>77</sup> The Civil Rights Project attributes that gap, at least in part to the harsher disciplinary practices, such as No Excuses, utilized by many charter schools.<sup>78</sup>

## II. Analysis

### A. Comparing and Contrasting Laws Governing Students with Disabilities

Section 504 of the Rehabilitation Act of 1973 was the first disability civil rights law to be approved in the United States.<sup>79</sup> Section 504 set the stage for the later Americans with Disabilities Act and Individuals with Disabilities Education Act.<sup>80</sup> Although all three laws share a common goal and represent an attempt to better the conditions of individuals with disabilities, there are a few notable differences between them.<sup>81</sup> The purpose of enacting section 504 was to ensure protection of individuals with disabilities from discrimination related to their disabilities.<sup>82</sup> Later, the “ADA broadened the agencies and businesses that must comply with the

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74. See *Data Snapshot*, *supra* note 66; Losen et al., *supra* note 19. Of course, it is also possible that charter schools utilize suspension at a higher rate than non-charter schools because they forgo other disciplinary practices such as restraint or seclusion altogether.

75. Losen et al., *supra* note 19.

76. *Id.* at 11.

77. *Id.*

78. *Id.* at 9.

79. Kitty Cone, *Short History of the 504 Sit In*, DISABILITY RIGHTS EDUC. & DEF. FUND, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> (last visited Nov. 19, 2017).

80. Peter Wright & Pamela Wright, *Key Differences Between Section 504, the ADA, and the IDEA*, WRIGHTSLAW (Mar. 2, 2008), <http://www.wrightslaw.com/info/sec504.summ.rights.htm#sthash.mwqCPfWe.dpuf>.

81. *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUC. & DEF. FUND, <https://dredf.org/advocacy/comparison.html> (last visited Nov. 19, 2017).

82. See 29 U.S.C. § 701 (2012); Wright & Wright, *supra* note 80.

non-discrimination and accessibility provisions of the law.”<sup>83</sup> Unlike either section 504 or the ADA, the IDEA was an education law intended to protect students with disabilities and ensure that they receive an individualized education program that will prepare them “for further education, employment and independent living.”<sup>84</sup>

Because of their common but distinct purposes, the scope and applicability of the laws governing disability civil rights vary with regard to education. For example, a child that has a disability but does not require special education services will not qualify for IDEA protection, but may still receive protection under section 504.<sup>85</sup> The IDEA defines a child with disability as:

a child--(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.<sup>86</sup>

Section 504, however, provides a broader interpretation of disability:

(A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or (B) for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], the meaning given it in section 12102 of Title 42.<sup>87</sup>

Thus, section 504’s definition of disability incorporates the ADA definition of disability: “(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 . . . .”<sup>88</sup>

83. Wright & Wright, *supra* note 80; see 42 U.S.C. § 12101 (2012).

84. Wright & Wright, *supra* note 80; see 20 U.S.C. § 1400 (2012).

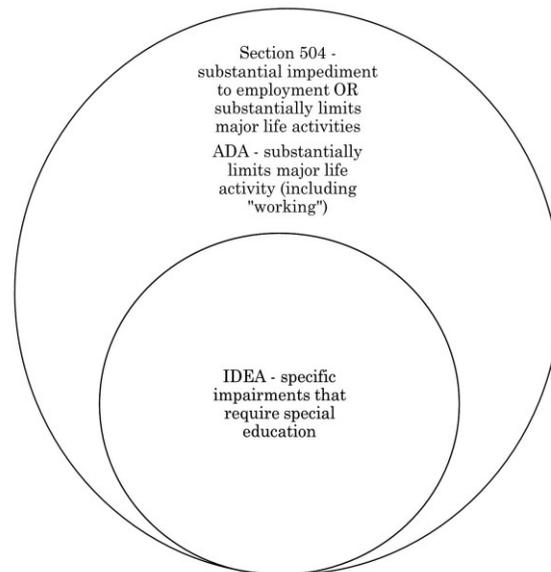
85. Wright & Wright, *supra* note 80; see 29 U.S.C. § 701; 20 U.S.C. § 1400.

86. 20 U.S.C. § 1401 (2012).

87. 29 U.S.C. § 705(9) (2012).

88. 42 U.S.C. § 12102 (2012). The ADA further defines major life activities (and such definition is thus included in section 504’s definition): “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading,

The relationship between the definitions of disability in all three of the laws is best demonstrated in the following chart:



Ultimately, there is no dispute that both section 504 and the ADA are more inclusive in terms of defining disability than the IDEA. The determining factor in deciding the laws under which a student is covered is whether his or her disability adversely effects educational performance.<sup>89</sup> If educational performance is adversely affected by the student's disability, the student is covered under both the IDEA and section 504.<sup>90</sup> If educational performance is *not* adversely affected, the student is not eligible for protection under the IDEA but *is* likely still covered by section 504 (and, consequently, the ADA).<sup>91</sup> The following are a few examples of disabilities that might be covered under section 504, but do not rise to the level of IDEA protection:

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concentrating, thinking, communicating, and working." *Id.* Notably, "working" is included on the list of major life activities, which may make the language of section 504 referencing "impediment to employment" somewhat redundant.

89. Peter Wright & Pamela Wright, *Who Is Eligible for Protections Under Section 504 . . . but Not Under IDEA?*, WRIGHTSLAW (July 30, 2013), <http://www.wrightslaw.com/info/sec504.who.protect.htm>; see 29 U.S.C. § 705; 20 U.S.C. § 1401.

90. See Wright & Wright, *supra* note 89.

91. *Id.*

- “students with communicable diseases (i.e., hepatitis);
- students with temporary disabilities arising from accidents who may need short term hospitalization or homebound recovery;
- students with allergies or asthma;
- students who are drug-addicted or alcoholic, as long as they are not currently using illegal drugs; [and]
- students with environmental illnesses.”<sup>92</sup>

Another major difference in the laws is their tie to funding. The IDEA provides federal funds to assist schools in meeting the requirements of the law and better serve students with disabilities, whereas section 504 and the ADA do not.<sup>93</sup> Section 504 is tied to the other federal funding schools receive, but it does not provide additional funding to public schools to assist with providing educational services to students with disabilities.<sup>94</sup> The ADA, however, is neither tied to federal funding nor provides for additional funds.<sup>95</sup>

Both the IDEA and section 504 provide a guarantee for “free [and] appropriate public education” (colloquially referred to in the education field as a “FAPE”), though the laws differ somewhat in how they define “appropriate.”<sup>96</sup> The ADA has no such requirement.<sup>97</sup> Unlike section 504, the IDEA requires the implementation of an individualized education plan (IEP) for protected students as part of the FAPE.<sup>98</sup> In order to be considered

92. Ohio Legal Servs., *Students & Schools: Section 504 & Disability Discrimination in Schools*, CINCINNATI CHILD. HOSP.: READING & LITERACY DISCOVERY CTR., <https://rldc.cchmc.org/sites/default/files/504.pdf> (last visited Nov. 19, 2017).

93. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81; see 20 U.S.C. § 1411 (2012).

94. Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, NASDSE PROF'L DEV. CONFERENCE, 3 (2011), <http://www.ode.state.or.us/initiatives/elearning/nasdse/nasdsesection504handout.pdf>.

95. *Id.*

96. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81.

97. *Id.*

98. *Id.*; see also Council for Exceptional Children, *Understanding the Differences Between IDEA and Section 504*, LD ONLINE (2002), <http://www.ldonline.org/article/6086/>. According to the Office of Special Education,

Each IEP must be designed for one student and must be a truly individualized document. The IEP creates an opportunity for teachers, parents, school administrators, related services personnel, and students (when appropriate) to work together to improve educational results for children with disabilities. The IEP is the cornerstone of a quality education for each child with a disability.

“appropriate” under the IDEA, the IEP must be “designed to provide ‘educational benefit’ for a person with disabilities.”<sup>99</sup> Section 504’s FAPE requirement instead mandates that students’ education be “comparable to the education provided to those students who are not disabled.”<sup>100</sup> Notably, because a student who qualifies under the IDEA also qualifies for section 504 protection, a student requiring an IEP is guaranteed both a program that provides some educational benefit and one that is comparable to the education provided to non-section 504 students.<sup>101</sup>

The restrictions on a school’s choice of discipline are also governed differently by these laws. Section 504, the IDEA, and the ADA protect a student from being disciplined because of his or her disability.<sup>102</sup> Thus, a child whose behavior is the result of his or her disability cannot be disciplined by a change of placement (including expulsion or suspension longer than ten days).<sup>103</sup> For behavior that is not the result of disability, a section 504 student may be suspended or expelled with no promise of continued education.<sup>104</sup> An IDEA student, however, remains entitled to an FAPE even after suspension or expulsion.<sup>105</sup>

Additionally, the procedural safeguards and due process requirements of the laws are different. Under section 504, parents must be given notice regarding identification, evaluation, placement, and any significant change in placement.<sup>106</sup> Parents must also be provided with impartial hearings when they disagree with the identification, evaluation, or placement of their child.<sup>107</sup> Beyond the requirement for an impartial hearing, section 504 does not provide for any additional due process for parents disputing the treatment of their child with a disability.<sup>108</sup> The IDEA, on the other hand,

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*A Guide to the Individualized Education Program*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/parents/needs/spced/iepguide/index.html?exp=0> (last modified Mar. 23, 2007).

99. Council for Exceptional Children, *supra* note 98, at 21.

100. *Id.*

101. *See* Wright & Wright, *supra* note 89.

102. *See A Comparison of ADA, IDEA, and Section 504*, *supra* note 81.

103. *Individualized Education Programs (IEPs) and 504 Plans: What’s the Difference?*, DISABILITY RIGHTS CTR. – NH, 3 (Mar. 15, 2015), <http://www.drncnh.org/IDEA504.pdf>.

104. *Id.*

105. *Id.*

106. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81; *see also* Office for Civil Rights, *Guidelines for Educators and Administrators for Implementing Section 504 of the Rehabilitation Act of 1973—Subpart D*, U.S. DEP’T OF EDUC., 17 (2010), [https://doe.sd.gov/oess/documents/sped\\_section504\\_Guidelines.pdf](https://doe.sd.gov/oess/documents/sped_section504_Guidelines.pdf).

107. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81.

108. *Id.*

has specific procedural safeguards in place in the event a parent disputes his or her child's treatment.<sup>109</sup> These disputes are to be resolved through mediation, impartial due process hearings, appeal of those hearings to a district court, and/or private civil action.<sup>110</sup> The ADA, however, does not have specific procedural safeguards related to special education of students.<sup>111</sup> Still, the ADA does outline the "administrative requirements, complaint procedures, and consequences for noncompliance."<sup>112</sup>

Enforcement mechanisms also differ slightly between the laws. Section 504 as well as complaints against schools under the ADA are enforced by the Office for Civil Rights, whereas the IDEA is enforced by the Office of Special Education Programs.<sup>113</sup> Individuals may bring private actions against schools in the event of noncompliance with any of the three laws.<sup>114</sup> The remedies commonly awarded under section 504 and the ADA in private enforcement actions include compensatory damages and attorney fees.<sup>115</sup> Under the IDEA, however, the prevailing view is that monetary damages are not available, but injunctive relief in the form of tuition reimbursement, compensatory education, and revisions of a student's individualized education plan are common.<sup>116</sup>

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109. *Id.*

110. *Id.*; see also Office of Special Education and Rehabilitation Services and Office of Special Education Programs, *Guidance on Required Content of Forms Under Part B of IDEA*, U.S. DEP'T OF EDUC., 33 (June 2009), [http://idea.ed.gov/download/modelform\\_Procedural\\_Safeguards\\_June\\_2009.pdf](http://idea.ed.gov/download/modelform_Procedural_Safeguards_June_2009.pdf) (citing 34 C.F.R. § 300.516) ("Any party (you or the school district) who does not agree with the findings and decision in the due process hearing (including a hearing relating to disciplinary procedures) has the right to bring a civil action with respect to the matter that was the subject of the due process hearing.").

111. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81.

112. *Id.*

113. Zirkel, *supra* note 94, at 9.

114. *Id.* at 10; see also Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1263, 1275 (2015). Although Title I of the ADA requires an individual to exhaust all administrative remedies before filing a private action of enforcement, Title II does not have the same requirement. *Cook v. City of Philadelphia*, 94 F. Supp. 3d 640, 647 (E.D. Pa. 2015) ("Title II, on the other hand, incorporates the [Rehabilitation Act's] enforcement provisions which do not require a plaintiff exhaust his administrative remedies."); see also 42 U.S.C. § 12132 (2012).

115. See 42 U.S.C. § 12132; Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L. ASS'N ADMIN. L. JUDICIARY 611, 615 (2012); Zirkel, *supra* note 94, at 10.

116. Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 219 (2013).

Clearly there are significant differences in the purposes and language of the federal laws governing schools' treatment of students with disabilities. There are also meaningful differences in their application to disputes regarding disciplinary practices in public schools.<sup>117</sup> Despite the nuances of each law, one thing remains true for all of them: these laws can be implemented in a number of different ways to prevent schools from discriminating against students with disabilities.

*B. Section 504 of the Rehabilitation Act of 1973*

The Department of Education's Office for Civil Rights can become involved with a school district's treatment of students with disabilities in two ways: parents can file a complaint or the office can conduct an agency-initiated compliance review.<sup>118</sup> Despite the fact that the OCR is also responsible for enforcing antidiscrimination laws regarding race, color, national origin, sex, and age, "more than 55 percent of the complaints OCR received [between 2009 and 2011] raised disability issues."<sup>119</sup> FAPE complaints are "by far the disability issue on which OCR receives the most complaints, making up almost two fifths of the more than 11,700 disability complaints received."<sup>120</sup>

Before a student's placement can be substantially changed through long-term suspension or expulsion, the school is required to determine whether the student's misconduct is a result of his or her disability.<sup>121</sup> Under section 504, a student cannot be suspended for longer than ten days for conduct that is a manifestation of his or her disability.<sup>122</sup> To establish a civil case for disability discrimination under section 504, a plaintiff must show four elements: (1) he or she is a qualified individual with a disability, (2) he or she was denied the benefits of a public entity that receives federal funding, (3) he or she was discriminated against because of his or her disability, and

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117. See *Individualized Education Programs (IEPs) and 504 Plans: What's the Difference?*, *supra* note 103.

118. *Frequently Asked Questions About Section 504*, *supra* note 6.

119. Office for Civil Rights, *Disability Rights Enforcement Highlights*, U.S. DEP'T OF EDUC. 4 (Oct. 2012), <https://www2.ed.gov/documents/news/section-504.pdf>.

120. *Id.* at 7.

121. *S-1 v. Burlington*, 635 F.2d 342, 346, 350 (5th Cir. 1981), *abrogated on other grounds by Honig v. Doe*, 484 U.S. 305 (1988) ("[B]efore a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition . . .").

122. *Id.* at 346.

(4) the school acted with bad faith or gross misjudgment.<sup>123</sup> To date, there have been no civil cases directly dealing with No-Excuses disciplinary practices that have reached a final judgment.<sup>124</sup> There are, however, some examples of successful section 504 cases invalidating blanket, district-wide policies that discriminated against students with disabilities that may provide guidance for future complaints.<sup>125</sup>

In 2015, the OCR investigated an Arizona charter school, Noah Webster Basic School, for potential violations under section 504.<sup>126</sup> The complaint alleged that the school had failed to implement certain portions of the student's section 504 education plan established to accommodate his disability: Attention Deficit Hyperactive Disorder<sup>127</sup> (ADHD).<sup>128</sup> The student's section 504 plan required the school to implement individualized behavior contracts with the student, shorten or simplify his assignments, and give him more time to complete assignments and tests.<sup>129</sup> The Complaint alleged that the school had failed to give the student enough time to complete his assignments, that the student was subject to punishment for homework incompleteness, and that he had received twelve "demerit points" related to his inability to complete his homework.<sup>130</sup> The student eventually accumulated more than thirty demerits, enough to trigger a "Manifestation Determination Review" on the part of school officials to determine whether

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123. M.P. *ex rel.* K. & D.P. v. Indep. Sch. Dist. No. 721, New Prague, Minn., 439 F.3d 865, 867 (8th Cir. 2006).

124. This does not mean that lawsuits have not been filed—a number of these cases are ongoing. *See, e.g.*, *Lawton v. Success Academy of Fort Greene*, No. 1:15-CV-07058-FB-SMG (E.D.N.Y., filed Dec. 10, 2015); *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015).

125. M.P. *ex rel.* K. & D.P., 439 F.3d at 867 (citing *Christopher S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 1211–12 (9th Cir. 2004)).

126. Letter from Thomas E. Ciapusci, Supervisory Team Leader, to Kelly Wade, Superintendent (Sept. 30, 2015) (on file with the Office for Civil Rights) [hereinafter Ciapusci Letter], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08151156-a.pdf>.

127. According to a Topic Brief published by the Department of Education in 1999, children with ADHD may be eligible for IDEA protection but are not necessarily considered disabled under the IDEA in all instances. *Children with ADD/ADHD -- Topic Brief*, U.S. DEP'T OF EDUC. (Mar. 1999), <https://www2.ed.gov/policy/speced/leg/idea/brief6.html> (last modified July 19, 2007) ("Some children with ADD/ADHD may be eligible under other disability categories if they meet the criteria for those disabilities, while other children may not be eligible under Part B, but might qualify under section 504 of the Rehabilitation Act.").

128. Ciapusci Letter, *supra* note 126.

129. *Id.*

130. *Id.* at 4.

his behavior was a consequence of his disability.<sup>131</sup> School officials erroneously concluded, relying “on medical documentation from the Student’s doctor that was more than three years old,” that the behavior was not a result of his disability; thus the student was eligible for expulsion.<sup>132</sup>

After investigating the student’s complaint, the OCR found that the school failed to implement the modifications required by the student’s section 504 education plan and that the school’s failure to modify “related directly to the bases for the Student’s expulsion.”<sup>133</sup> The OCR further concluded that the school had failed to reevaluate the student prior to any significant change in the student’s placement as required under section 504.<sup>134</sup> As a result of these findings, the school agreed to “voluntarily resolve the violations found in this investigation and entered into a Resolution Agreement.”<sup>135</sup> Thus, the school was not legally allowed to suspend the student for an extended period based on behavior that was a direct result of the student’s disability.<sup>136</sup>

Similarly, in December 2015, several parents filed joint civil actions on behalf of their children against Success Academy Fort Greene, a New York City charter school, alleging several violations of both section 504 and the IDEA.<sup>137</sup> According to the complaint, one student, S.S., was diagnosed with ADHD during his kindergarten year with Success Academy and was qualified as a student with disabilities under section 504.<sup>138</sup> Despite this

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131. *Id.* at 5.

132. *Id.* at 4.

133. *Id.* at 5.

134. *Id.*

135. *Id.*

136. *See id.*

137. Complaint at 1, *Lawton v. Success Acad. of Fort Greene*, No. 1:15-cv-07058-FB-SMG (E.D.N.Y., filed Dec. 10, 2015). The subsequent amended complaint was filed April 29, 2016. Amended Consolidated Complaint, *Lawton v. Success Acad. of Fort Greene*, No. 1:15-cv-07058-FB-SMG (E.D.N.Y., filed Apr. 29, 2016), <http://www.nylpi.org/wp-content/uploads/2016/04/Lawton-v-Success-Academy-et-al-Amended-Consolidated-Complaint.pdf>.

138. Amended Consolidated Complaint at 4, 17, *supra* note 137. Immediately before S.S.’s complaint was filed, Success Academy of Fort Greene had received a great deal of backlash for its treatment of other students with disabilities. Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have ‘Got to Go’*, N.Y. TIMES (Oct. 29, 2015), <https://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html>. In 2014, Success Academy Principal Candido Brown had created a “Got to Go” list—a list of students with disabilities Brown and other school officials hoped to push out in order to prevent further disruption in the classroom. *Id.* The official spokeswoman for Success Academy said the list was a mistake and that

diagnosis, Success Academy allegedly refused to provide S.S. with an individualized education plan that accounted for his behavioral issues, and he was suspended approximately thirty times during his kindergarten and first grade school years.<sup>139</sup> On one occasion, during a class field trip to a local museum, S.S. “became upset when he wanted to spend more time at an exhibit than his chaperones would allow.”<sup>140</sup> As a result of his behavior, one chaperone called the police and S.S. was taken to the hospital; his hospital discharge papers indicated “that the episode was an exacerbation of his ADHD.”<sup>141</sup> S.S.’s mother alleged violation under section 504 as a result of the charter’s failure to inform her of her rights under the law and to develop an educational or behavioral plan as required for students with disabilities under section 504.<sup>142</sup> Although the case against Success Academy is ongoing,<sup>143</sup> the allegations of several parents support the argument that charter schools that utilize rigid, unyielding disciplinary schemes are doing so with the intent of pushing out students with disabilities in violation of their civil rights under section 504.

### C. *Individuals with Disabilities Education Act*

According to current United States Attorney General and former United States Senator Jeff Sessions, the protections the IDEA offers students with disabilities “may be the single most irritating problem for teachers throughout America today.”<sup>144</sup> During debate over potential IDEA amendments, then-Senator Sessions commented that “[w]e have created a complex system of federal regulations and laws that have created lawsuit after lawsuit, special treatment for certain children, and that are a big factor in accelerating the decline in civility and discipline in classrooms all over

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Principal Brown was immediately reprimanded. *Id.* Even still, the State University of New York Charter School Institute, the entity that licenses charter schools in the State of New York, opened investigation of Success Academy to determine whether the charter school network was improperly using suspensions and other discipline as a means of forcing students with disabilities to transfer to other schools. *Id.*

139. Amended Consolidated Complaint, *supra* note 137, at 19.

140. *Id.*

141. *Id.*

142. *Id.* at 20.

143. According to the docket summary, the parties have agreed to limited discovery and mediation at this time. *Lawton*, No. 1:15-cv-07058-FB-SMG (E.D.N.Y., filed Apr. 29, 2016).

144. Jason Cherkis, *Jeff Sessions Slammed a Law Protecting Schoolchildren with Disabilities*, HUFFINGTON POST (Nov. 29, 2016), [http://www.huffingtonpost.com/entry/jeff-sessions-slammed-law-protecting-schoolchildren-disabilities\\_us\\_583cf751e4b06539a78a3bdc](http://www.huffingtonpost.com/entry/jeff-sessions-slammed-law-protecting-schoolchildren-disabilities_us_583cf751e4b06539a78a3bdc).

America.”<sup>145</sup> The IDEA, however, is not aimed at providing “special treatment for certain children”—its goal is to ensure equal treatment for students with disabilities.<sup>146</sup>

In 1988, the United States Supreme Court decided the first case involving students with disabilities.<sup>147</sup> The Court held that, even where a student’s behavior is unrelated to his or her disability, schools cannot suspend or expel them for longer than ten days without continuing to offer the student free, appropriate education.<sup>148</sup> Like section 504, a student protected under the IDEA cannot be suspended for more than ten days for behavior that is a manifestation of his or her disability.<sup>149</sup> But unlike section 504, even where a student is suspended or expelled for longer than ten days for behavior that is not a manifestation of his or her disability, the school is still required to provide an FAPE.<sup>150</sup>

In the event any IDEA student is subjected to ten days or more of suspension in the same year (whether or not the days are consecutive), the school is required to continue offering special education services that allow the student to continue his or her participation in the general curriculum and progress toward meeting the goals outlined in his or her IEP.<sup>151</sup> Prior to the 2004 amendments to the IDEA, there was a rebuttable presumption that a student’s misbehavior was related to his or her disability.<sup>152</sup> This presumption no longer exists, but IEP team members are still required to hold a manifestation determination meeting to determine whether the misbehavior was related to the disability.<sup>153</sup> The team members will also consider whether the behavior is a result of the school’s failure to implement the student’s IEP.<sup>154</sup> If either of these circumstances are true, the

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145. *Id.*

146. *Id.*; 20 U.S.C. § 1400 (d)(1)(A) (2012).

147. *Honig v. Doe*, 484 U.S. 305 (1988), *aff’g sub nom. Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986).

148. *Id.* at 325.

149. *See* Allan G. Osborne Jr., *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 *FORDHAM URB. L.J.* 513, 522 (2001); *see also IDEA 2004 Close Up: Disciplining Students with Disabilities*, GREATSCHOOLS (May 20, 2015), <http://www.greatschools.org/gk/articles/idea-2004-close-up-disciplining-students-with-disabilities/>.

150. *See* Osborne, *supra* note 149.

151. *IDEA 2004 Close Up: Disciplining Students with Disabilities*, *supra* note 149; *see* 34 C.F.R. § 300.530(b)(2) (2017).

152. *IDEA 2004 Close Up: Disciplining Students with Disabilities*, *supra* note 149.

153. *Id.*

154. *Id.*

student cannot be suspended<sup>155</sup> and should be returned to the original education placement.<sup>156</sup> If, however, the behavior is in no way related to the student's disability, the student may be disciplined in the same manner as a student without disabilities would be disciplined under similar circumstances.<sup>157</sup> Still, under these circumstances where the student is suspended for longer than ten days because his or her behavior was not a manifestation of his or her disability, the student is entitled to an FAPE and the school is required to offer him or her special education services in accordance with the goals of the student's IEP.<sup>158</sup>

The decision in *Shelton v. Maya Angelou Public Charter School* helps demonstrate the distinctions between section 504 protection and stricter IDEA coverage.<sup>159</sup> In 2006, a student classified as learning-disabled (Shelton) was involved in a physical altercation with another student resulting in Shelton's suspension with the intent to expel upon completion of a manifestation determination review.<sup>160</sup> The review concluded that Shelton's behavior was not a manifestation of his disability, and thus, in accordance with the IDEA, the school expelled him; moreover, the Special Education Coordinator "unilaterally decided the amount of tutoring" Shelton would receive from home.<sup>161</sup> The court found that this was a violation of Shelton's rights under the IDEA because the school failed to conduct a Functional Behavioral Assessment or implement a Behavioral Intervention Plan as required by the IDEA<sup>162</sup> and because the IEP team was not included in the determination of the student's necessary continuing services after expulsion.<sup>163</sup>

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155. There are, of course, exceptions to the overarching rule. Certain offenses are considered so heinous as to warrant an "alternative educational setting" for up to forty-five days, even where the behavior is deemed a manifestation of the student's disability. *Id.* These offenses include: possession of a weapon or drug, when the student has inflicted serious bodily injury to someone else, or when the school believes that it is substantially likely the student will injure themselves or others if returned to his or her original placement. *Id.*; see *Shelton v. Maya Angelou Pub. Charter Sch.*, 578 F. Supp. 2d 83, 98 (D.D.C. 2008) (citing 20 U.S.C. § 1415(k)(1)(C) (2006)).

156. *IDEA 2004 Close Up: Disciplining Students With Disabilities*, *supra* note 149.

157. *Id.*; see *Shelton*, 578 F. Supp. 2d at 98.

158. *IDEA 2004 Close Up: Disciplining Students With Disabilities*, *supra* note 149.

159. *Shelton*, 578 F. Supp. 2d at 83.

160. *Id.* at 88.

161. *Id.* at 90, 101.

162. *Id.* at 99 (citing 34 C.F.R. §§ 300.530(b)(2), (d)).

163. *Id.* at 100. The IEP team includes "the disabled student's parents, teachers, other educational specialists, and where appropriate, the student." *Id.* Here, only the Special Education Coordinator was involved in the determination of continuing services. *Id.* at 101.

If Shelton was only protected by section 504 and had no rights under the IDEA, the manifestation determination review's conclusion that Shelton's behavior was not a manifestation of his disability would have abrogated any continued requirements for the school to provide an FAPE.<sup>164</sup> But because his disability qualified him for protection under the IDEA, the school was still required to provide Shelton an FAPE even after the school expelled him as the result of behavior that was unrelated to his disability.<sup>165</sup> Although schools may differ in their disciplinary approaches under the IDEA, they are still required to abide by the law's FAPE requirements for suspensions and expulsions exceeding ten days in one school year.<sup>166</sup> As No-Excuses charter schools continue suspending students with disabilities at alarming rates, the chances for charters to violate the IDEA's mandate of implementing individualized education plans in accordance with the law prove ominous.

#### *D. Americans with Disabilities Act*

Even though the Americans with Disabilities Act was not intended to be an education law, its similarities with section 504 and its broad scope as a civil rights, anti-discrimination statute have proven beneficial to students seeking protection from discriminatory disciplinary practices. Perhaps because of its expansive nature, the ADA is not enforced solely by the Department of Education; rather, it is enforced by both the Department of Education and the Department of Justice.<sup>167</sup> Unlike both section 504 and the IDEA, the ADA does not impose a responsibility on schools to provide an FAPE.<sup>168</sup> To prove a violation under Title II of the ADA, a plaintiff must show:

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164. See *S-1 v. Turlington*, 635 F.2d 342, 346, (5th Cir. 1981); *IDEA 2004 Close Up: Disciplining Students with Disabilities*, *supra* note 149.

165. *Shelton*, 578 F. Supp. 2d at 100.

166. *Id.*

167. *Types of Educational Opportunities Discrimination*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/types-educational-opportunities-discrimination> (last updated July 28, 2017). This dual enforcement may prove useful in the event Congress passes the recently proposed bill to abolish the Department of Education. Anya Kamenetz, *About That Bill Abolishing the Department of Education*, NPR (Feb. 9, 2017), <http://www.npr.org/sections/ed/2017/02/09/514148945/about-that-bill-abolishing-the-department-of-education>. Given the recent statements of newly appointed Attorney General Jeff Sessions, however, it is unlikely the DOJ will seek strict enforcement of civil rights laws protecting students with disabilities. See Cherkis, *supra* note 144.

168. *A Comparison of ADA, IDEA, and Section 504*, *supra* note 81.

(1) they are qualified individuals with a disability; (2) they were “either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or [were] otherwise discriminated against by the public entity”; and (3) “such exclusion, denial of benefits, or discrimination was by reason of” their disability.<sup>169</sup>

Though there are minor differences in the language and intended scope of the laws, in application, “[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.”<sup>170</sup>

*P.P. v. Compton Unified School District* exemplifies the approach courts generally take in analyzing ADA complaints against schools.<sup>171</sup> The court noted that “courts have applied the same analysis to claims brought under both statutes” and proceeded to do just that.<sup>172</sup> In *P.P. v. Compton*, several students filed suit against their school district alleging both section 504 and ADA complaints regarding the district’s failure to provide adequate accommodations for a shared disability among the students: complex trauma.<sup>173</sup> In the court’s denial of the school’s motion to dismiss, it

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169. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1107 (C.D. Cal. 2015) (quoting *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)).

170. *Id.* (quoting *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); 42 U.S.C. § 12133 (2012) (“The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims].”); see also *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (stating courts are required to “construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”); *Therault v. Flynn*, 162 F.3d 46, 48 n.3 (1st Cir. 1998) (“Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision.”); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) (“The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.”).

171. 135 F. Supp. 3d at 1107.

172. *Id.*

173. *Id.* at 1105 (“The Complaint alleges that the neurobiological effects of the complex trauma to which Student Plaintiffs have been subjected impair the ability to perform activities essential to education—including, but not limited to, learning, thinking, reading, and concentrating—and thus constitute a disability under [Section 504 and the ADA].”). The plaintiffs provided several examples of the traumatic events students had experienced that resulted in their ongoing battle:

Plaintiff Peter P. was repeatedly physically and sexually abused by his mother's boyfriends and witnessed physical abuse of his siblings and mother. Plaintiff Peter P. reports that he watched as his best friend was shot and killed. Plaintiff

analyzed the applicability of both section 504 and the ADA.<sup>174</sup> It held that the meaning of “disability” under the ADA was inclusive of the definition given to it by section 504, and that the term should be construed broadly under both statutes.<sup>175</sup>

Notably, this case was based not only on the school’s refusal to train teachers in how to help students with complex trauma, but also on the school’s harsh disciplinary practices involving these students.<sup>176</sup> The students alleged that “[i]nstead of providing . . . accommodations to address complex trauma, Defendants subject trauma-impacted students to punitive and counter-productive suspensions, expulsions, involuntary transfers, and referrals to law enforcement that push them out of school, off the path to graduation, and into the criminal justice system.”<sup>177</sup>

The court concluded that the described forms of complex trauma can result in such substantial emotional and neurobiological effects as to give rise to a finding of physical or mental impairment as defined by the ADA.<sup>178</sup> Furthermore, the lasting effects complex trauma can have on “cognitive control, attention, memory, response inhibition, and emotional reasoning” reasonably fell within the statute’s intended meaning of substantially limiting a major life activity.<sup>179</sup> After concluding that complex

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Peter P. was stabbed with a knife while trying to protect a friend. Plaintiff Peter P. reports that he has witnessed over twenty people being shot. Plaintiff Kimberly Cervantes was sexually assaulted on the bus on her way home from school. Plaintiff Phillip W. estimates that he has witnessed more than twenty people being shot, one of whom was a close friend who died when shot in the head. Plaintiff Virgil W. witnessed his father pointing a gun at his mother. A stranger attempted to stab Plaintiff Donte J. and his friends when they were standing in front of the Whaley Middle School campus. Plaintiff Donte J. was arrested by police at gunpoint on school campus when he was mistaken for someone else. Plaintiff Donte J. was attacked by four people on his way to school.

*Id.* at 1104.

174. *Id.* Here, a claim under the IDEA was inapplicable because the students do not fall within the narrower category of students with disabilities as defined by the IDEA. The complaint does not allege that the students require special education services. *See id.* at 1105. Instead, they request reasonable, trauma-sensitive accommodations for their disability.

*Id.*

175. *Id.* at 1108 (citing 42 U.S.C. § 12102(4)(A) (2012)).

176. *Id.* at 1119.

177. *Id.*

178. *Id.* at 1111.

179. *Id.* at 1112 (“The Complaint makes additional allegations regarding, for example, the effects of trauma on concentration, goal-setting and long-term planning, and classroom behaviors.”).

trauma falls within the definition of disability under the ADA, the court held that the students sufficiently pled discrimination based on their disability.<sup>180</sup>

Although *P.P. v. Compton* has not yet been heard on the merits,<sup>181</sup> it provides important insight into how courts approach the ADA's (and thus section 504's) broad definition of disability. While students with complex trauma may not have the same protections under the ADA as students covered by the IDEA, they at least have the opportunity to seek protection from the blind implementation of strict disciplinary policies that fail to consider the unique life experiences of students.

### *III. Recommendations*

#### *A. Schools Should Abandon Zero-Tolerance Discipline Policies*

In light of the obvious potential for civil rights infringement, as well as the research indicating No Excuses' failure to accomplish its own goals of academic success and community unity, charter schools should abandon their use of zero-tolerance discipline. Obviously, charter schools are not a monolith and do not concertededly approach discipline in the punitive manner associated with zero tolerance, but those that do are in need of significant reform. In a recent interview regarding his research on charter schools and zero-tolerance approaches, Dan Losen, director of the Center for Civil Rights Remedies, commented:

[T]he fact that there are more low-suspending charters than high-suspending charters is more proof positive that there are less discriminatory alternatives than policies and practices that produce sky-high suspension rates and large disparities, not only for Black kids compared to white kids or Latino kids compared to white kids but kids with disabilities.<sup>182</sup>

Some charters have already begun the transition to more accommodating, less punitive practices.<sup>183</sup> Accordingly, these schools have

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180. *Id.*

181. The parties have agreed to a stay of the case until later this year. *P.P. v. Compton Unified Sch. Dist.*, CV 15-3726-MWF(PLAx) (Jan. 9, 2017) (Bloomberg Law).

182. Jennifer Berkshire, *Study: Time to End the Broken Windows Approach to School Discipline*, HUFFINGTON POST (Mar. 18, 2016), [http://www.huffingtonpost.com/jennifer-berkshire/study-time-to-end-the-bro\\_b\\_9498950.html](http://www.huffingtonpost.com/jennifer-berkshire/study-time-to-end-the-bro_b_9498950.html).

183. Monica Disare, *'No Excuses' No More? Charter Schools Rethink Discipline After Focus on Tough Consequences*, CHALKBEAT (Mar. 7, 2016), <http://www.chalkbeat.org/>

“taken steps to give more positive feedback, deemphasize the tiniest behavior infractions, differentiate how they treat student misbehavior, and ensure students are learning from their consequences.”<sup>184</sup> Even though this transition away from zero tolerance is an obvious step in the right direction, every school should take care to ensure that, no matter what disciplinary approach it utilizes, it is providing necessary accommodations to students with disabilities in accordance with federal law.

*B. Civil Rights Enforcement Agencies Should Monitor Discipline More Closely*

The research indicates that disproportionate suspension and expulsion of students with disabilities is not just a charter school issue—it is a nationwide epidemic among all public schools.<sup>185</sup> In order to ensure that students with disabilities are receiving the equal treatment guaranteed to them by section 504, the IDEA, and the ADA, the necessary enforcement agencies should more closely scrutinize the out-of-school punishments schools give their students with disabilities. Additionally, the Department of Education should require schools to report their disaggregated discipline data on an annual basis, and furthermore, should hold schools responsible for failing to report such data, in part by indicating their refusal to comply in publicly available reports.

*C. State Legislators Should Focus on Local Discipline*

In today’s political climate, charter schools will likely continue to receive bipartisan support in nearly every state. It is similarly evident that federal law can only begin to chip away at the profound problem that is the excessive suspension of students with disabilities. If state legislators are going to support the expansion of additional charters locally, they should actively seek to emulate already-existing charters that exhibit ideal school climate without the use of zero-tolerance discipline. Likewise, legislators at the state level should seek to limit or ban the use of zero-tolerance policies in their schools, charter or not, in order to reduce the overall number of suspensions, especially those given to students with disabilities.<sup>186</sup>

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posts/ny/2016/03/07/no-excuses-no-more-charter-schools-rethink-discipline-after-focus-on-tough-consequences/.

184. *Id.*

185. Losen et al., *supra* note 19, at 8.

186. Maryland has already taken active steps to reduce the use of such policies in its schools. Donna St. George, *Maryland School Board Approves New Discipline Regulations*, WASH. POST (Jan. 28, 2014), <https://www.washingtonpost.com/local/education/maryland->

*Conclusion*

Despite federal laws that aim to protect them, students with disabilities are being disproportionately punished and subsequently removed from public schools at a higher rate than their non-disabled peers. This is especially true in schools, often charters, that utilize zero-tolerance, “No Excuses” disciplinary practices, with little to no regard for the extenuating circumstances of individual students. Unless these schools abandon their harsh practices in favor of more strategic, individualized disciplinary schemes, they will continue to experience administrative investigations and lawsuits on behalf of students with disabilities exercising the rights guaranteed to them by federal law.

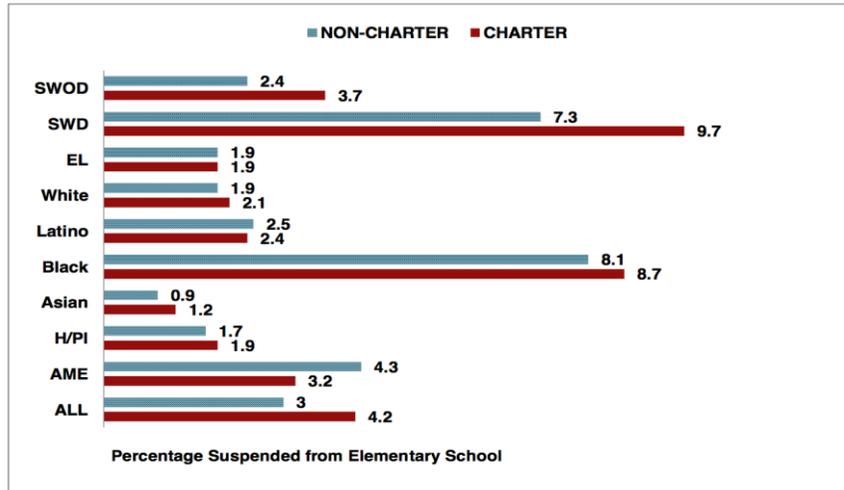
*Johanna F. Roberts*

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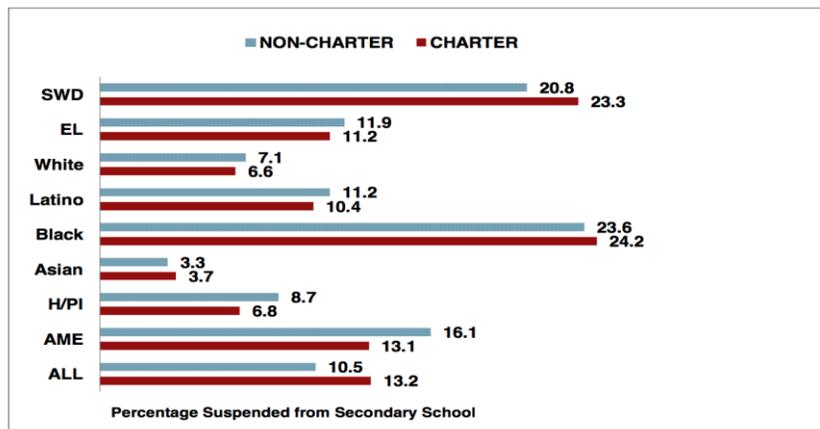
[approves-new-school-discipline-regulations/2014/01/28/c11ad4de-8385-11e3-bbe5-6a2a3141e3a9\\_story.html?utm\\_term=.9f5600af193f](https://digitalcommons.law.ou.edu/olr/vol70/iss3/6).

## Appendix A

## Percentage of Students Suspended from Elementary Schools



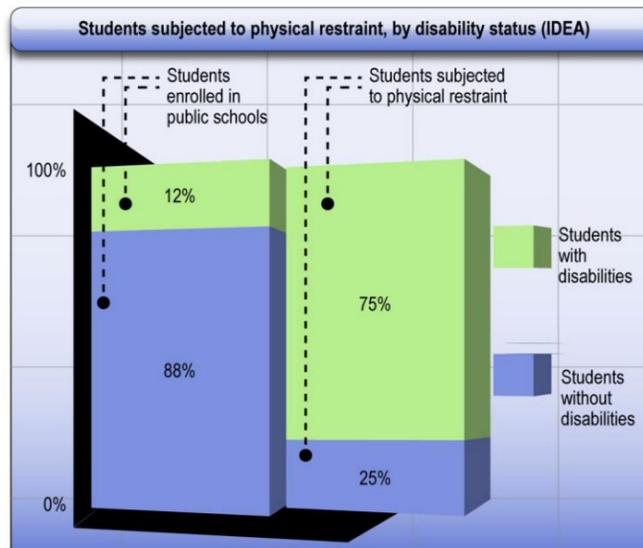
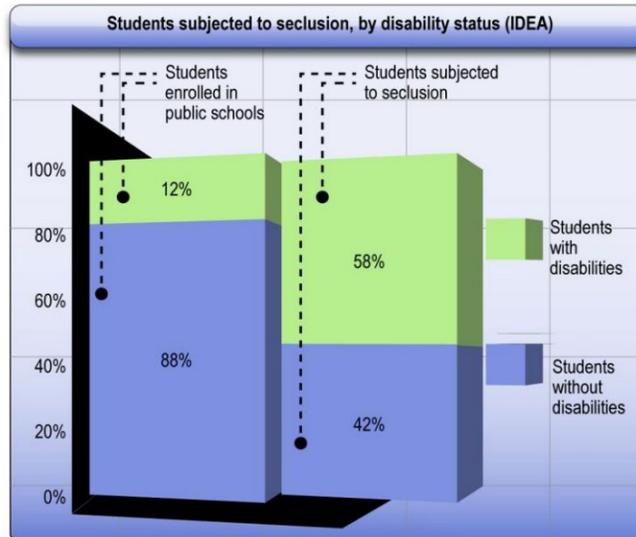
## Percentage of Students Suspended from Secondary School



Key for all charts: SWOD – Students Without Disabilities; SWD – Students with Disabilities; EL – English Learner; H/PI – Hawaiian/Pacific Islander; AME – American Indian; All – Combination of all students from every subcategory.<sup>187</sup>

187. Losen et al., *supra* note 19 (reprinted with permission).

## Appendix B



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188. *Data Snapshot*, *supra* note 66 (reprinted with permission).