

Cutting the IDEA’s Gordian Knot: Accepting Entanglements of Disability and Self and Embracing a “Best Interests” Approach to Disciplining Students with Disabilities

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ABSTRACT

The Individuals with Disabilities Education Act (IDEA) establishes a procedural right and process to protect students with disabilities from punitive disciplinary action where their misconduct is deemed to have stemmed directly from their disability. The manifestation determination review (MDR), in focusing on disability as a discrete, identifiable cause of student (mis)behavior, is oriented around an inquiry that is problematic, inadequate, and ultimately unworkable as a means of effectuating the aims of the IDEA. A central flaw of this assessment framework is that it is predicated on a faulty assumption that disability is (always) severable from a student’s identity, experience, and, ultimately, their¹ behavior or (mis)conduct. This does a profound disservice to students, particularly those with chronic or life-long disabilities who cannot be “cured,” because this approach does not

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1. This Article utilizes “they” and “their” as non-gendered singular pronouns throughout. Whereas even so-called “inclusive” but nevertheless, gendered pronouns (e.g., “s/he,” “his/her”) generally exclude non-cisgender students, non-gendered, or “gender-neutral,” pronouns (e.g., “they,” “their”) are broadly inclusive of all students, including and especially those who may identify as nonbinary, trans, or gender non-conforming. See Clio Corvid, *Non-Binary Students: A Guide for Public School Educators*, MEDIUM (Jan. 31, 2020), <https://medium.com/bein-enby/non-binary-students-5867563dc61f> (recommending the general elimination of “gendered language,” including but not limited to pronouns, in classroom and educational settings as a key strategy for supporting nonbinary students); Jubilee Otero Bravo, Kezia Gilyard & Am Norgren, *7 Non-Negotiables for Supporting Trans & Nonbinary Students in Your Classroom*, TEACH FOR AM. ONE DAY (Mar. 21, 2022), <https://www.teachforamerica.org/one-day/opinion/7-non-negotiables-for-supporting-trans-nonbinary-students-in-your-classroom> (emphasizing the importance of “[u]sing a . . . student’s . . . pronouns consistently” as “a non-negotiable for establishing a safe learning environment”). Furthermore, dictionaries, style guides, and other authorities on writing and language have increasingly begun to permit (and, in certain cases, even require) the use of the so-called “singular they” or have otherwise relaxed or caveated traditional pronoun agreement rules to reflect recent lexical shifts in contemporary society. See, e.g., *Singular “They”*, AM. PSYCH. ASS’N (Sept. 2019), <https://apastyle.apa.org/style-grammar-guidelines/grammar/singular-they> (explaining that while the “usage of the singular ‘they’ was once discouraged in academic writing, many advocacy groups and publishers have accepted and endorsed it,” including where it is used “as a generic third-person singular pronoun whose gender is unknown or irrelevant to the context of the usage”).

effectively help students develop the emotional and behavioral toolkits they need and deserve to have, and because it can detrimentally undermine young people's self-concept and lived experience at a critical moment in their development and identity formation.

As such, it is necessary that the primary inquiry and procedural structure of MDRs and hearings be revised and re-envisioned to better serve the needs of students with disabilities and of society at large. Arguing for a general shift in thinking to a "family law approach" and appropriating (modified) family law frameworks, this Article concludes that a modified "best interests of the child" analysis, reconfigured under a "best interests of the student (with disabilities)" framework, should be adopted because it would more adequately protect students' rights and produce better student outcomes. The proposed reforms would facilitate a more student-centered approach as well as a more nuanced consideration of linkages not only between a student's (mis)conduct and their disability, but also of intersectional equity issues. (In other words, it would allow assessors to consider the effects of compounding factors such as a student's race, socioeconomic status, food or housing insecurity, immigration status, limited English proficiency, trauma history, and other conditions and experiences) and the potentially heightened detrimental effects of harsh or exclusionary disciplinary actions on (certain) disabled students because of their disabilities. The proposed revisions would expand the current inquiry beyond simply the cause(s) of (mis)conduct to consider how a student's disability might affect their experience of discipline, including whether the student's disability might compromise the utility or efficacy of the action based on the student's ability to understand, internalize, or otherwise productively respond to discipline because of their disability.

Finally, this Article describes the benefits and overall suitability of shifting to something more similar to a shared custody co-parenting model as a paradigm shift in this corner of special education law. It broadly advocates reconceiving of the Individualized Education Plan (IEP) team as a kind of "co-parenting team" with respect to discipline and behavior and identifies several specific ways to effectuate these changes. Moving toward a co-parenting framework would not only mitigate the inequitable power imbalance between parents and school staff but it would also be more conducive to helping children and young

people with behavioral disabilities (and disabilities generally) learn to manage their behaviors and regulate their emotions by promoting consistency in discipline and behavioral expectations across school and home environments.

INTRODUCTION

In 2016 alone, U.S. students collectively lost an astounding 63,000 school years' worth of instructional days, in aggregate, to out-of-school suspensions.² There has been a steady uptick in the use of exclusionary discipline since the 1970s, with suspension rates nearly doubling between 1974 and 2000.³ The proliferation of so-called “zero tolerance” and other harsh disciplinary models in K–12 school settings⁴ adopted in the 1980s accelerated significantly beginning in the late 1990s and early 2000s as schools moved to adopt stricter approaches to student discipline in the wake of Columbine and other school shootings, events which continue to drive widespread public support for harsh disciplinary policies.⁵ These disciplinary practices disproportionately punish students who are already marginalized and vulnerable.⁶ In

2. DANIEL J. LOSEN & AMIR WHITAKER, UCLA CTR. FOR CIV. RTS. REMEDIES & ACLU, 11 MILLION DAYS LOST: RACE, DISCIPLINE, AND SAFETY AT U.S. PUBLIC SCHOOLS (PART 1) 4 (2018), <https://www.aclu.org/report/11-million-days-lost-race-discipline-and-safety-us-public-schools-part-1>.

3. *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited June 24, 2021) (“Rates of suspension have increased dramatically . . . from 1.7 million in 1974 to 3.1 million in 2000 . . .,” with students of color bearing the brunt of these increases.).

4. While this Article focuses specifically on exclusionary discipline in K–12, the Center for American Progress estimated that some 50,000 preschoolers received at least one suspension in 2016, while a staggering 17,000 were expelled over the same time period. Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. FOR AM. PROGRESS (Nov. 6, 2017), <https://www.americanprogress.org/article/new-data-reveal-250-preschoolers-suspended-expelled-every-day/> (reporting on data analysis conducted by researchers at the Center for American Progress using data collected in the 2016 National Survey of Children’s Health).

5. Sandra M. Way, *School Discipline and Disruptive Classroom Behavior: The Moderating Effects of Student Perceptions*, 52 SOCIO. Q. 346, 346 (2011). It is also worth noting that, at least in theory, “the majority of . . . parents support zero tolerance policies and strict enforcement of rules regarding minor misconduct.” LOSEN & WHITAKER, *supra* note 2, at 3.

6. See, e.g., Russell J. Skiba, *The Failure of Zero Tolerance*, 22 RECLAIMING CHILD. & YOUTH 27, 27 (2014) (explaining that despite initially being touted “as a solution to youth

particular, schools do very “little to take into account the needs of students with disabilities,” who are particularly impacted—and indeed, in many cases, specifically targeted—by exclusionary disciplinary practices namely out-of-school suspension and expulsion.⁷

Existing federal protections do not sufficiently protect vulnerable populations of students with disabilities and must be revised to better serve the needs of disabled students,⁸ especially highly vulnerable

violence,” zero tolerance policies “have created a school to prison pipeline” that exacerbates the criminal justice system’s disproportionate reach and impact with respect to youth of color).

7. E.g., Eden B. Heilman, *Stranger Than Fiction: The Experiences of Students with Disabilities in the Post-Katrina New Orleans School System*, 59 LOY. L. REV. 355, 378 (2013).

8. This Article will refer to this population using both the phrase “students with disabilities” (and “children with disabilities” and “individuals with disabilities”) and the term “disabled students” (and “disabled children” and “disabled individuals”). While “person-centered” language (i.e., “individuals with disabilities”) has increasingly come to be seen as preferable to “identity-centered” terminology (i.e., “disabled individuals”) in mainstream dialogues and care provision contexts, the privileging of “person-centered” descriptors has also been criticized by (some) members of the disabled community, who view the decentering of disability as inherently problematic and identity-negating in that a person-centered approach implicitly perpetuates an ableist view that defines disability as a deficit and presupposes that disabled persons are or should be ashamed of their disabilities. See DISABILITY LANGUAGE GUIDE, STANFORD UNIV. 1 (July 2019), https://disability.stanford.edu/sites/g/files/sbiybj1401/f/disability-language-guide-stanford_1.pdf (emphasizing that the disability community is not a monolith and that individuals vary in terms of their preferred language and recommending an approach that “use[s] [person-centered language and identity-centered language “interchangeably to acknowledge and respect” the diversity of individual preferences); *Disability*, AM. PSYCH. ASS’N (Aug. 2021), <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/disability> (explaining that “identity-centered language allows the individual to claim the disability and choose their identity rather than permitting others . . . to name it or to select terms with negative implications”). It is worth noting that we do not typically utilize a person-centered approach when referring to other marginalized identities, such as race or ethnicity (while “people of color” is commonly used as an umbrella term for non-white individuals, it is standard to use language such as “Black individuals” as opposed to “individuals who are Black”), e.g., *Racial and Ethnic Identity*, AM. PSYCH. ASS’N. (Sept. 2019), <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/racial-ethnic-minorities>, and gender identity (identity-centered language such as “trans or non-binary individuals” or “women” is accepted parlance, while person-centered language like “individuals who are trans or non-binary” or “female persons” is not viewed as necessary or preferable), e.g., *Gender*, AM. PSYCH. ASS’N. (Sept. 2019), <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/gender>.

These terminological distinctions suggest that, whereas other marginalized identity factors may, and indeed should, be regarded as neutral or positive descriptors that do not undermine or detract from an individual’s personhood or humanity, disability is, by contract, an inherently negative and dehumanizing descriptor and tacitly presupposes that disabled individuals do or should

subpopulations, such as students of color with disabilities. The manifestation determination review (MDR) process outlined in the Individuals with Disabilities Education Act (IDEA) affords some, largely procedural, protection of students with disabilities against excessive disciplinary responses to conduct directly stemming from the student's disability. Overall, however, the manifestation inquiry is inadequate, problematic, and ultimately unworkable as a means of effectuating the aims of the IDEA.

A central flaw of the assessment framework is that it is predicated on a faulty assumption that disability is (always, or generally speaking) severable from a student's identity, experience, and, ultimately, their behavior or (mis)conduct. This does a profound disservice to disabled young people, particularly those with chronic or life-long disabilities who cannot be "cured" because this approach does not effectively help students develop the emotional and behavioral toolkits they need and deserve to have, and because it can detrimentally undermine young people's self-concept and lived experience at a critical moment in their development and identity formation. As such, it is imperative that the primary inquiry and procedural structure of MDRs and hearings be revised and re-envisioned to better serve the needs of students with disabilities and of society at large.

aspire to see themselves as "more than just" their disability. On the other hand, "students with disabilities" is more consistent with the language employed by educators, researchers, practitioners, and other experts in the field. Additionally, it could be considered more accurate (versus "disabled students") due to the way the IDEA defines disability to exclude disabled students who are deemed not to be "adversely affected" by their disability in schooling environments, while simultaneously including students who may not fall under a traditional definition of disability (and may not identify as disabled), such as students with asthma, as well as students who may be incorrectly diagnosed with conditions such as ADHD or learning disabilities but are not actually disabled. Cf. *What Is the Definition of Disability Under the ADA?*, ADA NAT'L NETWORK, <https://adata.org/faq/what-definition-disability-under-ada> (last visited Mar. 18, 2022) (registering the distinction between a "medical" definition of "disability" versus the use of "disability" as "a legal term" in legislation such as the Americans with Disabilities Act (ADA) and the IDEA and specifically noting that unlike other definitions of disability, the ADA defines this term to "include[] people who have a record of [a physical or mental impairment that substantially limits one or more major life activity], even if they do not currently have a disability," as well as "individuals who do not have a disability but are regarded as having a disability"). As such, this Article will draw from both person-centered and identity-centered nomenclatures in recognition of the diverse perspectives on this issue that exist within the disability community as well the unique considerations that are at play in this specific context.

Part II of this Article summarizes the use of exclusionary discipline in K–12 school settings in the United States, highlighting the detrimental and disproportionate impact out-of-school suspensions and expulsions have on students with disabilities, especially disabled students of color and others experiencing compounded marginalization based on disability and other identity factors. Next, Part III provides an overview of federal legal protections for students with disabilities against discriminatory disciplinary and removal practices under the IDEA and introduces the MDR as the primary mechanism of procedural protection in the student discipline context. Part IV frames key limitations of the manifestation determination inquiry and asserts that its underlying framework is fundamentally flawed. It argues that the central task of the MDR as envisioned under the IDEA—parsing disability and self—is not only inherently unworkable in that it requires an impossible bifurcation of identity (into essentially a “disabled” self and “non-disabled” self), but also gravely problematic in that it is essentially rooted in and designed to perpetuate ableism. Part V asserts the need for a broad paradigm shift around student disciplinary decision-making and proposes radically re-envisioning the focus and overarching goal(s) of the manifestation determination inquiry to align with the dominant analytical frameworks and overarching values in contemporary family law. Specifically, it recommends the adoption of a modified “best interests of the child” standard to guide the MDR analysis and advocates (re)conceptualizing the IEP team as a kind of joint custodial or co-parenting enterprise to produce higher levels of harmony and consistency and, ultimately, better outcomes for students.

I. EXCLUSIONARY DISCIPLINE IN K–12 SCHOOL SETTINGS

Despite its proven ineffectiveness and myriad, substantial detrimental impacts, the use of exclusionary discipline remains widespread at all levels of primary and secondary schooling (K–12). The U.S. Department of Education (DOE) has unequivocally stated that “[s]uspensions don’t work.”⁹ Notably, the DOE itself has specifically identified “decreasing suspensions and expulsions” as a central goal under its broader initiative to “[r]ethink[] [d]iscipline” and “creat[e] supportive school climate[s].”¹⁰ In 2017, the agency even went so far as to promulgate guidance on this topic. This guidance establishes the overall ineffectiveness of suspension, describes the “impacts” and “negative consequences” suspension has on individual students as well as the entire school community, and outlines “effective alternatives,” such as “positive behavioral interventions and supports” and “proactive, preventive approaches [that] address the underlying cause or purpose of the behavior, and reinforce positive behaviors.”¹¹ Other agencies and organizations, including state education departments¹² as well as professional groups such as the National Association of Secondary School Principals, have adopted similar positions and likewise advocate for “the limited use of suspension, expulsion, and other punishments that remove students from instruction” and urge the use of “alternative methods to address school discipline” that are less detrimental to students.¹³

Suspensions and expulsions function within a “traditional deterrence framework,” which posits that “more severe discipline will reduce misbehavior.”¹⁴ But, in fact, “more school rules and higher perceived strictness” typically generate higher rather than lower levels of “disruptive behavior” among students—and may even backfire by

9. *Rethinking Discipline*, U.S. DEP’T EDUC. (Jan. 2017), <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html> (explaining that “discipline practices that remove students from instruction” do not have a positive impact on “either student behavior or school climate”).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Way, *supra* note 5, at 346.

engendering defiant opposition to authority.¹⁵ Studies suggest that students are most likely to adhere to behavioral codes and school community norms they view as “fair[] and legitima[te].”¹⁶ As an overall matter, however, exclusionary discipline in the K–12 context relies on a basic assumption that “youth perceive, comprehend, behave, and respond like adults”—despite ample evidence that this belief is “antithetical to all that is known about child and adolescent development.”¹⁷

Nevertheless, proponents of suspension often defend the practice as a necessary mechanism to hold students accountable for misconduct and discourage future malfeasance.¹⁸ Exclusionary disciplinary measures are also frequently justified under a utilitarian approach to community safety: within this framework, removing “disruptive” students from the learning environment is viewed as necessary to ensure the safety and wellbeing of students who meet behavioral expectations and who are deemed to require, and even, in a sense, deserve, protection *from* certain other students.¹⁹ Suspension is thus often seen as an essential behavioral management tool that enables educators and school administrators to maintain control of the classroom and community safety.²⁰

15. *Id.*

16. *See id.* at 347.

17. *See* Lisa H. Thureau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. 'S LEGAL RTS. J. 30, 30 (2009).

18. *See* Way, *supra* note 5, at 346.

19. *E.g.*, Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 3 (2000). *See also, e.g.*, Taylor Swaak, *As California Expands Ban on ‘Willful Defiance’ Suspensions, Lessons from L.A. Schools, Which Barred Them Six Years Ago*, 74 (Sept. 20, 2019), <https://www.the74million.org/article/as-california-expands-ban-on-willful-defiance-suspensions-lessons-from-l-a-schools-which-barred-them-six-years-ago/> (registering “concerns . . . that eliminating [defiance] suspensions would embolden unruly students and disrupt classroom instruction for other students” while also noting that the California state teachers’ union has stated that “suspensions should be used as a last resort” and called upon school districts to “provide sufficient resources for alternative discipline programs”).

20. *See* RECENT TRENDS IN STATE LEGISLATIVE EXCLUSIONARY DISCIPLINE REFORM, COMM. FOR CHILD. 3 (2018), <https://www.cfchildren.org/wp-content/uploads/policy-advocacy/exclusionary-policy-brief.pdf> (stating that in recent years, “20 [state] legislatures [have] enacted or proposed laws limiting the use of, or aiming to reduce, exclusionary discipline in public schools”); *See, e.g.*, Kevin Fasick & Danika Fears, *Eva Moskowitz Defends Charter Schools’ Suspension Policies*, N.Y. POST (Jan. 22, 2016, 11:36 PM),

Yet, despite the various justifications proffered by defenders of exclusionary discipline, overall, approximately 95% of suspensions nationwide are issued for “disruptive behavior” or “other” non-serious misconduct, as opposed to actually violent or physically, psychologically, or emotionally harmful conduct.²¹ This has led some critics of the harsh and excessive use of exclusionary discipline in K–12 settings to question the efficacy and interests of these practices.²² Notably, after the Los Angeles Unified School District implemented a district-wide ban on out-of-school suspensions for defiant and disruptive behavior, “[t]he percentage of middle and high schoolers

<https://nypost.com/2016/01/22/eva-moskowitz-defends-charter-schools-suspension-policies/> (reporting on Success Academy Charter Schools CEO Eva Moskowitz’s defense of the network’s “no-nonsense . . . approach to discipline,” citing a need to protect students as well as educators from “acts of violence that could put [them] in danger”). *But see Rethinking Discipline*, *supra* note 9 (emphasizing the demonstrated ineffectiveness of suspension as a tool for promoting student and community safety in schools). While Moskowitz has maintained that the vast majority of suspended students “return [to class] the next day” and that suspensions do not result in meaningful losses of instructional time (in part because of the “additional instruction[al]” hours students receive at Success Academy and many other charter schools), this runs counter to her claim that most suspensions are issued “for acts of violence” that endanger school communities, *see* Fasick & Fears, *supra* note 20, and is also patently inconsistent with research indicating that receiving even a single suspension has a measurable negative impact on students’ educational and life outcomes, *see* Swain-Bradway et al., WHAT ARE THE ECONOMIC COSTS OF IMPLEMENTING SWPBIS IN COMPARISON TO THE BENEFITS FROM REDUCING SUSPENSIONS, POSITIVE BEHAVIORAL INTERVENTION AND SUPPORTS (2017), <https://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Documents/PBIS/2017-18/Economic%20Costs%20of%20Implementing%20SWPBIS%20in%20Comparison%20to%20the%20Benefits%20from%20Reducing%20Suspensions.pdf> (citing RUMBERGER & LOSEN, *infra* note 36).

21. *See* Deanna Adams & Erica Meiners, *Who Wants to Be Special?: Pathologization and the Preparation of Bodies for Prison*, 453 COUNTERPOINTS 145, 148 (2014). *Accord* Pamela Fenning et al., *Call to Action: A Critical Need for Designing Alternatives to Suspension and Expulsion*, 11 J. SCH. VIOLENCE 105, 105 (2011) (finding that “[s]uspension [is] commonly offered as a response for all behaviors, including minor ones” and urging schools “to address the long-standing punitive nature of school discipline,” namely by implementing alternative school discipline practices).

22. *See* Christopher J. Ferguson, *Does Suspending Students Work?*, TIME (Dec. 5, 2012), <https://ideas.time.com/2012/12/05/does-suspending-students-work/> (remarking in response to the titular question that “[i]ncreasingly, the answer seems to be no,” and that, “[i]n fact, suspensions may do more harm than good”); *Rethinking Discipline*, *supra* note 9.

feeling some degree of safety in [district] schools” actually increased, rising to approximately 90%, a seven-year high-water mark.²³

Moreover, attorney and current director of the Center for Civil Rights Remedies at UCLA, Daniel Losen, plainly asserts that “[s]chools don’t need to rely on suspensions,” underscoring the “many alternatives that teach good behavior and hold students accountable for their conduct while keeping them in school.”²⁴ In fact, since 2013, the state of California has prohibited public schools from suspending students in kindergarten through third grade for defiance or for “disrupting classroom activities,” instead requiring administrators to utilize alternative methods where students “remain under school supervision” and “are expected to participate in activities that address the behavior that led to their being removed from the classroom.”²⁵ More recently, in 2019, this prohibition was extended to cover all students in kindergarten through eighth grade.²⁶ While California’s approach to defiance- and

23. Swaak, *supra* note 19. In 2013, the Los Angeles Unified School District (LAUSD) “adopted the School Climate Bill of Rights,” which “established restorative justice programs and other non-punitive strategies to promote positive behavior and ameliorate issues that might otherwise lead to a suspension” and sought to “keep students in school where they have opportunities to succeed.” *Id.* (quoting then-LAUSD superintendent Austin Beutner).

24. *School Suspensions Cost Taxpayers Billions*, UCLA CIV. RTS. PROJECT (June 1, 2016), <https://www.civilrightsproject.ucla.edu/news/press-releases/featured-research-2016/school-suspensions-cost-taxpayers-billions>.

25. Louis Freedberg, *California to Extend Ban on Punishing Students Out of School for Disruptive Behavior*, EDSOURCE (Sept. 9, 2019), <https://edsources.org/2019/california-to-ban-pushing-students-out-of-school-for-disruptive-behavior/617326>.

26. *Id.* (noting that the primary motivation for enacting the 2019 legislation “was the fact that disruption and willful defiance” are “vague categories that are subject to a range of interpretations” and that suspensions for these behaviors disproportionately impact students of color, especially Black boys). As enacted, the 2019 law permanently banned suspensions for defiant and disruptive behavior for students in kindergarten through fifth grade and provided for a temporary moratorium on these suspensions for students in grades six through eight, which is slated for re-evaluation at the expiration of the initial five-year trial period. Swaak, *supra* note 19. Prior to the passage of the 2019 legislation, the Los Angeles Unified School District, as well as several other large public school districts in the state, including those serving Oakland and San Francisco, had already “abolished the use of willful defiance suspensions entirely.” *Id.* As a result of both the state-wide and district-level prohibitions, suspension rates for disruptive and defiant behavior fell to “one-sixth the level they were a half dozen years ago” and supporters are hopeful that the state-wide moratorium “will result in less [sic] instructional days lost . . . improved academic outcomes and school climate, as well as decreased rates of dropout and interaction with the juvenile justice system. Freedberg, *supra* note 25 (quoting LAUSD board

disruption-related suspensions for elementary and middle school students remains a minority position among U.S. states and local school districts, advocates in other states have called for similar moratoriums or restrictions on the use of exclusionary discipline in K–12 school settings, and a handful of states have attempted to address these issues legislatively or are currently taking steps in this direction.²⁷

A. Detrimental Impact on Students with Disabilities

Exclusionary discipline disproportionately impacts students with disabilities, especially disabled students of color. K–12 students with disabilities across all school settings are suspended and expelled from school at higher rates than their non-disabled peers.²⁸ Research conducted at both the national and state levels indicates that students with disabilities are suspended “about twice as often as their non-disabled peers.”²⁹ Students with certain disabilities, including various

member Jackie Goldberg). *But see* Swaak, *supra* note 19 (noting that despite the overall decrease in suspensions for defiance and disruption, “racial disparities in suspensions have remained” and even, in some cases, “widened . . . since [California’s 2019] ban passed”).

27. *See, e.g.*, Rachel Silberstein, *Advocates to New York: Ban K-12 School Suspensions During COVID-19 Pandemic*, TIMES UNION (Aug. 31, 2020, 4:09 PM), <https://www.timesunion.com/news/article/Advocates-ask-state-to-ban-suspension-in-K-12-15527935.php> (“Advocates are asking the [New York State] Education Department to ban suspension in K-12 schools and invest in therapeutic alternatives during the COVID-19 crisis” to “minimize the long-term traumatic impact of the COVID-19 health pandemic on students and school communities.”); Ann Schimke, *New Colorado Bill Aims to Keep Young Students in School – Even After They Misbehave*, CHALKBEAT COLO. (Feb. 21, 2019, 5:04 PM), <https://co.chalkbeat.org/2019/2/21/21106871/new-colorado-bill-aims-to-keep-young-students-in-school-even-after-they-misbehave>. *See also* RECENT TRENDS IN STATE LEGISLATIVE EXCLUSIONARY DISCIPLINE REFORM, *supra* note 20, at 3–4 (stating that as of 2018, 20 state legislatures had considered or adopted legislation expressly limiting the use of suspension for students in certain grades or as a response to certain types of misconduct).

28. *E.g.*, Liat Ben-Moshe & Sandy Magaña, *An Introduction to Race, Gender, and Disability: Intersectionality, Disability Studies, and Families of Color*, 2 WOMEN, GENDER & FAMS. COLOR 105, 107 (2014) (citing Adams & Meiners, *supra* note 21). It is worth noting that some experts have “expressed concerns with potential inaccuracies in discipline reporting,” whether due to unintentional errors or deliberate underreporting of either overall suspension rates or suspension rates for disproportionately targeted demographics. *See* Swaak, *supra* note 19.

29. *E.g.*, Adams & Meiners, *supra* note 21, at 156 (finding that, nationwide, approximately 13% of students with disabilities are suspended, compared to approximately 7% of non-disabled students); Michele Scavongelli & Marlies Spanjaard, *Succeeding in Manifestation*

psychological and emotional disorders, are disciplined at even higher rates than peers with other types of disabilities.³⁰ Additionally, while students with disabilities of all kinds may be affected by the disproportionate impact of school discipline policies in various ways, evidence suggests that, for example, school policing practices, have a heightened detrimental impact on students with behavioral and learning disabilities.³¹

Punitive exclusion is associated with myriad detrimental impacts on students, particularly marginalized or otherwise “at risk”³² populations, including, indeed perhaps especially, students with disabilities. One study found that the average loss of instructional time due to suspension for students with disabilities was forty-four school days over the course of one school year—nearly twice as many days as students without disabilities.³³ Studies have indicated that for all elementary students (students in kindergarten through fourth grade), missing even just three instructional days over the course of a school year is correlated with a measurable decrease in student assessment scores.³⁴ The loss of instructional hours due to classroom removals often has especially negative effects on academic outcomes for students with disabilities, in part because these students rely on access to specialized services and

Determination Reviews: A Step-by-Step Approach for Obtaining the Best Result for Your Client, 10 U. MASS. L. REV. 278, 280 (2015) (reporting that in Massachusetts, students with disabilities comprise approximately 17% of K–12 students but constitute approximately one-third of all disciplinary removals).

30. Logan J. Gowdey, *Disabling Discipline: Locating A Right to Representation of Students with Disabilities in the ADA*, 115 COLUM. L. REV. 2265, 2268 (2015).

31. *Id.*

32. The term “at risk” has been criticized for referring to students “as if they are doomed already, and as if the expectation is to fail in life.” See Christina A. Samuels, ‘At Promise’? Can a New Term for ‘At-Risk’ Change a Student’s Trajectory?, EDUC. WK. (Jan. 9, 2020), <https://www.edweek.org/policy-politics/at-promise-can-a-new-term-for-at-risk-change-a-students-trajectory/2020/01> (recognizing the importance and consequences of the language we use to describe students and advocating for the use of a more positive, asset-based vocabulary to refer to and discuss students facing challenges at school). Cf. generally DAVID FLINK, THINKING DIFFERENTLY: AN INSPIRING GUIDE FOR PARENTS OF CHILDREN WITH LEARNING DISABILITIES (2014) (broadly advocating for a more positive construction of learning disabilities, including through the use of affirmative, disability-positive language).

33. LOSEN & WHITAKER, *supra* note 2, at 5.

34. Kathleen Hebbeler & Donna Spiker, *Supporting Young Children with Disabilities*, 26 FUTURE CHILD. 185, 190 (2016) (arguing that “[m]issing opportunities to learn is especially harmful for young children”).

supports as “a critical environmental factor that heavily influences their” educational participation and outcomes.³⁵ Suspensions and expulsions also significantly increase the likelihood of both grade retention and high school non-completion.³⁶

There are also significant psychological, emotional, and social effects on students with disabilities subjected to exclusionary discipline.³⁷ Many disabled students are already at heightened risk for developing negative self-concept, and research indicates that “[s]chool experiences affect students’ perceptions” of a wide range of personal traits and characteristics, including academic aptitude, social likeability, behavior, and more—and that these internalized beliefs can in turn impact academic performance and social outcomes.³⁸ Additionally, frequent or excessive disciplinary intervention may actually increase the likelihood and frequency of conduct violations among affected students.³⁹

35. *See id.*

36. RUSSELL W. RUMBERGER & DANIEL J. LOSEN, UCLA CTR. FOR CIV. RTS. REMEDIES, *THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT* 6 (2016). A 2015 study published by researchers at the Johns Hopkins University found that receiving even just a single suspension in ninth grade was associated with a twofold increase in dropout risk for affected students. *See id.*

37. *See* Alyssa Navarette Thorn & Madeline Carr, *Disproportionate Discipline of Students with Disabilities*, KENNEDY KRIEGER INST., <https://www.kennedykrieger.org/community/initiatives/maryland-center-developmental-disabilities/information-dissemination/posters/disproportionate-discipline-students-disabilities> (last visited Mar. 31, 2021). *Cf. Disabled Children Are Marginalized and Excluded in Society*, WORLD CHILD., <https://worldofchildren.org/children-issues/disabilities/> (last visited Mar. 15, 2022) (emphasizing that “[c]hildren with disabilities are one of the most marginalized and excluded groups in society” and frequently “fac[e] . . . discrimination in the form of negative attitudes [and] lack of adequate policies and legislation,” making them particularly vulnerable to the detrimental impacts of exclusionary discipline).

38. Batya Elbaum & Sharon Vaughn, *School-Based Interventions to Enhance the Self-Concept of Students with Learning Disabilities: A Meta-Analysis*, 101 *ELEMENTARY SCH. J.* 303, 303 (2001); *see also* Stephanie L. Haft et al., *Impact of Mentoring on Socio-Emotional and Mental Health Outcomes of Youth with Learning Disabilities and Attention-Deficit Hyperactivity Disorder*, 24 *CHILD & ADOLESCENT MENTAL HEALTH* 318, (2019) (explaining that “[l]earning disabilities (LD) and attention-deficit hyperactivity disorder (ADHD) are often accompanied by significant socio-emotional impairments and mental health challenges”).

39. *See* CHRISTINA LICALSI ET AL., *An Empirical Examination of the Effects of Suspension and Suspension Severity on Behavioral and Academic Outcomes*, *AM. INSTS. FOR RSCH.* 33, 35 (2021) (finding that, for both middle and high school students, out-of-school suspensions, “in particular, actually had a negative effect on . . . students’ behavioral incidents, both overall and

Furthermore, exclusionary discipline actively harms students, particularly Black students and other youth of color, as a mechanism of the “school-to-prison pipeline,” a term that broadly refers to the “increase[ed] amount of contact students have [with] the juvenile justice system because of the discipline practices implemented by schools” over the past several decades.⁴⁰ Students who experience repeated suspensions or expulsions are more likely to have interaction(s) with the criminal justice and carceral systems.⁴¹ Furthermore, this type of disciplinary action is generally associated with the increased criminalization of youth behavior.⁴²

Overall, suspensions also have high societal and economic costs. In 2016, UCLA’s Civil Rights Project estimated that suspensions issued to tenth graders *alone* cost the United States approximately \$35 billion annually.⁴³ A similar study of students in California placed the economic cost of suspension-driven non-completion in a single grade cohort at approximately \$2.7 billion over the course of that cohort’s generational lifetime.⁴⁴ In terms of economic costs associated with school non-completion, not only do individual students who do not complete high school significantly limit their lifetime earning potential, but this also, in turn, translates to broader economic costs in the form of

for more severe” infractions and concluding that, especially for older students, “rather than serving as a lesson or deterrent,” out-of-school suspensions are ineffective at reducing future behavioral incidents and “instead result[] in continued severity in future punishment”). *Cf.* Navarette Thorn & Carr, *supra* note 37 (explaining that “[r]estorative approaches and methods that focus more on positive behavioral interventions and effective classroom management techniques have been shown to be more effective than exclusionary discipline practices at correcting student behavior”).

40. Jessica Schneider, *What Rights Do Students Have in the Charter School Era?*, AM. BAR. ASSOC. CHILD.’S RTS. LITIG. (2017), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/what-rights-do-students-have-in-the-charter-school-era/?msclkid=bd250b93baa711eca2f1eec688886b88>. *See also* *School-to-Prison Pipeline*, *supra* note 3 (The ACLU defines this phenomenon using slightly stronger and more direct language: “a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems.”).

41. *See* Scavongelli & Spanjaard, *supra* note 29, at 280; *School-to-Prison Pipeline*, *supra* note 3.

42. *See, e.g.,* *School-to-Prison Pipeline*, *supra* note 3; Skiba, *supra* note 6, at 27.

43. *School Suspensions Cost Taxpayers Billions*, *supra* note 24.

44. *Students Suspended from School*, KIDSDATA (2019), <https://tinyurl.com/yzctew4>.

lost wages and unrealized tax revenue.⁴⁵ Higher rates of unemployment and underemployment among those without a high school degree also make this population more reliant on public health and welfare services (and individuals with disabilities often require more resource-intensive care to manage their condition(s), further driving up long-term costs borne by society at large).⁴⁶ Because suspensions and high school non-completion are also associated with higher rates of contact with the juvenile and criminal justice systems, exclusionary discipline correlates with increased expenditure on carceral operations and infrastructure and contributes to the broader problem of mass incarceration.⁴⁷

1. Disproportionate Racial Impact and Other Intersectional Concerns

In the school disciplinary context, race and socioeconomic status are compounding factors for students with disabilities.⁴⁸ According to researchers Deanna Adams and Erica Meiners, non-white students with disabilities “are the most likely to receive the harshest school sanctions.”⁴⁹ This population is suspended at a rate that is approximately sixteen percentage points higher than that of white students with disabilities.⁵⁰ Indeed, research indicates that educators and school administrators are susceptible to both racist and ableist biases in disciplinary decision-making and tend to “react harshly to behaviors

45. See LOSEN & WHITAKER, *supra* note 2, at 3 (citing research indicating that “suspension alone contributes to an estimated 7-point lower graduation rate” nationwide); RUMBERGER & LOSEN, *supra* note 36, at 6 (citing 2015 research finding an “approximately 11 percentage-point increase in the probability of dropping out” due to suspension).

46. *Cf. Students Suspended from School*, *supra* note 44.

47. RUMBERGER & LOSEN, *supra* note 36, at 7. See also Scavongelli & Spanjaard, *supra* note 29, at 280.

48. *Id.* at 2276. Race and poverty are most predictive of disciplinary outcomes. *Id.* Additionally, male students of all races are suspended at higher rates than their female peers. See *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, GOV'T ACCOUNTABILITY OFF. (2018), <https://www.gao.gov/assets/gao-18-258.pdf>.

49. Adams & Meiners, *supra* note 21, at 156 (noting that students of color with disabilities are “sanctioned with greater frequency, and with harsher measures, by school discipline policies”).

50. *Id.* (citing a 2012 study demonstrating that while just one in twenty white students was suspended one or more times over the course of one school year, an astonishing one out of every six Black students received at least one suspension during the same time period).

that fall outside of a white cultural frame of reference.”⁵¹ According to a 2012 study of school discipline data conducted by the New York Civil Liberties Union, students of color with disabilities are suspended not just for violent or dangerous “altercations” and “physically aggressive behaviors” that might pose a legitimate danger to other students or school community members, but also, and indeed quite commonly, for a broad range of lower-level, typically non-violent, vaguely defined misconduct, such as “horseplay,” “insubordination,” and “percent level one behavior” (the latter categorization encompassing such innocuous rule-breaking as “chewing gum” and “getting out of [one’s] seat without permission”).⁵² The so-called “adultification” of Black children has been identified as contributing to the perception of youth of color as inherently more dangerous, “less innocent,” more knowledgeable “about adult topics,” “more culpable for their actions,” “less needing of protection,” and ultimately, “more adult-like” overall compared to their white peers.⁵³ This dehumanizing viewpoint falsely leads many in positions of authority to “punish [children of color] more harshly” and perpetuates systemic inequalities along racial lines in the public school system and other institutional settings.⁵⁴

Students of color are also generally “overrepresented in special education” settings, where they are “disproportionately labeled in ‘soft’

51. Anne Gregory & Edward Fergus, *Social and Emotional Learning and Equity in School Discipline*, 27 SOC. & EMOTIONAL LEARNING 117, 117 (2017). Accord Swaak, *supra* note 19 (quoting education equity advocate Aurea Montes-Rodriguez) (registering ongoing “‘systemic issues of racial biases’” in school settings and noting their particular effect on Black students, who are often “‘profiled or disciplined in harsher ways than other students’”).

52. See Adams & Meiners, *supra* note 21, at 156 (citing the New York Civil Liberties Union’s report).

53. See *New Study: The ‘Adultification’ of Black Girls*, ANNIE E. CASEY FOUND. (July 27, 2017), <https://www.aecf.org/blog/new-study-the-adultification-of-black-girls> (also citing prior research demonstrating that “[a]dultification contributes to a false narrative that [B]lack youths’ transgressions are intentional and malicious, instead of the result of immature decision making—a key characteristic of childhood”). Notably, “Black girls are disciplined for behaviors that diverge from white femininity and closely match stereotypical images of Black women as angry, hostile, and hypersexualized” as well as for “behaviors that support academic success, such as outspokenness,” behaviors which are frequently “misperceived as aggressive.” Hailey R. Love et al., *Whose Parenting Is Legitimate?: School Positioning of Multiply-Marginalized Black Families and Consequences for Black Girls*, in RACISM BY ANOTHER NAME: BLACK STUDENTS, OVERREPRESENTATION, AND THE CARCERAL STATE OF SPECIAL EDUCATION 184 (Dorothy E. Hines et al., eds. 2021).

54. *Id.*

disability categories such as emotionally disturbed, ADHD, and, historically, 'mental retardation'"⁵⁵ While certain disabilities and conditions do appear to impact certain populations or groups at higher rates, or in more pronounced, or simply different, ways, the overrepresentation of non-white students in special education classrooms is not purely a function of heightened incidence rates of disability among these student populations: according to Adams and Meiners, special education classifications have long "been manipulated to harm youth of color."⁵⁶ Indeed, Congress acknowledged this fact in 1997 and has since attempted to "specifically address [the] overrepresentation of minorities in special education" in every subsequent reauthorization of the IDEA.⁵⁷ Yet, overrepresentation "persists," despite these efforts.⁵⁸

Nevertheless, it is necessary and productive to acknowledge that both race and socioeconomic status appear to play a role in the overall incidence, diagnosis, treatment, and life outcomes associated with disability. First, however, with respect to race, it is imperative to distinguish the impact of the lived experience of chronic and systemic racism from that of race itself (i.e., as a social construct, categorization, or identity) and recognize that "mental health issues are often compounded by the psychological stress of systemic racism."⁵⁹ In terms

55. Ben-Moshe & Magaña, *supra* note 28, at 107. *But see* Kaili Chen, *Cultural Perspectives on Student Behaviors: A Study of American and Chinese Students*, 2 U.S.-CHINA EDUC. REV. 25, 26 (2005) (noting the "under-representation of Chinese [American] students in . . . special education" settings and asserting that, in addition to the fact that many U.S. educators lack the knowledge and training to work effectively with this student population, "[i]n some cases, anomalies may [be] masked or compounded by misconceptions and misunderstandings" arising from cultural differences). Immigrant students, especially those coming to the United States from non-English speaking countries or those with limited English proficiency, also face unique challenges with respect to (special) education in K-12 settings that may contribute to misidentification bidirectionally. *See id.* ("[T]eachers' attitudes and reactions to speakers of nonstandard English and the lack of culturally responsive assessment instruments are often cited as reasons for these students' lower academic achievement and referral to special education programs.").

56. Adams & Meiners, *supra* note 21, at 150. *Accord* Gowdey, *supra* note 30, at 2280 (noting "the overrepresentation of minority youth, and particularly [B]lack youth, in special education").

57. Adams & Meiners, *supra* note 21, at 154.

58. *Id.* at 155.

59. *See Why Mental Health Care Is Stigmatized in Black Communities*, USC SUZANNE DWORAK-PECK SCH. SOC. WORK (Feb. 12, 2019), <https://dworakpeck.usc.edu/news/why-mental-health-care-stigmatized-black-communities>.

of socioeconomic status, cognitive and psychological disorders are generally “more prevalent in lower socio-economic environments.”⁶⁰ For example, several known socioeconomically-linked risk factors associated with developmental delays exist, including “lack of prenatal care, [exposure to] environmental toxins, and toxic stress” during pregnancy.⁶¹ Additionally, certain specific conditions, such as post-traumatic stress disorder (PTSD), may also be directly or indirectly caused or triggered by poverty, which is now widely recognized as an “adverse childhood experience.”⁶² In general, children living in poverty face a “much greater” risk of experiencing trauma during their formative years.⁶³ In fact, according to a 2014 study, children growing up in urban areas with high levels of exposure to street and community violence were found to be at risk of developing PTSD at rates comparable to those of soldiers returning from combat.⁶⁴

Significant disparities also exist in terms of the availability, accessibility, and suitability of health and wellness resources, including with respect to diagnosis, education, and intervention or treatment,

60. Kamali Houston, *A Classroom as an Opportunity to Learn, Not an Obligation to Fill a Seat: Accommodating Hidden Disabilities in Marginalized Communities*, 63 HOWARD L.J. 431, 435 (2020).

61. Hebbeler & Spiker, *supra* note 34, at 190.

62. *Adverse Childhood Experiences*, INDIAN HEALTH SERV., <https://www.ihs.gov/dccs/mch/aces/> (last visited June 29, 2021) (defining an adverse childhood experience as a “potentially traumatic experience[] or event[] that can have negative, lasting effects on health and well-being” and further noting that “[e]conomic hardship (poverty) is the most common adverse childhood experience (ACE) reported nationally and in almost all [U.S.] states”). Other commonly reported ACEs include “divorce or separation of a parent or guardian,” “having been the victim of or witness to violence,” and “[l]iving with a parent who has an alcohol- or drug-use problem.” *Id.* Houston, *supra* note 60, at 435. *See generally Adverse Childhood Experiences (ACES)*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/aces/index.html> (last visited Feb. 15, 2021).

63. Lucy Darragh, *Adverse Childhood Experiences (ACEs): What Are They and Why Are They Important?*, POVERTY CHILD (Mar. 9, 2018), <https://povertychild.org/adverse-childhood-experiences-aces-what-are-they-and-why-are-they-important/>.

64. *See* Lois Beckett, *Living in a Violent Neighborhood Is as Likely to Give You PTSD as Going to War*, MOTHER JONES (Feb. 4, 2014), <https://www.motherjones.com/politics/2014/02/ptsd-among-wounded-americans-in-violent-neighborhoods/>. “[E]xposure to neighborhood violence” is considered an adverse childhood experience. *Adverse Childhood Experiences*, *supra* note 62 (further explaining that neighborhood violence is typically “among the most commonly-reported adverse childhood experiences in every state” across the country).

across socioeconomic strata and among different racial communities.⁶⁵ For example, despite the fact that psychological disorders, learning and attention issues, and other “hidden” (namely, mental, emotional, learning, or cognitive) disabilities are demonstrably more prevalent among lower-socioeconomic status groups,⁶⁶ these conditions are typically diagnosed and “treated,” or managed, at higher rates in middle class and affluent communities.⁶⁷ Additionally, according to mental health activist and former social work professor Dr. Ruth White, “seeking mental health care is stigmatized within many [B]lack communities,” and, as a result, only around one-third of Black Americans “who struggle with mental health issues will ever receive appropriate treatment.”⁶⁸ Finally, medical or therapeutic intervention may ultimately be “less fruitful for people without substantial socioeconomic resources.”⁶⁹ For example, medications to treat certain disabilities, such as ADHD, require specialist doctor visits and when prescribed, are often “prohibitively expensive without insurance.”⁷⁰

2. Cultures of Exclusionary Discipline in “No Excuses” Charter Schools

While it is important to recognize the broad diversity that exists among different charter schools and networks, there are, overall, observable patterns of persistent failure to meet the special education needs of students with disabilities, as well as evidence of “discriminatory practices” used against disabled students, including the overapplication of exclusionary discipline with insufficient recognition

65. Houston, *supra* note 60, at 432–33.

66. *See id.* at 435.

67. *Id.* at 436. Among other contributing factors, lower-income or otherwise marginalized or under-resourced families are often “unfamiliar with the symptoms of hidden disabilities,” whereas middle-class families tend to have higher level of symptom-recognition and are therefore able to seek professional diagnosis sooner. *Id.* at 433.

68. *Why Mental Health Care Is Stigmatized in Black Communities*, *supra* note 59. White and others attribute much of the observed “reluctance to seek both physical and mental health care” to “a general distrust of the medical establishment,” while also identifying as an additional barrier the fact that in Black and other marginalized or minority communities, “seeking mental health care is often viewed as a weakness, running counter to the survivalist mentality born from systemic oppression and chronic racism.” *Id.*

69. Houston, *supra* note 60, at 433.

70. *Id.* at 432–33.

of the role of disability in a student's behavioral profile.⁷¹ According to one study of New Orleans charter schools in the 2010–2011 school year, suspension rates for students with disabilities “dramatically exceeded” the statewide average, in some cases posting rates two to three times the statewide figure (14.2% of charter students with disabilities were disciplined with out-of-school suspensions over the course of the school year, which, as attorney and education law expert Eden Heilman notes, is “already high”).⁷² In 2016, researchers at UCLA’s Center for Civil Rights Remedies published findings demonstrating that both students of color and students with disabilities at charter schools were suspended at “excessive and disparate rates.”⁷³ According to their report, during the 2011–2012 school year, nearly 1,100 of the nation’s approximately 5,250 charter schools reported suspension rates for students with disabilities that were ten or more percentage points higher than suspension rates for students without disabilities.⁷⁴ Some charter school networks have even been found to utilize targeted exclusionary discipline against certain students as a tactic to effectively “counsel out” students with disabilities or behavioral challenges.⁷⁵ Nevertheless,

71. See Sarah Wieselthier, *Judicial Clarity: Giving Teeth to the Application of Federal Disability Laws in Charter Schools*, 2013 BYU EDUC. & L.J. 67, 68 (2013).

72. Heilman, *supra* note 7, at 376.

73. DANIEL J. LOSEN ET AL., UCLA CTR. FOR CIV. RTS. REMEDIES, CHARTER SCHOOLS, CIVIL RIGHTS, AND SCHOOL DISCIPLINE: A COMPREHENSIVE REVIEW 6 (2016), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/charter-schools-civil-rights-and-school-discipline-a-comprehensive-review/losen-et-al-charter-school-discipline-review-2016.pdf>. It is important to stress that while this study collected separate data for each of these two groups (racial minorities and individuals with disabilities), race and disability are not mutually exclusive but rather combine (with each other as well as other identities) to create intersectional identities. See generally *id.*

74. *Id.* at 6.

75. See Kylah Torre, *Charter Schools and the Process of “Counseling Out,”* 2 THEORY, RSCH. & ACTION URB. EDUC. (2013), <https://traue.commons.gc.cuny.edu/issue-2-fall-2013/torre/> (noting that, in addition to the fact that charter schools typically “accept a lower percentage of children with disabilities than [traditional] public schools do” and “are often less equipped to provide necessary services” to this student population—“despite the fact that they are required to do so by federal law”—charter schools have been found to engage in the “[c]ounseling out” of students with disabilities,” along with “other practices limiting the access special education students have to services” that “may lead to a kind of segregation by default”). See also, e.g., Kate Taylor, *At a Success Academy Charter School, Singling Out Students Who*

charter school students with disabilities possess the same rights as students in traditional public school settings.⁷⁶

Notably, while nationally, white students have historically (narrowly) comprised the largest single racial demographic served by charter schools,⁷⁷ many public charter schools are located in “underserved neighborhoods with high concentrations of low income, minority, and low performing students,” and indeed, “[m]any charter operators make the strategic decision” to pursue education reform efforts in these communities specifically.⁷⁸ Overall, charter schools also “consistently enroll[] a lower percentage of students with disabilities” compared to traditional public schools.⁷⁹

Have ‘Got to Go’, N.Y. TIMES (Oct. 29, 2015), <https://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html> (reporting on the use of suspensions as a tactic to effectively “counsel out” students with disabilities at Success Academy, a major public charter school network in New York City). The author of this Article was previously employed by Success Academy Charter Schools and worked at the organization’s central network offices from 2013–2017.

76. U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS 1 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-charter-school.pdf>. *But see* Schneider, *supra* note 40 (explaining that “charter staff and administration may be unaware of federal requirements or suggest they do not apply in the same way” and noting that “[t]here has . . . been local evidence of charter schools requesting application information that would discourage students with disabilities from applying”—including, in some cases, “inappropriate and sometimes illegal information, such as disability status”—and that, overall, “[m]ost [charter school] enrollment forms lacked clear nondiscrimination statements and a clear process that ensures charter schools welcome all students”).

77. *See Public Charter School Enrollment*, NAT’L CTR. FOR EDUC. STATS. (May 2021), <https://nces.ed.gov/programs/coe/indicator/cgb>. Across the country, public charter schools enroll approximately 3.3 million students, or around 7% of the nation’s public school students. *Id.*

78. *Details from the Dashboard: Charter School Race/Ethnicity Demographics*, NAT’L ALL. FOR PUB. CHARTER SCHS. 1, https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/NAPCS-2010-2011-Race_Ethnicity-Details-from-the-Dashboard_20120516T152831.pdf (last visited June 30, 2021).

79. Schneider, *supra* note 40 (citing data published in 2012 by the U.S. Government Accountability Office indicating that students with disabilities comprised approximately 8% of charter school students during the 2009–2010 school year, compared to just over 11% of students in traditional public school settings).

II. LEGAL PROTECTIONS FOR STUDENTS WITH DISABILITIES: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

The IDEA extends certain educational rights and protections to students with qualifying disabilities. Enacted in 1992, the IDEA represents the first federal legislative mandate that public schools provide a “free and appropriate” public education to students with disabilities, a population that had previously been excluded from mainstream schools in the absence of a requirement to educate these students.⁸⁰ In extending disability rights protections to students in public schools, the IDEA acknowledges in its statutory text that “[d]isability is a natural part of the human experience” and expressly reaffirms the “right of individuals [with disabilities] to participate in or contribute to society,” including in educational settings, which it describes as “an essential element of . . . ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁸¹

The IDEA expressly protects thirteen qualifying categories covering a range of disabilities.⁸² Each category is defined according to enumerated criteria outlined in a series of provisions in the regulatory guidance⁸³ and gives rise to a separate “classification” that provides the basis for a student’s special education plan, referred to under the IDEA as an Individualized Education Program (IEP).⁸⁴ Once a student is classified with a qualifying disability, a team comprised of educators,

80. Individuals with Disabilities Education Act (IDEA), Pub. L. 101-476, 20 U.S.C. § 1400(c)(2) (2004) (citing congressional findings explaining that “the educational needs of millions of children with disabilities were not being fully met,” including due to the fact that this population of students “did not receive appropriate educational services” and was “excluded entirely from the public school system”). *But see* MARK KELMAN & GINGER LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 116 (1998) (registering schools’ “widespread refusal to pay a great deal of heed to federal discipline law”).

81. 20 U.S.C. § 1400(c)(2).

82. 34 C.F.R. § 300.8(a)(1) (defining “child with a disability” to include thirteen categories of qualifying conditions, which must be evaluated in accordance with other provisions in the regulations). *See also* Andrew M.I. Lee, *The 13 Disability Categories Under IDEA*, UNDERSTOOD <https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea> (last visited Mar. 12, 2021).

83. *See* 34 C.F.R. § 300.8.

84. *See id.*

learning specialists, and other school personnel convenes to develop a plan that entitles the student to the educational placement(s), services, and accommodations enumerated within the text of the IEP.⁸⁵

During the 2019–2020 school year, approximately 7.3 million students between the ages of three and twenty-one—representing approximately 14% of public school students nationwide—received special education services under the IDEA.⁸⁶ Presently, the most common IEP classification is “specific learning disability,” which qualifies approximately one-third of students for special education services and encompasses conditions such as dyslexia, dysgraphia, dyscalculia, auditory and language-based processing disorders, and nonverbal learning disabilities.⁸⁷ Certain classifications, notably emotional disturbance, autism spectrum disorder, and intellectual disabilities, are observed to be more frequently diagnosed among students of color.⁸⁸

A. The Manifestation Determination Review (MDR)

One specific purpose of the IDEA is to prevent students from being “disciplined for behavior that is a result of their disability.”⁸⁹ The Act’s “free and appropriate public education” standard broadly “establishes due process procedures so parents and guardians may receive notice, challenge, and review their child’s placement and record.”⁹⁰ This is primarily effectuated via the manifestation determination review (MDR) process, which provides the main source of procedural

85. See Antonis Katsiyannis & John W. Maag, *The Manifestation Determination as a Golden Fleece*, 68 EXCEPTIONAL CHILD. 85, 85 (2001).

86. *Students with Disabilities*, NAT’L CTR. FOR EDUC. STATS. 1 (May 2021), <https://nces.ed.gov/programs/coe/indicator/cgg>. There has been a slight uptick in this figure over the past decade, with the percentage of students receiving services increasing from approximately 13% in 2009–2010 to approximately 14% by 2019–2020. *Id.*

87. *Id.* at 2; Lee, *supra* note 82.

88. OFF. OF SPEC. EDUC. & REHAB. SERVS., U.S. DEP’T OF EDUC., RACIAL AND ETHNIC DISPARITIES IN SPECIAL EDUCATION: A MULTI-YEAR DISPROPORTIONALITY ANALYSIS BY STATE, ANALYSIS CATEGORY, AND RACE/ETHNICITY 7 (2016), <https://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/disproportionality-analysis-by-state-analysis-category.pdf>.

89. Scavongelli & Spanjaard, *supra* note 29, at 281.

90. Houston, *supra* note 60, at 444.

protections available to students with disabilities facing potentially discriminatory disciplinary action.⁹¹

1. Procedure

The MDR involves multiple levels of formal review of a school's disciplinary removal of a student with disabilities from their current educational setting. Under these provisions of the IDEA, parents have a procedural right to seek review of qualifying "change[s] of placement" resulting from the disciplinary removal due to a student conduct violation, which categorically includes out-of-school suspensions.⁹² Under the IDEA, a "change of placement" occurs in two cases: when a student with disabilities is removed from their normal educational setting for (1) ten or more consecutive school days or (2) ten or more school days in aggregate in a single school year, where the series of removals from the normal educational setting constitute a pattern based on "substantially similar" behaviors.⁹³

The full IEP team⁹⁴ must convene for any manifestation determination procedure, and the team as a whole conducts the inquiry into the cause of the student's misconduct.⁹⁵ Additionally, parents must be notified of the placement change and provided the opportunity to challenge the decision via the MDR process and, where the outcome of the initial determination proves unfavorable, to seek administrative and, ultimately, judicial review via appeals.⁹⁶ The MDR does not encompass

91. *Id.*

92. See OFF. OF SPECIAL EDUC., MICH. DEP'T OF EDUC., CONDUCTING A MANIFESTATION DETERMINATION REVIEW 1 (June 2020), https://www.michigan.gov/documents/mde/Conducting_MDR_694067_7.pdf; 34 C.F.R. § 300.536. In-school suspensions do not typically constitute "removals" for MDR purposes; Scavongelli & Spanjaard, *supra* note 29, at 282.

93. 34 C.F.R. § 300.536(a).

94. The IEP team is typically comprised of the child's classroom teachers, learning specialists and other service providers, school administrators, and other "qualified personnel," as well as parents and, where appropriate, students themselves. Katsiyannis & Maag, *supra* note 85, at 87.

95. See Heilman, *supra* note 7, at 376.

96. See Scavongelli & Spanjaard, *supra* note 29, at 289.

a determination as to whether or not the (alleged) student misconduct occurred in fact.⁹⁷

School districts, not students with disabilities nor their parents, bear the burden of proof and must demonstrate that the student's behavior was *not* a manifestation of his or her disability.⁹⁸ Nevertheless, schools tend to have the upper hand in these situations due to a combination of factors, and disagreements between schools and parents are typically resolved in favor of schools.⁹⁹ As a general rule, "deference is given to [IEP] teams to determine whether conduct is the manifestation of a student's disability."¹⁰⁰ Although the IEP team's determinations are reviewable, including by federal judges on appeal, attorneys and special education law experts Michele Scavongelli and Marlies Spanjaard note that, in practice, appeals at the circuit level are uncommon.¹⁰¹

2. Analytical Framework: The Manifestation Inquiry

In an MDR, the IEP team is tasked with determining whether the behavior underlying the misconduct motivating the proposed change of placement (i.e., suspension) is a "manifestation of the student's disability."¹⁰² As such, the primary inquiry centers on whether the

97. *Id.* at 284.

98. 34 C.F.R. § 300.525(b)(1). *See also, e.g.*, Katsiyannis & Maag, *supra* note 85, at 88.

99. *Cf.* Scavongelli & Spanjaard, *supra* note 29, at 285.

100. *Id.*

101. *See id.* *But see* Bristol Twp. Sch. Dist. v. Z.B., 2016 U.S. Dist. LEXIS 4626, at *18 (E.D. Pa. Jan. 14, 2016) (deeming the initial manifestation determination to have been "insufficient" based on the hearing officer's stated opinion that school administrators were "determined to have [the student, Z.B.] expelled, regardless of the circumstances" and had based the disciplinary decision on a mere "cursory investigation of the incident" with what the hearing officer described as a "complete disregard of any facts contrary to the conclusion that [Z.B.] assaulted and injured a teacher," despite the existence of other "relevant circumstances," including the fact that the student had been observed to "exhibit more uninhibited behaviors, including aggression, when his ADHD is not well-controlled by medication," coupled with the fact that the student's medication typically began to wear off before the end of the school day, facts that were relevant to the alleged assault at the center of the disciplinary action). The *Bristol Township* case demonstrates that school officials do not have unlimited latitude in issuing manifestation determinations and may be overruled where their decision-making clearly falls short of what is required under the IDEA. *See generally id.*

102. *See* 20 U.S.C. § 1415(k)(1)(E)–(F); 34 C.F.R. § 300.530(f) (2014).

student's misconduct was "caused" by the student's disability.¹⁰³ In determining causality for MDR purposes, decision-makers must analyze whether the misconduct is "directly related" to the student's disability by asking two primary, substantive questions: first, whether there was a sufficient nexus between the student's misconduct and their disability and second, whether the misconduct resulted from the district's failure to implement the student's IEP.¹⁰⁴ This Article primarily focuses on the first inquiry.

If a student's conduct *is* deemed such a manifestation, in most cases,¹⁰⁵ the school is barred from proceeding with the disciplinary action, and the IEP team must "consider what additional supports the student may need" to succeed in their environment. If, on the other hand, the student's behavior is deemed *not* to be a manifestation of the student's disability pursuant to the IDEA, the school may terminate its inquiry and proceed with the desired action.¹⁰⁶ A student's behavior may be found *not* to constitute a manifestation of their disability where "the disability did not impair [their] ability to understand the impact and consequences of the behavior subject to disciplinary action," and "the

103. See 34 C.F.R. § 300.530(b)(1); see also Katsiyannis & Maag, *supra* note 85, at 86–87. In addition to the behavioral-analytical component of the manifestation determination inquiry, the IEP team must determine "whether the special education services, supplementary aids and services, and behavior intervention strategies provided were consistent with the student's IEP and placement." *Id.* at 87. If the IEP team concludes that the services, aids, or strategies used were *not* consistent with the IEP or placement, such determination provides an alternative basis to invalidate the school district's proposed disciplinary action (i.e., suspensions beyond ten days or expulsion). *Id.* at 87–88.

104. Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860, 889 (2018).

105. A "special circumstances" provision in the IDEA enables schools to place students in an "interim alternative educational setting" for up to forty-five school days where a student's "code violation" involved (1) the possession or use of weapon or (2) a controlled substance, or (3) the infliction of "serious bodily injury upon another person." 34 C.F.R. § 300.530(g). In such cases, an interim alternative placement is justified on the grounds that "maintaining the current placement . . . is substantially likely to result in injury to the child or to others." *Id.*

106. See 20 U.S.C. § 1415(k)(1)(E)–(F) (2014); 34 C.F.R. § 300.530(f) (2014). Students whose conduct is deemed *not* to be a manifestation of their disability must, however, continue to receive the services to which they are entitled by law and must continue to receive the opportunity to make progress toward meeting the goals outlined on their IEPs in the least restrictive educational setting possible, considering their individual educational needs and the services to which they are entitled. See 34 C.F.R. § 300.530(d)(1)(i).

disability did not impair his ability to control the behavior subject to disciplinary action.”¹⁰⁷

An MDR must give “‘specific consideration’ to whether the behavior arose from, or was substantially related to,” the student’s “disability and manifestation thereof,” meaning that it is insufficient to assess student misconduct only “in light of what is typical for students with” the same diagnosis or classification as a general matter.¹⁰⁸ In other words, school officials must “consider the *specific circumstances* of the incident and the alleged conduct” and cannot rely on generalizations about the student’s disability to support their determination.¹⁰⁹

Furthermore, school officials may not circumvent the IDEA’s procedural safeguards by making a manifestation determination prior to the actual hearing such that the hearing does not actually fulfill its designated purpose of providing students with disabilities and their parents with an opportunity to be heard in contested disciplinary removal cases.¹¹⁰ A premature determination that effectively “preclude[s] any meaningful discussion of whether” the student’s behavior constitutes a manifestation of their disability is fundamentally “deficient.”¹¹¹

3. Student Attendance and Participation

Students are, as a general rule, permitted to attend and participate in MDR hearings, ideally in a manner appropriate to their age, disability, and other relevant factors and circumstances, and where school administrators and the student’s parent(s) or guardian(s) mutually consent to such arrangement.¹¹² Although it may be advisable to include

107. Katsiyannis & Maag, *supra* note 85, at 87.

108. *See* Bristol Twp. Sch. Dist. v. Z.B., 2016 U.S. Dist. LEXIS 4626, at *28–29 (E.D. Pa. Jan. 14, 2016).

109. *See id.* at *32 (finding that school administrators’ inquiry into the connection between ADHD and aggressive behaviors in general, and their concurrent failure to focus on “what occurred during th[e] specific incident,” was improper and “deficient”).

110. *See id.* at *29–30 (registering with disapproval the fact that the school administrator overseeing the process had already “answered the two key questions of the determination” “before the manifestation determination review [had] even started” and finding that this constituted a procedural violation under the IDEA).

111. *Id.* at *32.

112. *See* Katsiyannis & Maag, *supra* note 85, at 88; *see also* 34 C.F.R. § 300.530(e)(1) (2021) (tasking “the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA)” with conducting the manifestation determination).

students in these discussions for numerous reasons, it is also worth highlighting that the nature of the MDR inquiry itself raises unique concerns as far as student participation. For example, some practitioners have observed that the singular focus on students' "disabilities and how they impact . . . [a] student's day-to-day life at school," coupled with the reality that "the advocate must highlight the student's deficits" as a basic strategy and vocabulary of representation, has the potential to "negatively impact" disabled students and may ultimately be "counterproductive to supporting the[ir] self-esteem."¹¹³ On the other hand, excluding students from these dialogues may exacerbate problems for students who, as one practitioner put it, "already feel upset because a large school meeting is happening 'about them.'"¹¹⁴ Where students do participate in an MDR, they might elect to, for example, give a statement or other explanation of the conduct at issue, dispute teachers' or administrators' accounts or conclusions, or ask questions.¹¹⁵

III. THE INADEQUACY OF THE IDEA'S DISCIPLINARY PROTECTIONS: TAKING AIM AT THE MANIFESTATION DETERMINATION INQUIRY

Despite the protections against excessive discipline applicable to students under the IDEA, many scholars and practitioners charge that schools continue to fail vulnerable students, particularly students with disabilities, and especially disabled students of color.¹¹⁶ In addition to establishing an unworkably vague standard that resists objective measurement, the guiding query of the manifestation determination—

113. See Erin Han et al., *Special Education Advocacy in School Meetings: Part I*, AM. BAR ASS'N (Oct. 25, 2011), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2011/special-ed-advocacy-school-meetings-part-1/> (also noting that a student's presence at the proceedings can detrimentally impact advocacy if it leads to "avoiding or downplaying the student's problems to make the student feel better" or "glossing over [the student's] actual disabilities").

114. *Id.*; cf. generally JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (2000).

115. See Han et al., *supra* note 113.

116. E.g., Adams & Meiners, *supra* note 21, at 156. Accord Laura Schifter, *The ADA Has Fallen Short for Black Students. It's Past Time to Fix That*, EDUC. WK. (July 24, 2020), <https://www.edweek.org/teaching-learning/opinion-the-ada-has-fallen-short-for-black-students-its-past-time-to-fix-that/2020/07>.

whether the student's disability was the root cause of the misconduct resulting in the contested disciplinary action—misunderstands and runs contrary to the lived reality of disability as a holistic identity experience.

Although an overly essentialist approach to disability raises legitimate, significant concerns, current legal frameworks and discourse result in the over-exclusion of students with disabilities from classroom settings and reinforce damaging mythologies about divergent behavioral expressions that are ultimately rooted in, and which ultimately serve to consolidate and perpetuate, ableism. While it is important to recognize that disabled individuals are not defined exclusively by their disabilities, or by their status as disabled individuals, it is equally critical to acknowledge the inherent ableism of the manifestation determination inquiry as a disciplinary decision-making paradigm predicated on a view of disability as a subcomponent of individual identity that not only may, but indeed must, for purposes of equity and justice, be summarily parsed, compartmentalized, and severed from the broader, or perhaps the “non-disabled,” self.

A. The Manifestation Determination Inquiry Relies on a Vague, and Ultimately Wholly Unworkable, Standard Predicated on an Impossible Bifurcation of Disability and Self

Pinpointing the exact cause or source of misconduct, or indeed any discrete act or behavior, is a difficult, if not impossible, task. Among other criticisms levied against the MDR protocol, numerous experts have charged that the central inquiry of the manifestation determination is both “conceptually and methodologically flawed.”¹¹⁷ These obstacles are fundamentally in conflict with the kind of sound, objective decision-making presumably envisioned by the IDEA's drafters, and these roadblocks may functionally require school officials to render a subjective determination. Therefore, one overarching problem with the IDEA's procedural protection scheme is that the manifestation

117. *E.g.*, Katsiyannis & Maag, *supra* note 85, at 85, 91 (according to researchers, even existing evaluation models that are ostensibly impartial, such as “[b]ehavior rating scales,” in fact generally “suffer from . . . methodological shortcomings,” which substantially limit their utility for manifestation determination purpose); Raj, *supra* note 104, at 889–90 (noting as a central problem the dearth of “clear and credible evidence on which to base [the manifestation determination] analysis”).

determination inquiry is tethered to a vague and ultimately illusory standard.¹¹⁸

More specifically, the manifestation determination is inherently problematic in that it requires decision-makers to parse disability as a condition, identity, or phenomenon that is separable from the broader self. The central inquiry is predicated on a misguided fiction that “concrete distinctions” exist “between disability-related and non-disability related misbehavior”—and that decision-makers can reliably identify and distinguish between the two to pinpoint a particular source or cause of the (mis)conduct.¹¹⁹ In other words, school administrators are assigned the fundamentally futile task of “dissect[ing] a student’s behavior” in an attempt to draw bright lines around what “is” or “is not” rooted in the child’s disability, without recognizing the basic impossibility of not only neatly delineating disability from self but then also precisely mapping those distinctions onto specific incidents or behaviors.¹²⁰

Ultimately, this framework rests on the problematic and unworkable “assumption that a disability exists within persons as do physical diseases” and, accordingly, fails to adequately recognize that disability is a social construct.¹²¹ Whereas a medical model of disability centers

118. See Katsiyannis & Maag, *supra* note 85, at 90; see also, e.g., Hope Reese, *The Real Problems with Psychiatry*, ATLANTIC (May 2, 2013), <https://www.theatlantic.com/health/archive/2013/05/the-real-problems-with-psychiatry/275371/> (underscoring the overarching difficulty of defining “mental illness” and emphasizing that our dominant classification model for psychological disorders, the Diagnostic and Statistical Manual of Mental Disorders (DSM), is highly problematic and even anti-scientific, particularly in the sense that it broadly lacks “established thresholds” for classification and because, ultimately, it arguably “does not capture real illnesses” but rather functions merely as “a set of constructs,” which are arrived upon via “expert consensus,” as opposed to objective scientific inquiry, and are, furthermore, highly influenced by external stakeholders, such as insurance companies). In other words, limitations, biases, and sundry medical fictions that are baked into the DSM further complicate the MDR’s causation inquiry due to professionals’ exclusive (and more or less compulsory) reliance on the DSM as a diagnostic and behavioral-analytical tool. *See id.*

119. *See Raj, supra* note 104, at 865.

120. *See id.* at 900.

121. See Katsiyannis & Maag, *supra* note 85, at 85; Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347, 350–52 (2011) (citing MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 33 (1996)) (attempting to reconcile medical and social models of disability by “distinguishing disablement from impairment” and

on pathologization and rehabilitation and inherently relies on and reproduces normative ableism, a social model of disability acknowledges that “disadvantage resulting from disability is” not “natural or necessary,” illuminating “how social conditions contribute to disability disadvantage” and “shifting the attention from . . . deficits” to focus on “the ways in which society includes or excludes [persons with disabilities].”¹²² Nevertheless, it is important to note that some disability scholars have criticized the uncritical acceptance of the social model framework among legal scholars and cautioned against “simply citing the social model as implicit support for” predetermined “policy and legal positions.”¹²³

In fact, disability “encompasses a broad range of bodily, cognitive, and sensory differences and capacities,” making it “more fluid than most other forms of identity.”¹²⁴ Indeed, throughout human history, “societies have struggled with defining disability and determining whether individuals are disabled.”¹²⁵ For while disability undeniably exists as a social construct, it is also true that a “biology-centered definition of impairment is fundamental to the social model”—meaning, in other words, that medical and social models of disability are, to some extent, inextricably entwined.¹²⁶ Yet, whatever the precise formulation, disability scholars agree that disability as a lived experience confers

explaining that while “impairment” refers to “a description of the physical body,” “disablement “has ‘nothing to do with the body’” but rather registers the social dimensions of disability. Areheart notes that because of Michael Oliver’s formative theorization of a social model of disability, “[s]eparating disability into its biological and social components has . . . been the linchpin for a social model of disability,” producing a kind of “disability binary” that has come to be “considered key to the social model [of disability].”)

122. Areheart, *supra* note 121, at 352.

123. *See id.* at 353–54.

124. RACHEL ADAMS ET AL., *Disability, in* KEYWORDS FOR DISABILITY STUDIES 5, 5 (2015). *See also* Dan Goodley & Rebecca Lawthorn, *The Disavowal of Uncanny Disabled Children: Why Non-Disabled People Are So Messed Up Around Childhood Disability*, in *DISABLED CHILDREN’S CHILDHOOD STUDIES* 164, 165 (Tillie Curran & Katherine Runswick-Cole eds., 2013) (emphasizing that “disabled” and “non-disabled” are not fixed categories but rather social constructs generated by and for the purposes of propagating and reinforcing ableism).

125. SILVIA YEE ET AL., *DISABILITY RTS. EDUC. & DEF. FUND, COMPOUND DISPARITIES: HEALTH EQUITY AT THE INTERSECTION OF DISABILITY, RACE, AND ETHNICITY* 3 (2018), <https://dredf.org/wp-content/uploads/2018/01/Compounded-Disparities-Intersection-of-Disabilities-Race-and-Ethnicity.pdf>.

126. *See* Areheart, *supra* note 121, at 362.

upon individuals a distinct identity and perspective on the world.¹²⁷ Indeed, disability often functions as “a mode of situating one’s understanding of self.”¹²⁸

The IDEA does not adequately account for situations where a student’s (mis)conduct was not necessarily directly caused by his or her underlying disability per se but is nevertheless connected to the student’s “disabled” status in view of the psychological, emotional, interpersonal, and other challenges attendant to the social experience of disability. The IDEA misleadingly collapses different modalities of disability experience and identity into a manufactured, one-dimensional conceptualization of disability as existing only within the boundaries of an individual’s specific medical or psychological condition(s), when in reality, the experience of living with disability and navigating disability identity formation in an ableist culture confers its own set of challenges and concerns that are particular to the social treatment of disability and persons with disabilities.

The current framing of the manifestation determination inquiry fundamentally disregards the social dimension of disability and thus fails to recognize and align with the actual lived experience of disability, particularly among youth. Especially in the K–12 context, which emphasizes conformity with normative identity and behavior standards to a greater extent than many other environments, students with disabilities of all kinds are susceptible to the negative psychological and emotional ramifications of stigmatization, othering, and exclusion on the basis of disability.¹²⁹ Some scholars have alleged that manifestation determination provides schools with “a mechanism . . . to . . . exclude students with disabilities [who] misbehaved” under a substantially similar approach to that taken with non-disabled students.¹³⁰ In fact,

127. See, e.g., ADAMS ET AL., *supra* note 124, at 8.

128. *Id.* at 9.

129. Cf. Maryrose Robson, Note, *Charters’ Disregard for Disability: An Examination of Problems and Solutions Surrounding Student Discipline*, 29 B.U. PUB. INT. L.J. 353, 371 (2019) (noting the impact of stigma in the school setting on students with disabilities and its relationship to negative outcomes such as high school non-completion).

130. E.g., Katsiyannis & Maag, *supra* note 85, at 92.

schools have historically been, and often continue to be, resistant to educating the most behaviorally challenging students.¹³¹

Indeed, numerous diverse factors may intertwine to entangle disability and (mis)conduct. For example, students with speech or language delays or impairments may struggle to “interact[] competently with peers and adults,” which can be extremely frustrating, as it impedes their ability to learn important information and skills as well as their ability to make connections that enable them to “fully participate in everyday settings.”¹³² Studies have also demonstrated that children with learning disabilities experience “social-emotional problems as a side effect” of “[a]cademic problems and educational isolation,” as well as “peer rejection” and other forms of social ostracization.¹³³ These students frequently have low self-worth based on perceived history of failure and rejection.¹³⁴ Students with learning disabilities may also possess limited communication skills and have “[d]ifficulty recognizing and understanding others’ emotions.”¹³⁵ Additionally, those with mental

131. *See id.* (noting that, “[t]raditionally, there has been little interest in public schools serving students who engage in aggressive and violent acts”).

132. Hebbeler & Spiker, *supra* note 34, at 193.

133. *E.g.*, Linda K. Elksnin & Nick Elksnin, *The Social-Emotional Side of Learning Disabilities*, 27 *LEARNING DISABILITY Q.* 3, 3 (2004). *See also Disabled Children Are Marginalized and Excluded in Society*, *supra* note 37 (describing disabled children as among the “most marginalized and excluded groups in society”).

134. *See Learning Disabilities and Psychological Problems: An Overview*, GREATSCHOOLS (Sept. 23, 2009), <https://www.greatschools.org/gk/articles/learning-disabilities-and-psychological-problems/> (noting that multiple studies have concluded that “individuals with learning disabilities may have a lower self-concept” compared to their peers). Indeed, according to research conducted by Drs. Kenneth Kavale and Stephen R. Forness, up to 70% of children with learning disabilities experience low self-esteem, while up to 75% experience “social difficulties such as making and keeping friends” due to heightened levels of social rejection. *Id.* (citing Kavale & Forness). Losses in self-esteem may arise from experiencing “repeated failure” and “disapproval,” not only from teachers and parents, but also from their own peers, while simultaneously “receiv[ing] little positive feedback,” all of which can cause these students to “end up in a quagmire of frustration and shame” and “erode the development of a positive self-concept,” which “further interfere[s] with learning and academic success” and can “reinforce a cycle of failure and negativity.” *Id.* *See also* Rick Lavoie, *Symptoms of Learning Disabilities*, LD ONLINE, <http://www.ldonline.org/article/65394/> (last visited Mar. 14, 2022) (attributing low self-esteem among children with learning disabilities to the fact that these students “have experienced innumerable failures and frustrations in school and social situations” and noting that the “constant negative feedback . . . they receive reinforces their feelings of being ‘different’ or ‘inferior,’” causing them to “view themselves as failures”).

135. Elksnin & Elksnin, *supra* note 133, at 3.

health or emotional disorders may struggle to attend or pay attention during class, hindering their achievement.¹³⁶ Young people with mental health disorders with stigmatizing “labels” like bipolar disorder or borderline personality disorder may also experience social difficulties and struggle with positive self-worth.¹³⁷

Indeed, even the Supreme Court has recognized that for students with certain disabilities—namely, emotional disturbance—the day-to-day experience of schooling can create “[f]rustrating situations” as well as ongoing “difficulties with peers,” particularly those who struggle with things like emotional regulation due to their disability.¹³⁸ In *Honig v. Doe*, the Supreme Court noted that these frustrations and difficulties were produced and exacerbated by factors stemming from the student’s disability, including “physical abnormalities, speech difficulties, and poor grooming habits,” which “made him the target of teasing and ridicule” throughout his schooling career.¹³⁹

Yet, while all the aforementioned factors could reasonably contribute to behavior underlying student misconduct, none are likely to be recognized as manifestations of disability under the current inquiry—including in cases where a certain behavior, emotional response, or maladaptive coping mechanism has been observed and addressed in the text of the student’s IEP. As legal scholar and special education law expert Claire Raj summarizes, “[a] hearing-impaired student who gets in a fight would likely lose an MDR, even if the student’s IEP contained counseling services to help teach more appropriate responses to frustration.”¹⁴⁰ The MDR inquiry is perhaps particularly ill-suited to “soft disabilities,” such as psychological conditions and neurodivergence (typically defined to encompass ADHD

136. Houston, *supra* note 60, at 436.

137. *Cf. id.* at 451.

138. *See Honig v. Doe*, 484 U.S. 305, 313 (1988). The Supreme Court’s ruling in *Honig* was “at least partially superseded” by 1997 amendments to the IDEA, which permitted school officials to take emergency removal action in situations involving weapons and controlled substances “without regard to whether the behavior is determined to be a manifestation of the child’s disabilities.” *See Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1039, n.1 (2009) (quoting 20 U.S.C. § 1415(k)(1)(G)).

139. *Honig*, 484 U.S. at 313.

140. Raj, *supra* note 104, at 900.

and autism spectrum disorder).¹⁴¹ In part, this is because the MDR framework makes it essentially “impossible to make a valid manifestation determination unless there is a known physical cause for the [student’s] behavior problem.”¹⁴² Research conducted by Claire Raj supports a conclusion that students with psychological, emotional, or similar disabilities experience the most frequent and extreme friction between their behavioral challenges and normative behavioral expectations as expressed in students conduct codes.¹⁴³ Raj’s analysis of manifestation determination appeals data suggests that students with ADHD and emotional disturbance are particularly overrepresented in excessive discipline cases.¹⁴⁴

B. The Manifestation Determination Inquiry is Inherently and Irreparably Ableist

The manifestation determination inquiry is fundamentally ableist, and like many school-based systems, derives from and perpetuates hegemonic or normative ableism. The IDEA displays a limited understanding of disability, viewing it primarily as an impairment that can be “cured,” and something that students can, and indeed should, aspire to and be able to (always or usually) “overcome” with sufficient effort and focus.¹⁴⁵ This perspective is inherently ableist in that it

141. *See id.* at 886–87.

142. Katsiyannis & Maag, *supra* note 85, at 86.

143. *See* Raj, *supra* note 104.

144. *Id.* at 886 (finding that nearly half of appeals involved students with an ADHD diagnosis (typically classified under “other health impairment” for IEP purposes), while approximately one-quarter involved students categorized under the “emotional disturbance” classification). *Cf.* L. Kate Mitchell, “*We Can’t Tolerate That Behavior in This School!*”: *The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 N.Y.U. REV. L. & SOC. CHANGE 407, 407 (2017) (noting that “[a] disproportionate number of . . . suspended students are students with behavioral health conditions and particularly students of color with behavioral health conditions”).

145. *See* Julia Miele Rodas, *Identity*, in *KEYWORDS FOR DISABILITY STUDIES* 103 (Rachel Adams et al. eds., 2015). “The long-standing ‘medical model’ of disability locates disability exclusively in the body, seeing the body as deviant, broken, and in need of a cure performed by non-disabled agents,” and “categorizes people with disabilities according to impairments” to generate an illusion of experiential isolation among various classes of disabled persons. *Id.* Another foundational framework is what Miele Rodas refers to as the “charity model of disability,” which “perpetuate[s] negative stereotypes that interfere with self-determination.” *Id.* at 103–04.

conceptualizes disability as a fundamentally undesirable condition and implicitly holds that it must therefore be corrected or ameliorated in order for social acceptance or assimilation to occur, which implicitly denies the validity and value of disability and disabled persons. Applying a critical disability studies lens, conceptual frameworks centered on “overcoming” disability are, as a general matter, viewed as “hav[ing] a distinctly negative connotation that is consistent with a long history of pathological views of disability.”¹⁴⁶ Ableism is ultimately predicated on false hierarchies that dictate the categorical, innate inferiority of disability in order to justify and maintain “ability” (non-disability) as a superior position of hegemonic power and control.¹⁴⁷ In ableist cultures, including our own, “[b]eing non-disabled is the preferential ontological state” as well as “a preferred moral category of contemporary life” such that ableism demands a “distancing [of] the non-disabled self from the disabled other” and “disability becomes wrapped up in responses of the non-disabled.”¹⁴⁸

Ableism remains “common in schools,” though according to some disability scholars, it is nevertheless “often unrecognized or overlooked in analyzing why students with disabilities” continue to encounter prejudice and face obstacles to full inclusion, as well as other difficulties, in educational settings.¹⁴⁹ Professor emeritus and special education expert Keith Storey contends that schools overwhelmingly subscribe to an unquestioned belief that not only is it “better or superior

146. E.g., Wendy S. Harbour et al., “Overcoming” in *Disability Studies and African American Culture: Implications for Higher Education*, in NEGOTIATING DISABILITY: DISCLOSURE AND HIGHER EDUCATION 149, 150 (Stephanie L. Kerschbaum et al. eds., 2017).

147. See Karen Mogendorff, *Constructive Counter-Hegemony*, 37 DISABILITY STUDS. Q. (2017), <https://dsq-sds.org/article/view/5971/4692> (observing that the contention that an “impaired body is primarily a skilled and competent body” is, for example, “a very counter-hegemonic notion”); Goodley & Lawthorn, *supra* note 124, at 165 (explaining that ““non-disabled”” as a “category exists not as a simple fixed position of humanity but as a register, a subject position, a preferred way of living life and a phenomenon of ableist cultures”).

148. Goodley & Lawthorn, *supra* note 124, at 164–65. Cf. also *Autism Spectrum Disorders Fact Sheets*, AUTISM RTS. MOVEMENT, SYNAPSE, <https://www.autism-help.org/points-autism-rights-movement.htm> (last visited Mar. 15, 2022).

149. See Keith Storey, *Combating Ableism in Schools*, 52 PREVENTING SCH. FAILURE 56, 56 (2007).

not to have a disability than to have one,” but that it is also “better to do things in the way nondisabled people do.”¹⁵⁰

This overall orientation toward disability permeates and, indeed, fundamentally structures, school-based approaches to student conduct and discipline. In school settings, intervention is frequently framed as a logical adjunct to disability, and this mentality reifies ableism by disallowing disability to exist organically in unaltered form(s), and by subtly, but nevertheless unequivocally, insisting that disabled individuals bear the burden of their own acceptance and inclusion and must alter themselves to participate fully in civic and community life. Specifically, disciplinary approaches that punish students based on their inability or struggle to conform to conduct norms and expectations are predicated on ableist notions of normative behavioral presentation. Indeed, in some cases, students with certain disabilities may simply be unable to “conform their behavior to the school’s requirements,” especially in behaviorally demanding settings like no-excuses charter schools.¹⁵¹

Disabled students suffer from exclusion and discrimination both inside and outside of the classroom. Students with disabilities “are not always integrated fully into the social world of the classroom” and are, in fact, frequently “isolated physically and emotionally from their peers in both instructional and social settings” and routinely socially excluded or marginalized by their peers because of their disability or status as a disabled individual.¹⁵² As education experts Wendy Smith-D’Arezzo and Cheryl Moore-Thomas note, while these experiences are common

150. *Id.* See, e.g., Pamela Brillante, *Every Child Belongs: Welcoming a Child with a Disability*, NAT’L ASS’N FOR EDUC. YOUNG CHILD. (Aug./Sept. 2017), <https://www.naeyc.org/resources/pubs/tyc/sep2017/every-child-belongs> (recommending the strategic use of “[p]eers who do not have disabilities” to “model positive prosocial and communication skills and demonstrate everyday routines that young children with disabilities can imitate,” as well as help to disabled students “develop social relationships and increase their motivation to be part of classroom activities,” while entirely failing to discuss or even consider what disabled students might be able to teach or model for their non-disabled peers).

151. Heilman, *supra* note 7, at 378. See also, e.g., *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 643 (8th Cir. 2003) (Bye, J., dissenting) (noting that when the school “expected [the student’s] behavior to conform to its structured and inflexible approach, [the student] began to self-destruct”).

152. See Wendy M. Smith-D’Arezzo & Cheryl Moore-Thomas, *Children’s Perceptions of Peers with Disabilities*, 6 TEACHING EXCEPTIONAL CHILD. PLUS 2, 3 (2010).

in K–12 settings, they are “generally not benign” in terms of the detrimental impacts they have on disabled students.¹⁵³

Overall, the manifestation inquiry is simply inconsistent with contemporary theories and frameworks of disability, namely those advanced within the critical disability studies discipline. Attorney Pallavi Vishwanath has criticized the United States’ general approach to disability in primary and secondary school settings, arguing that the approach taken “lacks an understanding of neurodiversity or cognitive pluralism.”¹⁵⁴ Critical disability rights discourses have generally articulated the need to “depathologize dis/ability from notions of deficiency” and adopt an asset-based view of disability.¹⁵⁵ After all, as noted disability scholar Rosemarie Garland-Thomson posits, “we might *want* disabled people in the world.”¹⁵⁶ Current approaches to student behavior, disability, and discipline, as embodied by the manifestation determination framework, fit within Garland-Thomson’s framework of “eugenic world building,” which ultimately “strives to eliminate disability” and trades in “ideology and . . . practices that control who enters and participates in . . . shared public spaces.”¹⁵⁷ A “best interests” framework, on the other hand, is more aligned with Garland-Thomson’s concept of “inclusive world building,” which “seeks to integrate people with disabilities into the public world by creating an accessible, barrier-free material environment” and “frames disability as valued social diversity.”¹⁵⁸

In addition to raising concerns around fairness and equity, even simply from a behavior management perspective, harsh disciplinary actions are unlikely to serve as effective interventions for certain students. If a student does not understand, feel capable of, or perceive

153. *Id.*

154. Pallavi M. Vishwanath, *Neurodiversity in Public Schools: A Critique of Special Education in America*, 47 HASTINGS CONST. L.Q. 595, 599 (2020).

155. Ben-Moshe & Magaña, *supra* note 28, at 106. *But see generally* FLINK, *supra* note 32 (generally reframing learning disabilities as “learning differences,” as one salient example of shifting toward a more positive concept of disability while nevertheless eschewing a traditional nomenclature of “disability” in favor of alternative terminology).

156. Rosemarie Garland-Thomson, *Building a World with Disability in It*, in CULTURE – THEORY – DISABILITY: ENCOUNTERS BETWEEN DISABILITY STUDIES AND CULTURAL STUDIES 51 (Anne Waldschmidt et al. eds., 2017) (emphasis added).

157. *Id.* at 52.

158. *Id.*

the value of meeting behavioral expectations and is not provided with the tools, skills, and supports to facilitate behavior modification, a punitive response will.¹⁵⁹

1. Countering the Rhetoric of “Low Expectations”

A common argument offered in support of strict conduct codes that apply equally to all students regardless of disability is that to do otherwise would be to disrespect and harm students with disabilities by cossetting them with “low expectations.”¹⁶⁰

Though it may seem more “equal” to impose the same or similar disciplinary consequences for the same or similar behaviors regardless of disability or other relevant compounding factors, it is not only inherently ableist but also antithetical to notions of equity and justice. First, to have value and utility, behavioral expectations must be achievable for students. Second, the very concept of “low expectations” is fundamentally suspect and frequently functions to covertly uphold normative ableism. This narrative insists that holding certain students to modified or different behavioral expectations, even those that might better serve their needs, constitutes a grave disservice to disabled students.¹⁶¹ However, this belief fails to acknowledge its inherently

159. See Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 306 (2011) (stressing that youth understand “basic concepts of fairness, dignity and respect” and will not hesitate to “question [the] legitimacy” of rules they view as unfair, unfounded, or otherwise unjust). It is also worth noting that for students who are experiencing difficulties at school, including many students with disabilities, removal from the school or classroom environment may come to be seen as preferable to school and become an attractive outcome—meaning that disciplinary tactics like suspension and expulsion can, at least in some cases, ultimately backfire, including by inadvertently rewarding or incentivizing misconduct. See Ashley Nicole Black, *Why School Suspensions Backfire*, ATTN (Mar. 15, 2015), <https://archive.atten.com/stories/1184/keeping-kids-in-school>. This may be especially true of older (middle and high school-aged) students who serve out-of-school suspensions in unsupervised home environments, which in turn may be more prevalent among students from lower-income backgrounds who do not have a stay-at-home parent. Cf. *id.*

160. Cf. Areheart, *supra* note 121, at 359 (noting that, due to “Americans’ strong ideological bent toward formal equality, differential treatment is often perceived as special treatment”).

161. See, e.g., U.S. Dep’t of Educ., RAISING THE ACHIEVEMENT OF STUDENTS WITH DISABILITIES: NEW IDEAS FOR IDEA 1 (2006),

ableist roots, while also demanding conformity to a standard that narrowly envisions a norm predicated on the experiences of (middle-class, white, cisgender) neurotypical children who have stable home and family lives and no significant trauma history.¹⁶² While these norms may be functional for non-disabled students—who generally do not experience significant challenges or “deficits” with respect to processing and regulating emotions, socializing with peers and making friends, or other key social-emotional functions and skills that undergird children’s capacity to comply with behavioral expectations in school settings they are significantly less workable where applied to students who do experience these and other behavioral, emotional, or social obstacles as a result of their disability.

The unwillingness to consider that adjusting expectations for certain disabled students might actually be a preferable approach is not just harmful but is fundamentally illogical. If we can recognize the problem with, for example, insisting that a hearing-impaired student can only demonstrate foreign language competency in fulfillment of a degree requirement through an assessment that includes listening and speaking components, we should likewise be able to recognize the fundamental inappropriateness and futility of insisting that a student with PTSD or bipolar disorder, for example, be able to regulate their emotions and behavioral responses as non-disabled students are able to more easily and with less effort.

<https://www2.ed.gov/admins/lead/spced/ideafactsheet.pdf> (partially attributing the “achievement gap” that persists between disabled and non-disabled students to what then-President George W. Bush described as the “soft bigotry of low expectations”). *But see*, Kalman R. Hettleman, ABELL FOUND., ROAD TO NOWHERE: THE ILLUSION AND BROKEN PROMISES OF SPECIAL EDUCATION IN THE BALTIMORE CITY AND OTHER PUBLIC SCHOOL SYSTEMS 3 (2004) (highlighting the overall “ineffective[ness]” of “[s]pecial education instruction” and services in the Baltimore City Public School System). According to Hettleman, the achievement gap between “students with learning difficulties” and those without such disabilities is primarily a function of “a system that does not give teachers and other service providers the [necessary] training and resources”—and one that “conceals its shortcomings,” “gives the false impression that it is providing research-based instruction,” “exaggerates student progress,” and “buries the poor academic performance of students under a mountain of excessive bureaucratic paperwork.” *Id.*

162. Love et al., *supra* note 53, at 185 (“Families of color are similarly positioned against white, middle-class family values and behaviors.”).

Notably, the criticism and discomfort with respect to individuated or adjusted conduct expectations or disciplinary approaches for students with (certain) disabilities and the deployment of “the bigotry of soft expectations”-aligned rhetoric is largely voiced by non-disabled individuals. Non-disabled individuals may not even realize that they have adopted a fundamentally problematic mindset toward disability, one that is predicated on the misguided assumption that transcending disability is a central goal of disabled individuals, and that disabled people must aspire to become like non-disabled people.

It is also worth emphasizing that a more flexible, child-centered legal decision-making framework that focuses on whether a particular disciplinary action is in the best interests of a disabled student does not preclude the use of exclusionary discipline measures so long as they meet the proposed new standard. This limitation only affects school administrators who are issuing suspensions or expulsions that they know or suspect may be contrary to the best interests of those students. In other words, considering whether removing a disabled student from their classroom or school environment would be advisable or even effective in a specific situation and for a particular student need not be viewed a radical departure from the status quo. After all, presumably all disciplinary decision-making is implicitly centered on how to teach or help the misbehaving student.

Lastly, the purpose behind effectuating the kind of paradigm shift this Article proposes is not to loosen behavioral standards or conduct expectations for disabled students but rather to acknowledge the ways in which the current approach is failing these students and endeavor to adopt decision-making processes and frameworks that better recognize and serve their needs.

IV. THE CASE FOR APPROPRIATING FAMILY LAW PRINCIPLES AND DECISION-MAKING FRAMEWORKS IN THE STUDENT DISCIPLINE CONTEXT

A. Shifting the Adjudicatory Paradigm Toward a “Best Interests of the Child”-Aligned Standard

A better, more workable approach to disciplining students with disabilities would recognize and account for “the wider relationships

between education, special education, and the forces of referral and suspensions.”¹⁶³ Family law’s best interests (of the child) standard¹⁶⁴ provides a superior legal framework that would facilitate the necessary paradigm shift and better align special education law with contemporary understandings of disability identity and lived experience. A best interests approach would permit a more flexible, child-centered, and individualized inquiry. Indeed, in adopting the best interests of the child standard, family law recognized the need to individuate inquiries into the wellbeing of individual children on a case-by-case basis, and special education law should do the same by appropriating a modified version of this standard to guide the manifestation determination inquiry.

Under the proposed revised inquiry, in determining whether to proceed with or disallow the proposed suspension or expulsion, school districts would be required to:

- (1) justify the proposed change in the student’s educational placement under a broad “best interests of the student” standard by using an analytical framework that
 - (a) takes a more holistic and neutral or positive view of disability;
 - (b) considers the *impact* of the proposed disciplinary action, including on the student’s educational and social-emotional development and overall wellbeing; and
 - (c) directly addresses or explicitly states how the proposed exclusionary disciplinary action serves the child’s best interests;
- (2) provide a detailed alternative instructional plan and describe how the proposed alternative instruction will serve, or at least will not disrupt or undermine, the student’s academic progress; and

163. See Adams & Meiners, *supra* note 21, at 155.

164. See generally CHILD. BUREAU & CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

(3) demonstrate adequate, good faith prior efforts to resolve conflict in a non-adversarial fashion for example, with the student and their parent(s) or guardian(s).

A best interests analysis resonates more strongly with a progressive, asset-based view of disability. (In part, because an asset-based view of disability is itself in the best interests of children with disabilities.) It organically incorporates many aspects of what psychologist and disability rights advocate Sherri Rings refers to as an “ecological perspective” on disability, which she contends better recognizes and aligns with lived experiences of disability, particularly among children and adolescents.¹⁶⁵ Similarly, it represents the kind of “individualized” inquiry advocated by scholars, including Claire Raj, in that it allows decision-makers to “fully explore how an individual child experiences disability—whether or not those experiences are grounded in her eligibility category.”¹⁶⁶

A best interests framework also facilitates prioritization of both the educational and social-emotional needs of students and is consistent with approaches proposed by researchers and special education experts Antonis Katsiyannis and John Maag, who advocate for manifestation determinations to be based on evaluations such as “social skills assessment[s].”¹⁶⁷ Social skills assessment theory holds that students may experience behavioral, social-emotional, problem-solving, or self-control challenges (or “deficits”), as well as cognitive distortions that cause them to inaccurately interpret social situations and result in difficulties interacting with and maintaining social relationships with peers.¹⁶⁸ Under this framework, a student who “respond[s] aggressively to peer teasing” may be manifesting his or her disability because the behavior arose from the student’s inability to “gradually accept [the teasing], make a joke of it, ignore it, use an escape route, or get adult

165. Sherri L. Rings, *Fitting In, Letting Go, and Other Common Concerns for Students with Disabilities*, in NARRATING PRACTICE WITH CHILDREN AND ADOLESCENTS 172 (Mery F. Diaz & Benjamin Shepard eds., 2019).

166. Raj, *supra* note 104, at 901.

167. Katsiyannis & Maag, *supra* note 85, at 92–93.

168. *Id.*

assistance,” which would be viewed as a “behavioral skill deficit.”¹⁶⁹ Such behavior could also arise due to a problem-solving or self-control deficit, or cognitive distortion.¹⁷⁰ In other words, behaviors that might superficially seem unrelated to the student’s disability may be, and, in fact, in many cases are, actually strongly related—a perspective that would be accommodated, though not necessarily required, under a modified best interests standard.

Placing the focus on whether the student understood his or her actions to be “wrong” obscures the complexity of disability and arguably asks the wrong question. A skills assessment-based approach appropriately considers whether the student has a sufficient toolkit to “engage in an appropriate alternative behavior,” “to analyze the problem, generate solutions, evaluate their effectiveness, and select one,” to “interpret the situation factually” rather than “distort[ing] it to fit some existing bias,” or to “monitor his behavior” in general.¹⁷¹ All of these alternative inquiries should be incorporated into the proposed best interests analysis. Because there are no empirical measurements and only imperfect evaluation models, a best interests inquiry should encompass a wide range of potential factors and considerations.

169. *Id.* at 93. This framing is predicated, however, on the unquestioned assumption that being able to “ignore” or “accept” teasing from peers is the correct or best approach to managing social rejection or relational aggression from peers. The underlying assumption here is that disabled children, especially those who may be perceived as overly sensitive or who may struggle with behavioral and social challenges, such as emotional dysregulation or impulsivity, are not responding to these situations “correctly” and should take cues from their non-disabled peers to “fix” their behavior so as to bring it in line with normative expectations. Such a perspective categorically excludes the possibility that, in fact, there might be a problem with encouraging students to accept teasing and mistreatment rather than addressing and discouraging the damaging behavior of those students who are actually responsible for harming their vulnerable peers. At a minimum, it is worth considering that encouraging non-disabled students to strive to be more sensitive and attuned to the needs of their peers might be a better approach, not just for disabled and other marginalized students, but indeed for all students and school communities. Moreover, the alternative effectively establishes an implicit hierarchy that assigns non-disabled students a position of superiority and teaches these students that they have nothing to learn from their disabled peers and no obligation to ever consider the detrimental impacts of their behavior or to modify their own behavior to mitigate harm to more vulnerable peers.

170. *Id.*

171. *Id.*

1. Supporting the IDEA's Goals

A best interests standard is more consistent with students' lived experiences of disability and better comports with and accomplishes the IDEA's overarching goal of educational inclusion. The best interests standard aids consideration of a multiplicity of complex factors that contribute to a student's experience and manifestation of disability. The underlying analytical framework also facilitates a recognition that disability is neither a monolithic experience, nor is it necessarily a static identity or condition. This more flexible, open-ended approach is preferable and more workable for student disciplinary decision-making given the fact that the disability community encompasses a wide range of individuals with "heterogenous and intersectional" experiences and perspectives.¹⁷² According to Sherri Rings, disability is "highly contextual," and, as such, demands a more flexible and holistic analytical approach.¹⁷³ A best interests standard acknowledges and accommodates these realities and, as a result, will produce results that are more consistent with the protections Congress intended to confer in enacting the IDEA.

Shifting toward a best interests approach is consistent with the IDEA's overall emphasis on a "broad and holistic approach" to special education and disability inclusion.¹⁷⁴ And, indeed, the stakes are high for students with disabilities, a fact recognized within the legislative history and statutory text of the IDEA. Persistent criticism, social ostracization, and negative treatment of disability are all linked to long-term impacts on the emotional and psychological wellbeing of disabled individuals as well as other life outcomes. Unfortunately, once young people begin to develop a negative self-concept, it can be difficult to uproot or quell these feelings.¹⁷⁵ By contrast, asset-based approaches to disability, especially those that concurrently emphasize support, self-acceptance, and the development of strong social-emotional learning

172. Rings, *supra* note 165, at 172.

173. *Id.*

174. See Raj, *supra* note 104, at 900 (noting the contrast between student disciplinary provisions and the overarching goals and principles expressed elsewhere in the IDEA).

175. Elbaum & Vaughn, *supra* note 38, at 304 ("[O]nce formed, negative self-perceptions can be extremely resistant to change.").

skills, have been shown to have the potential to positively benefit youth with learning and attention issues.¹⁷⁶

2. *Facilitating Intersectional, Equitable Student Disciplinary Decision-Making*

Another benefit of the best interests framework is that it enables and promotes the consideration of intersectional or other compounding factors affecting students, such as experiencing trauma, poverty, systemic racism, neighborhood or domestic violence, family separation, housing insecurity, and food insecurity.¹⁷⁷ Although a traditional best

176. See Haft et al., *supra* note 38, at 318.

177. It is worth emphasizing that millions of children across the country rely on schools for basic necessities and essential resources: Schools not only distribute critical welfare benefits, ranging from free and reduced-price meals for income-qualifying students to psychological counseling, they also may provide a safe environment that serves as a respite, for example, from domestic violence or abuse at home—not to mention the fact that, for nearly all school-aged children, the majority of their social interaction beyond the family unit occurs at school, and school is typically a critical site of independence and identity formation for young people. See Katherine Ralston & Alisha Coleman-Jensen, *USDA's National School Lunch Program Reduces Food Insecurity*, ECON. RSCH. SERV., U.S. DEP'T AGRIC. (Aug. 7, 2017), <https://www.ers.usda.gov/amber-waves/2017/august/usda-s-national-school-lunch-program-reduces-food-insecurity/> (Approximately 38% of students who receive free or reduced-price lunches through the National School Lunch Program (NSLP) do not receive any additional form of food or nutrition benefits from the government, such as through the non-school-based Supplemental Nutrition Assistance Program (SNAP), meaning that a sizable minority of program participants and their families rely heavily or exclusively on the NSLP to prevent food insecurity and malnutrition.); *Trauma-Informed Systems – Schools*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/trauma-informed-care/creating-trauma-informed-systems/schools> (last visited June 24, 2021) (“Schools serve as critical support systems for children who have experienced trauma.”); Gabrielle Emanuel, *How Domestic Violence in One Home Affects Every Child in a Class*, NPR (Sept. 3, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/09/03/491204888/how-domestic-violence-in-one-home-affects-every-child-in-a-class> (describing how, for the approximately 10%–20% of children who are exposed to domestic violence annually, a relationship with a counselor or other trusted adult at school may be the only meaningful relationship that child has with an adult where “they feel listened to and . . . respected and they know someone cares,” and also noting that these children often “act out in school” due to trauma and feelings of powerlessness, which can in turn negatively impact social relationships with peers, compromise learning and academic performance, and result in disciplinary action); *CDC Healthy Schools – Social and Emotional Climate*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyschools/sec.htm> (last visited June 24, 2021) (“Time spent at school gives children the opportunity to engage with peers and adults and develop skills to enhance their social and emotional experiences.”).

interests analysis would not necessarily require decision-makers to consider factors such as the impact of racial, anti-disability, or other biases in all student disciplinary decisions, it would allow them to consider and weigh these factors more directly in the decision-making process where they are deemed to be relevant.¹⁷⁸ Adopting an analysis that mirrors the decision-making framework for custody determinations is inherently student-centered in the sense that the centerpiece inquiry in custody cases is the best interests of the child.

One limitation of the current approach that would be mitigated by shifting to a best interests analysis is its troubling disregard for the fact that emotional and behavioral challenges are frequently exacerbated by external social factors, as well as by other psychological or neurological conditions that may or may not be encompassed by a student's disability classification for IEP purposes.¹⁷⁹ For example, while PTSD could serve as an independent basis for disability classification, where trauma is comorbid with other disabilities, or where it is either un(der)diagnosed or misdiagnosed, the impact of trauma may not be adequately acknowledged as a contributing factor to certain behavioral issues.¹⁸⁰

178. Typically, judges are accorded significant discretion in evaluating and weighing various factors to “decide what is ‘best’” for a child given the relevant facts and circumstances. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUDS. 337, 337 (2008). Indeed, subjectivity is often viewed as a defining characteristic of the best interests standard and decision-making framework. *See id.* at 339.

179. *Cf., e.g.,* KATHERINE RALSTON ET AL., ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., CHILDREN'S FOOD SECURITY AND USDA CHILD NUTRITION PROGRAMS 15 (June 2017) (citing research indicating that hunger and nutrition negatively impact academic performance); Veronica Gaitán, *How Housing Affects Children's Outcomes*, HOUSING MATTERS, URB. INST. (Jan. 2, 2019), <https://housingmatters.urban.org/articles/how-housing-affects-childrens-outcomes> (identifying the “central importance of housing as a determinant of wide-ranging outcomes” for children, including with respect to educational opportunities and academic performance).

180. *See* Christina Rainville, *Recognizing Signs of Undiagnosed and Misdiagnosed Disabilities in Your Child Client*, AM. BAR ASS'N (July 1, 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/july-2014/recognizing-signs-of-undiagnosed-and-misdiagnosed-disabilities-i/ (noting that “PTSD is frequently undiagnosed or misdiagnosed” among youth and explaining that because a formal diagnosis of PTSD necessarily turns on the disclosure of the underlying traumatic event(s), many young people whose trauma is undisclosed, under-considered, or otherwise rendered illegible in the diagnostic context “are frequently wrongly diagnosed with ADHD, depression, bipolar disorder, emotional disturbance,

Additionally, while the current inquiry disregards the fact that culturally-rooted differences in social norms and values can influence a student's individual behavioral presentation,¹⁸¹ and furthermore, fails to facilitate nuanced examination of racial or cultural bias in conduct assessment,¹⁸² by contrast, a best interests approach would allow for the application of these and related perspectives as functional lenses for understanding, productively responding to, and managing classroom conduct issues.¹⁸³

A best interests standard would hold school personnel accountable for a higher level of preparation and a more nuanced consideration of the individual factors that can provide critical context for understanding a student's behavior and the conduct or incident in question. Currently, while IEP team members are obligated to perform at least a cursory review of a student's file in preparation for an MDR or hearing, at least one court has clarified that the statutory text of the IDEA "does not

oppositional defiance, and other disorders" and may continue to experience behavioral, emotional-regulatory, and other difficulties even if they are receiving treatment and/or accommodations for another psychological disorder or disability). Cf. generally Kathleen T. Brady, Therese K. Killeen et al., *Comorbidity of Psychiatric Disorders and Posttraumatic Stress Disorder*, 61 J. CLINICAL PSYCHIATRY 22, 22 (2000) (PTSD "is commonly co-morbid with other psychiatric disorders" to the point that "in individuals with PTSD, the presence of other psychiatric disorders is the rule rather than the exception.").

181. E.g., Chen, *supra* note 55, at 27–28 (explaining that "[c]hildren's development is directly influenced by their cultural backgrounds" because "each society has its own distinct values and norms that impact . . . [a] child's behaviors and development"—including by directly shaping normative practices around parenting, child-raising, and schooling, as well as in less direct ways, such as architecting key social-relational infrastructure and establishing specific social and cultural value systems that broadly structure and influence conduct—and, furthermore, that "[w]hen cultural beliefs are in conflict with the dominant community or school environment, behavioral/emotional development and educational performances are affected").

182. Kristen Weir, *Inequality at School: What's Behind the Racial Disparity in Our Education System?*, AM. PSYCH. ASS'N (Nov. 2016), <https://www.apa.org/monitor/2016/11/cover-inequality-school> (explaining that "[r]acial bias . . . affects whether and how [teachers] discipline students for misbehavior" and highlighting how "[i]mplicit bias [may] make teachers more likely to assume misconduct is part of a pattern of misbehavior" as well as lead teachers to "overestimate[] the . . . culpability of [B]lack children" of all ages and view them as "more dangerous" compared to white peers).

183. Cf. Anita Thomas, *Promoting Culturally Affirming Parenting in African-American Parents*, AM. PSYCH. ASS'N (Apr. 2017), <https://www.apa.org/pi/families/resources/newsletter/2017/04/african-american-parents> (explaining that "positive self-concept and racial identity are important for greater achievement and adaptive functioning for children [of color]" and calling for the widespread use of "culturally relevant and affirming practices" to support positive youth development).

require each member [of the IEP team] to read . . . every piece of information in the student's file," but rather obligates team members only to "review the information pertinent to [the manifestation determination] decision."¹⁸⁴ Although the modified approach would not necessarily enumerate specific, concrete requirements for review (for example, requirements that IEP team members must each spend a minimum of two hours reviewing the student's file, or the IEP team be collectively responsible for reviewing listed criteria or documentation), it could shift some accountability for diligent review back to the IEP team by obligating them to review the incident and ultimate disciplinary decision in accordance with the child's best interests, as opposed to framing the scope of review in terms of disability causation.

3. Giving Due Consideration to Disability-Related Effects of Exclusionary Discipline

A best interests framework is also preferable to the current inquiry because it would provide a mechanism for recognizing the potentially detrimental *effects* of exclusionary discipline and other punitive measures on students with (certain) disabilities because of their disability or because of their status as a disabled person. The manifestation determination inquiry is singularly concerned with the underlying cause of the student's (mis)conduct and fails to acknowledge that certain disciplinary tactics may be especially harmful to—or especially ineffective for—students with (certain) disabilities.

For example, children with ADHD may suffer from intense and prolonged emotional disturbance in response to suspension or expulsion,¹⁸⁵ which can ultimately undermine or even fully negate the

184. See *Fitzgerald v. Fairfax Cty. Sch. Bd.*, 556 F. Supp. 2d 543, 559 (E.D.Va. 2008) (listing "the child's IEP, his teachers' comments, and any information provided by the parents" as examples of "pertinent" information). The court in *Fitzgerald* also clarified that this review "may occur before *or* during the course of an MDR hearing," explaining that the statutory language merely requires that such review take place "before a manifestation determination," but not necessarily before the hearing itself). *Id.*

185. Individuals with ADHD commonly experience a psychological phenomenon known as "rejection sensitivity dysphoria" (RSD) at incredibly high rates: According to some researchers, "[u]p to 99% of teens and adults with ADHD are more sensitive . . . to rejection" (compared to their neurotypical peers) to the point of observability as a pathology. *What Is*

efficacy and potential utility of such actions as behavioral management tools or even as punitive measures intended to deter future misconduct. While such considerations go unregistered under the current inquiry, they could be considered and even centralized, where merited, under a best interests-aligned analysis of disciplinary decisions. In addition to students with ADHD, suspensions may also have an outsized

Rejection Sensitive Dysphoria?, WEBMD (Sept. 13, 2020), <https://www.webmd.com/add-adhd/rejection-sensitive-dysphoria>. Children and adolescents with ADHD typically experience the effects of rejection “more intensely” and also “take longer to recover from it,” in part because many young people with ADHD “struggle with managing emotions” and also because “[b]eing rejected can bring up very strong and long-lasting feelings . . . of disappointment, sadness, shame, and regret” that they have experienced as a result of their neurodivergence. Kate Kelly, *ADHD and Coping with Rejection*, UNDERSTOOD, <https://www.understood.org/articles/en/adhd-and-coping-with-rejection-what-you-need-to-know> (last visited July 2, 2021). Dealing with rejection requires executive functioning skills, such as “cognitive flexibility and self-control,” which most individuals with ADHD lack or struggle with, and unlike neurotypical persons, neurodivergent individuals often “find it hard to shift their thinking,” which impedes their ability to deal with these emotions and “move on,” such that they can often “become hyperfocused on the rejection.” *Id.* Though it may seem relatively mild or trivial in comparison with other symptoms and challenges presented by disability, it is imperative to underscore the fact that around one-third of diagnosed individuals themselves view RSD as “the hardest part of living with ADHD.” *Id.* Thus, while some students who have extreme RSD may be able to handle isolated suspension(s) with the appropriate scaffolding, some students who lack the necessary supports in their school and/or home environments, as well as those who are repeatedly suspended or expelled, may be profoundly impacted and could suffer both short- and long-term consequences as a result of being subjected to exclusionary discipline at school.

detrimental effect on autistic students¹⁸⁶ as well as those with PTSD¹⁸⁷ and other psychological and emotional disabilities.¹⁸⁸ While in individual cases there may be of some value in helping children learn how to cope with challenges like (hyper)sensitivity to rejection or difficulty adjusting to unexpected changes in routine—both undeniable facts of day-to-day life—and all children benefit from structured systems of rules and consequences, it does not necessarily follow that

186. See Karen Burner, *Autism and Dealing with Change*, SEATTLE CHILD.'S HOSP. BLOG (Feb. 8, 2013), <https://theautismblog.seattlechildrens.org/autism-and-dealing-with-change/>. Many autistic individuals find “[c]hange, especially *unexpected* change,” to be “extremely stressful,” and derive comfort from “[c]onsistency and predictability,” meaning that maintaining a consistent, predictable daily routine is often especially critical for children with autism spectrum disorder such that any major deviations from the anticipated schedule of activities would typically be more disruptive and consequential for this student population. *Id.* (emphasis added). Unexpected changes to an autistic child’s schedule or daily routine may prompt “withdrawal, repetitive behaviors, tantrums, or even aggression” as a “result of extreme anxiety,” which may be exacerbated by difficulty or “inability to communicate their emotions/desires.” *Id.* Many autistic individuals prefer to describe themselves as “autistic” rather than as “individuals with autism” or autism spectrum disorder. See *Autism Glossary: What Terms Are Acceptable in the ASD Community?*, SAFE MINDS (Sept. 26, 2021), <https://safeminds.org/news/autism-glossary-what-terms-are-acceptable-in-the-asd-community/> (also registering disagreements between non-disabled parents of disabled children and disabled individuals themselves as to the use of terms such as “special needs,” which many disabled persons view as “infantilizing and euphemistic” and feel “gloss[es] over their struggles,” versus “disabled,” which is largely favored by the disability community as language that is considered more affirmative of disability and that better captures their lived experiences as disabled persons). Notably, non-disabled individuals—namely parents of autistic children and therapists and other professionals who work with this population—largely “prefer” and advocate for the use of “person-first language,” illustrating overarching differences between non-disabled individuals’ paternalistic approach to disability versus many disabled individuals’ tendency to embrace disability as both a central and meaningful part of their identities. See *id.* These differences feed into a broader conflict between disabled adults and non-disabled stakeholders, especially parents of disabled children; for example, autistic individuals have criticized non-autistic parents of autistic children for inappropriately centering their own (non-disabled), frequently harmful, perspectives on disability, often to the exclusion of disabled individuals themselves. See, e.g., *Autism Spectrum Disorders Fact Sheets*, *supra* note 148.

187. See *Anger and Trauma*, NAT’L CTR. FOR PTSD, U.S. DEP’T OF VETERANS’ AFFS., <https://www.ptsd.va.gov/understand/related/anger.asp> (last visited July 12, 2021) (indicating that individuals with PTSD often experience difficulty processing negative emotions, such as anger or disappointment, and may display harmful or even “aggressive behaviors” towards themselves or others in response).

188. See generally, e.g., Mia Foxhall et al., *The Link Between Rejection Sensitivity and Borderline Personality Disorder: A Systematic Review and Meta-Analysis*, 58 BRIT. J. CLINICAL PSYCH. 289 (2019) (finding that individuals with borderline personality disorder commonly experience extreme sensitivity to perceived or actual rejection).

suspension is an effective or advisable approach to disciplining neuroatypical students and students with certain other disabilities.

Though the disproportionate impact of exclusionary discipline on students with disabilities is a consideration that lies firmly beyond the relatively narrow scope of the current manifestation determination inquiry, to the extent that discipline is essentially leveraged as a kind of instructional tool in K–12 settings, it too should be evaluated for appropriateness and efficacy in light of a child’s individual learning needs and goals. Shifting to a best interests of the child-aligned analytical framework in the MDR context as this Article proposes would organically incorporate a consideration of these “effects concerns” into the overarching inquiry.

B. Reenvisioning the IEP Team: Incorporating Co-Parenting Principles and Approaches to Promote Student Achievement and Wellbeing

Beyond the best interests of the child analytical lens, family law frameworks overall, particularly those pertaining to joint custodial or other co-parenting determinations, provide a more workable model for resolving parent-school conflicts. Indeed, there are numerous benefits to shifting the paradigm in this corner of special education law to resemble more closely something akin to a shared custody co-parenting model. In highlighting the suitability of custodial decision-making frameworks, this Article broadly advocates reconceptualizing the IEP team as a kind of “parenting team” with respect to student discipline and identifies several specific ways to effectuate these changes. Moving toward a co-parenting framework would not only mitigate the inequitable power imbalance between parents and school staff but it would also be more conducive to helping children and young people with behavioral disabilities (and disabilities generally) learn to manage their behavior and regulate their emotions by promoting consistency in disciplinary responses and behavioral expectations across school and home environments.

1. *Diffusing Tensions by Design*

Family law principles and frameworks apply particularly well in the special education context because family law necessarily recognizes and attempts to manage emotional conflict and tension between parties who are ultimately aligned in their overarching goals, even though they may be in vehement disagreement as far as how to best achieve those goals.¹⁸⁹ Conflicts between schools and parents over disciplinary decisions are similar to conflicts between co-parents arising in a joint custodial context. Parents of children with disabilities and IEP team members in the MDR context and co-parents in the custodial determination context engage in similar kinds of decision-making, in both cases on behalf of a minor child, and implicate parallel dialogues around disability, behavior, consequences, and discipline.¹⁹⁰ In both cases, stakeholders on both “sides” are broadly aligned in their overarching goals, though they may be sharply divided by opposing viewpoints with respect to approach or implementation. Both MDR hearings and custody determinations are quasi-adversarial, and disagreements between stakeholders, in many cases, arise from reasonable differences in perspectives, beliefs, values, or priorities.

189. *See, e.g.*, Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1257 (2008) (“Family law inherently addresses significant emotional conflict within families” and works to “craft regulatory systems to govern . . . difficult relationships.”).

190. It is imperative to note that some parents may support and even actively seek out or encourage the use of exclusionary discipline as a corrective, punitive, or behavioral management tool for their child(ren)—and to underscore that such preferences, especially where they are expressed by BIPOC or other marginalized parents, are, in fact, highly rational and must be treated as such. *Cf.* Thomas, *supra* note 183 (observing overall higher rates of verbal and physical punishment among Black parents but explaining that for many Black parents, physical punishment, for example, is often “motivated by an effort to reduce misbehavior for youth and improve their futures” and such tactics may be utilized within the family unit “to protect [Black] children” against the realities of systemic racism and in response to “omnipresent fears and dangers from police brutality and the school-to-prison pipeline” in the outside world). In other words, some parents may favor “harsh” disciplinary techniques, including suspension, because the stakes are simply higher for their children. *See id.* While this Article generally opposes the (over)use of exclusionary discipline in K–12 settings, particularly for students with disabilities and other marginalized student groups, it simultaneously advocates meaningful recognition of divergent cultural perspectives on discipline and child-rearing and, on all levels, calls for greater intentionality and respect for BIPOC, immigrant, and other marginalized parents and the parenting values and approaches utilized by these groups.

Family law, however, provides a preferable framework for resolving these (often) reasonable disagreements simultaneously navigating entwined legal, emotional, and interpersonal tensions to cultivate common ground. Specifically, child custody laws accomplish this by centering the best interests of the minor child(ren) as the primary inquiry and guiding force of custodial decision-making.¹⁹¹

2. *Minimizing Conflict to Support Students*

The text of the IDEA expressly provides rights not only to students but also to their parents or guardians. Courts have specifically emphasized and upheld parental rights as an explicit provision and goal of the legislation.¹⁹² In other words, Congress clearly intended to identify parents as important stakeholders with enforceable legal rights. Although the legislation does not frame parents and school districts as entirely co-equal decision-makers (largely because it assigns a kind of tie-breaking authority to school districts), the fact that parents are expressly mentioned implies a commitment to shared, collaborative decision-making—a reading that is reinforced by other provisions of the IDEA. Indeed, the Supreme Court has highlighted Congress’s emphasis on “the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.”¹⁹³ The Court has similarly emphasized that the Act establishes a clear statutory procedural right that “guarantee[s] parents . . . an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate.”¹⁹⁴ A co-parenting model is conducive to this kind of collaborative decision-making, and its

191. *But see* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL’Y REV. 267, 267–68 (1987) (arguing that “the ‘best interests of the child’ standard is more a vague platitude than a legal or scientific standard”).

192. 20 U.S.C. § 1400(c). *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 306 (1988). In some cases, including in the MDR context, procedural rights are attached primarily, even exclusively, to parents as opposed to students themselves. *See* 34 C.F.R. § 300.530(e)(1) (according procedural rights to parent(s) or legal guardian(s) and providing for the participation of students only at the discretion and mutual agreement of all members of the IEP team).

193. *Honig*, 484 U.S. at 306 (citing various provisions under 20 U.S.C. § 1400).

194. *Id.*

alignment with a best interests standard is consistent with the IDEA's equally strong focus on the rights of students. A modified co-parenting conceptual-legal framework would better facilitate the kind of shared, collaborative decision-making process the IDEA explicitly contemplates and provides for. Moreover, reframing the work of the IEP team as a kind of shared custodial enterprise is also consistent with the longstanding principle that schools assume a kind of limited parental role with respect to their students.¹⁹⁵

Finally, from a practical perspective, when schools and parents are not aligned on behavioral expectations and consequences—and when there is inconsistency or when disciplinary actions or responses fail to address the underlying cause of the misconduct—this usually translates to worse outcomes for students.¹⁹⁶ Behavioral systems that reward rather than punish may be more effective not only with students with disabilities but as a behavioral model for all children.¹⁹⁷

Because school officials already tend to have the advantage when disagreement arises between parents and the IEP team or school administrators, applying a co-parenting lens to these relationships has the potential to not only mitigate counterproductive and harmful conflicts, but also facilitate more equitable working relationships between parents and schools. This approach may be more functional for addressing the considerable racial bias that exists in the classroom, particularly in schools serving majority-minority student population where most teachers are white. The evidence indicates that these biases

195. See generally Susan P. Stuart, *In Loco Parentis in the Public Schools: Confused, and in Need of Change*, 78 U. CIN. L. REV. 969 (2010). Notably, “[a]s originally conceived, the doctrine [of *in loco parentis*] was used primarily to justify and defend student disciplinary actions,” typically against objections raised by a student’s (actual) parents or guardians. *Id.* at 969. While Stuart and others have aptly criticized *in loco parentis* for “tasking schools with more than just an educational function” and warned against its recent “misguided revival” in the K–12 context, this Article refers to this doctrine merely to demonstrate that the law broadly frames educational institutions as quasi-parental actors, at least in the sense that it recognizes schools’ legal capacity to make quasi-parental decisions in certain situations. *See id.*

196. See Amy Morin, *Behavior Modification Techniques*, VERY WELL FAM. (Feb. 16, 2021), <https://www.verywellfamily.com/what-is-behavior-modification-1094788> (emphasizing that “[c]onsistency is key to making behavior modification effective,” meaning that “[a]dults need to be united” and “work together as a team,” including across school and home settings). *Cf.* Houston, *supra* note 60, at 452.

197. *Cf.* Houston, *supra* note 60, at 452 (recommending that schools shift toward “incentiviz[ing] good behavior rather than penaliz[ing] students” to meaningfully address behavioral challenges presenting in students with disabilities).

also influence interactions between parents and school staff.¹⁹⁸ White school staff may unfoundedly view Black parents as less responsible, less capable of meeting their children's needs, less knowledgeable than white parents, and more emotional or unreasonable.¹⁹⁹ These stereotypic misconceptions may lead educators to adopt a paternalistic approach where they minimize or deride parent opinions, view their motivations as suspect, or frame parents as being in denial, too ignorant, or too "irrational," to fully comprehend their children's educational needs.²⁰⁰ The long history of institutionalized racism in the United States has left "a legacy of mistrust between communities of color and schools, especially in contexts where certain families have been viewed through deficit—rather than asset—based lenses."²⁰¹

Leveraging professional "expertise" to discourage or invalidate parental input can be exploitative and exacerbate preexisting power

198. See Matt Barnum, *Principals Show Bias in Responses to Black Parents, New Study Finds*, CHALKBEAT (Apr. 26, 2021, 6:00 AM), <https://www.chalkbeat.org/2021/4/26/22400039/principals-public-schools-racial-bias-racism-study> (discussing research finding that "[w]hite principals, in particular, showed signs of discrimination" in their interactions with Black parents and noting that nearly 80% of public school principals are white). Accord Afrika Afeni Mills, *Here's What I Wish White Teachers Knew When Teaching My Black Children*, EDUC. POST (July 9, 2019), <https://educationpost.org/heres-what-i-wish-white-teachers-knew-when-teaching-my-black-children/> (emphasizing the importance of white educators acknowledging and working to dismantle racial biases that inform cross-racial interactions and dialogues in classroom and school settings, including between teachers and parents).

199. Cf. Love et al., *supra* note 53, at 184–85 (explaining that both students and "[f]amilies of color are . . . positioned against white, middle-class family values and behaviors" and that under such a formulation, non-white parents' motivations, attitudes, and practices are frequently misinterpreted and undervalued by white educators and school administrators). Not only are non-white parents of disabled children more likely to be viewed (erroneously) "as being 'in denial' about their children's (lack of) abilities" and "uninvolved" with their children's education, Black parents in particular are often viewed by white school staff as "intimidating, confrontation, and uninformed."). *Id.* at 185.

200. See *id.* at 185. Cf. Anne E. Brodsky & Katherine A. De Vet, "You Have to Be Real Strong": Parenting Goals and Strategies of Resilient, Urban, African American, Single Mothers, 20 J. PREVENTION & INTERVENTION CMTY. 159, 159–60 (2008) (noting the existence of baseless but nevertheless persistent negative stereotypes about "the parenting skills of poor, single mothers," especially when they are Black).

201. David DeMatthews, *Addressing Racism and Ableism in Schools: A DisCrit Leadership Framework for Principals*, 93 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 27, 29 (noting that many white school leaders "may also lack the preparation and training to uncover, understand, and address institutionalized and individual instances of racism and ableism").

imbalances between schools and parents, especially parents of color and those belonging to other marginalized groups. By contrast, an approach that is more closely aligned with co-parenting goals and values would facilitate higher levels of mutual respect and understanding and ultimately be more productive from a decision-making and best interests of the child perspective. As researchers Anne Brodsky and Katherine De Vet have demonstrated through their research, contrary to unfounded, damaging negative stereotypes about low-income parents of color, particularly Black single mothers, these individuals utilize “a range of . . . fully implemented parenting strategies designed to respond to a variety of parenting goals, including protecting their children, instilling values, and disciplining misbehavior[.]” and which were “congruent with their goals, the neighborhood context, and particular child behaviors.”²⁰² A stronger presumption of parental competency would help to ensure that parents’ unique perspectives and expertise on their own children is adequately considered in school disciplinary decisions, and a co-parenting-aligned approach would bake in this presumption by recalibrating the power (im)balance between parents and schools.

VI. CONCLUSION

This Article has demonstrated how the current manifestation determination inquiry is both broadly unworkable and deeply and specifically detrimental to students with disabilities. In proposing a shift in the IDEA’s analytical framework for disciplinary decision-making involving students with disabilities, it has identified family law’s best interests of the child standard as a desirable model to adopt for the purposes of the MDR and outlined the numerous advantages of transitioning to this more flexible, child-centered approach.

In proposing a (re)appropriation of the best interests framework in student discipline decisions, this Article has also sought to highlight the overall suitability of family law frameworks to special education contexts and discussed the numerous potential benefits of reframing the parent-school relationship as something more akin to a shared custody or co-parenting arrangement. In short, family law already provides a

202. Brodsky & De Vet, *supra* note 200, at 160.

workable model for navigating tense interpersonal conflicts between stakeholders who are ultimately aligned as to their broader or overarching goals, so it may prove applicable to other areas of (special) education law or other legal issues affecting disabled youth.

While this Article has intentionally worked within the confines of existing education law for the purposes of asserting concrete proposals, as an overall matter, it advocates a broad re-envisioning of student discipline to decrease the use of exclusionary discipline, especially out-of-school suspensions and expulsions. Not only is it demonstrably clear from the data that students from marginalized groups face disproportionately high rates of exclusionary discipline, but there is also reason to question the wisdom and efficacy of such measures, even simply from a behavior modification perspective.