THE LAW OF DISPOSABLE CHILDREN: DISCIPLINE IN SCHOOLS

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With almost no jurisprudence from the Supreme Court constraining schools' discretion in disciplining schoolchildren, it has been left to the states to define the constitutional boundaries of school practices that include exclusion, isolation, and physical restraint. But overwhelmingly, states defer to schools to set their own rules on disciplinary proceedings. This not only encourages schools to grant themselves large degrees of power over students' bodies and educational futures; it creates perverse incentives for schools to craft vague rules that provide little due process. The result is a system that permits discipline practices that are highly intrusive, discriminatory in numerous ways—including by race, disability status, homelessness, and poverty—and are often destructive to children's educations and future life options. For instance, school jurisdictions can allow schools to not only expel students from an individual school with disciplinary procedures that can last a matter of seconds but to exclude students from the entire public school system for up to two years. Students excluded from school entirely for long periods typically never recover from such disruptions and are drawn into the juvenile justice system.

In this Article, we describe and critique the minimal Supreme Court jurisprudence in the area. We then use the case study of Illinois to examine the permissive regulatory system that grants school administrators—as well as police stationed in schools—enormous control over children. Finally, to examine how discipline practices actually work on the ground, we conducted interviews with eighteen experts in the field. Our interviews with juvenile court judges, school administrators, probation officers, reintegration officers, child advocates, and others, reveal a remarkable level of agreement that the system not only fails many students but permits schools to actively harm some students. Schools are targeting some students for statuses they perceive as stigmatizing for the school, arresting and handcuffing students just to make a point, and illegally preventing students from reentering schools once released from the criminal justice system. The

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situation is so dire that there are children who remain in prison after having served their sentences because reentering school and receiving necessary services is so difficult that they are better off remaining incarcerated. Students are being thrown out of school, put into the juvenile justice system, and forgotten about. The Supreme Court must step in to prevent children from being treated as disposable.

TABLE OF CONTENTS

I. INTRODUCTION

In 2021, in what is often colloquially referred to as "the cheerleader case," the Supreme Court upheld the rights of schoolchildren to exercise their free speech, even when using vulgarities to express their views over matters as minor and mundane as who is chosen for the cheer squad.[1] The Court was roundly lauded for providing important protections to schoolchildren.[2] Yet, this Article shows that the Supreme Court has in fact grossly neglected its duties to protect

1. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021) ("It might be tempting to dismiss [the cheerleader's middle-finger and f-word-laden messages] as unworthy of . . . robust First Amendment protections . . . . But sometimes it is necessary to protect the superfluous in order to preserve the necessary.").

2. For example, one scholar proclaimed that "[p]ublic school students should be dancing in the streets." Nina Totenberg, *Supreme Court Rules Cheerleader's F-Bombs are Protected by the 1st Amendment*, NPR (June 23, 2021, 4:48 PM), https://www.npr.org/2021/06/23/1001382019/supreme-court-rules-cheerleaders-f-bombs-are-protected-by-the-first-amendment [https://perma.cc/ARB3-ZAQ5] (quoting Justin Driver). Similarly, the legal director of the ACLU declared, "It's a huge victory . . . . It means that when students leave school every day, they don't have to carry the schoolhouse on their backs." *Id.* (quoting David Cole).

schoolchildren when it comes to what matters most.[3] It crafted a standard for the searches of schoolchildren that grants school administrators, staff, and school resource officers nearly unfettered discretion over students' bodies and effects,[4] it has never addressed the constitutional limits on seizures of schoolchildren by such school personnel,[5] and it has devised only the most minimal constraints on other disciplinary actions, such as expulsions.[6] Schools and lower courts have exploited that lack of oversight to conduct and permit, respectively, disciplinary practices that are highly intrusive and discriminatory—actions that can be extremely destructive to children's educations and future life options.[7] Notably, this lack of oversight has permitted school systems in some jurisdictions to exclude students not only from individual schools but from the entire public school system for up to two years,[8] through disciplinary procedures that fail to meet even basic requirements of due process.[9] Experts we engaged from the field say that students who are out of school for even a short time—let alone such a long time—are much more likely to engage in criminal conduct and thus be drawn into the juvenile justice system, and that children can never recover from such long-term disruptions to their schooling.[10] Multiple experts we interviewed independently referred to the entire system as treating some children as disposable.[11]

3. *See also* Tonja Jacobi, *This Supreme Court Guards the First Amendment—and Neglects the Fourth*, WASH. POST (June 28, 2021, 8:11 AM), https://www.washingtonpost.com/outlook/2021/06/28/cheerleader-snapchat-breyer-roberts/ [https://perma.cc/F43Z-EKF7].

4. *See* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Searches in Schools*, 13 U.C. IRVINE L. REV. 205 (2022).

5. The Court has ruled on other aspects of the treatment of schoolchildren, such as First Amendment rights, *see* Morse v. Frederick, 551 U.S. 393, 403 (2007) (limiting the free speech of students on topics such as endorsing drug use), and limitations of the states' ability to discriminate in access to education, *see* Plyler v. Doe, 457 U.S. 202, 230 (1982) (prohibiting the state from withholding funds for the education of noncitizen children).

6. *See infra* Part II.

7. *See infra* Part IV.

8. For instance, Illinois permits "expulsions without services" for up to two years. *See* 105 ILCS 5/13A-3 (2022), discussed further *infra* Section IV.C.

9. For instance, Amy Meek, who has represented schoolchildren opposing their discipline in court through her work for the Chicago Lawyers Committee for Civil Rights and the ACLU, has witnessed expulsion proceedings stemming from an accusation without any corroborating evidence. Interview with Amy Meek, Civil Rights Bureau Chief, Ill. Att'y Gen.'s Off. (Feb. 18, 2020) (on file with authors).

10. Dr. Pamela Fenning, a scholar specializing in school and child psychology, says that expulsion for this amount of time means there is basically no chance of educational recovery for a student. Video Interview with Dr. Pamela Fenning, Professor & Co-Program Chair for Sch. Psychology, Loy. Univ. of Chi. (Mar. 12, 2020) (on file with authors); *see also* Interview with Monica Llorente, Senior Lecturer, Nw. Univ. Sch. of L., in Chi., Ill. (Feb. 24, 2020) (on file with authors); Telephone Interview with Ashley Fretthold, Supervisory Att'y, Child. & Fam.'s Prac. Grp., Leg. Aid Chi. (Feb. 7, 2020); EDUC. COMM'N OF THE U.S., POLICY SNAPSHOT: SUSPENSION AND EXPULSION 1 (2018), https://files.eric.ed.gov/fulltext/ED581500.pdf [https://perma.cc/VC39-G5LC] ("[These] disciplinary interventions negatively impact student achievement and increase both students' risk of dropping out and their likelihood of future involvement with the criminal justice system.").

11. Interview with Francisco Arenas, Supervisor Grants Coordinator, Cook Cnty. Juv. Prob. (Apr. 23, 2020) (on file with authors) (concluding that many schools treat children as "disposable"); Barbara Mahany, *Freeing the Spirit*, CHI TRIB. (July 13, 2008, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2008-07-13-0807090407-story.html [https://perma.cc/N6W5-D4Y8] (explaining that Reverend Kelly devotes himself to working with children coming out of the juvenile detention system because they are often "the forgotten, discarded, disposable people").

Beyond protecting their most flippant expressions of off-campus speech, the Supreme Court has failed students. In contrast to its more robust First Amendment protections, the Court has issued very few Fourth and Fifth Amendment rulings to regulate the treatment of schoolchildren by the state, and to the extent that it has regulated schools in these areas, it has focused on searches and interrogations.[12] However, most experts in the field agree that school searches and interrogations are only a very narrow part of the problem and that it is the largely unregulated field of school discipline that permits children to be treated as disposable by the law and the state.[13] It is disciplinary proceedings that constitute the primary route by which schoolchildren's rights are significantly intruded upon. Discipline procedures include detention, suspension, expulsion, and arrest, as well as workarounds that avoid school accountability for formal disciplinary action. The effectively unregulated exercise of these powers leads to the deterioration of children's privacy rights, hampers their access to education, and fosters the "school-to-prison-pipeline."[14]

With such minimal consideration of these issues, looking to the Supreme Court tells us little about the real-world extent of the rights of schoolchildren, how school administrators interpret their duties to respect those rights, and the role of lower courts in ensuring, or failing to ensure, the protection of those rights. Here, we detail how the law relating to school students operates on the ground, and how children are treated as disposable by some schools and school authorities, by examining the issue at three levels. First, we describe the very minimal jurisprudence developed by the Supreme Court in regard to the Fourth and Fifth Amendment rights of schoolchildren, as well as the minimal and highly permissive jurisprudence that has developed around discipline more directly. Second, having shown the limitations of the Supreme Court's jurisprudence, we then look at how the doctrinal freedom such a lack of oversight provides has translated into highly deferential regulatory systems that allow states to grant enormous discretion to the very school personnel that the rules are meant to

12. *See* discussion *infra* Part II.

13. For instance, Ashley Fretthold, who represents schoolchildren in court through Legal Aid's Children & Families Practice Group, reports that her office deals with many expulsion cases and relatively few school searches. Telephone Interview with Ashley Fretthold, *supra* note 10. Similarly, Monica Llorente, who has been involved with multiple organizations promoting the rights of schoolchildren, says school searches are a very narrow part of the problem; she saw many more discipline cases. Interview with Monica Llorente, *supra* note 10.

14. *See, e.g.*, ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005). Many scholars have argued that the lack of Supreme Court jurisprudence has contributed to and even laid the foundation for this pipeline. *See, e.g.*, Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 329 (2016) ("And while students theoretically are entitled to greater procedural protections for suspensions longer than ten days or for expulsions, scholars agree and school officials concede that those disciplinary proceedings too often are formulaic rather than substantive and are not aimed towards justice or accuracy."); Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 847 (2015) ("The Court's concern with burdening the assumed 'fair-minded' administrator led to a second major flaw: a decision devoid of meaningfully enforceable substance."); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 869 (2012) ("The record before the Court . . . was replete with facts indicating that school suspensions harm students."); Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. L. REV. 1071, 1079 (2010) ("While it would seem that inconsistent application of disciplinary measures would prove fertile ground for student lawsuits, students have often been unsuccessful when challenging school disciplinary decisions.").

constrain. Taking the state of Illinois as a case study, we see that the resulting permissive regulatory system not only allows schools to craft their own rules, it also affirmatively gives schools structural incentives to craft rules that are vague and highly deferential to school administrators. Illinois is just one state, but we show that it is representative of a problem of national scope. Third, to examine how state actions against schoolchildren—the vast majority of which never receive any judicial review whatsoever—are actually conducted in practice, we draw on interviews conducted with experts working on issues relating to school students' lives and educations in Chicago and in Illinois more broadly.[15] These experts include attorneys representing students, disability advocates, advocates at various charitable organizations, deans of schools, school social workers, school administrators, probation officers in the juvenile justice system, juvenile court judges, post-incarceration reintegration officers, and others.

What emerges from these interviews is a picture of a system that not only fails many students, but that permits schools to actively harm some students, discriminating among them, targeting them for exclusion from school, and preventing their reentry to school for fear of the stigma that they will bring. It also shows that other children are treated very differently, based on factors such as race, disability, homelessness, wealth, and community characteristics.[16] Our experts relate stories of principals and other school administrators explicitly stating that they do not want certain children enrolled in their schools because of the stigma they see as associated with those children. But we also show that interventions and support for students can make an enormous difference, be it representation by attorneys or training and mentoring programs for students, teachers, administrators, and law enforcement officers dealing with students. Unfortunately, the former tends to dominate the latter, due to a lack of resources being devoted to interventions, even when they would be ultimately cost-saving in addition to increasing each child's opportunity as enabled through education.

This is an issue that arises daily in America's schools. The most recent data available reflects that in the United States, more than 2,500,000 students were suspended in the 2017–2018 academic year, and more than 100,000 were expelled.[17] These numbers are only estimates, and the actual numbers are almost certainly much higher, as many suspensions of less than a week are imposed informally and never recorded. Moreover, expulsion data does not reflect "push

15. All interviews were conducted between late 2019 and 2021 by the authors, in person, by telephone, or via videoconferencing; detailed records of the interviews are available from the authors. Each interview subject was shown the detailed record of the interview and given the opportunity to make any correction. *See supra* notes 9–11 and accompanying text.

16. This involves differential treatment both within and between schools. In some schools, the balance has gone the other way, with lawsuits threatened for minor issues and schools failing to enforce rules, or sometimes even laws, because of teachers' fear of lawsuits. As a result, there are two very different systems that coincide with wealth and race. Clearly guidance is needed. *See infra* Section IV.D., IV.F; *see also* Jacobi & Clafton, *supra* note 4, at 210.

17. U.S. DEPT. OF EDUC., CIVIL RIGHTS DATA COLLECTION, 2017-18 STATE AND NATIONAL ESTIMATIONS, https://ocrdata.ed.gov/estimations/2017-2018 [https://perma.cc/VP67-YRZD]. The number of suspensions is up 500,000 from two years prior. *See* U.S. DEPT. OF EDUC., CIVIL RIGHTS DATA COLLECTION, 2015-16 STATE AND NATIONAL ESTIMATIONS, https://ocrdata.ed.gov/estimations/2015-2016 [https://perma.cc/RJY3-JR6N].

outs"—the processes in which students are successfully pressured by the school to transfer to a new school, without the school having to formally report the school's action as an expulsion.[18] These "disciplinary interventions negatively impact student achievement and increase both students' risk of dropping out and their likelihood of future involvement with the criminal justice system."[19] Compounding the issue, these disciplinary measures are almost entirely within the discretion of the individual schools and are utilized in a discriminatory fashion. Studies show, for example, that "black students in K-12 schools are 3.8 times as likely to be suspended, and twice as likely to be expelled, as white students. Similarly, students with disabilities are more than twice as likely to receive out-of-school suspensions as students without disabilities."[20] Yet, the Supreme Court has barely touched on the constitutionality of any of this state conduct against the most vulnerable.

These numbers only begin to hint at the unequal and often illegal way that some students are treated. Our experts relate stories of students being criminally prosecuted for snowball fights, students being targeted by teachers because they smell due to their poor living conditions, and students being left with so few schooling options that they remain in prison after they have served their sentences. Our experts describe interventions they have personally undertaken to combat racial and other forms of discrimination, to fight illegal actions taken by schools to prevent students from enrolling, to represent students in disciplinary proceedings that would otherwise surely have led to their expulsion, and to help them overcome the trauma that leads to a cycle of behavioral problems central to the school-to-prison pipeline.

Part II proceeds by addressing the very limited Supreme Court precedent on the recourse available to students deprived of their education by a school's disciplinary practices. Part III uses the case study of Illinois and the state's approach to expulsions and suspensions to illustrate that state legislatures' responses have been equally unsatisfactory. As we discuss, Illinois is representative of the national symptoms experienced as a result of the Court's abdication of protection of the most vulnerable students. Part IV discusses the entrenched nature of these exclusionary practices, drawing on interviews with experts and showing that there are manifold problems with school discipline: the lack of regulation by the Supreme Court, the school-to-prison pipeline, strikingly unequal treatment of students, and the dramatic harm that can be done to children's lives and educations by school administrators with very little court oversight. It also shows that reforms to reduce exclusionary practices can lead to many unintended consequences, including push outs and other detrimental trends.

18. Interview with Christine Agaiby Weil, Adjunct Professor, Loy. Univ. Chi. Sch. of L. (Apr. 16, 2020) (on file with authors); Interview with Daniel Losen, Dir. of Ctr. for Civ. Rts. & Remedies at the Civ. Rights Project at UCLA (Apr. 7, 2020) (on file with authors); Video Interview with Dr. Pamela Fenning, *supra* note 10; Telephone Interview with Ashley Fretthold, *supra* note 10. For more detailed information about push outs, see *infra* Section IV.C.

19. EDUC. COMM'N OF THE U.S., *supra* note 10, at 1.

20. *Id.*

II. JUDICIAL NEGLECT OF SCHOOLCHILDREN'S MOST FUNDAMENTAL AMENDMENT RIGHTS

A. The Wrong Focus of the Minimal Supreme Court Jurisprudence

In two companion articles, we have shown that the few decisions the Supreme Court has issued related to schoolchildren have been very minimally protective of schoolchildren's rights.[21] The sole Court decision over interrogation, *J.D.B. v. North Carolina*, mandated that the age of a child—as is objectively apparent to a reasonable police officer—must be taken into consideration in determining whether a child is in custody.[22] That case concerned an interrogation conducted by multiple police officers of a thirteen-year-old child in the school setting, without any *Miranda* warnings given.[23] Although this ruling provided one layer of protection for children, its ambit is very limited. The case applies only to officers and does nothing to prevent the common practice of school administrators working with police officers, including those permanently stationed in schools, from conducting joint interrogations.[24] It does not even apply the same logic of the custody analysis—that children are less mature and responsible than adults, "more vulnerable or susceptible to outside pressures,"[25] and more susceptible to interrogation and false confession,[26] and therefore their objective age must be considered in the analysis—to assessments of whether an interrogation is taking place.[27] This single limiting case has left school administrators with enormous discretion remaining.

This lack of oversight by the apex court has been exploited by both schools and lower courts to massively restrict schoolchildren's Fifth Amendment rights. For instance, schools throughout the nation have made use of the Reid technique against young children in schools.[28] The Reid technique was designed to

21. *See generally* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Interrogations in Schools* (unpublished working paper) (on file with authors).

22. J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011) (holding that custody analysis must be applied differently to children because they are uniquely susceptible to influence in situations in which adults are not).

23. *Id.* at 264–67.

24. The Supreme Court has never declared whether *Miranda* applies in the school context. Absent such guidance, lower courts have devised their own approaches to this issue. Jacobi & Clafton, *supra* note 21, provides a review of those cases and shows that a structured typology emerges that is highly permissive to the state: "[W]here an officer is not involved in an interrogation, even if the schoolteacher or administrator is questioning a student about a crime and shares any information gained in the interrogation with law enforcement, courts hold that *Miranda* does not apply . . . [W]here an officer is present during the interrogation along with school personnel, courts usually hold that *Miranda* is not required . . . if the investigation is primarily led by schoolteachers or administrators, even if the officer is involved in the questioning . . . [W]here an officer leads questioning in the school context, courts are more likely to find that *Miranda* is required, but not always." *Id.*

25. *See* Roper v. Simmons, 543 U.S. 551, 569 (2011).

26. *J.D.B.*, 564 U.S. at 272–74 (internal citations omitted).

27. The opinion drew on the common law's long history of differentiating children from adults across a litany of legal doctrines, emphasizing that the "differentiating characteristics of youth are universal," *id.* at 273, yet did not address whether the interrogation analysis must follow the same logic.

28. *Dozens of Orgs to ISBE and IPA, Stop Offering Controversial Law Enforcement Interrogation Course to Teachers and Administrators*, CHI. LAW.S' COMM. FOR C.R. (Dec. 20, 2016), https://www.clccrul.org/media-press-1/2016/12/20/dozens-of-orgs-to-isbe-and-ipa-stop-offering-controversial-law-enforcement-interrogation-

circumvent Supreme Court holdings forbidding the use of physical or mental pain to extract confessions, by instead teaching interrogators to apply psychological pressures to the suspect.[29] Experts have shown the Reid technique to be so coercive as to overwhelm the will of adults and to lead to false confessions,[30] yet such techniques are applied to children in schools. Lower courts have also used the lack of oversight by the Supreme Court in school interrogations to be highly deferential to school administrators.[31] For instance, even a police interrogation that was so threatening and ill-founded as to cause a child to commit suicide in its immediate aftermath was ruled unproblematic constitutionally.[32]

The Court's jurisprudence relating to searches is similarly limited. Literally millions of searches and seizures of schoolchildren are conducted every year,[33] yet the Court has decided only two cases regarding the individualized searches of schoolchildren.[34] The first, *New Jersey v. T.L.O.*, created an entirely novel and permissive constitutional standard[35] for searches that applies only to schoolchildren—even when they are suspected of breaking no law—the "reasonable grounds" test.[36] This test is far more permissive than any test applied to adults suspected of committing crimes.[37] The second, *Safford Unified School District*

course-to-teachers-and-administrators [https://perma.cc/K64B-FD76] (describing how the Reid technique has been implemented in schools throughout Illinois); Alexa Van Brunt, *Adult Interrogation Tactics in Schools Turn Principals into Police Officers*, GUARDIAN (Mar. 19, 2015, 7:15 AM), https://www.theguardian.com/commentis-free/2015/mar/19/interrogation-schools-turns-principals-police-officers [https://perma.cc/9VN7-K77H] (same).

29. *See, e.g.*, Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 551–61(2010).

30. Because it is so coercive, "Reid itself cautions that its technique should only be used when the police are confident that the suspect is responsible for the crime being investigated. At its core, the technique is a guilt-presumptive, accusatory, manipulative process; and it packs a powerful psychological punch." Megan G. Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626, 647–48 (2017).

31. *See* Jacobi & Clafton, *supra* note 21.

32. Walgren v. Heun, 2019 WL 265094, at *1 (N.D. Ill. Jan. 17, 2019). This decision was seen as so outrageous that it prompted a legislative response. *See* Stacy St. Clair, *Prompted by Naperville Teen's Suicide, New Law Requires Parents Be Present Before Police Question Students on School Property*, CHI. TRIB. (Aug. 23, 2019, 5:10 PM), https://www.chicagotribune.com/news/breaking/ct-corey-walgren-new-illinois-law-naperville-teen-suicide-20190823-mws7jtsb2jczdiwdqpqhtagmxu-story.html [https://perma.cc/4F2D-8FXT].

33. Jacobi & Clafton, *supra* note 4, at 208. In Illinois alone in the school year 2018–2019, over 100,000 students were subject to out-of-school suspensions, and more than 150,000 students were subject to in-school suspensions. *See* ILL. STATE BD. OF EDUC., END OF YEAR STUDENT DISCIPLINE REPORT SCHOOL YEAR 2018-19, https://www.isbe.net/Pages/Expulsions-Suspensions-and-Truants-by-District.aspx [https://perma.cc/LDG4-ELZM].

34. The Court has also ruled on non-individualized, non-targeted school searches of groups of students. As with individualized searches of students, the Court was similarly permissive, upholding programs of drug testing all student athletes as a special need based on the student athletes' "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search . . . ." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

35. *See, e.g.*, Sarah J. Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 332 (2011) ("The lowered standard for searches set forth by *T.L.O.* and reiterated by its progeny reduces constitutional freedoms of the individual to an empty guarantee.").

36. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (permitting searches of schoolchildren based on "reasonable grounds," a threshold lower than reasonable articulable suspicion or probable cause).

37. For example, in *Terry v. Ohio*, the Court allowed a limited stop and frisk of a criminal suspect but required that such action be based on reasonable and individualized suspicion. 392 U.S. 1, 27 (1968). In so holding, the Court noted that police could stop someone only for a very brief period, and a frisk must be limited to a

No. 1 v. Redding, like *J.D.B.* regarding interrogations, did limit a school search of a child; however, its protection was equally illusory.[38] The Court in that case ruled that a strip search of a thirteen-year-old girl was unconstitutional under the facts of a search for ibuprofen based on the uncorroborated allegation of another student under suspicion, but the Court made clear such a search *could* satisfy the low "reasonable grounds" standard if the allegation concerned different drugs or there was more reason to suspect drugs would be found in the teenage girl's underwear.[39]

The doctrinal freedom permitted by the Court, leaving open the possibility that strip-searches of children could be justified on slightly different facts, has been exploited by school administrators and lower courts, resulting in highly invasive searches of children that can be based on little evidence and contrary to first principles of individualized suspicion.[40] For instance, a strip search in which school staff required an eighth-grade student to remove her shirt, undershirt, pants, and shoes, after which a school staff member shook the bra the girl was wearing, was upheld as not contrary to established law even though no rationale or basis for suspicion was given whatsoever.[41]

In our companion articles on school searches and school interrogations, as in the research for this Article, we conducted interviews with experts working broadly in the realm of schoolchildren's legal rights to understand how the Court's standards operate on the ground. Strikingly, our experts agree that while the Supreme Court's jurisprudence on searches and interrogations are each problematic, and the lack of oversight they have provided allows enormous freedom to infringe upon the fundamental rights of schoolchildren, there is a much bigger problem: its complete lack of regulation of school discipline.

B. The Even More Sparse Doctrine on Discipline Proceedings

While a lack of Supreme Court oversight permits intrusive searches and interrogations of students, which are problematic in and of themselves,[42] the fruits of those state actions contribute to a larger issue that evades Court scrutiny—school discipline. This Section shows that there are a slew of problematic American school discipline and policing practices that warrant discussion, by

pat down of their outer clothing to discover weapons. *Id.* at 30–31. In crafting a new test only to be applied to schoolchildren, however, the Court showed no such constraint.

38. 557 U.S. 364, 379 (2009).

39. *Id.* at 377.

40. *See* Jacobi & Clafton, *supra* note 21; *see also* Cornfield by Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993) (finding a strip search of a sixteen-year-old student permitted under *T.L.O.*).

41. S.J. v. Perspectives Charter Sch., 685 F. Supp. 2d 847, 853–55 (N.D. Ill. 2010).

42. As we discuss in other work, *see* Jacobi & Clafton, *supra* note 4, the Supreme Court's lack of supervision permits lower courts to stray far from the few boundaries that the Court *has* laid down, sometimes permitting searches that clearly cross the line into illegality. And in the absence of Court intervention in the realm of interrogations, lower courts provide such deference that even where school administrators conduct interrogations related to crimes with the participation of police officers, lower courts have found no interrogation and therefore no *Miranda* warning required. *See* Jacobi & Clafton, *supra* note 21.

providing an overview of the legal landscape.[43] Yet, despite expert consensus that disciplinary practices are the most problematic aspects of school power over children, Supreme Court attention to this issue has been even more limited and its protections even more miserly than that of school searches and interrogations.

There is very little legal recourse for students challenging the disciplinary actions schools take against them. This is not by happenstance but by the Court's design. "The Supreme Court 'has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'"[44] In fact, the Court has itself said that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."[45] Lower courts have followed this admonition and typically defer to schools when children bring actions challenging discipline imposed by schools—only a few constitutional limits to discipline have ever been found.[46] The result is virtually unfettered discretion on the part of state actors and nearly complete abdication by the courts: the schools themselves set their own policies, which they in turn almost exclusively interpret and adjudicate.

Students have sought constitutional relief from suspensions and expulsions—the more serious and therefore more commonly challenged disciplinary practices—under the doctrines of procedural and substantive due process, as well as equal protection. Of these potential claims, the only avenue for relief the Supreme Court has unequivocally established in the school context is a claim that the school failed to provide procedural due process in depriving the student of his or her education.[47] In *Goss v. Lopez*, the Supreme Court oscillated repeatedly between its aversion to interference with school administrators' discretion and power to control the school setting and its recognition of the importance of public education.[48] In this case, nine students brought an action under 8 U.S.C. § 1983,

43. *See* Kaitlyn Shepherd, Note, *I Walk the Line: Balancing Teachers' and Students' Rights in the Context of Public-School Discipline*, 33 REGENT U. L. REV. 199 (2020); John M. Malutinok, *Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases*, 38 CHILD LEGAL RTS. J. 112 (2018); Kim, *supra* note 14; CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 5–6 (2010); Skiba et al., *supra* note 14; Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191 (2002).

44. Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827 (7th Cir. 1998) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)).

45. Wood v. Strickland, 420 U.S. 308, 326 (1975), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

46. *See* Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1052–54 (2001) (discussing cases noting that "permanently removing students from public school bars them from advancement in society, a very serious and detrimental consequence for acts committed before adulthood," and overturning a lower court decision because "the school exceeded its authority by adopting a zero tolerance policy that failed to include discretionary review").

47. Goss v. Lopez, 419 U.S. 565, 581 (1975).

48. *Id.* at 579–80.

alleging that the school had suspended them from public high school without providing any hearing, in violation of the Due Process Clause.[49]

On one hand, the Court recognized a "student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[50] And importantly, although the Court noted that suspension is "far milder deprivation than expulsion," a suspension of ten days was found as a matter of law to constitute more than a *de minimis* deprivation—such that a child suspended for more than ten days is entitled to the protections of the Due Process Clause.[51] To support the proposition that a suspension constitutes a sufficiently substantial deprivation to trigger the protections of the Due Process Clause, the Court noted that "education is perhaps the most important function of state and local governments," that "exclusion from the educational process" is a "serious event in the life of the suspended child," and that there are significant collateral damages inherent to suspension—such as reputational damage and loss of later opportunities in education and employment.[52]

Despite this recognition of the potential seriousness of the harm school exclusions can cause,[53] when it turned to the question of what process an excluded schoolchild is entitled to, the Court reiterated its commitment to permitting school administrators great discretion and its hostility towards court interference: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities."[54]

Even though the Court held that "[a]t the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing,"[55] the test it crafted reflects nothing more than mere lip service to procedural due process. Seemingly torn between recognizing the importance of education but wanting to defer to school administrators, the Court ultimately issued a weak compromise, requiring only token notice and opportunity to be heard. Highly informal proceedings were deemed sufficient:

> In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts

49. *Id.* at 568.

50. *Id.* at 574.

51. *Id.* at 575–76.

52. *Id.*

53. Indeed, as some scholars point out, even so long ago as *Goss*, the Court took a stance of willful blindness to the harm that exclusionary discipline practices render on students. *See* Kim, *supra* note 14, at 869–70 (noting the record available to the Court at the time of its decision in *Goss* indicated the negative impact that a suspension had on student success, "including reputational harm to the student, loss of instructional time, exacerbation of deviant behavior, lower high school graduation rates, and fewer future employment opportunities. Yet the majority ignored these facts altogether.").

54. *Goss*, 419 U.S. at 578 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (punctuation in original).

55. *Id.* at 579.

> at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.[56]

The Court based this low standard on its perceptions of the nature of the interests at stake and, notably, the purported importance of discipline to education. Indeed, the Court went so far as to embrace suspensions, reasoning that "[s]uspension is considered not only to be a necessary tool to maintain order but a *valuable educational device*."[57] As we discuss,[58] and the literature unequivocally establishes, a suspension is by no means an educational device, but rather is linked to long-lasting negative effects on students.[59] The Court acknowledged the permissiveness of its approach, noting that "we have imposed requirements which are, *if anything, less than* a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[60] But in practice, as we show, school districts, principals, and other administrators often exploit this permissiveness to impose very little restriction upon themselves.[61]

The Court further limited the substance of the due process requirement by insisting that there be no guarantee of the opportunity for a child to obtain counsel, or any advocate, based on a resource concern: "[b]rief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness."[62]

In this way, the Court justified a hands-off approach to the oversight of school discipline by the *very pervasiveness* of disciplinary procedures already in practice. This approach reflects the Court's general approach towards schoolchildren, which is to favor systemic arguments over individual justice.

Ultimately, the story of *Goss* is one of deference to schools, much akin to the Court's deference to school searches and interrogations.[63] The Court vested the school official with complete power to decide whether to "summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced."[64] As a result, the protections of procedural due process are largely empty: the Court only mandated that students be given a minimal opportunity to

56. *Id.* at 582.

57. *Id.* at 580 (emphasis added).

58. *See infra* Part IV.

59. *See supra* note 14 and accompanying text (discussing how suspensions and other like forms of discipline contribute to the school-to-prison pipeline); *see also* KIM ET AL., *supra* note 43, at 78–96 (discussing the legal avenues available to a child to oppose school disciplinary measures); Emily Boudreau, *School Discipline Linked to Later Consequences*, HARV. GRADUATE SCH. OF EDUC. (Sept. 16, 2019), https://www.gse.harvard.edu/news/uk/19/09/school-discipline-linked-later-consequences [https://perma.cc/SZ3G-NFNU]; *infra* Part III.

60. *Goss*, 419 U.S. at 583 (emphasis added).

61. *See infra* Parts III, IV; *see also* Jacobi & Clafton, *supra* note 4; Jacobi & Clafton, *supra* note 21.

62. *Goss*, 419 U.S. at 583.

63. *See supra* Section II.A, and the sources cited therein.

64. *Goss*, 419 U.S. at 584.

speak in their own defense, and required *no* opportunity for the student to speak to anyone other than the school administrator seeking to punish the student.[65] This "due process" requirement vests the official seeking to exclude the child with total power over the proceedings—effectively combining the role of prosecutor and judge. Thus, despite the Court's high-minded language regarding the importance of education, the Court refused to protect a student's right to challenge the substance of their suspension or exclusion; this fundamental means of self-improvement, and recognized property right, received only pro forma protections.

It is important to understand that *Goss* was the high point of the Supreme Court's protection of children's right to challenge disciplinary actions restricting their access to education: other avenues have yielded even fewer limits on school authority over children. Students have additionally sought relief through two other constitutional avenues—a claim that education is a fundamental right protected by the Substantive Due Process Clause and a claim that the discipline constitutes an act of discrimination violating the Equal Protection Clause. Both approaches have been largely unsuccessful, providing little protection to schoolchildren.

First, in a challenge to the state of Texas's school financing system—a system dramatically disproportionate in its funding across school districts, with hundreds of dollars more per year spent on pupils in wealthier and whiter neighborhoods[66]—schoolchildren argued that education is a fundamental right "because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution."[67] The Court rejected this argument, holding that there is no "right to education explicitly or implicitly guaranteed by the Constitution."[68] Once again, a chief justification for its holding was deference to local authorities, both to state legislatures' funding choices and school administration systems' choices in educational policy.[69] Accordingly, the Court applied the permissive rational basis standard and found that the Texas division of funds "constituted a 'rough accommodation'" of the various interests at play, and so was constitutionally rational.[70] The only caveat that the Court expressed is telling in its minimalism: a state's "absolute denial of educational opportunities to any of its children" *may* constitute an "interference with fundamental rights."[71]

As a result, the Court action requires litigants to meet a very high bar, amounting to an absolute denial of education, which translates to a very low bar for what courts require from schools in the care of children. This low standard bears out in shocking ways in practice. Indeed, as multiple experts relayed,

65. *Id.* at 584.
66. San Antonio Indep. Sch. Dist. v. Rodriguez 411 U.S. 1, 4–17 (1973).
67. *Id.* at 35.
68. *Id.* at 33–36.
69. *Id.* at 42–43.
70. *Id.* at 55.
71. *Id.* at 36–37.

students may find themselves without any educational option for as long as two years, without any recourse for the deprivation.[72]

Second, any individual student seeking to challenge school action as discriminatory under the Equal Protection Clause faces similarly high hurdles. In *Plyler v. Doe*, the Court held that the denial of funding for a class of noncitizen schoolchildren, without a justification furthering some substantial state interest, violated the Equal Protection Clause.[73] In this case, Texas failed to advance a sufficient justification for refusing to reimburse schools for the education of children who were not legal citizens, leaving the Court to conclude that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[74] But, while there is some recourse for classes of students under such flagrant facts, for an individual student to take advantage of this ruling is extremely difficult. To claim denial of equal protection for a "class of one," the student must show "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[75] The circumstances in which such a claim could successfully be made are essentially nonexistent because all children will be different, with different backgrounds, behavior, academic standing, and other considerations that can serve to justify disparate treatment.[76] For instance, courts have upheld disparate treatment when two children commit the same offense;[77] because of the inefficacy of this challenge, advocates we interviewed do not make these claims on behalf of individual students.[78]

Putting these rulings together, the only concrete constitutional protection the Supreme Court has provided to schoolchildren is a limited procedural due process guarantee. Beyond this, educational policy, laws, and frameworks are established completely by state and local governments, with the courts enforcing whatever rules the states and localities establish. With so little Court intervention or supervision, states wield immense power over the policing and disciplining of students. As the next Part shows, vesting states with the power to determine the substance and procedure for disciplining students, without providing any external mechanisms for review, contributes to a problematic circularity. Since states are free to set their own disciplinary procedures, they can then establish policies

72. *See infra* Section IV.A.

73. 457 U.S. 202, 230 (1982) ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").

74. *Id.*

75. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

76. Telephone Interview with Ashley Fretthold, *supra* note 10; *see also* Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 713 (7th Cir. 2002).

77. *Martin*, 295 F.3d at 713.

78. Telephone Interview with Ashley Fretthold, *supra* note 10; Video Interview with Rachel Shapiro, Supervising Att'y, Equip for Equality (Mar. 30, 2020) (on file with authors); *see also* Sabol v. Walter Payton Coll. Preparatory High Sch., 804 F. Supp. 2d 747, 756 (N.D. Ill. 2011) ("[T]he difference between a five- and ten-day suspension is not constitutionally significant, and it certainly provides no basis from which to infer that defendants had an invidious discriminatory purpose.").

that allow for highly invasive and punitive disciplining of students, contributing to a race to the bottom at the expense of vulnerable children. Because discipline is so wholly vested in the states, we next turn to the case study of Illinois.

III. STATE DEFERENCE TO SCHOOLS: EXPULSIONS & SUSPENSIONS IN ILLINOIS

The Supreme Court's abdication of oversight of student discipline means that it is up to the states to create protections, but the states in turn defer to the schools. The upshot is an unprecedented rise in punitive school discipline[79]—and with it, a dramatic increase in zero tolerance policies and the criminalization of youth,[80] a surge in police presence in schools,[81] and, to put one number to it, eleven million days of instruction lost to out-of-school suspensions in one year alone.[82] Moreover, while there has been an across-the-board escalation in exclusionary discipline practices, racial and other disparities in the use of those practices have only grown greater with time: for example, over the past thirty years, "although suspension rates have nearly doubled for all students," Black students—previously "twice as likely to be suspended as their white counterparts"—are now "more than three times as likely to be suspended."[83] The overarching epidemic, widely referred to as the school-to-prison pipeline,[84] is national in scope. And because "[s]chool suspensions have large negative impacts on longer-term outcomes that mirror the negative impact of early exposure to the criminal justice system,"[85] the failures of the Court and states to act are failing the most vulnerable schoolchildren.

79. *See generally* KIM ET AL., *supra* note 43.

80. *See generally* ADVANCEMENT PROJECT, *supra* note 14.

81. AMIR WHITAKER ET AL., COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS, ACLU (2019), https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [https://perma.cc/7QDR-PE2Z].

82. *See generally* DANIEL J. LOSEN & AMIR WHITAKER, 11 MILLION DAYS LOST: RACE, DISCIPLINE, AND SAFETY AT U.S. PUBLIC SCHOOLS PART 1, CTR. FOR C.R. & REMEDIES OF UCLA'S C.R. PROJECT & ACLU OF S. CAL. (2018), https://www.aclu.org/sites/default/files/field_document/final_11-million-days_ucla_aclu.pdf [https://perma.cc/C8CL-C93D].

83. KIM ET AL., *supra* note 43, at 1–2; *see also* DISABILITY RTS. EDUC. & DEF. FUND, *School-to-Prison Pipeline*, DREDF, https://dredf.org/legal-advocacy/school-to-prison-pipeline/ (last visited Feb. 25, 2023) [https://perma.cc/GL4A-KT2X] ("Students with disabilities represent 12 percent of the overall student population, yet make up 25 percent of all students involved in a school-related arrest, 58 percent of all students placed in seclusion, and a staggering 75 percent of all students physically restrained at school.").

84. ADVANCEMENT PROJECT, *supra* note 14.

85. Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime*, NAT'L BUREAU OF ECON. RSCH. WORKING PAPER NO. 26257 (2019), https://www.nber.org/system/files/working_papers/w26257/w26257.pdf [https://perma.cc/RH8W-PWU2]; *see also* Matthew P. Steinberg & Johanna Lacoe, *What Do We Know About School Discipline Reform?*, EDUC. NEXT (Oct. 4, 2016), https://www.educationnext.org/what-do-we-know-about-school-discipline-reform-suspensions-expulsions/ [https://perma.cc/Y3UB-AWXY] ("Students who are removed from school do tend to have lower achievement on standardized exams; are less likely to pass state assessments; and are more likely to repeat a grade, drop out of school, and become involved in the juvenile justice system. The AASA's 2014 survey found that 92 percent of superintendents believe that out-of-school suspensions are associated with negative student outcomes, including lost instructional time and increased disengagement, absenteeism, truancy, and dropout rates.").

Given the lack of Court oversight, coupled with the historically entrenched localism of education at the state and local levels, the country is a patchwork of highly variant educational systems.[86] Some states and localities have sought to undertake reform to combat the inequity and harm of exclusionary discipline practices,[87] but many remain entrenched in their ways.[88] Therefore, to really see how schoolchildren experience this problem on a daily basis, this Part provides an overview of the disciplinary framework for suspensions and expulsions, how students can seek relief from exclusionary discipline, and the consequences of this framework for students by taking Illinois as a case study. Since each state is different from the next, we provide an overview only in very broad strokes, covering the governing laws and regulations, the process students receive, and the resulting outcomes in Illinois. Illinois serves as a particularly effective case study because it allows for comparison of both the urban and suburban experience, the state has recently pursued reform, and the limitations of that reform exemplify the intractable nature of the problem absent judicial oversight. But the problem is one of national scale, and any number of states could serve this role.[89]

Control over schools in Illinois has been largely local since 1819 when elected school boards first began to use land set aside by the state government to finance teacher salaries and the costs of school buildings.[90] The current educational framework came into inception in 1975; the Illinois State Board of Education ("ISBE") was created by state constitutional amendment, replacing the prior system—election of a single school superintendent—and advancing an agenda

86. Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2052–61 (2006) ("Substantial variation in state approaches to public education has existed since the Founding."); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 748 (2018) ("[T]he dangers of localism and school funding policies . . . privilege the majority or seek to entrench its power. These trends suggest a major defect in education policy that only constitutional intervention can correct.").

87. Kavita Mediratta & M. Karega Rausch, *Introduction*, *in* INEQUALITY IN SCHOOL DISCIPLINE: RESEARCH AND PRACTICE TO REDUCE DISPARITIES 3, 4 (Russell J. Skiba, Kavitha Mediratta & M. Karega Rausch eds., 2016).

88. Steinberg & Lacoe, *supra* note 85 ("As of May 2015, [only] 22 states and the District of Columbia had revised their laws in order to require or encourage schools to: limit the use of exclusionary discipline practices; implement supportive (that is, nonpunitive) discipline strategies that rely on behavioral interventions; and provide support services . . . .").

89. LOSEN & WHITAKER, *supra* note 82, at 8 tbl.1 (documenting days of lost instruction for students by state, race, and disability status). We do not focus on federal educational law and policy or the Civil Rights Acts, which are already the subject of extensive literature, unless relevant to Illinois students' experiences. *See generally* Eloise Pasachoff, *Equality, Centralization, Community, and Governance in Contemporary Education Law*, 42 FORDHAM URB. L.J. 763 (2015); Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427 (2012); Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J. L. & EDUC. 1 (2010); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (summarizing the various waves of education litigation); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

90. Kenneth K. Wong, *School Districts*, ENCYC. CHI., http://www.encyclopedia.chicagohistory.org/pages/1122.html (last visited Feb. 25, 2023) [https://perma.cc/J4UH-JBTF].

of desegregation.[91] The ISBE sets educational policies for both public and private schools.[92] By statute, the ISBE is empowered to make rules "that are necessary to carry into efficient and uniform effect all laws for establishing and maintaining free schools in the State."[93] The ISBE has not promulgated rules in regard to discipline, although it is empowered by statute to do so.[94] Instead, discipline falls to the school officials.

Indeed, high-level guidance is scant in Illinois. By statute, it is merely required that schoolteachers and employees "shall maintain discipline in the schools."[95] Moreover, the education statutes that are on the books primarily function to authorize or direct the local school boards and districts to themselves establish the substance of regulations.[96] And the statutes that do themselves establish governing rules set procedural requirements, rather than proscribe or prescribe particular conduct—that is to say, the ISBE has very little to say on the actual substance of disciplinary laws and regulations.[97] As a result, it is the schools and not the state entity that craft rules controlling discipline of schoolchildren. Thus, the very actors that engage in disciplining schoolchildren also determine the rules controlling how that discipline can be conducted.

The consequence of this system is that the substance of school discipline comes from the schools themselves; school districts craft their own Codes of Conduct, and schools supplement those codes with additional guidelines and enforce those codes within the schools. Because the school district drafts the same code that schools will enforce, there is an incentive to use vague and broad language that is either open to interpretation or that delegates decision-making authority to school personnel, providing the widest possible discretion to school officials.[98] For example, Cicero School District 99, a school district in the western suburbs of Chicago, forbids students from "[d]isobeying rules of student conduct or directives from staff members or school officials. Examples of

91. ILL. CONST. art. X, §2; *see also* Donald Sevener, *The Evolution of the State Board of Education*, ILL. PERIODICALS ONLINE 8,10 (July 1986), https://www.lib.niu.edu/1986/ii860708.html [https://perma.cc/SG36-DXHR].

92. *Board Information Regarding the Illinois State Board of Education*, ILL. STATE BD. EDUC., https://www.isbe.net/Pages/Board-Information.aspx (last visited Feb. 25, 2023) [https://perma.cc/SV2N-NBS9].

93. 105 ILCS 5/2-3.6 (2004).

94. *Rules Currently in Effect*, ILL. STATE BD. EDUC., https://www.isbe.net/Pages/Rules-Currently-in-Effect.aspx (last visited Feb. 25, 2023) [https://perma.cc/5W4J-4Z37].

95. 105 ILCS 5/24-24 (2022).

96. *See, e.g.*, 105 ILCS 5/10-20.28(b) (2022) ("The school board may establish appropriate rules and disciplinary procedures governing the use or possession of cellular radio telecommunication devices . . . ."); 105 ILCS 5/26-13 (2022) ("School districts shall adopt policies, consistent with rules adopted by the State Board of Education . . ., which identify the appropriate supportive services and available resources which are provided for truants and chronic truants."); 105 ILCS 5/27-23.7(d) (2022) ("Each school district, charter school, and nonpublic, non-sectarian elementary or secondary school shall create, maintain, and implement a policy on bullying . . . .").

97. *See, e.g.*, 105 ILCS 5/10-22.6(b) (2022) ("The board may by policy authorize the superintendent of the district or the principal, assistant principal, or dean of students of any school to suspend pupils guilty of such acts for a period not to exceed 10 school days."); 105 ILCS 5/10-22.6(d) (2022) ("The board may expel a student for a definite period of time not to exceed 2 calendar years, as determined on a case-by-case basis.").

98. Telephone Interview with Ashley Fretthold, *supra* note 10.

disobeying staff directives include refusing a District staff member's request to stop, present school identification, or submit to a search."[99] Regulations such as these transmute a school official's instruction to a potential Code of Conduct infraction with important disciplinary consequences. Another example is the policy of Thornton Fractional School District; rather than provide an inclusive list of all possible infractions, the district only provides examples—leaving students to guess what else might be included in the rules, and essentially leaving students subject to the whims of school personnel.[100]

Exploiting the permissiveness of *Goss v. Lopez*,[101] in Illinois no hearing is required to suspend a student for ten days or less—instead, the school needs only to provide notice of the charge and the student's right to review by the school board or the school board's hearing officer.[102] Consequently, review only needs to be conducted by the board, leaving school districts to police themselves. The notice may be as minimal as handing the student a written notice of suspension, and in practice, the school personnel may do so little as tell the student not to come back until next week.[103] A student's "process" available to oppose a suspension is limited to an on-the-spot argument to the disciplining school official that on the facts, no violation of the Code of Conduct occurred, or—if the student happened to study the applicable case law and statutes prior to graduating high school—that certain mitigating factors are present.[104] Students and parents can request review of a suspension,[105] but as we next turn to, such review—even in the context of the greater protections provided in expulsion proceedings—offers very little protection for students.

There are more protections for students facing expulsions, as students are entitled to more formalized expulsion hearings. But in practice, the form of the actual process and outcomes depend on whether the student has representation. On paper, students have the ability to present their case and cross-examine school witnesses, and students additionally have the right to bring representation to their expulsion hearing—but this is obviously unrealistic for almost all students without a professional advocate.[106] The school board is authorized to determine whether it will oversee the hearing itself or appoint an independent hearing officer.[107] In practice, where no attorney is present at the hearing, parents will typically receive summary treatment akin to a proceeding in eviction court; they may be given a mere thirty seconds to explain their child's case before it is

99. *Policy Manual for Cicero School District 99, Section 7:190*, CICERO SCH. DIST. 99 (section adopted Jan. 12, 2022), https://boardpolicyonline.com/?b=cicero_99 [https://perma.cc/YVY9-6JNP].

100. *See* THORNTON FRACTIONAL HIGH SCHOOL DISTRICT 215 STUDENT HANDBOOK 28 (2019) ("The following list of infractions is not intended to be all inclusive, but rather exemplifies the types of misconduct that are prohibited and will result in some form of disciplinary action.").

101. 419 U.S. 565, 582 (1975).

102. 105 ILCS 5/10-22.6(b) (2022); Telephone Interview with Ashley Fretthold, *supra* note 10.

103. Telephone Interview with Ashley Fretthold, *supra* note 10.

104. Video Interview with Rachel Shapiro, *supra* note 78; Telephone Interview with Ashley Fretthold, *supra* note 10; *see also infra* notes 113, 240 and accompanying text.

105. 105 ILCS 5/10-22.6(b) (2022).

106. Telephone Interview with Ashley Fretthold, *supra* note 10; 105 ILCS 5/10-22.6(a) (2022).

107. 105 ILCS 5/10-22.6(a) (2022).

summarily dispensed with.[108] A parent can ask questions to engage in cross-examination, but to do so, the parent must know they are entitled to do so, have an idea of the substance of the law and applicable Code of Conduct to know which questions to ask, be assertive enough to ask those questions, and overcome any resistance by the school.[109] The result, if there is no representation, is that no one presents the case law and no one can hold the school accountable—the hearings typically take the form of a dean reading documents and the student providing a meek response.[110] In the rare case where a child is able to attain representation, the proceeding more closely resembles a trial and students can meaningfully challenge their expulsions.[111]

In the case of either a suspension or an expulsion, the primary avenues to challenge student discipline decisions are arguments based on applicable state statutes, the applicable Code of Conduct, or case law interpreting the statutes. In Illinois, the seminal case is *Robinson v. Oak Park & River Forest High School*, which held that school officials may not abuse their discretion in doling out discipline.[112] To assess for abuse of discretion, the reviewing court "must consider (1) the egregiousness of the student's conduct; (2) the history or record of the student's past conduct; (3) the likelihood that such conduct will affect the delivery of educational services to other children; (4) [the] severity of the punishment; and (5) the interest of the child."[113]

Additionally, a student may be able to make out a claim for violation of due process where there is some deficiency in the process on the part of the school—but the due process required is minimal, and the school only needs to check the requisite boxes.[114] Of note, if a school board develops a policy or process that constrains its discretion, courts require school boards to adhere to those policies and practices[115]—again, incentivizing more vague codes and less process. Where a case for discrimination can be made out, a child may bring a claim under the Illinois Human Rights Act;[116] otherwise, these designedly limited rights are usually all that govern a child's options.

108. Telephone Interview with Ashley Fretthold, *supra* note 10.

109. *Id.*

110. *Id.*

111. *Id.*; Video Interview with Rachel Shapiro, *supra* note 78.

112. 571 N.E.2d 931, 934–35 (Ill. App. Ct. 1991).

113. *Id.* at 935. Ashley Fretthold regularly practices in this area; she indicates there is very little relevant case law. Additionally, she has observed that courts are often deferential to schools, an effect exacerbated by tragedies such as Columbine and Parkland—these events greatly color how judges see school discipline, even for issues that are not weapon-related, such as drugs. Telephone Interview with Ashley Fretthold, *supra* note 10.

114. As we have discussed, a consequence of the Court's holding in *Goss*. *See* Nance, *supra* note 14, at 329; *infra* Section IV.B.

115. *See* Camlin v. Beecher Cmty. Sch. Dist., 791 N.E.2d 127, 132 (Ill. App. Ct. 2003) ("The school board, by promulgating the rules, has created an entitlement and a right to certain procedures, on which a student may expect to rely. It may not refuse to apply the rules it has created.").

116. 775 ILCS 5/5A-102 (2010). If a student has a recognized disability, the student is provided with additional protections provided by federal law. *See* 34 C.F.R. § 300.530 (2006). Specifically, if it is determined that the incident for which the school seeks to exclude the child was caused by or substantially related to her or his disability, the student cannot be removed from the school for more than ten days. *Id.*

When it comes to how these proceedings are conducted, the process is once again stacked against the schoolchild. In proceedings before the school board or the board's appointed hearing officer, the rules of evidence do not strictly apply.[117] Indeed, there are no rules for these proceedings beyond what is proscribed by the Code of Conduct.[118] Thus, while an advocate may make an objection to a search, seizure, or interrogation as inadmissible, fruits of any violations of the student's rights are not excluded—instead, the reviewing officer will take the objection under advisement and use it in weighing the evidence.[119] If a student has the resources to appeal a decision, the procedural vehicle is an appeal to state court.[120] The overall result of this system is that school districts are authorized to establish their policies and codes of conduct, as well as the procedures for enforcement of that code, and adjudicate decisions under that code—essentially, to be prosecutor, witness, legislator, and judge all in one.

Compounding the issue, courts routinely defer to school officials. As Illinois courts have made clear, "[s]chool discipline is an area which courts enter with great hesitation and reluctance–and rightly so."[121] Again and again, the cases reiterate that "[t]he punishment imposed on a student must be sufficiently egregious in order to come within the narrow concept of arbitrary or capricious official conduct that justifies the extraordinary intervention by the court in the operation of a public school of this state."[122] This deference bears out in grave consequences for the students; take, for example, the case of *Wilson on Behalf of Wilson v. Collinsville Community Unit School District No. 10*, in which the court found that expulsion of a student for the possession of pills containing caffeine and ephedrine to be "neither arbitrary, unreasonable, capricious nor oppressive."[123]

The Illinois legislature has made efforts to intervene in this dynamic, with Senate Bill 100—legislation introduced and passed "to address the 'school-to-prison pipeline.'"[124] The bill modifies Illinois education law with the goal of decreasing the use of exclusionary practices; most significantly for the purposes of this discussion, it stipulates that:

> [O]ut-of-school suspensions of longer than 3 days, expulsions, and disciplinary removals to alternative schools may be used only if other appropriate and available behavioral and disciplinary interventions have been

117. Telephone Interview with Ashley Fretthold, *supra* note 10.

118. *Id.*

119. *Id.*

120. *Id.*

121. Donaldson v. Bd. of Ed. for Danville Sch. Dist. No. 118, 424 N.E.2d 737, 738 (Ill. App. Ct. 1981) (finding no abuse of discretion).

122. Geiger *ex rel.* Wilson v. Hinsdale Elementary Sch. Dist. 181, 810 N.E.2d 637, 643 (Ill. App. Ct. 2004); *see also* Clements *ex rel.* Clements v. Bd. of Educ. of Decatur Pub. Sch. Dist. No. 61, 478 N.E.2d 1209, 1213 (Ill. App. Ct. 1985) ("[W]e do not determine the imposition of the suspension to be sufficiently egregious to come within the narrow concept of arbitrary or capricious official conduct . . . .").

123. 451 N.E.2d 939, 942 (Ill. App. Ct. 1983).

124. *VOYCE's Groundbreaking Bill, SB 100, to Address "School-to-Prison Pipeline" Passes Illinois Legislature*, VOICES YOUTH CHI. EDUC., http://voyceproject.org/campaigns/campaign-common-sense-discipline/sb100/ (last visited Jan. 23, 2023) [https://perma.cc/KXE4-A6Q8].

> exhausted and the student's continuing presence in school would either (i) pose a threat to the safety of other students, staff, or members of the school community or (ii) substantially disrupt, impede, or interfere with the operation of the school.[125]

While the new law represents a recognition of the need to change the disciplinary approach taken towards children, in practice it has demonstrated the entrenched nature of exclusionary discipline. The statute lacks any independent enforcement mechanism to give teeth to the mandate,[126] so it is largely meaningless in the majority of proceedings, in which students and parents have no representation and do not have the means to use the law as it was designed. Additionally, even in this reform provision, deference to school officials persists; for example, the statute provides that "[f]or purposes of this subsection . . ., the determination of whether 'appropriate and available behavioral and disciplinary interventions have been exhausted' shall be made by school officials."[127] So, schools get to dictate the punishment, the review of that punishment, and then interpret the legislation meant to reform their previous processes of imposing and reviewing such punishment. Moreover, as advocates explain and we discuss, many schools have simply responded with alternative means to push students out and evade the statutory requirements.[128]

The results of this framework are startling but also predictable. The literature finds, nationally, that frameworks such as that in Illinois are applied in discriminatory ways,[129] with lasting harm on students.[130] But the heart of the harm that courts do in abdicating oversight can only be seen from the ground. We turn to that now in the next Part.

125. 105 ILCS 5/10-22.6(b-20) (2022).

126. *Id.*

127. *Id.*

128. *See* discussion *infra* Section IV.C.

129. Skiba et al., *supra* note 14, at 1087 ("For over thirty years, in national, state, district, and building level data, the documentation of disciplinary overrepresentation for African American students has been highly consistent."); U.S. DEPT. OF ED., OFFICE FOR C.R., PROTECTING CIVIL RIGHTS, ADVANCING EQUITY 20 (Apr. 2015), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf [https://perma.cc/9SVB-5YG7] (revealing "stark discipline disparities") (italics omitted); Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS INST. (Jan. 18, 2018), https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/ [https://perma.cc/VD6P-BJXL] ("Major racial disparities in student discipline rates have been documented for decades."); DANIEL LOSEN, CHERI HODSON, MICHAEL A. KEITH II, KATRINA MORRISON & SHAKTI BELWAY, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 2 (2015), https://escholarship.org/uc/item/2t36g571 [https://perma.cc/6Z5V-FQSQ].

130. *See generally* AM. BAR ASS'N, ABA TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE 71 (2018), https://www.americanbar.org/content/dam/aba/administrative/corej/final-school-to-prisonpipeline.pdf [https://perma.cc/K5VS-S3YD]; C.R. PROJECT AT HARV. UNIV. & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE & SCHOOL DISCIPLINE (June 2000), https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf [https://perma.cc/6Y4D-8YZZ]; Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 48 (2016) ("Nuanced studies indicate that a school's approach to discipline and frequency of suspensions heavily influence student achievement. Even after controlling for race, poverty, and school type, suspension rates predict more than one-third of a school's overall academic achievement.").

IV. SCHOOL DISCIPLINE IN PRACTICE

Our experts agree that school discipline is the most pressing issue among the concerns of searches, seizures, and interrogations of schoolchildren, and the area in which the greatest amount of damage is done. Yet, it has received the least attention from the Supreme Court and lower courts. Accordingly, it is not possible to get a clear picture of how school discipline is practiced by looking at Supreme Court cases, local cases, or state legislation. This Part draws on interviews with our experts to detail what actually happens on the ground in schools. It paints a very concerning picture, with practices that intrude upon fundamental privacy rights being commonplace, discrimination going unchecked, and state actions traumatizing children and greatly diminishing their educational and life opportunities. Since the existing data fails to capture many of these phenomena,[131] we turn to our experts to share their first-hand observations and insights developed over years and decades working with schoolchildren, to understand what is happening in the community.

A. Exclusion: Suspensions and Expulsions by the Numbers

Suspension is a common response to disciplinary problems, but our experts agree it is highly problematic.[132] Rachel Shapiro is an attorney with the Juvenile Justice Project, which provides legal assistance to students with disabilities, run by Equip for Equality, an advocacy organization for people with disabilities.[133] She says that removing students from their environment and their resources does not solve disciplinary problems; exclusion from school may even exacerbate behavioral issues.[134] If a student has a disability, sometimes the parents and school system can reach an agreement that the child should be enrolled in a therapeutic day school, which provides more intensive services.[135] But if the student does not have a disability, they can lawfully be kept out of school for up to two school years.[136] Further, that disciplinary exclusion can apply not only to expel or suspend the student from their current school—the disciplinary action can cover the

131. *See, e.g.*, WHITAKER ET AL., *supra* note 81, at 49 ("In many districts, it is nearly impossible to obtain accurate, up-to-date information about police activities in schools—including the number of arrests and the demographic breakdown of the students involved.").

132. For example, Michelle Rappaport, a prominent licensed clinical social worker and a practice-based researcher in Illinois, has authored three books developing an approach to student behavioral issues that serves as an alternative to suspension, which she says simply does not work. *See* Interview with Michelle Rappaport, Licensed Clinical Sch. Soc. Worker (Apr. 6, 2020) (on file with authors). For more information on Rappaport's work, *see* sources cited *infra* note 224. Tom Scotese, an experienced former Dean and Assistant School Principal, agrees that suspension is overused, but does indicate that in rare cases, schools need the *threat* of suspension as leverage to ensure good behavior from a handful of troublesome students. *See* Interview with Tom Scotese, Former Assistant Sch. Principal (May 4, 2020) (on file with authors). Scotese has recently retired.

133. Video Interview with Rachel Shapiro, *supra* note 78; *see also Education Juvenile Justice Project*, EQUIP FOR EQUALITY (Oct. 7, 2022), https://www.equipforequality.org/issues/special-education/special-projects/juvenile-justice-project/ [https://perma.cc/YV69-MJRF].

134. Video Interview with Rachel Shapiro, *supra* note 78.

135. *Id.*

136. *Id.*

entire school district, effectively taking the child out of school entirely, with nowhere for the student to realistically go.[137]

This is permissible in Illinois because the relevant expulsion legislation stipulates that "[a]n expelled pupil *may* be transferred to an alternative school"[138]—but does not *require* that the student be transferred—which creates the possibility that a school may instead leave a student without any schooling option for the maximum expulsion period of up to two years.[139] That length of term is very significant and massively affects the ability of the student to reintegrate into school.[140]

School districts typically refute that a child is being entirely denied schooling on the rationale that the student can go to a private school, but that is unrealistic both financially for the vast majority of students as well as practically, as private schools are unlikely to enroll an expelled student. Dr. Pamela Fenning, Professor of Psychology at Loyola University, Chicago, specializing in school and educational psychology, says that in Chicago Public Schools ("CPS"), there are more services and potential safety nets for expelled students—but that in larger Illinois, an expulsion for this amount of time means that there is basically no chance of educational recovery for that student.[141] And more rural areas more commonly use lengthier suspensions and expulsions—Shapiro says this is because those schools react more strongly to less severe threats, as compared to CPS.[142]

Moreover, this harm perpetrated by school districts is not doled out equally. According to the Transforming School Discipline Collaborative, an interdisciplinary organization of experts "dedicated to supporting districts and schools to implement equitable and non-exclusionary discipline practices,"[143] "[i]n Illinois, during the 2014–2015 school year, there were over 340,644 suspensions, expulsions, and transfers to alternative schools in lieu of other disciplinary measures. Black students represented approximately 45% of the students impacted by these practices, even though black students constituted only 17.5% of the student population."[144] In fact, this understates the problem: while Black students were grossly overrepresented in the total number of exclusionary actions, when one considers the population of students facing *multiple* exclusions in a year, the

137. Interview with Amy Meek, *supra* note 9.

138. 105 ILCS 5/10-22.6(a) (2022) (emphasis added).

139. *See* 105 ILCS 5/10-22.6(d) (2022) ("The board may expel a student for a definite period of time not to exceed 2 calendar years, as determined on a case-by-case basis."). Multiple of our interviewees independently raised the issue as a major concern. *See, e.g.*, Telephone Interview with Ashley Fretthold, *supra* note 10; Interview with Amy Meek, *supra* note 9.

140. *See* Boudreau, *supra* note 59; Bacher-Hicks et al., *supra* note 85, at 3.

141. Video Interview with Dr. Pamela Fenning, *supra* note 10. Dr. Fenning added that parents with resources may be able to afford some other way to educate their child, but it is otherwise unlikely the students will receive meaningful help from the state. *Id.*

142. Video Interview with Rachel Shapiro, *supra* note 78.

143. *Transforming School Discipline Collaborative*, TRANSFORMING SCH. DISCIPLINE COLLABORATIVE, https://www.transformschooldiscipline.org/ (last visited Feb. 25, 2023) [https://perma.cc/G34D-NBN8].

144. *Driving Change: Illinois Laws*, TRANSFORMING SCH. DISCIPLINE COLLABORATIVE, https://www.transformschooldiscipline.org/illaws (last visited Feb. 25, 2023) [https://perma.cc/HK6P-LETR].

disproportionate effect only grows.[145] The extent of the problem was recognized by lawmakers in Illinois, prompting them to pass legislative reform—but as described, *infra*, that reform had unintended and highly problematic effects.[146]

And while Illinois performed worse than the national average that year, the problem was national: 44.8% of students facing multiple suspensions in the United States were Black in that same year.[147] And race is not the only problem: for example, students with disabilities were disproportionately subject to suspension as well.[148]

This data provided by the Department of Education does not indicate what happens to a student beyond the category of the discipline received—importantly, it says nothing of whether they were provided with alternative schooling or not. We were able to access more detailed data specifically relating to expulsions in one school district in Illinois, due to a Freedom of Information Act inquiry.[149] The response gives an indication of how many students are excluded entirely from one school district in the broader Chicago area, J. Sterling Morton High School District, and for how long.[150] In this one district, there were multiple entries indicating, for instance, "Expelled with no services for the remainder of the 2015–2016 school year and the entire 2016–2017 school year." "Expelled with no services" means that a student is simply excluded from school with no alternative school option made available—in the case cited, for over one year.[151] There were 180 expulsions in this one district during 2016–2019.[152] Of those, twenty-seven were expulsions without services.[153] That is, in one school district alone, twenty-seven students were denied any form of schooling within the entire public school district.[154] Given that other data sources indicate that 45,082 students were expelled without services in one year,[155] this chilling breakdown suggests that the number of schoolchildren being left without any schooling option whatsoever is far from a rarity.

145. In the most recent data available, in 2017–2018, the percentage of students facing multiple suspensions in a given year who were Black was 55.5%. *See 2017-18 State and National Estimations*, C.R. DATA COLLECTION, https://ocrdata.ed.gov/estimations/2017-2018 (last visited Feb. 25, 2023) [https://perma.cc/YYH7-SPQR]. This is not cherry-picking: for instance, in Tennessee, the percentage was 69.9%; in the high minority District of Columbia, the percentage was 94.2% and in the much whiter Alabama the percentage was 73.3%. *Id.*

146. *See infra* Section IV.C.

147. *2017-18 State and National Estimations*, *supra* note 145.

148. *Indicator 15: Retention, Suspension, and Expulsion*, NAT'L CTR EDUC. STAT. (Feb. 2019), https://nces.ed.gov/programs/raceindicators/indicator_rda.asp [https://perma.cc/SN4U-PVNU].

149. Provided to Amy Meek by Connie Chapman, Superintendent's Secretary, Board Clerk and FOIA Officer, as part of J. Sterling Morton High School District #201's FOIA Response (on file with authors).

150. The data are not in a useful form to summarize in table form, because the entries consist of qualitative descriptions, but do nonetheless contain highly salient information.

151. 105 ILCS 5/10–22.6(b–30) (2022).

152. J. Sterling Morton High School District #201's FOIA Response, *supra* note 148.

153. *Id.*

154. *Id.*

155. *Table 233.27*, NAT'L CTR. EDUC. STAT. (Jan. 2018), https://nces.ed.gov/programs/digest/d18/tables/dt18_233.27.asp [https://perma.cc/KL47-YGLG].

B. Suspension and Expulsion Processes

Experts agreed that one of the most significant impacts of school searches—beyond any humiliation or trauma involved in the search itself, or the harm of school hypervigilance and over-policing[156]—is that evidence found in these searches is often used in suspension and expulsion proceedings. For example, Amy Meek has participated as an advocate in several expulsion hearings that resulted from searches that were justified by suspicion of matters unrelated to the ultimate basis for expulsion. She cited examples of searches justified by an SRO or administrator's claim to have smelled marijuana, but which ultimately revealed student possession of contraband that could not possibly have emitted the claimed odor.[157] Berenice Villalobos of Transforming School Discipline Collaborative[158] echoes this charge, noting that intensive search practices employed by schools can also lead to unnecessary escalations that result in student discipline. She gives an example where a Latinx student was in the school bathroom with his friends when a security guard came in and searched the students.[159] Nothing was found, but the student, who described the officer as aggressive and assumed he was breaking the rules without any basis, responded with aggression, resulting in a physical altercation.[160] The security guard said he "thought he saw smoke coming out of bathroom" and "could have sworn he saw the student throw something out the window" even though this did not occur.[161] The student was expelled.[162]

Expulsion hearings conducted on the basis of such seemingly pretextual grounds are possible because there is no means to suppress evidence during an expulsion procedure; instead, the decision-maker will merely consider the

156. Importantly, "'[t]here is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.' In school situations, many removals are for behaviors that do not invoke real safety concerns; the vast majority of suspensions—95% of the 3.3 million children suspended from school each year—are for nonviolent offenses such as violating the dress code or 'disruptive' behavior." AM. BAR ASS'N, *supra* note 130, at 14.

157. Interview with Amy Meek, *supra* note 9.

158. Telephone Interview with Berenice Villalobos, Transforming Sch. Discipline Collaborative (Mar. 3, 2020) (on file with authors).

159. *Id.*

160. That such escalation is common, particularly among student populations with experiences with trauma, see *infra* at Section IV.C; *see also* J. Stuart Ablon, *School Discipline Is Trauma-Insensitive and Trauma-Uninformed*, PSYCH. TODAY (Jan. 9, 2020), https://www.psychologytoday.com/us/blog/changeable/202001/school-discipline-is-trauma-insensitive-and-trauma-uninformed#:~:text=Students%20who%20exhibit%20challenging%20behavior,turn%20result%20in%20challenging%20behaviors [https://perma.cc/Y2DQ-KH4H] ("Students who exhibit challenging behavior are often the students with trauma histories because being exposed to chronic stress or trauma delays brain development, causing lags in skill development which in turn result in challenging behaviors."); Jennifer Erb-Downward & Michael Blakeslee, *Recognizing Trauma: Why School Discipline Reform Needs to Consider Student Homelessness*, U. MICH. POVERTY SOLS. 6 (May 2021) ("Research on child development and trauma suggest that in the vast majority of cases, harsh disciplinary practices for young children lead to more harm than good, often perpetuating the negative behavior and setting the stage for future disciplinary issues.").

161. Telephone Interview with Berenice Villalobos, *supra* note 158.

162. *Id.*

objection to the admission of the evidence when weighing it.[163] Furthermore, evidentiary rules do not strictly apply; for instance, hearsay can be used.[164] These processes can also be based on very little evidence: Amy Meek has witnessed expulsion proceedings stemming from an accusation without any corroborating evidence.[165] Adding to these procedural advantages of the school over the student, schools often take advantage of students' lack of knowledge of the law. Meek reports that, typically, schools will instruct students to sign a statement at the time of the alleged infraction, without warning students, who have little to no knowledge of the potential repercussions, which can include expulsion for up to two years.[166] Very few students have any representation, which makes all the difference in terms of outcomes for the student.[167] Numerous of our experts stress that students who do not have representation have essentially no prospects of success in these proceedings, regardless of the underlying merits.[168]

In addition to these legal advantages that schools possess, schools often receive extralegal help in the form of a biased process. Berenice Villalobos says that in the expulsion hearings she has witnessed, the hearing officer is often not truly independent but is connected to the school district and inclined toward the school's side.[169] She says that typically the hearings are little more than a "checkmark" to show that the school held a hearing, rather than a process in which the outcome can actually be changed.[170] Ashley Fretthold concurs. She points out that because expulsion cases are administrative cases, they are sometimes not even overseen by a hearing officer who is a lawyer; usually, the decision-maker is an administrator, and while the hearing officer is supposed to be independent, sometimes they are a retired administrator or an administrator from another campus, who is not truly independent.[171]

Expulsions can be for very minor infractions. Dr. Fenning points to exclusion stemming from infractions as minor as tardiness, truancy, or

163. Villalobos says that even where the exclusionary rule should apply, you do not see it in practice. *Id.*

164. Hearsay can also be used, although there is caselaw saying it should be limited and viewed with caution. *Cf.* Colquitt v. Rich Twp. High Sch. Dist. 227, 699 N.E.2d 1109 (Ill. App. 1998).

165. Monica Llorente provides an example in which the sole evidence advanced in an expulsion hearing was another student's accusation that the boy took something out of a backpack. In another instance, she said that an expulsion hearing followed a pep rally where kids were making a "hang loose" hand gesture while a song was playing, and the school claimed it was gang signaling. At the hearing, Llorente introduced the song video into evidence to show the gesture was part of the song, as well as evidence of then-President Bush making the same signal. Interview with Monica Llorente, *supra* note 10.

166. Interview with Amy Meek, *supra* note 9.

167. Interview with Monica Llorente, *supra* note 10.

168. Interview with Amy Meek, *supra* note 9; Interview with Monica Llorente, *supra* note 10; Telephone Interview with Ashley Fretthold, *supra* note 10; *see also* Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 643 (2007).

169. Telephone Interview with Berenice Villalobos, *supra* note 158.

170. *Id.*

171. Telephone Interview with Ashley Fretthold, *supra* note 10; *see also* John M. Malutinok, *Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases*, 38 CHILD. LEGAL RTS. J. 112, 114 (2018) (surveying the national landscape of deficient disciplinary hearings and explaining "the deprivation of due process that occurs when a student's disciplinary hearing is adjudicated by a tribunal whose impartiality is questionable").

insubordination.[172] Even more severely, Monica Llorente, who has developed multiple juvenile justice projects and co-founded juvenile justice organizations,[173] describes how even a minor fight at school can, if the police are called, land a student in juvenile court.[174] Even if the student is able to obtain alternate schooling, as Amy Meek describes succinctly, "every time you move a student, you interrupt their education and reduce their chances of graduation."[175]

Monica Llorente reports that she has observed that a particular student may be "targeted" for expulsion. For instance, if a student has behavioral issues, often stemming from prior trauma, schools sometimes keep an eye out for minor infractions that they can use as an excuse to expel the child.[176] She also advised that targeting is often based at least partly on race, and often homeless students are particularly focused on.[177] Dan Losen, Director of the Center for Civil Rights Remedies at the Civil Rights Project at UCLA and a scholar who studies the disparities in schools, says this kind of targeting is part of a general problem of inequality between and within schools, which includes discrimination on the basis of race, disability, and income.[178]

Additionally, schools deliberately target students based on academic scores. Rachel Shapiro reports that:

172. Video Interview with Dr. Pamela Fenning, *supra* note 10; *see also* Nance, *supra* note 14, at 342; Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 933 (2016) ("States and localities have applied zero tolerance to a multitude of offenses, including possession of drugs, alcohol, or tobacco; fighting; dress-code violations; truancy; and tardiness."); L. Boyd Bellinger, Nicole Darcangelo, Stacey S. Horn, Erica R. Meiners, and Sarah Schriber, *Ecologies of School Discipline for Queer Youth: What Listening to Queer Youth Teaches Us About Transforming School Discipline*, *in* INEQUALITY IN SCHOOL DISCIPLINE, *supra* note 87 ("A majority of suspensions and expulsions experienced by young people in school, including queer young people, are the result of minor violations of a school's code of conduct (e.g., tardiness, cell phone use, dress code) and other informal school norm/gender norm violations (e.g., dress, speech, mannerisms), rather than acts that have the potential to cause serious harm to others within the school community.") (internal citations omitted). In Illinois, Rachel Shapiro describes rural schools as particularly likely to overreact as compared to schools in Chicago: a student might sing a song about bombing a school or make a joke to a friend about a gun when that student is known not to have access to one, and such conduct will result in an expulsion hearing. *See* Video Interview with Rachel Shapiro, *supra* note 78.

173. Monica Llorente developed the Children's Law Pro Bono Project and co-founded Dignity in Schools, an organization seeking "to improve juvenile justice and school expulsion policies and implement alternatives through legislation and practice." She also co-created the Transforming School Discipline Collaborative. *Faculty Profiles: Monica Llorente*, NW. U. SCH. L., https://www.law.northwestern.edu/faculty/profiles/MonicaLlorente/ [https://perma.cc/3B2D-K6XZ]; *see also* Interview with Monica Llorente, *supra* note 10.

174. Interview with Monica Llorente, *supra* note 10.

175. Interview with Amy Meek, *supra* note 9; Dr. Pamela Fenning notes also that every suspension increases the likelihood that a student will drop out. Video Interview with Dr. Pamela Fenning, *supra* note 10; *see also* Nance, *supra* note 172, at 956 ("Ample studies demonstrate that a suspended student is less likely to advance to the next grade level or enroll in college and is more likely to drop out, commit a crime, get arrested, and become incarcerated as an adult."); Bacher-Hicks et al., *supra* note 85, at 4 ("We find that schools with greater suspension effects have negative impacts on student outcomes.").

176. Interview with Monica Llorente, *supra* note 10.

177. Interview with Monica Llorente, *supra* note 10; *see also* Erb-Downward & Blakeslee, *supra* note 160, at 4.

178. Interview with Daniel Losen, *supra* note 18; *see also* KIM ET AL., *supra* note 43, at 1 ("Unfortunately, the youth who suffer disproportionately from these practices are likely to be precisely those who need the most support, including low-income students, students of color, English language learners, homeless youth, youth in foster care, and students with disabilities.").

> [T]here are often kids suspended during times of statewide testing. One day when I was at the school on a statewide testing day, the office was filled with kids who were then prohibited from taking their tests because they 'will distract other students.' I have seen whole rooms of children removed from the testing.[179]

Dan Losen says the problem is not unique to Illinois; it is systematic. Of particular concern, since in many states students take standardized high school exams in grade ten, there is a lot of "churning"—i.e. ousting—of students that occurs in grade nine.[180]

The schools have perverse incentives for such churning: federal funding is based on the number of students enrolled when counting occurs, and so schools have an incentive to enroll as many students as possible, but it is not necessary for those students to be there at the end of the year to count for the funding.[181] Francisco Arenas, Juvenile Probation Officer at Cook County Juvenile Probation, adds that schools get paid based on how many students are on the roll; as a result, he has observed instances in which students will be maintained on the roster but prevented from actually coming to school.[182]

C. "Push Outs"

Although expulsions are extremely severe, numerous experts report that there is a related and more insidious problem—the phenomenon of "pushing out" students into alternative schools, which may in turn push or counsel students out of the school system altogether.[183] This phenomenon is in part an effect of an attempt at reform: Illinois passed a law in 2016, still commonly referred to as Senate Bill 100,[184] which mandated that "out-of-school suspensions of longer than three days, expulsions, and disciplinary removals to alternative schools may be used only if other appropriate and available behavioral and disciplinary interventions have been exhausted."[185] The law's goals were laudable—the result of

179. Video Interview with Rachel Shapiro, *supra* note 78.

180. Interview with Daniel Losen, *supra* note 18; *see also* David N. Figlio, *Testing, Crime, and Punishment* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11193, 2005) ("While schools always tend to assign harsher punishments to low-performing students than to high-performing students throughout the year, this gap grows substantially during the testing window. Moreover, this testing window-related gap is only observed for students in testing grades."); GARY ORFIELD, DANIEL LOSEN, JOHANNA WALD & CHRISTOPHER B. SWANSON, LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS, C.R. PROJECT 53 (2004), https://www.civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/losing-our-future-how-minority-youth-are-being-left-behind-by-the-graduation-rate-crisis/orfield-losing-our-future-2004.pdf [https://perma.cc/N3XS-3FYD].

181. Interview with Monica Llorente, *supra* note 10.

182. Interview with Francisco Arenas, *supra* note 11.

183. Interview with Amy Meek, *supra* note 9; Video Interview with Dr. Pamela Fenning, *supra* note 10; Interview with Miranda Johnson, Clinical Professor of L. & Dir. of Educ. Pol'y Inst. & Diane Geraghty, A. Kathleen Beazley Chair in Children's L., Loy. Univ. Chi. Sch. of Law, in Chi., Ill. (Feb. 4, 2020) (on file with authors).

184. Act of Sept. 15, 2016, Pub. Act 099-0456, 2016 Ill. Laws; *see also VOYCE's Groundbreaking Bill*, *supra* note 124.

185. 105 ILCS 5/10-22.6(b-20) (2022).

a legislative effort involving a number of stakeholders intended to "ensur[e] that suspension, expulsion, and school transfers are a measure of last resort."[186] And while after the bill was passed expulsions did decrease dramatically, equally dramatically, push outs increased.[187]

Ashley Fretthold describes the process: students are told something along the lines of "this is not the right school for you" and they are encouraged to leave voluntarily; or they are explicitly told they are being transferred into an alternative school, for which no hearing is required under Illinois law; or they are presented with a false choice—be expelled or agree to the transfer—and if they "agree," they later discover that they have waived their right to an expulsion hearing.[188] Each scenario pushes them into "alternative schools" or "option schools," which can be of variable quality, but many provide very minimal student resources.[189] Indeed, some option schools in Chicago were discovered to be providing students with false diplomas, and the former head of CPS, Barbara Byrd-Bennett, was convicted for her participation in a scheme to receive monetary kickbacks for every child enrolled in these alternate schools.[190]

These types of push outs are *not* reflected in the state's official expulsion numbers, as the students are often reported as voluntarily choosing to attend another school.[191] Ashley Fretthold has witnessed this phenomenon first-hand. She explains that actual expulsion numbers must be reported to the state, and if the school has a large number of expulsions, they can be put on a "corrective action plan" significantly limiting the discretion of the school.[192] This creates an incentive to underreport expulsions.[193]

186. *Driving Change*, *supra* note 143.

187. For example, Meek witnessed that some schools are responding to the requirement to report expulsions and suspensions by trying to instead coerce students and families to transfer to another school, in order to avoid having to report it. Interview with Amy Meek, *supra* note 9.

188. Telephone Interview with Ashley Fretthold, *supra* note 10; *see also* Interview with Amy Meek, *supra* note 9. Rachel Shapiro concurs; charter schools will simply hand the student a piece of paper with a list of alternatives and tell the parent they need to enroll the student in one of these schools. The parents, not knowing any better, do what they are told, and this action is not formally reported. Video Interview with Rachel Shapiro, *supra* note 78. For further information on push outs nationally, see Nick Morrison, *One in 10 Children Being Pushed Out of School*, FORBES (Oct. 10, 2019, 7:01 PM), https://www.forbes.com/sites/nickmorrison/2019/10/10/one-in-10-children-being-pushed-out-of-school/?sh=4048ab6c21b0 [https://perma.cc/VG22-W47N]; Davin Rosborough, Note, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663, 664 (2010).

189. Interview with Amy Meek, *supra* note 9; Interview with Christine Agaiby Weil, *supra* note 18; *see also* Black, *supra* note 130, at 40 ("[I]t is far from clear that alternative schools even work for the students who might actually need them. The most obvious problem is that many offer the lowest quality education imaginable; they are more akin to warehouses than locations of learning.").

190. *See, e.g.*, Jason Meisner & Katherine Rosenburg-Douglas, *Former CPS Head Barbara Byrd-Bennett, Convicted of Corruption, Moved from Prison to Ohio Halfway House*, CHI. TRIB. (May 6, 2020, 2:29 PM), https://www.chicagotribune.com/news/breaking/ct-barbara-byrd-bennett-prison-release-20200506-mxnfrofhavbabkqb75gi3abdpy-story.html [https://perma.cc/6K4R-F478].

191. Telephone Interview with Ashley Fretthold, *supra* note 10; Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 277 (2008) ("Some schools resort to 'push-out' practices with students who perform poorly and are not eligible for special education protections . . . . [These practices fly] under the radar of effective accountability.").

192. Telephone Interview with Ashley Fretthold, *supra* note 10.

193. *Id.*

Tom Scotese, a former dean and high school assistant principal, says that he has never seen any efforts by his school to keep students out, but he has seen students come to his school who were pushed out from their prior school and that the frequency of this has increased since SB 100.[194] He reports, similarly to other experts, that the push out is often informal: the school simply tells the child to go somewhere else without indicating to them that they could have stayed.[195] This process is particularly common in charter schools and suburban schools, but less common among urban schools in CPS.[196] For instance, the wealthy city of Evanston[197] has more than 300 push outs per year,[198] but only around a hundred reported discipline events.[199]

Students are similarly targeted for push outs, as they are when it comes to expulsions. For instance, Dr. Fenning reports that her work has shown students who are struggling in other ways are often the students being pushed out, and that it is primarily students of color or in poverty that are being harmed by these practices.[200] In Ashley Fretthold's experience, children from low-income areas are particularly overrepresented in expulsions and push outs, as are special education children, especially those with emotional and behavioral issues—although students with recognized disabilities are less prone to expulsion because the Individuals with Disabilities Education Act ("IDEA") prohibits students from being expelled for anything caused by or related to their disability.[201] Fretthold reports that many of her cases involved students with previously unrecognized disabilities that directly caused or contributed to the expulsion.[202]

As with expulsions, push outs are also a means to academically weed out unwanted children. Christine Agaiby Weil, who worked for many years as a post-incarceration reintegration officer in the juvenile justice system, notes that charter schools in particular do this so that they can claim 100% graduation rates—but such rates are more a reflection of how many students are pushed out than anything relating to actual school quality.[203] Similarly, she notes that suspensions

194. Interview with Tom Scotese, *supra* note 132.

195. *Id.*

196. Video Interview with Rachel Shapiro, *supra* note 78. Shapiro reports that CPS is often on the side of the student in their dispute with a charter school's efforts to "weed out" students, as charter schools are under contract with CPS and CPS therefore has a duty to ensure that the charter school is upholding its obligations to CPS.

197. The median income in Evanston is $81,543, which is approximately 20% higher than average in Illinois, and the median value of owner-occupied housing is $395,500, which approximately doubles the value of the Illinois average. *Evanston, IL*, CENSUS REP., https://censusreporter.org/profiles/16000US1724582-evanston-il/ (last visited Feb. 25, 2023) [https://perma.cc/GR3W-B6TY].

198. Telephone Interview with Ashley Fretthold, *supra* note 10.

199. ILL. STATE BD. OF EDUC., *supra* note 33 (identifying 96 formal discipline events, including both in-school and out-of-school suspensions, in the 2018–19 school year).

200. Video Interview with Dr. Pamela Fenning, *supra* note 10.

201. Telephone Interview with Ashley Fretthold, *supra* note 10.

202. *Id.*

203. Interview with Christine Agaiby Weil, *supra* note 18. As discussed, the use of exclusion to achieve desired academic outcomes for reporting purposes is not unique to Illinois. *See supra* text accompanying note 188.

are used increasingly around testing dates.[204] She gives an example of a student who was the *victim* of a physical assault and was told not to come back to school for five days, just as the school was entering a testing period.[205]

Sarah Gibson, a school administrator at one of Chicago's main charter school systems, the Noble Network of schools, explained that one way that students were culled—prior to the school's disciplinary reform—was through repeated disciplinary measures.[206] If a student had too many detentions, they were deemed to "fail" discipline, and so were required to repeat the year, regardless of their grades.[207] Many such students were not willing to repeat the whole grade and consequently left the school.[208] Only 3% of the students who were required to repeat a grade for disciplinary reasons ultimately graduated from Noble.[209] Gibson says the faculty typically expected students to transfer rather than repeat, and that it was more surprising to see a student come back than leave.[210] Of the intent of the Noble Network, Gibson says: "[i]t wasn't that there was anyone who was looking to get rid of particular students; it was more that the system was to remove any students who wouldn't be 'Noble-fied' in time."[211] Yet, when asked about whether students were pushed out, Gibson acknowledged that "pushing students out was to some degree a natural consequence of the system as it was set up. . . . The system was set up to shed students who could not be 'Noble-ized' . . . . Th[ese] problems were embedded in the network."[212] Noble faced enormous public scrutiny after some of its more stringent disciplinary procedures were made public,[213] and Gibson reports the schools have undergone substantial disciplinary reform and acknowledged the racism inherent in their system.[214]

Experts agree that these various practices lead to a considerable underreporting of what are effectively expulsions, though a number of our experts

204. Interview with Christine Agaiby Weil, *supra* note 18.

205. *Id.*

206. Telephone Interview with Sarah Gibson, Sch. Adm'r at a Noble Charter Sch. (Aug. 17, 2021) (on file with authors).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See, e.g.*, Chelsea Ritschel, *Female Students at Chicago Charter Schools are Reportedly 'Bleeding Through Their Trousers' Due to Strict Bathroom Policy*, INDEPENDENT (May 1, 2018, 5:34 PM), https://www.independent.co.uk/life-style/chicago-charter-schools-periods-female-bleeding-bathroom-policy-a8331261.html [https://perma.cc/6VLP-ETWP] (describing how female students were bleeding through their uniforms when menstruating because they were not allowed to go to the bathroom unsupervised); Dusty Rhodes, *Culture Shock: Teachers Call Noble Charters 'Dehumanizing'*, NPR ILL. (Apr. 3, 2018, 11:46 PM), https://www.nprillinois.org/education-desk/2018-04-03/culture-shock-teachers-call-noble-charters-dehumanizing [https://perma.cc/AN9Z-5E59] (describing restrictions on hairstyles that a teacher at the school describes as "not only unnecessary, but racist").

214. Telephone Interview with Sarah Gibson, *supra* note 206; *see also* Yana Kunichoff, *Amid a Pandemic, a Reckoning for a Chicago Charter Turning Away from 'No Excuses'*, CHALKBEAT CHI. (Dec. 1, 2020, 7:51 AM), https://chicago.chalkbeat.org/2020/12/1/21755014/amid-a-pandemic-a-reckoning-for-a-chicago-charter-turning-away-from-no-excuses [https://perma.cc/6LC5-DCUL] (describing the reform of Noble's controversial demerit policy that punished students for small infractions such as chewing gum or not wearing a belt).

believe that even push outs themselves are also underreported.[215] Typically counted as "administrative transfers to an alternate school," push out data is coded obscurely and it is not possible to discern what actually occurred.[216] And whereas expulsions without services are limited to two years, there is no statutory time limit on transfers, so students can be forced out of the school and into an option school for an unknown and potentially unlimited period of time.[217] Further, there is little regulation over the operation of transfers—Illinois law provides that "[a]t least one alternative school program *may* be located within each educational service region or established jointly by more than one regional office,"[218] so even if there is one such school, potentially shared by several districts, students may have to travel an hour and a half to get to that school.[219] This further adds to the burden of students who are already borderline likely to attend, given they are almost always experiencing other troubles to begin with.

For students who leave the ordinary school system and enter transfer schools, they face alternative schools of highly variable quality. One such option is "therapeutic day school," the alternative available for those students who have a disability and are pushed out. Rachel Shapiro says: "[t]herapeutic day schools run the gamut; some of the schools are terrible and essentially similar to jails."[220] But in others—although all therapeutic day schools are more restrictive than other schools—some students do well, since they are typically smaller, and the students may be more comfortable with the student population.[221] For example, Shapiro says many of her clients act out because they cannot read; if they are in a smaller school with other students in their situation, they are often more open to expressing feelings and learning. Some therapeutic day schools are genuinely therapeutic and directed toward meeting the needs of special needs children.[222]

Michelle Rappaport, a social worker at a therapeutic day school,[223] has written three books on alternative forms of discipline.[224] Her school uses such

215. Video Interview with Rachel Shapiro, *supra* note 78; Interview with Amy Meek, *supra* note 9; Telephone Interview with Ashley Fretthold, *supra* note 10.

216. Telephone Interview with Ashley Fretthold, *supra* note 10.

217. *Id.*

218. *See* 105 ILCS 5/13A-3 (2022).

219. *See* Interview with Christine Agaiby Weil, *supra* note 18. Rachel Shapiro says although it is recommended that students should not travel more than an hour each way to their institution, she often argues on behalf of her clients that CPS needs to bus students to farther afield to attend better therapeutic day schools, which are geographically clustered. Video Interview with Rachel Shapiro, *supra* note 78.

220. Video Interview with Rachel Shapiro, *supra* note 78. For a broader discussion of the inequities in special education, see generally *Significant Disproportionality in Special Education: Current Trends and Actions for Impact*, NAT'L CTR. FOR LEARNING DISABILITIES (2020), https://www.ncld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf [https://perma.cc/SP8T-VKBB].

221. Video Interview with Rachel Shapiro, *supra* note 78.

222. *See id.*

223. Interview with Michelle Rappaport, *supra* note 132.

224. *See generally* MICHELLE RAPPAPORT, BUILDING MORE BRIDGES (Susan Lava Coleman ed., 2018); MICHELLE RAPPAPORT & DR. SUSAN LAVA COLEMAN, THE SUSPENSION QUESTION: BRIDGING THE GAP BETWEEN PREVENTION, INTERVENTION AND SUSPENSION (2016); MICHELLE RAPPAPORT, BUILDING BRIDGES: AN ALTERNATIVE TO SUSPENSION (Building Bridges, 2014).

alternative disciplinary measures such as points loss, loss of computer time, or the student having lunch without their peers. But alternative measures require special training, which requires the school to have access to additional resources.[225] Rappaport indicates that when such resources are available, it makes a difference in every aspect of the student-school interaction, even with the law enforcement arm of the school.[226] At Rappaport's school, the School Resource Officer ("SRO"), a law enforcement officer stationed at a school,[227] only gets involved when there is an emergency or in a situation where the SRO takes over the disciplinary process altogether. This is typically when there is a physical fight or if a student leaves campus, but even in these situations the school endeavors to use a ticket system rather than involve the juvenile justice system.[228] The school makes additional effort to encourage positive interactions with the SRO—for instance, he has a snake that he brings to school and allows the students to interact with—so that when there is escalation, he is a trusted person.[229] The school has less than a hundred students, permitting more direct intervention.[230] Some students are able to work through a program that allows for reintegration back into a regular school.[231]

In contrast, non-therapeutic transfer schools are mostly of very low quality.[232] These schools are for students who are expelled or pushed out but do not have a recognized disability. In such institutions, schooling is based almost

225. Employees at Rappaport's school are trained in the Crisis Prevention Institute. Interview with Michelle Rappaport, *supra* note 132.

226. *See id.*

227. For further information on SROs and the problems with their placement in schools, see Jacobi & Clafton, *supra* note 4; LOSEN & WHITAKER, *supra* note 82, at 10; AM. BAR ASS'N, *supra* note 130, at 73 ("Although lawmakers, police departments, and school officials expanded SRO programs to enhance school safety in the wake of rising juvenile crime rates and high-profile school shootings, the programs were largely unevaluated and may have the opposite effect.").

228. Interview with Michelle Rappaport, *supra* note 132.

229. However, students can be pushed out of therapeutic day schools. Rachel Shapiro notes that private therapeutic day schools can just give notice that they are removing the student from school; there are not the same protections as in public school. At such private institutions, they can simply let CPS and the parents know they have 30 days to enroll the child somewhere else. Video Interview with Rachel Shapiro, *supra* note 78. However, Michelle Rappaport, a social worker at a therapeutic day school, objects to the term "push outs." She indicated that although it is rare to have a student be particularly aggressive and lash out, especially at a staff member, when it does happen, these students need to be moved to a school better equipped for these behaviors. Interview with Michelle Rappaport, *supra* note 132.

230. Interview with Michelle Rappaport, *supra* note 132.

231. *Id.* Rachel Shapiro echoes that such positive outcomes are possible with the right support: "I had a student who had been arrested 25 times and had a lot of significant disciplinary issues. Once we got him into a therapeutic day school, he started going more regularly and he was actually able to graduate. He became more comfortable and could talk about his trauma." Therapeutic day schools, however, are more restrictive than their public counterparts, and so when it is possible, her office works to re-integrate the student back to public school in stages—for example, a few class periods at a time. Interview with Rachel Shapiro, *supra* note 78.

232. Telephone Interview with Ashley Fretthold, *supra* note 10; Interview with Christine Agaiby Weil, *supra* note 18; Interview with Amy Meek, *supra* note 9. Francisco Arenas indicated that in option or alternative schools, the virtual classrooms are not effective for students. Moreover, their trauma certainly isn't going to be addressed, whereas in a school these issues *could* be addressed, such as by a social worker. Interview with Francisco Arenas, *supra* note 11. Dr. Pamela Fenning's read of the landscape is that there are some decent charter schools, but some have a great deal of online instruction and do not provide the best support for students—and she observes a large variance in quality. Video Interview with Dr. Pamela Fenning, *supra* note 10.

entirely on online instruction, with very few resources and typically no extracurricular activities.[233] Christine Agaiby Weil describes that at some of such schools she has seen "the kids just sit in front of the computer all day," with no social or emotional learning.[234] Many of the students have literacy issues, yet there are typically only three teachers to eighty computers.[235] This lack of resources is particularly troublesome given that the schools are populated entirely by students who have been expelled or pushed out from other schools, and therefore typically are comprised of behaviorally challenged, and often traumatized, children.[236] Yet, these schools are the least likely to have career counselors and have few to no guidance counselors or social workers.[237] Weil explained it starkly: "these schools report the highest number of students murdered, yet these schools have the fewest resources, such as counseling, to deal with that kind of trauma."[238]

Ashley Fretthold reports that the students in option schools are typically subject to full searches and seizures every day.[239] And, importantly, school districts typically consider the option for excluded children to attend alternative schools as a privilege, taking the stance that students can then be expelled from the alternate school without any due process; the district claims the student has already received due process through the initial expulsion process and the student's transfer.[240] Amy Meek gave the example of a student she represented who she believed was targeted by the principal for expulsion after his reentry into the schooling system.[241] The student was caught doodling on a keyboard; the principal told the student that if he signed a form, he could "leave today."[242] Believing that meant he could go home for the day, he signed, but he was actually signing a form to leave the school permanently.[243] Meek said this kind of strategy is not unusual, and she believes that administrators often rely on the fact that these students, typically Black and Brown, are assumed not to know their rights or have the ability or power to push back.[244]

Dan Losen notes that push outs can take many forms, not just school discipline resulting in transfers.[245] Another informal method of pushing students out can be "disenrollment": when a school administrator notices a student disengaging from school, rather than reaching out to the absentee child or the parents,

233. Telephone Interview with Ashley Fretthold, *supra* note 10.

234. Interview with Christine Agaiby Weil, *supra* note 18; *see also* Black, *supra* note 130, at 40; ADVANCEMENT PROJECT, *supra* note 14, at 36 (describing the situation in Chicago, finding that "[e]xpelled students are clearly at a loss; these students are transferred to alternative schools, which one CPS assistant principal described as 'warehouses for kids the CPS hopes will drop out'").

235. Interview with Christine Agaiby Weil, *supra* note 18.

236. *See infra* Section IV.G. Weil additionally says students sometimes have to take three modes of public transit just to get to these schools.

237. Telephone Interview with Ashley Fretthold, *supra* note 10.

238. Interview with Christine Agaiby Weil, *supra* note 18.

239. Telephone Interview with Ashley Fretthold, *supra* note 10.

240. *Id.*

241. Interview with Amy Meek, *supra* note 9.

242. *Id.*

243. *Id.*

244. *Id.*

245. Interview with Daniel Losen, *supra* note 18.

they just claim that the student is no longer a student and strike them from the rolls.[246] Losen says there has been litigation about this practice, and the underlying incentives vary by school, due to different enrollment periods and formulas for school funding. It is particularly a problem with charter schools, which can refuse to take a student who attempts to enroll, whereas a public school cannot. Another form of push out that Losen describes is that schools will call the police for school actions that do not need police involvement: by involving juvenile justice, this enables the school to get rid of an unwanted child without reporting the action as an expulsion or action by the school.[247]

D. Unequal Treatment and Targeting

Our experts all agree that different students are treated differently, both within and between schools.[248] Contributing to this dynamic is the inequality in resources between schools: the richer the district or school within the district, the more resources such as social workers and other forms of support will be provided, regardless of whether the need is greater in other schools.[249] That is not surprising, given the vast inequality that exists in the United States.[250] What is shocking, though, is the strategic use of discriminatory policies to suppress minority enrollment at schools. Susan Coleman previously worked as a dean in a school district that contained both a large, poor, and Latinx population and an otherwise wealthy, mostly white population.[251] The superintendent said to Coleman that he "didn't want gang-banging kids" at the school—Coleman says he

246. *Id.* Christine Agaiby Weil similarly reports that schools often manipulate expulsion numbers by telling the student to enroll somewhere else, and they often do. Indeed, the student can sign themselves out of the school without having to do any kind of hearing. Very few of the students she worked with to assist them in reintegration at school were students who had incidents in the school; most of the students she dealt with had simply not been going to school *at all*. She says that no one is keeping track of these numbers accurately. Interview with Christine Agaiby Weil, *supra* note 18.

247. Interview with Daniel Losen, *supra* note 18; *see also* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 16 (Mar. 2010) ("[S]chools are increasingly utilizing the police to enforce even the most basic student infractions, such as tardiness and school attendance."); AM. BAR ASS'N, *supra* note 130, at 73 ("[W]hile SROs may be in schools primarily to enhance school safety, many SROs also become involved in student disciplinary matters that educators traditionally have handled and should continue to handle."); Video Interview with Dr. Pamela Fenning, *supra* note 10 (discussing in-school arrest as the direct path to the school-to-prison pipeline).

248. *See e.g.*, Interview with Daniel Losen, *supra* note 18; Jacobi & Clafton, *supra* note 4; *see* discussion *supra* Sections IV.B, IV.C (describing the disparities between and among different schools, respectively, in conducting school searches).

249. Interview with Tom Scotese, *supra* note 132; Interview with Susan Coleman, Assistant Sch. Superintendent (Apr. 24, 2020). For information about the issue nationally, see Douglas J. Gagnon & Marybeth J. Mattingly, *Most U.S. School Districts Have Low Access to School Counselors: Poor, Diverse, and City School Districts Exhibit Particularly High Student-to-Counselor Ratios*, CARSEY RSCH., 1, 2 (2016), https://scholars.unh.edu/cgi/viewcontent.cgi?article=1285&context=carsey [https://perma.cc/B26F-8T3A] ("Poor districts and districts with higher rates of traditionally disadvantaged races exhibit less access to school counselors across all examined measures.").

250. The U.S. has the highest level of inequality in the G7 and the fourth highest in the thirty-seven countries in the OECD, behind only Turkey, Mexico, and Chile. *See Income Inequality*, ORG. FOR ECON. CO-OPERATION AND DEV. (2015), https://data.oecd.org/inequality/income-inequality.htm [https://perma.cc/XP3P-62VL].

251. Interview with Susan Coleman, *supra* note 249.

made this explicit and would use racial terminology.[252] The superintendent would deliberately craft discriminatory, draconian rules with a goal to set students up to fail.[253] For instance, he would involve the police instead of deans in disciplinary issues, and he gradually decreased the number of deans from four to one in a school of 2,400 students to reduce the amount of support for the poorer and minority students, and to hamstring the ability of the deans to help children stay in school.[254] Eventually, there were more security guards than social workers.[255]

In addition to the dramatically disparate disciplinary treatment by race,[256] there are several other bases on which schools treat students differently and reasons for which they target certain students. Students with disabilities are disproportionately disciplined,[257] but they receive additional protection through legislative requirements placed on schools. Federal law and regulations require a "manifestation determination" to occur "[w]ithin ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct."[258] If it is determined that the student's conduct was "caused by, or had a direct and substantial relationship to, the child's disability" or the conduct was "the direct result of [] failure to implement the [student's individualized education program ('IEP')]," additional protections are triggered before a student can be removed from school.[259]

These protections have begun to make a great deal of difference: Rachel Shapiro says that when she started as an attorney with the Juvenile Justice Project at Equip for Equality fourteen years ago, she had "hundreds of expulsion hearings" in CPS.[260] But in recent years, she has seen only approximately twenty to fifty, typically none involving students with recognized disabilities, and at the time of our interview she reported no current cases involving students with disabilities.[261]

In contrast, students with *un*recognized disabilities do not receive the same protections. Shapiro says that most of these students do not know that they can qualify for extra protection, even though the school is supposed to do an

252. *Id.*

253. *Id.*

254. *See id.*

255. The data indicates this is a problem in the country writ large. *See* WHITAKER ET AL., *supra* note 81, at 4 ("14 million students are in schools with police but no counselor, nurse, psychologist, or social worker.").

256. *See supra* Section IV.A; ADVANCEMENT PROJECT, *supra* note 14, at 18–19; LOSEN & WHITAKER, *supra* note 82, at 5.

257. *See, e.g.*, LOSEN & WHITAKER, *supra* note 82, at 5 ("Similarly profound disparities are observed between students with and without disabilities. The former lost 44 days of instruction, which was more than double the loss experienced by their non-disabled peers."); Beah Jacobson, *New Reports Reveal Extreme Discipline Disparities for Students with Disabilities*, AM. PROMISE ALL. (Apr. 30, 2018), https://www.americaspromise.org/news/new-reports-reveal-extreme-discipline-disparities-students-disabilities [https://perma.cc/TR7S-RJ3P] (summarizing a number of reports documenting disparities in American education).

258. 34 C.F.R. § 300.530(e) (2022).

259. 34 CFR § 300.530(e)–(f) (2022).

260. Video Interview with Rachel Shapiro, *supra* note 78.

261. *Id.*

evaluation for potentially relevant disabilities.[262] But the schools have incentives to avoid finding this information: ironically, our experts report that the extra protections of the IEPs make schools even more determined to keep disabled students out, in order to avoid having to provide additional resources and being subject to the greater restrictions imposed on school interactions with students with disabilities.[263]

Dan Losen reports that children with disabilities often have behavioral issues that are caused by the disability, but it is not always easy to show that causation.[264] For instance, children with ADHD or an emotional disturbance often break rules because they are not getting the right support, such as a behavior improvement plan.[265] Losen's research has shown that, across all racial groups, children with disabilities are at least twice as likely to be suspended as compared to their peers in the same racial group who do not have disabilities.[266] This is particularly true of children with emotional disturbances; Losen reports that only approximately 1% of students with a disability have an emotional disturbance, but roughly 33% of children with emotional disturbance in a given year are suspended, so this group faces an extraordinary number of suspensions compared to any other group.[267]

Another ground for which students are targeted for exclusion is homelessness. Christine Agaiby Weil has had principals say to her directly that they do not want another student who is "STLS"—that is, students with temporary living situations, i.e., homeless children.[268] She cites the salient example of an eighth grader who had no disciplinary record but who was STLS.[269] Weil became involved because an elementary school in Englewood, one of the most dangerous neighborhoods of Chicago,[270] was refusing to let him attend school. The student

262. *Id.*

263. *Id.*; Interview with Christine Agaiby Weil, *supra* note 18. Shapiro said that "it is sort of like an automatic loss for the school if the protections of an IEP kick in, so they try to keep students from knowing about it." Video Interview with Rachel Shapiro, *supra* note 78. Francisco Arenas concurred, saying, "Because IEPs are time-consuming, the schools don't want those students." Interview with Francisco Arenas, *supra* note 11.

264. Daniel Losen reports that in these cases, identifying the problem and how it relates to the disability can really help. Often these students can be highly functional in the classroom, and so do not have an IEP, but should be entitled to a section 504 plan, which guarantees the student some level of accommodation but no additional services. "Section 504 makes it discriminatory to remove the student for behavior on the basis of their disturbance" and includes procedural protections for children regarding suspensions. Interview with Daniel Losen, *supra* note 18.

265. *Id.*

266. *Id.*

267. *Id.*; *See* Bethany Barnes, *Targeted: A Family and the Quest to Stop the Next School Shooter*, OREGONIAN (June 26, 2018), https://www.oregonlive.com/news/erry-2018/06/75f0f464cb3367/targeted_a_family_and_the_ques.html [https://perma.cc/GV9X-EMWK] (detailing a case study of the systematic targeting of students with special needs).

268. Interview with Christine Agaiby Weil, *supra* note 18; *see also* Erb-Downward & Blakeslee, *supra* note 160, at 2 ("The analysis finds both currently and formerly homeless students face much higher rates of disciplinary action.").

269. *See* Interview with Christine Agaiby Weil, *supra* note 18.

270. *'It's Englewood:' 12 Hours in One of Chicago's Most Dangerous Neighborhoods*, WGN (Aug. 25, 2013, 3:31 PM), https://wgntv.com/news/wgn-investigates/its-englewood-12-hours-in-one-of-chicagos-most-dangerous-neighborhoods/ [https://perma.cc/65B3-4LHQ].

would turn up to school to try to enroll, would be rejected, and then he would spend the day in a laundromat trying to stay warm.[271] Weil was given the runaround by numerous administrators—including multiple principals, due to school turnover—and eventually she doggedly sat in an attendant's office all day, refusing to go until someone would take action, determined to get the boy enrolled.[272]

But even upon getting this homeless student enrolled, the school still resisted providing him with the benefits of the programs he was entitled to.[273] The administrator did not want to give him the benefits that his STLS status entitled him to, such as bus cards, lunch, and soap.[274] Even though these goods are provided through outside funding, and thus do not cost the school money, the school was reluctant; Weil believes this is because school administrators think that high numbers of homeless children reflect poorly on the school—they associate homeless children with stigma for the school.[275] Weil says this example is not unique: schools will come up with various reasons not to enroll children they see as stigmatized; without an advocate to help them, many will not be admitted.[276] Francisco Arenas, the juvenile probation officer, reports the same thing with children on probation: principals, quite frankly, would just say, "I don't want this student in school."[277]

E. Arrests and Juvenile Detention

The most dramatic school action is that which draws the student into the juvenile justice system. Importantly, rates of arrests of children vary by race: Judge Stuart F. Lubin, Circuit Judge in the Juvenile Justice Division, reports that children in his courtroom, which covers Chicago city districts, are disproportionately minority, and "it has always been that way."[278] Judge Lubin says the majority of kids in his courtroom are Black or Latinx and that about 80% of children in detention are Black.[279] He believes this is because police are more likely to arrest a minority child than a white child for the same conduct.[280] He describes the phenomenon as a "funnel" that starts with the police department, whereby minority children are funneled into the juvenile justice system.[281]

When police are involved, the stakes are dramatically heightened for schoolchildren. Reverend David Kelly of the Precious Blood Ministry of Reconciliation—an organization that serves "young people and families most impacted

271. Interview with Christine Agaiby Weil, *supra* note 18.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *See id.*
277. Interview with Francisco Arenas, *supra* note 11.
278. Interview with the Honorable Stuart F. Lubin, Cir. Judge, Juv. Just. Div., Ill. (July 20, 2021) (on file with authors).
279. *Id.*
280. *Id.*
281. *Id.*

by violence, incarceration, and structural inequity"[282]—works with students struggling with the consequences of incarceration, trauma, and discrimination. Reverend Kelly says that police involvement should be the last resort, as any police detention puts a child at risk of becoming caught up in the criminal justice system, but that many schools and courts do not treat it as a last resort.[283] Students held in any kind of criminal detention can often be traumatized by the experience and are cut off from their community and resources.[284] He says: "I have never seen a young person do better because of detention."[285]

Christine Agaiby Weil points out that there is less need to call the police on school students these days, given that most schools have police within the school itself, armed with guns.[286] She also points out that some charter schools have high numbers of arrests made in response to minor incidents, like verbal disrespect of a teacher.[287] Once again, she says this is directed at maintaining high graduation rates.[288] Francisco Arenas, a juvenile probation officer, confirms this, reporting that he has witnessed the targeting of specific children by school administrators through the use of juvenile detention.[289] He cites an example of a special education child on parole who was targeted by the school principal—the principal sought to suspend the child unlawfully; when Arenas reported this unlawful suspension, he and his team were told that they were not permitted to

282. The Precious Blood Ministry of Reconciliation is a not-for-profit organization that, among other activities, supports individuals who have been incarcerated, along with their families and communities. For more information, see *Our Mission*, PRECIOUS BLOOD MINISTRY RECONCILIATION, https://www.pbmr.org/about-us#MissionVisionValues [https://perma.cc/34U6-PCW2].

283. Interview with Reverend David Kelly, Dir. of Precious Blood Ministry of Reconciliation (May 12, 2020) (on file with authors); *see also* Nance, *supra* note 172, at 955 ("[A] first-time arrest during high school almost doubles the odds that a student will drop out of school, and a court appearance associated with an arrest nearly quadruples those odds.").

284. Interview with Reverend David Kelly, *supra* note 283.

285. *Id.*; *see also* ADVANCEMENT PROJECT, *supra* note 247, at 17 ("Students who are arrested or ticketed by law enforcement can face a variety of consequences, including being detained, having to miss school to go to court, being fined, having to agree to other sanctions such as probation, and possibly being suspended or expelled by their school. They may also find that a juvenile record will haunt them when they apply to college, apply for financial aid or a government grant, try to enlist in the military, or attempt to find a job. These ramifications can be devastating, as can the psychological effects resulting from school-based arrest: public humiliation, diminished self-worth, distrust of the police, distrust of the school, and further alienation."); Nance, *supra* note 14, at 321 ("After the police arrest a student, sometimes the school will refuse to readmit that student. If an arrested student is readmitted to school, that student often suffers from emotional trauma, stigma, and embarrassment and may be monitored more closely by school resource officers, school officials, and teachers . . . lower standardized test scores, a higher probability that the student will not graduate from high school, and a higher likelihood of future involvement in the justice system.").

286. Interview with Christine Agaiby Weil, *supra* note 18; *see also* WHITAKER ET AL., *supra* note 81, at 5 ("This results in an increased criminalization of our youth: we found that schools with police reported 3.5 times as many arrests as schools without police. As a result, students with disabilities and students of color are most frequently criminalized."); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410 (2013) ("Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions.").

287. Interview with Christine Agaiby Weil, *supra* note 18.

288. *Id.*; *see also* Interview with Daniel Losen, *supra* note 18.

289. Interview with Francisco Arenas, *supra* note 11.

come back to the school.[290] Ultimately, Arenas had to go to court to get this school to work with them.[291]

Juvenile Court Judge Stuart F. Lubin reports that while on the bench he has witnessed students being brought into the juvenile criminal justice system by schools for incidents at schools as minor as a snowball fight that took place off school grounds.[292] He says that whether this kind of over-criminalization of children's behavior occurs depends largely on who the Attorney General is and the stance they take on the prosecutions of children, noting that in his calendar there has been great improvement due to a change in personnel.[293] But even with the policy shifts by more recent Attorney Generals, Judge Lubin has seen that some schools still want judges to act to punish the child, instead of taking responsibility for problems with difficult children, and matters that should be dealt with in-house at school still appear before him in the courtroom.[294] He describes that schools push for criminal charges as a strategic move to get problem students out of the school system and that schools still try this tactic—but it is less successful when prosecutorial personnel decline to file charges and insist on diversion.[295] When schools still engage this tactic, he believes the goal is a conviction in court to serve as a basis to expel a child.[296] But Judge Lubin warns, "once a child is expelled, there is a downward spiral from there; it is hard to get the student back in, and there is subsequently targeting by teachers and disciplinarians of the school."[297]

Judge Lubin's observation that the frequency of school-based arrests on his calendar has decreased was substantiated by other experts. Arrests and juvenile detentions stemming from CPS have dramatically decreased in recent years, due

290. *Id.*

291. *Id.*

292. Interview with Honorable Stuart F. Lubin, *supra* note 278; *see also* Nance, *supra* note 172, at 922 ("For example, police officers stationed at schools have arrested students for texting, passing gas in class, violating the school dress code, stealing two dollars from a classmate, bringing a cell phone to class, arriving late to school, or telling classmates waiting in the school lunch line that he would 'get them' if they ate all of the potatoes.").

293. Judge Lubin reports that when he first took the bench, "I had 2,000 cases on my court call and many of them should not have been on my call at all; now my docket is maybe one tenth of that size." He attributes much of the difference to the philosophy of the State Attorney General (SA) and gives the example of how students with guns are treated. Prior SA Alvarez would seek a juvenile conviction for the very first offense by a student; in contrast, present SA Foxx offers supervision on the first case, which does not even involve a conviction for the child. Judge Lubin warns that with respect to guns, probation is appropriate for a first offense and conviction is necessary subsequently because juveniles, whose brains are not fully developed, are dangerous with handguns and do not think about the consequences of what they are doing. However, he agrees that there should not be the imposition of a prison sentence for a first gun charge, but rather probation. Interview with Honorable Stuart F. Lubin, *supra* note 278.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*; *see also* Kim, *supra* note 14, at 890 ("[T]hose who were arrested in ninth or tenth grade were six to eight times more likely to drop out of high school as classmates who were not arrested, even after controlling for variables including prior delinquency, peer delinquency, truancy, academic achievement, and anger control").

to intense pressure from advocacy groups and greater oversight.[298] Daveed Moskowitz, a CPS Juvenile Justice supervisor, says there is not hard data kept on juvenile detention but he estimates that the juvenile population in detention, which used to hover around 1,000 students, now is around 170.[299] Detention is increasingly seen as a last resort after other avenues of diversion and compliance have been exhausted. Currently, according to Moskowitz, most incidents resulting in juvenile arrests do not stem from incidents that occur at school.[300] Probation officer Francisco Arenas agrees: he says that about eight to twelve years ago, the majority of his office's referrals were coming from Chicago Police Department arrests of students in CPS.[301] Many youths were arrested by the police assigned to schools, most commonly for food fights; threatening a teacher was the second most common cause of arrest.[302] Cook County Juvenile Probation ("CCJP") subsequently worked with CPS to address what they saw as excessive arrests and assisted in recrafting the school discipline approach and codes of conduct; now students cannot be arrested for trivialities such as food fights.[303]

The prior approach was not only harmful to the children but also for some administrators and police: a number of officers did not want to arrest the children for these kinds of violations.[304] While he was on the committee charged with changing the codes of conduct and discipline, Arenas learned that some officers

298. *See* Telephone Interview with Daveed Moskowitz, Juv. Just. Supervisor, Chi. Pub. Schs. (May 7, 2020) (on file with authors); Interview with Francisco Arenas, *supra* note 11; Interview with Honorable Stuart F. Lubin, *supra* note 278; Hannah Leone, *7 Out of 10 People Arrested at CPS Schools Are Black, and Most Are Younger Than 18*, CHI. TRIB. (Aug. 14, 2020, 8:21 PM) https://www.chicagotribune.com/news/breaking/ct-cps-arrests-at-schools-20200815-gqrxeip5nvdtnkc7lye2n6gyca-story.html [https://perma.cc/Q95N-UWDT] ("While the district has made substantial progress in reducing the number of arrests on school properties by 72 percent since (2012), we remain fully committed to addressing disparities and will continue to work with school communities to create a holistic student-centered approach to school safety." (quoting CPS spokeswoman Emily Bolton)); Susie An, *School-Based Arrests Down at CPS Schools*, WBEZ CHI. (Apr. 15, 2016, 8:55 AM), https://www.wbez.org/stories/school-based-arrests-down-at-cps-schools/6d2b533b-bc5f-4b6e-bf04-46ab09f0b6e9 [https://perma.cc/9H6Y-WCTK].

299. Telephone Interview with Daveed Moskowitz, *supra* note 298. The lack of data is seen as a problem. Advocates in Illinois have been calling for greater data collection and transparency, and a bill has been introduced which would require the ISBE to "collect data on all disciplinary incidents that result in office referrals but do not result in out-of-school suspensions, expulsions, disciplinary transfers to alternative schools, referrals to law enforcement, or school-based arrests," among other new data. *See* S.B. 2091, 102d Gen. Assemb., Reg. Sess. (Ill. 2021). Daniel Losen told us that federal law began to mandate that schools report the numbers of school-based arrests in 2010, but this data is not being collected accurately—schools in many large urban districts are reporting zeros arrests, yet experts know from talking to advocates that this is not accurate. Interview with Daniel Losen, *supra* note 18; s*ee also* WHITAKER ET AL., *supra* note 81, at 50 ("[M]any districts that had reported zero arrests later confirmed that they do not keep track of those data despite the federal requirement to report it to the U.S. Department of Education.").

300. Telephone Interview with Daveed Moskowitz, *supra* note 298.

301. Interview with Francisco Arenas, *supra* note 11.

302. *Id.* Again, the problem is not unique to Chicago or Illinois. *See* AM. BAR ASS'N, *supra* note 130, at 71 ("While at one time it was common for educators to send students involved in a fight to the principal's office for assessment and discipline, in too many schools today it is just as common to refer those students to law enforcement for arrest and prosecution.").

303. Interview with Francisco Arenas, *supra* note 11.

304. Sarah Gibson, a school administrator at a charter school—part of Chicago's Noble network—reports that her school has been reluctant to involve police after witnessing police mishandle issues in the past. Telephone Interview with Sarah Gibson, *supra* note 206.

requested transfers because principals were asking officers to lock up children when the officers did not believe it would be a solution.[305]

Arenas indicates that the greatest catalyst for change was a pilot program initiated by the Mayor's office.[306] The program centralized the arrests of seven different police districts, and this centralization made obvious just how many students were being arrested for such minor conduct as food fights.[307] It was clear that children should not have to go before a judge and get a permanent record for such minor incidents—for the large number of students impacted by this overly stringent disciplinary approach, that record came back to haunt them later when it came to job placement, receiving federal funding, and college, to name a few examples.[308] These efforts matter: audits have shown that, previously, 46,000 children were being arrested in Cook County per year—now that number is down to 5,000.[309] That meant there were about 10,000 students on probation in any given month; now, the total caseload is down 1,500 students, and with the pandemic, Arenas expects that the number may continue to drop.

Yet, Arenas reports, like Judge Lubin, that he still sees some schools trying to strategically criminalize disruptive or other trouble behavior as a way to get a particular student out of school—he finds that the treatment of the student in these situations can vary greatly based on the philosophy of the principal.[310] He does not believe this occurs because schools are afraid of criminal behavior by the students coming out of the juvenile system; rather, he believes schools are strategizing in order to avoid the stigma associated with children who have come out of the criminal justice system.[311]

To provide context, Arenas shared an example of his experience with a school on the southeast side of Chicago; when Arenas went to the school to enroll a child following his release from the juvenile justice system, the principal came out to confront him.[312] Arenas responded, "I will be here all day. I am going to stay as long as necessary to make this happen."[313] The principal subsequently tried to find ways to make school unpleasant for the child; for example, she would insist that previously incarcerated students should be served last.[314] Arenas says that labeling a child—be it as a felon, a probationer, homeless, or as a "troubled child"—is often what leads the school to "view these children as disposable."[315] He has had principals ask if juvenile detention cannot just lock up the child; he finds it mind-boggling that there is this disposable approach to the

305. Interview with Francisco Arenas, *supra* note 11. Judge Lubin agrees that sending a child to juvenile prison often has little effect because the student goes back into the same community from which they came, with little changing. Interview with Honorable Stuart F. Lubin, *supra* note 278.

306. Interview with Francisco Arenas, *supra* note 11.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*; Interview with Honorable Stuart F. Lubin, *supra* note 278.

311. Interview with Francisco Arenas, *supra* note 11.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

treatment of children.[316] Arenas is involved in work to counteract this treatment; at CCJP, they view their job as helping to heal and repair communities.[317] For instance, he has set up glass blowing classes for children on probation—most recently, thirteen of the fifteen participating children completed the coursework satisfactorily, illustrating how children coming out of juvenile detention can be effectively engaged.[318]

It is clear from the testimony of multiple experts that the situation in Chicago Public Schools has dramatically improved in recent years due to a deliberate policy of reversing the criminalization of minor school misbehavior. But the experts also agree that some schools are still pushing for strategic prosecution of children, and would be successful in the absence of these higher-level interventions. Without the constant vigilance of child advocates and those in the system who recognized the harm of criminalization, as well as responsible personnel acting in the Attorney General's office, these positive developments could be reversed.

F. Disparate Treatment

In contrast to children who are stigmatized, privileged children are treated very differently. Susan Coleman is an assistant superintendent at a school that she describes as "very white and wealthy."[319] In her school, administrators cannot even bring drug dogs into the school, despite there being a very significant drug problem, because the community would not approve.[320] Students are seldom arrested. For example, even when students are caught possessing drugs, they are arrested only if they possess a sufficient quantity to constitute a felony.[321] Coleman indicated that usually, there must be an immediate threat before police will arrest a student, and even when they are arrested, they do not get handcuffed.[322] In contrast, when Coleman worked in more urban and racially diverse schools, particularly where there was a gang presence, the police would arrest students in handcuffs to make a point.[323] Coleman says that these differences depend on the political and racial makeup of the community: in some communities, people expect the police to arrest children to make an example of them and to keep the school safe; the richer and whiter the school, the more likely parents will get an attorney and sue for an arrest, so arrests are far less likely.[324]

316. *Id.*
317. *Id.*
318. *Id.*
319. Interview with Susan Coleman, *supra* note 249.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* Similarly, in regard to attitudes toward other discipline issues, Coleman says that the whiter and wealthier the community, the more people think that children and families have the right to come and go; the more administrators try to crack down on security, the more parents resist it. *Id.* At her school, the students are not required to wear IDs, whereas at her old school, in a much poorer district, every child had to have an ID around their neck. *Id.* For further discussion of the research on the disciplinary inequity, see generally

Tom Scotese, a former school Dean and Assistant Principal, agrees, saying that the behavioral expectations in schools with different cultural backgrounds are starkly divergent.[325] He relays that during his seven years at a prior school as a dean, more than twenty times he had parents say to him, "I pay your salary."[326] At that prior school, there was an incident in which a student vandalized school property at a wrestling meet and then went into the female teachers' washroom and defecated on a glass table; the offender then took photos and sent them to his friends.[327] Scotese started the disciplinary meeting of that student by saying to the student that everyone was present because his behavior was so abhorrent, and it was an embarrassment to the school and his parents.[328] The parent interjected, "I don't like the way you are talking to my son," expressing what Scotese refers to as "the entitlement perspective."[329]

Scotese subsequently became Assistant Principal at Wheeling, a majority-minority school, with a population that is approximately 65% Latinx, 6% Black, and has the largest ESL and special education population in the district.[330] About 200 students out of the 1,830 have IEPs.[331] Surrounding Wheeling are majority-white schools.[332] Scotese says he processed more disciplinary referrals than two of the nearby schools put together, not because Wheeling is highly disciplinarian, but because the teachers at the neighboring schools avoid disciplinary issues out of fear of parental litigation or retaliation, as occurs in some of the wealthier suburban schools.[333] Daveed Moskowitz, CPS Juvenile Justice supervisor, puts the matter in stark terms: 75% of students in detention are Black males and overwhelmingly low income, which he says is a clear indication of how these students' behavior is being responded to.[334]

Although overall arrest numbers are decreasing, a continuing source of arrests and other harsh disciplinary responses is hypervigilance in response to school threat assessments, particularly in the wake of the numerous high-profile school shootings that have occurred.[335] Rachel Shapiro says that after the

INEQUALITY IN SCHOOL DISCIPLINE, *supra* note 87; Gordon, *supra* note 129; LOSEN & WHITAKER, *supra* note 82.

325. Interview with Tom Scotese, *supra* note 132.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. Telephone Interview with Daveed Moskowitz, *supra* note 298.

335. *See, e.g.*, AM. BAR ASS'N, *supra* note 130, at 71 ("[A]lthough juvenile crime rates have steadily declined since 1994, a series of high-profile school shootings further propelled lawmakers to . . . pass[] a series of harsh laws designed to deter juvenile crime on the streets and in schools. At the same time, many school officials, also facing pressure to respond to high-profile incidents of school violence, began embracing strict, heavy-handed disciplinary methods to maintain order and control in their buildings."); S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 283 (2014) ("[Z]ero tolerance policies are a quick fix reaction to high-profile events that have dire consequences for students' rights and disproportionately impact students of color."); Jason P. Nance, *School Surveillance and*

Parkland shooting, schools are jumping to exclusion in response to behaviors that previously were treated differently.[336] Miranda Johnson and Diane Geraghty, scholars specializing in children's law, note that Illinois legally requires that schools have a threat assessment procedure, but do not specify what that procedure needs to be.[337] Indeed, because the Illinois legislative mandate provides no specificity,[338] it increases school discretion and thus the potential for harassment.[339] Susan Coleman believes that the actual level of threat in high schools is low and that teachers are actually more likely to be threatened by elementary school children, who are more impulsive and do not have frontal lobe development, and therefore cannot really understand permanence or consequences.[340] She also adds that in her experience, teachers are probably more afraid of being sued by parents than afraid of the students themselves.[341]

Another example of disparity is in the treatment of children with and without disabilities. Students with disabilities are disproportionately impacted when it comes to arrests. Moskowitz provides specific numbers. Among the detained students he works with at Nancy B. Jefferson Alternate School, the school for court-detained youths,[342] approximately 35% have IEPs—that is, recognized disabilities; in contrast, the overall percentage of students with IEPs in CPS is approximately 15%.[343] Whereas learning disabilities are the most common disabilities in the school district generally, at Jefferson school, emotional and behavioral disabilities dominate.[344] As such, even with the protections of IEPs, students with relevant disabilities are clearly being disproportionately impacted by school arrests.[345]

the Fourth Amendment, 2014 WIS. L. REV. 79, 82 (2014) ("Recent empirical research indicates that schools serving higher proportions of minority and low-income students are more likely to implement these harsh, intense security conditions than other schools"). Daniel Losen reports that the data indicates that there are more police in schools after mass shootings. Interview with Daniel Losen, *supra* note 18. Amy Meek says schools are paranoid about threats to school safety, over-relying on police referrals and like tactics even when there is no plausible safety threat, such as where a student posts a picture of a gun on social media or makes a joke about bombing the school. Interview with Amy Meek, *supra* note 9.

336. Video Interview with Rachel Shapiro, *supra* note 78.

337. Interview with Miranda Johnson & Diane Geraghty, *supra* note 183. Johnson and Geraghty point out that schools are expanding the boundaries of their access to potentially private student activities, such as speech outside of school as well as external databases containing student records, based on the justifications of these threat assessments. *Id.* Moreover, SROs, operating as quasi-school officials, have access to school records under FERPA, making it unclear which standard applies to these data searches—probable cause, reasonable suspicion, or some other standard. *Id.*

338. Indeed, the statute only requires the school district to "implement a threat assessment procedure that may be part of a school board policy on targeted school violence prevention" and establish a threat assessment team. *See* 105 ILCS 128/45 (2022). While the statute provides certain procedural requirements for the composition of the threat assessment team, it provides no other guidance or requirements of substance. *See id.*

339. Interview with Miranda Johnson & Diane Geraghty, *supra* note 183.

340. Interview with Susan Coleman, *supra* note 249.

341. *Id.*

342. *About Us*, NANCY B. JEFFERSON ALT. SCH., http://jefferson.cps.edu/about-us.html (last visited Feb. 25, 2023) [https://perma.cc/7PTG-F5EA].

343. Telephone Interview with Daveed Moskowitz, *supra* note 298.

344. *Id.*

345. Daveed Moskowitz stresses that there are a large number of students in detention with significant academic ability and achievements; there is a misconception that all detained students struggle in school but that is

G. The Role of Trauma

Dr. Fenning has researched the school-to-prison pipeline and has observed that there are essentially two primary mechanisms, an indirect and a direct path.[346] First, in terms of the indirect path, there is overwhelming evidence that exclusions from school increase the likelihood of student disengagement and dropout—particularly in those schools which lack the resources to adequately engage and support children to begin with[347]—which further contributes to the likelihood the child will end up in the juvenile justice system.[348] Second, more directly, the increased police presence and hypervigilance of schools associated with threat assessment results in the criminalization and escalation of issues that were once treated as questions of school discipline, which directly causes the child's entry into the juvenile justice system.[349] Dr. Fenning, along with many other experts, argues that the presence of SROs in schools increases the probability an issue will be escalated to the juvenile justice system rather than remain internal to the school.[350] Dr. Fenning points out that some schools have gone so

not true—behavioral history tends to correlate more strongly with periods of incarceration than low test scores. In fact, he reports that the test score history of Nancy B. Jefferson High School students is not far out of line with neighborhood schools. *Id.*

346. Video Interview with Dr. Pamela Fenning, *supra* note 10.

347. Grace Chen, *School-to-Prison Pipeline Persists Despite Local, State and National Efforts*, PUBLIC SCH. REV. (May 11, 2020), https://www.publicschoolreview.com/blog/school-to-prison-pipeline-persists-despite-local-state-and-national-efforts [https://perma.cc/NS9T-K8UP] ("Many discipline problems arise when students are disengaged and do not have support services to help them persist in their educational pursuits. Lack of textbooks, inexperienced teachers, and non-existent counseling and special education services all contribute to delinquency and high dropout rates.").

348. Video Interview with Dr. Pamela Fenning, *supra* note 10; s*ee also* Russell J. Skiba, Mariella I. Arredondo, Chrystal Gray & M. Karega, *What Do We Know About Discipline Disparities? New and Emerging Research*, *in* INEQUALITY IN SCHOOL DISCIPLINE, *supra* note 87, at 27 ("[T]he research evidence makes clear that out-of-school suspension and expulsion are in and of themselves risk factors for a host of negative school and life outcomes, regardless of levels of poverty, achievement, or previous behavioral history."); Bacher-Hicks et al., *supra* note 85, at 27 ("Students who are quasi-randomly assigned to schools with higher conditional suspension rates are significantly more likely to be arrested and incarcerated as adults. This shows that early censure of school misbehavior causes increases in adult crime—that there is, in fact, a 'school to prison pipeline.'"). Daniel Losen added that a common response to schools' fear of threat is to bring more police into the schools, but there has been research showing that police respond differently to students of color and the students respond differently when there are officers within the schools, patrolling the hallways. Interview with Daniel Losen, *supra* note 18; *see also* Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INTEREST L. REP. 137, 139 (2019) ("Certain situations, such as what took place at Sandy Hook and Columbine, as well as fears of rising school violence in recent decades, necessitate security in American schools; however, it does not follow from the necessity of school security officers that elementary schoolchildren need to be placed into a criminal law system in which they are treated with a lack of sensitivity as if they are hardened criminals.").

349. Video Interview with Dr. Pamela Fenning, *supra* note 10. For further information on the issue nationally, see generally Nance, *supra* note 14, at 316 ("[D]uring the 2011–2012 school year, schools referred approximately 260,000 students to law enforcement, and approximately 92,000 students were arrested on school property during the school day or at school-sponsored events.").

350. Reverend Kelly reports that having officers in schools increases the chances a student will be sent into the system. Interview with Reverend David Kelly, *supra* note 283. Amy Meek cites examples where SROs become involved with policing even basic school policy rules, such as possession of a vape pen, which is not illegal but is contrary to school policy. Students who have had bad experiences with police can become particularly

far as to establish booking stations connected to the school itself.[351] Students of color are at the highest risk of being hyper-surveilled.

Dr. Fenning explains that student experiences of trauma play a large part in this cycle: experiences of trauma can lead a student to be triggered by certain interactions with teachers, which in turn can inadvertently escalate the situation—as the children can themselves respond by exhibiting hypervigilance.[352] For example, she says a teacher might touch a student on the shoulder and the student—who may be on high alert by virtue of living in a high gang or crime area—may jump and react badly to the minor touch; this in turn can escalate based on a simple misunderstanding.[353] She cites a specific example in which a student with a disability had an IEP that required, in any instance of misbehavior, the school administrator to allow the student to talk to his counselor; instead, police became involved, ignored this IEP, and escalated the situation.[354]

As well as disparities in resources, as discussed,[355] our experts agree that there simply are not enough resources made available to schools[356]—particularly in a state like Illinois, which has significant financial problems.[357] As a result, it can take months to get a psychology appointment, even if a student has a referral, because there simply are not the resources available.[358] This is particularly important because almost all our experts indicated that trauma is a major factor leading to behaviors that are likely to result in disciplinary measures, as well as the inverse: disciplinary measures themselves contribute to trauma. Based on her experience, Berenice Villalobos estimates almost all students involved in the disciplinary system are victims of trauma, to varying degrees.[359] Reverend Kelly

scared and agitated when confronted by a police officer rather than an administrator. Interview with Amy Meek, *supra* note 9.

351. Video Interview with Dr. Pamela Fenning, *supra* note 10.

352. *Id.*; Telephone Interview with Berenice Villalobos, *supra* note 158. Johnson and Geraghty both indicate that trauma has a "huge impact" on these issues, and how the students respond. Interview with Miranda Johnson & Diane Geraghty, *supra* note 183. The hypervigilance which schools exhibit towards children greatly exacerbates the problems already confronting vulnerable children. *See* Erb-Downward & Blakeslee, *supra* note 160, at 2 ("The fight-or-flight response, which can be easily triggered in children who have experienced trauma, is often misunderstood as a disciplinary issue. Approaching reactions driven by trauma in children with harsh disciplinary consequences does not improve the behavior in question and often re-traumatizes the child.").

353. Video Interview with Dr. Pamela Fenning, *supra* note 10.

354. *Id.*

355. *See supra* note 255 and accompanying text.

356. Interview with Susan Coleman, *supra* note 249; Interview with Reverend David Kelly, *supra* note 283; Telephone Interview with Daveed Moskowitz, *supra* note 298; Interview with Christine Agaiby Weil, *supra* note 18; *see also* WHITAKER ET AL., *supra* note 81, at 4 ("[F]unding for police in schools has been on the rise, while our public schools face a critical shortage of counselors, nurses, psychologists, and social workers . . . millions of students are in schools with law enforcement but no support staff.").

357. *See* Matt Egan, *How Illinois Became America's Most Messed-Up State*, CNN (July 1, 2017, 8:51 AM), https://money.cnn.com/2017/06/29/investing/illinois-budget-crisis-downgrade/index.html [https://perma.cc/DT7Y-NZQQ].

358. Interview with Susan Coleman, *supra* note 249.

359. Telephone Interview with Berenice Villalobos, *supra* note 158; *see also* Wendy D'Andrea, Bradley Stolbach, Julian Ford, Joseph Spinazzola & Bessel A. van der Kolk, *Understanding Interpersonal Trauma in Children: Why We Need a Developmentally Appropriate Trauma Diagnosis*, 82 AM. J. ORTHOPSYCHIATRY 187, 189 (2012) ("Numerous studies have documented that exposure to interpersonal trauma during childhood is related to increased incidence of affect and impulse dysregulation, alterations in attention and consciousness,

says that the number one issue in the work of Precious Blood Ministry is to address deep trauma; essentially every child they work with has a family member who has been killed, and the child is subject to the inequalities and stigma of someone who is looked upon as though they are dangerous, which children internalize.[360]

Berenice Villalobos notes that students' experience is not limited to individual trauma: cultural and generational trauma are significant factors as well.[361] She says, for instance, that cultural trauma is common among Latinx students in the West Side suburbs, which has a large, undocumented Mexican population that lacks resources and experiences systems that do not work for the community due to their legal status.[362] Villalobos indicated that, broadly, the students who most need trauma services come from schools that are heavily under-resourced in terms of counseling and psychological services.[363] Once a student is incarcerated, the problem only gets worse: Christine Agaiby Weil says that she cannot think of any students who left the detention center without trauma.[364] As well as the trauma of the juvenile justice system itself, many students enter the system with trauma—for instance, she gives the example of students at Jefferson who were living in abandoned buildings and had witnessed great violence.[365]

Disabled students are particularly vulnerable. Rachel Shapiro says that most of her clients at Equip for Equality, in addition to many having disabilities, have had some experience with violence in their family or community. Many have been victims, perpetrators, or witnesses of gun fights, knife fights, or other forms of violence.[366] Yet, while there are isolated schools that have undergone trauma-informed training and are much better at supporting students, for the most part, the schools she interacts with are not trauma-informed.[367] But this is vital, because as a result of trauma, children will often escalate, and if a police

disturbances of attribution and schema, and interpersonal difficulties."); Olga Acosta Price & Wendy Ellis, *Student Trauma Is Widespread. Schools Don't Have to Go It Alone*, EDUC. WEEK (Feb. 26, 2018), https://www.edweek.org/leadership/opinion-student-trauma-is-widespread-schools-dont-have-to-go-it-alone/2018/02 [https://perma.cc/H5ZB-5YA5] (discussing the consequences of trauma in schools, along with potential soluations); MAURA MCINERY & AMY MCKLINDON, UNLOCKING THE DOOR TO LEARNING: TRAUMA-INFORMED CLASSROOMS & TRANSFORMATIONAL SCHOOLS, EDUC. L. CTR. 1–5 (2014) (discussing the impact and frequencies of the experience of trauma on students); Ablon, *supra* note 160 ("As a direct result of their trauma, many of these students struggle with skills like flexibility, frustration tolerance, and problem-solving. They don't lack the will to behave well; they lack the skills to behave well. No wonder traditional school discipline doesn't work with traumatized students: motivational strategies don't teach students the neurocognitive skills they lack.").

360. Interview with Reverend David Kelly, *supra* note 283.

361. Telephone Interview with Berenice Villalobos, *supra* note 158; *see also* Ike Evans & Nia West-Bey, *Young Minds Matter: Historical and Cultural Trauma*, HOGG FOUND. FOR MENTAL HEALTH (Oct. 8, 2019), https://hogg.utexas.edu/historical-and-cultural-trauma [https://perma.cc/HB76-X5LP].

362. Telephone Interview with Berenice Villalobos, *supra* note 158.

363. *Id.*

364. Interview with Christine Agaiby Weil, *supra* note 18.

365. *Id.*; *see also* SUE BARELL, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS, NAT'L CHILD TRAUMATIC STRESS NETWORK 1 (2013), https://njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf [https://perma.cc/PC8Y-AP5X].

366. Video Interview with Rachel Shapiro, *supra* note 78.

367. *Id.*

officer becomes involved, often things will be further escalated.[368] Similarly, Michelle Rappaport estimates that of students who come to her therapeutic day school, which educates excluded students with disabilities, more than 50% of them are dealing with trauma, and there is a strong correlation between trauma and students acting out.[369] Trauma also results in students self-harming, such as through attempted suicide or cutting. Many children have family members in jail or may themselves have been in jail, and a significant portion of students in therapeutic care are not living with a parent.[370]

Daveed Moskowitz worries, however, about emphasizing the role of trauma, as he fears this is a way of psychologizing social problems; although the students he serves could typically be described as having trauma, he believes that the better predictor of whether they will end up in the juvenile justice system is the social, economic, and policing systems under which they live.[371] He fears that emphasizing trauma may lead away from addressing social justice issues.[372] But Susan Coleman, who has worked in poor, wealthy, majority, and minority schools, emphasizes that trauma and mental health issues impact students across all socioeconomic and racial backgrounds; in fact, in her experience, it is the higher-functioning students who are hospitalized more often.[373] For example, at her wealthy school, there are many students who are in AP classes who cut themselves, often in response to stress from competition.[374] The difference is that at Coleman's school, the administration responds with training in social-emotional learning, which enables them to be proactive in addressing these issues, build community trust, and help struggling students. She says they have a great social work and counseling staff, and the deans get involved in the trauma teams.[375] They worked for a year and a half to get the program implemented, an admirable administrative achievement that simply may not be practical for schools with fewer resources.[376]

368. *Id.*; Video Interview with Dr. Pamela Fenning, *supra* note 10; Telephone Interview with Berenice Villalobos, *supra* note 158; *see also* Chelsea Connery, *The Prevalence and the Price of Police in Schools*, NEAG SCH. EDUC. AT U. CONN., (Oct. 27, 2020), https://education.uconn.edu/2020/10/27/the-prevalence-and-the-price-of-police-in-schools/ [https://perma.cc/687F-T7BX] ("Overall, research suggests that SROs' potential to escalate conflicts puts students at risk."); Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 875 (2018) ("Officers often have carte blanche to address misbehavior as they roam school hallways, but their presence can escalate situations."); Nance, *supra* note 172, at 977 ("These data support the conclusion that a school's regular contact with SROs leads school officials to redefine lower-level offenses as criminal justice issues rather than as social or psychological issues that they can address using more pedagogically sound disciplinary methods or employing mental health treatments.").

369. Interview with Michelle Rappaport, *supra* note 132.

370. *Id.*

371. Interview with Daveed Moskowitz, *supra* note 298. For further discussion of the relationship between these systemic issues and disciplinary disparity, *see* LOSEN & WHITAKER, *supra* note 82, at 24; Mediratta & Rausch, *supra* note 87, at 7; KIM ET AL., *supra* note 43, at 34.

372. Telephone Interview with Daveed Moskowitz, *supra* note 298.

373. Interview with Susan Coleman, *supra* note 249.

374. *Id.*

375. *Id.*

376. *Id.*

Francisco Arenas says that 100% of the children in probation are dealing with trauma, and most are typically navigating multiple traumas—which are then compounded by economic racism.[377] Clearly, then, the cause lies in a combination of trauma and sociological problems, and it is important to note that trauma itself can be sociological as much as psychological; for instance, it may be a result of poverty and gang violence in the community as well as individual circumstances.

The solution, then, would ideally also lie in treating both the individual and social problems. Dan Losen advocates for more trauma-informed care and student support, including training administrators and teachers to recognize trauma.[378] Likewise, Francisco Arenas tries to develop programs that address trauma, particularly without requiring massive funding.[379] He stresses the need for positive interactions within a community that spends time with troubled youth and tells the children they care, which is often something these children have never experienced before.[380] Arenas started a volunteer running group for the students emerging from the juvenile justice system and has witnessed it make an enormous impact: simply seeing people volunteering to help the children is powerful for individual children.[381] He says that the biggest obstacle to overcome is to show children they are supported and to encourage the community to help previously detained children re-integrate and heal from trauma.[382]

But such a trauma-informed approach can be hard for teachers and administrators, both due to a lack of resources and the baseline stress involved in a job that deals with high numbers of children with trauma. But training can make a difference.[383] Francisco Arenas told a story of a training for teachers in which he shared the experience of a student who felt he was being bullied by a teacher because, in his own words, "he stank."[384] The student told Arenas he knew it was true, but he couldn't help it: his family was on a fixed income and he was only able to wash his clothes once a month; he lived in a house with eight children and a single mother.[385] He knew he smelled bad, and he thought that was why the teacher was unfair to him.[386] Once, his friend's mother washed his clothes for him and when he went home, his mother beat him up for it, out of the shame

377. Interview with Francisco Arenas, *supra* note 11.

378. Interview with Daniel Losen, *supra* note 18.

379. Interview with Francisco Arenas, *supra* note 11.

380. *Id.*; *see also* Price & Ellis, *supra* note 359 ("[M]aintaining a strong connection to school and to caring adults throughout the building is a powerful way to buffer the negative impact of pervasive stressors."); Russell J. Skiba, Mariella I. Arredondo, Chrystal Gray & M. Karega, *What Do We Know About Discipline Disparities? New and Emerging Research*, *in* INEQUALITY IN SCHOOL DISCIPLINE, *supra* note 87, at 28 (discussing the importance of engagement and relationships with students, which "can lead to a reduction in the use of exclusionary discipline, particularly for African American students").

381. Interview with Francisco Arenas, *supra* note 11.

382. *Id.*

383. Interview with Michelle Rappaport, *supra* note 132. Michelle Rappaport says that when teachers and administrators have not had trauma-informed training, they are more likely to respond to students with punitive, sarcastic, or demeaning approaches, which can have a large negative impact on the student.

384. Interview with Francisco Arenas, *supra* note 11.

385. *Id.*

386. *Id.*

of their poverty.[387] Arenas was confident that the teacher in question was at the training.[388] Arenas used the story to emphasize how important it is to have empathy and understand the circumstances that these children find themselves in. Afterward, a teacher approached Arenas, shared that he was the teacher in question, and said he felt badly for his behavior towards the child.[389] He said that he realized he was burnt out—being a teacher, especially in a school with low resources, was taking a real toll on him and he was taking it out on the child.[390]

This is an example of what Arenas describes as teachers with "vicarious trauma."[391] But he also describes scenarios where an administrator or teacher with greater understanding can break the school-to-prison pipeline. He cites an example of a principal who asked him to talk to a student at his home because he did not want to suspend the student after he started a food fight and was acting belligerently.[392] Arenas went to the home and witnessed domestic violence during his visit.[393] When he relayed this to the principal, the principal said that he had suspected this was why the child was acting out, and it was why he did not want him punished.[394] Together, they were able to arrange counseling for the child and get the mother out of the domestic violence situation, although it took two years.[395] This kind of action by administrators obviously takes much more work, but in Arenas's view, it is the only way to change problematic juvenile behavior for the better: "You cannot repair generational trauma inherited by the child in jail."[396]

Dr. Fenning agrees: not only do students in the incarceration system tend to be traumatized, but involving law enforcement in school discipline contributes further to that trauma.[397] She says that being handcuffed at school and taken from school in a public way in and of itself can be very traumatic and stigmatizing.[398] The feeling that the school does not want a student back, and the barriers schools put up to keep students out, provides an ongoing source of trauma. Exclusion

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* Rappaport indicated that when her school staff has issues with particular students, the school's response is to consult with the staff member to learn about why they might be reacting to the student in this way. Interview with Michelle Rappaport, *supra* note 132.

391. Interview with Francisco Arenas, *supra* note 11.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. In contrast, Arenas says that turning straight to severe punishment can really damage a child's life, for just one mistake. He provided the example of a student who mumbled to himself, "I'll blow up the school." Unbeknownst to the school, that day the student was navigating his mom's divorce, he had just found out his mother was expecting a new child with a man besides his father, and he was feeling without a family. The student was expelled for this one outburst under zero tolerance, at age 15, and his parents could not pay for additional schooling. *Id.*

397. Video Interview with Dr. Pamela Fenning, *supra* note 10; Interview with Francisco Arenas, *supra* note 11 (describing the trauma involved when parole officers must pull students out of class).

398. Video Interview with Dr. Pamela Fenning, *supra* note 10.

also makes students feel isolated, and students face significant difficulties in reintegration after exclusion.

H. Reintegration and Support

The aforementioned reluctance of schools to enroll students who have been excluded, and the often-illegal measures taken to avoid enrollment of those students, make reintegration very difficult, and so recidivism is more likely. There are also difficulties that arise specifically for students coming out of detention, such as the fact that students can be released any day year-round, and a school has to figure out how to acclimate the student.[399] Francisco Arenas describes the difficulty he faces as a probation officer in ensuring that students get the resources they need to reintegrate.[400] At the outset, there are challenges in convening the relevant stakeholders—including family, parole officers, school officials, and advocates—and often schools feel they do not have the resources to give the necessary extra support these students need.[401] His office provides restorative justice and other training for school officials to in turn provide support for reentry, but there are not enough resources to do this broadly.[402] But the biggest challenge is not financial: it is that it is very difficult to provide reentering students with comprehensive and longitudinal services because the students are so mobile.[403] The juvenile justice system has a patchwork of bodies responsible for different aspects of juvenile parolees' lives, and when students move around frequently, both in terms of home life and school life, it is extremely difficult to get a coherent program of services to any student.[404]

Reverend Kelly, who does charitable work with many of these students, concurs: many of the students have unstable housing situations, often with nowhere to stay.[405] They are also often in alternate schools, which, as described, have very little in-person interaction between students and teachers or administrators. Even if they are in regular schools, those schools often lack key resources—most importantly, social workers and afterschool programming where students can build relationships or get academic help if they are struggling. In this context, when the students, traumatized and freshly back from exclusion or detention, almost inevitably act out, even well-meaning administrators may not have the resources to help that student. As a result, the student is often pushed out or gives up and opts out. But mentoring programs can make all the difference:

399. Telephone Interview with Daveed Moskowitz, *supra* note 298.
400. Interview with Francisco Arenas, *supra* note 11.
401. Telephone Interview with Daveed Moskowitz, *supra* note 298.
402. *Id.*
403. *Id.*
404. *Id.*
405. Interview with Reverend David Kelly, *supra* note 283.

of those who participate in Reverend Kelly's program, the majority do finish high school.[406]

Christine Agaiby Weil was a re-engagement specialist at CCJP.[407] When she first took that role, those in her position were basically writing out a prescription that merely directed the student where to go when the student left prison—they found an open school slot, sent the student there, and this was it.[408] Without any further support, predictably, the statistics for success were terrible: approximately 20% of students actually went back to school, and of that 20%, most of them did not stay enrolled.[409] Furthermore, previously, it was a probation violation not to attend school, so the school-to-prison pipeline was quite direct.[410] Now, students cannot be arrested for these "status offenses," but Weil says that most school-age children who are not attending school are often doing something illegal, so failure to enroll lands them back in the juvenile system more indirectly.[411] Getting the students reenrolled, then, is a key to their success.

Under the rule of Barbara Byrd-Bennett, the former CEO of CPS imprisoned for kickback schemes with option schools, re-engagement specialists were required to send children to these option schools, where these children were simply parked in front of a computer all day.[412] When leadership changed and students were no longer pushed to option schools, Weil and her colleagues were able to train neighborhood schools on the reentry needs of students.[413] She was also able to directly work with students, finding out what gaps they had in their education, what made them uncomfortable about returning to school, if there was a victim of the crime committed by the student to address, and how she could help the student to work on the child's relationships.[414] Many of the children reported to her that this was the first educational support they had ever received.[415] But if Weil was not physically there to help the student reenter the school, she says that many schools would see Nancy B. Jefferson, the detention center school, on a student's transcript, and find ways to prevent enrollment.[416] She saw schools literally make up a reason they could use to prohibit the child from attending—such as telling the parents that the child did not have the right

406. *Id.*; *see also* WHITAKER ET AL., *supra* note 81, at 6 ("Data shows that school staff who provide health and mental health services to our children not only improve the health outcomes for those students, but also improve school safety.").

407. Interview with Christine Agaiby Weil, *supra* note 18.

408. *Id.* Reverend Kelly agrees, saying it "drives him crazy" when a child is locked up and there is no plan for enrolling them in school when they are released, providing them the documents they need, etc. At his organization, they have staff who work to fill this gap, but they cannot handle the large number of children being released. Interview with Reverend David Kelly, *supra* note 283.

409. Interview with Christine Agaiby Weil, *supra* note 18.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* Judge Lubin noted that a program initiated in the last two to three years, in which probation officers support the students to help them get into school as well as work with students, is particularly helpful in reintegration. Interview with Honorable Stuart F. Lubin, *supra* note 278.

414. Interview with Christine Agaiby Weil, *supra* note 18.

415. *Id.*

416. *Id.*

attire and so could not enroll that day, or that they had missed the enrollment period.[417] Weil reiterates the point made by other experts: "without an advocate for the student, schools can do whatever they want."[418]

Most experts agree that providing training to schools can also make a difference. Berenice Villalobos's organization, Transforming School Discipline Collaborative, administers academies that address the leadership in a school district and bring them in for all-day training by a restorative justice practitioner, an attorney, and a psychologist.[419] Together, they look at the district's data, current policies, gaps, and trends in terms of their discipline, and how they are impacting students—especially students of color.[420] They also do individualized trainings of schools within districts in response to requests for assistance—for example, on how to deal with violence in the school due to gang presence.[421] The focus is to get community buy-in and collaborate with family.

Monica Llorente's group, Dignity in Schools, does trainings with administrators and teachers; they would like to do more work with the SROs.[422] One part of the training is an explanation of the law and how to comply with it, another is training in social science about how to better work with students, and psychologists explain the role of childhood trauma.[423] They also bring these trainings to help judges in juvenile courts learn about other avenues available outside of formal detention.[424] But she reports that the efforts are constantly stymied by the lack of resources put toward these practices by policymakers.[425]

In Michelle Rappaport's therapeutic day school, all of the school workers are trained to provide trauma-informed responses to students.[426] She says that every child benefits from a trauma-informed perspective, regardless of the student's background or characteristics, but many of the students in regular schooling do not have teachers that receive this kind of training.[427] Dr. Fenning notes that Chicago is on board with reform in theory but does little in practice: the city has passed unfunded mandates such as SB 100 but does not provide the support to actually make the changes realizable.[428]

417. *Id.*
418. *Id.*
419. Telephone Interview with Berenice Villalobos, *supra* note 158.
420. *Id.*
421. *Id.*
422. Interview with Monica Llorente, *supra* note 10.
423. *Id.*
424. *Id.*
425. *Id.*
426. Interview with Michelle Rappaport, *supra* note 132.
427. *Id.*
428. Video Interview with Dr. Pamela Fenning, *supra* note 10. Tom Scotese provided an example of the problems associated with this cost-cutting at his school. When employees retired, the school would hire new staff without providing the benefits that used to accompany the role. This made it hard to hire quality candidates, and they ended up with a security team with a number of employees in their eighties, and a mean age of sixty-five. Some of the security personnel could only sit at the front booth because they were not mobile, limiting their capacity to enforce discipline in the school. Interview with Tom Scotese, *supra* note 132.

According to Judge Lubin, the biggest cause of the decrease in his criminal juvenile justice docket is diversion programs, including restorative justice programs.[429] He cites one very effective program in which children participate for two to three months, and if they complete the program, their cases are dismissed.[430] That program is run with money donated by the Lurie family, a major source of philanthropic funds in Illinois.[431] Francisco Arenas cites other excellent programs in Chicago that help to keep students in schools, but such programs are rare.[432] Our experts agree that interventions, training, advocacy, and diversion programs can make a huge difference in the lives of children and their communities. Monica Llorente says that policymakers and voters need to recognize that paying these costs at the front end will avoid costs later.[433]

V. CONCLUSION

Explaining why he devotes himself to working with children coming out of the juvenile detention system, Reverend Kelly said: "[i]t's the forgotten, discarded, disposable people. That's so often who you find in jail—the forgotten."[434] Francisco Arenas made a similar observation, commenting that many schools treat children as "disposable."[435] The situation is so dire that research has shown that, in some cases, it is actually *better* for incarcerated students to *remain* incarcerated in the juvenile system and attend Nancy B. Jefferson than to be released from prison.[436] This is in part because many regular schools, seeking to resist enrolling these previously incarcerated children, refuse to recognize the credits earned by incarcerated students, making it impossible for them to catch up and graduate.[437] Additionally, schools often lack the resources needed to help the students. Astoundingly, there are children in detention who are labeled "release upon request," who remain in detention beyond their required sentence because there is no secure environment for them to go to.[438] There are often services, such as medical care, mental care, housing, food, clinical services, and education services which the juvenile justice system provides to them that they do not receive outside of detention.[439] Unsurprisingly, research shows that detention increases students' chances of not graduating, even when controlling for

429. Interview with Honorable Stuart F. Lubin, *supra* note 278.

430. *Id.*

431. *Id.*

432. Interview with Francisco Arenas, *supra* note 11.

433. Interview with Monica Llorente, *supra* note 10.

434. Mahany, *supra* note 11 (quoting Reverend David Kelly).

435. Arenas describes a "disposable approach" in the attitudes of some schools towards children. Interview with Francisco Arenas, *supra* note 11.

436. Video Interview with Dr. Pamela Fenning, *supra* note 10.

437. *Id.* (relaying the results of the research of her graduate student).

438. Telephone Interview with Daveed Moskowitz, *supra* note 298. Reverend Kelly observed that this problem has become even more pronounced during the COVID-19 pandemic. Interview with Reverend David Kelly, *supra* note 283.

439. Telephone Interview with Daveed Moskowitz, *supra* note 298.

other factors; but perversely, once incarcerated, students may be more likely to graduate if kept incarcerated.[440]

There is perhaps no better example of the treatment of some children as disposable as this: that children are simply left in prison after their sentence is served, because they have nowhere to go and the state makes no accommodation for them, or that they may even be better off staying in prison, because schools are so determined to exclude them. This treatment of some children as disposable is a failing by society, and it is also specifically a failing of the Supreme Court to in any way regulate the disciplinary system in the nation's schools that makes this kind of treatment possible.

This case study shows that schools often ignore their responsibilities to children with special needs and children who are traumatized—be it by the system itself or by their individual circumstances. Schools often unlawfully discriminate against some students based on race, poverty, disability, homelessness, and other status factors. Many schools fail to follow even the minimal due process that is required by the courts. Solving some of these problems requires legislative action, which requires community buy-in; but these problems also demand judicial action, to provide an enforcement mechanism to require schools to treat children fairly and respect their basic constitutional rights or value. Some more privileged schoolchildren get that respect, so much so that teachers are afraid to enforce the rules against them out of fear of litigation. But many students do not get even basic respect of their rights, and some are treated in ways that are simply shocking: excluded from the entire school system for up to two years, arrested and handcuffed at school to "set an example," and left in prison beyond their sentences, just to get a basic education and social services. The law as it currently stands allows these children to be treated as disposable, and that is anathema to the claimed values of our society and our constitutional system.

440. Video Interview with Dr. Pamela Fenning, *supra* note 10 (relaying the results of the research of her graduate student).