

# Schooling at Risk

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*ABSTRACT: For much of the nation's history, states excluded entire groups of students from mainstream public-school classrooms based on classifications of race or disability. Although Brown vs. Board of Education and its progeny, as well as the Individuals with Disabilities Education Act, now prohibit the most blatant and egregious forms of this type of exclusion, a new version has emerged. Over the last thirty years, schools have suspended, and transferred into separate schools known as Alternative Education Programs ("AEPs"), a significant and growing number of students.*

*Proponents of this new version of exclusion argue that these practices can help to curb misbehavior, promote school safety, and assist students in obtaining academic success. Yet research shows that suspending students does little to improve behavior; nor does it necessarily improve school safety. And while policymakers intend for AEPs to re-engage students at risk of educational failure, they are often demonstrably inferior to regular public schools and thus unable to accomplish these stated objectives. Perhaps most troubling, the individual students at greatest risk of suspension and transfer to AEPs are from those groups once subject to de jure segregation and outright bans from classrooms: African-American students and students with disabilities.*

*This Article contextualizes suspension and AEP transfer within the longer history of exclusion of Black students and students with disabilities. It*

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*describes how pre-civil rights school districts justified group-based exclusion of African-American students and students with disabilities on the basis that they were undeserving of the full promise of public education. It then analyzes the rise in suspensions and growth of AEPs and outlines their problematic features, while drawing important parallels between the new exclusion and the historical trope of the underserving child. It shows the ways in which suspension resists legal challenge, as well as how traditional tools for promoting educational equity are likely to be inadequate in addressing the flaws of AEPs. Looking forward toward possible solutions, the Article commends the small but growing number of schools finding non-exclusionary ways to address misbehavior and suggests that rather than seek to reform AEPs, policymakers should consider abandoning this failed educational innovation.*

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“How does it feel to be a problem?”<sup>1</sup>

“I would show up, I would sit down and listen to music the whole time. I didn’t really make any progress the whole time I was there . . . .”<sup>2</sup>

I. INTRODUCTION

A new version of school exclusion has emerged over the last thirty years. During this period, schools have increasingly employed out-of-school suspensions and involuntary transfers. Since the 1970s, many students’ chances of suspension have doubled.<sup>3</sup> In the 2011–2012 school year, the most recent for which data are available, 3.5 million students—nearly 7% of the total number of enrolled students—received at least one out-of-school suspension, while over 100,000 students were expelled.<sup>4</sup> In addition, school districts have begun to transfer a growing number of students struggling with academic or behavioral issues out of regular public schools and into Alternative Education Programs (“AEPs”).<sup>5</sup> Over half a million students attend AEPs each year.<sup>6</sup>

States and school districts make reference to purported educational benefits in justifying suspension and AEP transfer. Suspension typically rests on notions that removal from school can deter future misbehavior by the offending student.<sup>7</sup> AEPs are meant to provide a different, ostensibly more

1. WILLIAM EDWARD BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 2 (1904).

2. Heather Vogell & Hannah Fresques, ‘Alternative’ Education: Using Charter Schools to Hide Dropouts and Game the System, PROPUBLICA (Feb. 21, 2017), <https://www.propublica.org/article/alternative-education-using-charter-schools-hide-dropouts-and-game-system> (quoting Thiago Mello, who spent a year at an alternative education program and left without graduating).

3. Derek Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 3 (2016) (citing DANIEL LOSEN ET AL., CTR. FOR CIVIL RIGHTS REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 6 (2015), <https://perma.cc/R2PH-2F24>).

4. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), <https://perma.cc/MH78-N72B>.

5. Camilla A. Lehr et al., *Alternative Schools: A Synthesis of State-Level Policy and Research*, 30 REMEDIAL & SPECIAL EDUC. 19, 23–24 (2009).

6. *Id.* at 23 (noting that there were 646,500 students enrolled in public school districts attending alternative schools and programs for at-risk students in 2007–2008); Hannah Fresques et al., *Methodology: How We Analyzed Alternative Schools Data*, PROPUBLICA (Feb. 21, 2017), <https://www.propublica.org/article/alternative-schools-methodology> (noting alternative school students number roughly half a million).

7. *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Suspension is . . . a valuable educational device.”); *see also infra* notes 232–39 and accompanying text.

supportive environment for students at risk.<sup>8</sup> The “at risk” category is capacious, typically encompassing academic problems as well as misbehavior both in and out of school.<sup>9</sup>

Yet research reveals that suspension and AEP transfer in fact have little proven educational benefit, and they instead cause significant harm.<sup>10</sup> Suspended students fall behind in their studies<sup>11</sup> and face a heightened risk of involvement in the juvenile and criminal systems.<sup>12</sup> In addition, high rates of suspension in a school can negatively affect both the climate in the classrooms they leave behind and the safety and academic achievement of the remaining students.<sup>13</sup> AEPs are *designed* to be inferior to regular public schools in significant respects, including curricular offerings and extracurricular opportunities.<sup>14</sup> In-person instruction is frequently absent; when teachers are present, they are often less qualified than their counterparts in regular public schools.<sup>15</sup> AEPs frequently mete out comparably harsher forms of discipline than regular schools.<sup>16</sup> Students assigned to AEPs thus tend to become more rather than less alienated from school, with significant numbers leaving school entirely.<sup>17</sup>

8. See PRISCILLA ROUSE CARVER ET AL., U.S. DEP’T OF EDUC., ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007–08, at 1 (2010), <https://nces.ed.gov/pubs2010/2010026.pdf> (discussing purpose of alternative schools and programs).

9. See, e.g., ALLAN POROWSKI ET AL., U.S. DEP’T OF EDUC., HOW DO STATES DEFINE ALTERNATIVE EDUCATION? 1 (2014), <http://files.eric.ed.gov/fulltext/ED546775.pdf> (noting “little consensus” among states on how to define alternative education); N.C. DEP’T OF PUB. INSTRUCTION, POLICIES AND PROCEDURES FOR ALTERNATIVE LEARNING PROGRAMS AND SCHOOLS GRADES K-12, at 8 (2014), <http://www.dpi.state.nc.us/docs/alp/develop/alpmanual.pdf> [hereinafter N.C. POLICIES AND PROCEDURES] (providing examples of circumstances that make a student eligible for placement in an alternative learning program, including, *inter alia*, “alienation from school,” “tardiness and/or poor school attendance,” “abuse and neglect,” and “*other risk factors*”).

10. TONY FABELO ET AL., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 54 (2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf); see also Vogell & Fresques, *supra* note 2 (noting high percentages of Florida alternative school students who leave school and criticizing the school district practice of eliminating those numbers when calculating dropout rates). For harms of suspension see *infra* notes 152–54 and accompanying text.

11. CHERYL ANDERSON ET AL., RESTORATIVE PRACTICES: FOSTERING HEALTHY RELATIONSHIPS & PROMOTING POSITIVE DISCIPLINE IN SCHOOLS 4 (2014), <http://schottfoundation.org/sites/default/files/restorative-practices-guide.pdf> (“Students who are not in class are, of course, not doing much learning. Thus, students subjected to harsh disciplinary measures that exclude them from school tend to fall behind academically.”).

12. See FABELO ET AL., *supra* note 10, at 61.

13. Black, *supra* note 3, at 45–47.

14. See *infra* notes 194–205 and accompanying text.

15. See *infra* notes 213, 216 and accompanying text.

16. See *infra* note 204 and accompanying text.

17. See *infra* note 335 and accompanying text; *supra* text accompanying note 10; see also ACLU, MISSING THE MARK: ALTERNATIVE SCHOOLS IN THE STATE OF MISSISSIPPI 51 (2009),

This new version of school exclusion raises critical issues of inclusion and equity. Students who are suspended are disproportionately African-American students and students with disabilities.<sup>18</sup> So too are AEP transferees.<sup>19</sup> Today's AEPs in important respects resemble the pre-civil rights era's separate and inferior educational settings for students of color and disabled students.<sup>20</sup> Yet the new school exclusion remains underexamined by legal scholars.<sup>21</sup>

This Article situates suspension and AEP transfer within the longer history of exclusion of African-American students and students with disabilities. For much of the nation's history, states and school districts banned or consigned to inferior school settings youths based on classifications of race or disability.<sup>22</sup> Courts upheld exclusion on the grounds that some groups of students were undeserving of inclusion in regular classrooms. In affirming the ability of a school district to maintain a segregated system before the decision in *Brown v. Board of Education*, for example, one court stated that education "is a beneficent State institution . . . and surely those who create the charity have the undoubted right to nominate the beneficiaries of it."<sup>23</sup> Before the passage of federal legislation creating education rights for students with disabilities,<sup>24</sup> state courts regularly upheld the practice of barring such students. One court affirmed a school district's decision to bar a child from the public schools because "his physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children."<sup>25</sup>

While legal precedent and statutes have remediated the most blatant and egregious of these practices,<sup>26</sup> I argue here that the notion that some children are undeserving of the full promise of public education persists. Today,

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[https://www.aclu.org/files/pdfs/racialjustice/missingthemark\\_report.pdf](https://www.aclu.org/files/pdfs/racialjustice/missingthemark_report.pdf) (noting that alternative programs can increase dropout rates).

18. See *infra* notes 161–66 and accompanying text.

19. See *infra* notes 224–25 and accompanying text.

20. See discussion *infra* Section III.C–D.

21. A Westlaw search for articles specifically addressing charter schools and tuition vouchers revealed 141 articles published since January 1, 2006. By contrast, a Westlaw search for articles specifically addressing alternative education programs conducted *without* any date parameters found only 17 articles, many of which are student notes.

22. See *infra* notes 55–82 and accompanying text.

23. *Ward v. Flood*, 48 Cal. 36, 40 (1874).

24. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

25. *State ex. rel. Beattie v. Bd. of Educ. of Antigo*, 172 N.W. 153, 154 (Wis. 1919).

26. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding *de jure* school segregation unconstitutional); see also Education for All Handicapped Children Act of 1975 (guaranteeing all handicapped children a right to a public education "designed to meet their unique needs"); 20 U.S.C. § 1412(a)(5)(A) (2012) (modifying and expanding the principles of free, appropriate public education for students with disabilities by way of a requirement that students with disabilities be maintained in a classroom with non-disabled children "[t]o the maximum extent appropriate"); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 158–63 (2016) (summarizing post-*Brown* jurisprudence that attempted to dismantle segregation).

developmentally normative student misbehavior can result in removal from school.<sup>27</sup> In addition, districts transfer students out of their schools and into AEPs after labeling them disruptive, or “low perform[ing].”<sup>28</sup> The rhetoric surrounding suspensions and AEP transfers echoes the discourse that accompanied earlier group-based exclusion. In this way, an historical trope of the undeserving child justifies and even normalizes the ongoing exclusion of African-American students and students with disabilities.

Traditional tools for promoting educational equity are largely inadequate to confront the new exclusion. Suspended students have minimal recourse to challenge their suspensions; those who exercise their rights to appeal encounter procedural obstacles and experience limited success.<sup>29</sup> The unique features of AEPs—small size, off-campus physical location, and transitory student population—place them largely outside the federal and state regulatory ambit for schools. As a result, students at risk of this new form of exclusion must rely on school districts voluntarily adopting alternatives to suspension and AEP transfer as means of addressing student misbehavior.<sup>30</sup>

The Article proceeds as follows. Part II offers the historical context within which the current form of exclusion is situated. It describes the central norm of universal public education advanced by the 19th century “common school” movement. It details the history of outright bans, and later segregation, of African-American students and students with disabilities. It demonstrates that the notion that these groups were undeserving of education animated those exclusionary practices. Part III demonstrates that while *de jure* segregation has ended and federal laws now protect students with disabilities, the trope of an undeserving child persists. It supports this contention through detailing the increase in misbehavior-based exclusion and rise of AEPs. It analyzes how the structure and operation of AEPs work to harm rather than help students and thus reinforce notions that the students within them are undeserving. Part IV examines the difficulty of combatting suspension with legal remedies and shows that key legal and legislative strategies that advocates have used to curb

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27. See J. Kevin Jenkins & John Dayton, Commentary, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 WEST’S ED. L. REP. 13, 14–16 (2003) (recounting examples of suspensions under “zero tolerance” policies).

28. Vogell & Fresques, *supra* note 2 (quoting Randle Richardson, who ran schools for students who had committed disciplinary violations).

29. See *infra* Part IV.A.

30. For an example of laudable reforms, see, e.g., NORTHSIDE ELEMENTARY SCHOOL OF THE NORTH CAROLINA, CHAPEL HILL-CARRBORO CITY SCHOOLS DISTRICT OF N.C., POSITIVE BEHAVIORAL INTERVENTION AND SUPPORT, <http://nes.chccs.k12.nc.us/parents/pbis-positive-behavior-intervention-and-support>; *CHCCS Leaders Take Aim at Racial Disparities in School Discipline*, CHAPELBORO.COM (Sept. 8, 2015), <http://chapelboro.com/featured/chccs-leaders-take-aim-at-racial-disparities-in-school-discipline> (describing changes in this district meant to reduce out-of-school discipline). But see Black, *supra* note 3, at 57–71 (arguing that students can utilize precedent from school-finance cases to challenge suspension and that reliance on voluntary changes is bound to be unsuccessful at achieving widespread reform).

the most blatant forms of exclusion are ill-equipped to reform the flaws of the AEP. Looking forward toward possible solutions, Part IV notes as a welcome trend the small but growing number of schools that have implemented alternatives to exclusionary forms of discipline. It concludes by arguing that while individual districts may be able to institute small improvements in AEPs, this particular educational innovation should be abandoned.

## II. SCHOOLING FOR SECOND-CLASS CITIZENSHIP

While suspension and AEP transfer are aimed at individual students based on misbehavior or personal or family circumstances, group-based exclusionary practices have a long historical lineage. Subpart A sets forth the inclusionary aspirations of the “common school” movement of the 19th century. Subpart B juxtaposes those aspirations against the reality of exclusion based on race, ethnicity, and disability that has persisted throughout the history of public education. This section also demonstrates how poverty has exacerbated the impact of race- and disability-based exclusion.

### A. *THE MOVEMENT FOR COMMON SCHOOLS*

Although the church and the family were the primary instruments of education in the colonies, the desirability of state-sponsored public schooling occupied a prominent place in political thought at the time of the nation’s founding.<sup>31</sup> George Washington, James Madison, and Thomas Jefferson in particular believed public education was essential to a democracy.<sup>32</sup>

Notwithstanding the Founders’ articulation of the importance of education to the health of the Republic, the structure of the U.S. Constitution relegated the federal government to a secondary role in education.<sup>33</sup> Because education is omitted from the purview of federal authority, state and local

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31. IRA KATZNELSON & MARGARET WEIR, *SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL* 32–33 (1985) (noting that while some localities in 17th century Massachusetts provided formal schooling, outside of New England public schooling did not constitute a fact of public life).

32. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 13 (2004). The Founders’ commitment to education was apparent in two Land Ordinances enacted by the Continental Congress, which reserved specified land parcels for the maintenance of public schools within each township and promoted education as a key principle of governance in newly admitted states. See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 114 n.129 (2013) (citing Northwest Ordinance of 1787 art. III, reprinted in U.S.C.A. Northwest Ordinance, which declares “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged”).

33. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1038 (1995) (“[Public schools] were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State laws.” (quoting *Ward v. Flood*, 48 Cal. 36, 40 (1874))).

governments are charged with creating and regulating the institutions of primary and secondary public education.<sup>34</sup>

At the state level, a campaign to establish schooling for all citizens began in earnest in 1830.<sup>35</sup> Horace Mann, Secretary of the Massachusetts Commission to Improve Education, advanced the notion that young people should be educated in “common” schools that would supplement what families taught their children at home,<sup>36</sup> envisioning them as “common, not as inferior . . . but as the light and air are common.”<sup>37</sup> Proponents of this idea envisioned free, public schools where children of all socioeconomic backgrounds would share the same classroom, learning skills and habits that would make them productive and law-abiding.<sup>38</sup> Echoing themes articulated by Jefferson, common-school proponents argued that an educated citizenry is necessary for democracy;<sup>39</sup> that education promotes economic self-sufficiency and social mobility;<sup>40</sup> and that common schooling creates social cohesion.<sup>41</sup>

34. U.S. CONST. amend. X. See generally Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 968–69 (2015) (discussing constitutional foundations of state and local control of education).

35. JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935*, at 2 (1988); see Friedman & Solow, *supra* note 32, at 122–27 (discussing combination of nativist, progressive, and egalitarian motivations for movement for universal schooling).

36. Horace Mann, *Twelfth Annual Report of the Massachusetts Board of Education, in THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 79–112 (Lawrence A. Cremin ed., 1957).

37. THE INST. FOR EDUC. EQUITY & OPPORTUNITY, *EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION* 32 (2008) (omission in original) (quoting Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 611 (2004)).

38. KATZNELSON & WEIR, *supra* note 31, at 50 (describing common-school sentiment through quoting the first superintendent of the Chicago public schools, who argued in 1854: “Tear down our School Houses and turn our children into the streets, and our political institutions would be involved in the ruin.”).

39. Political philosophers have echoed this theme. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 101 (1916) (“The devotion of democracy to education is a familiar fact.”); AMY GUTMANN, *DEMOCRATIC EDUCATION* 134 (1987) (“The democratic truth in equalization is that all children should learn enough to be able not just to live a minimally decent life, but also to participate effectively in the democratic processes by which individual choices are socially structured. A democratic state, therefore, must take steps to avoid those inequalities that deprive children of educational attainment adequate to participate in the political processes.” (emphasis omitted)).

40. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting as valid State of Wisconsin’s argument that state interest in preparing individuals to be self-reliant and self-sufficient participants in society justified compulsory education law); John Dewey, *A Democratic Conception of Education, in PHILOSOPHY OF EDUCATION* 47, 48 (Randall Curran, ed. 2007) (arguing that a socially mobile society must ensure that “its members are educated to personal initiative and adaptability”).

41. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216–17, 231 (1948) (Frankfurter, J., concurring); see KATZNELSON & WEIR, *supra* note 31, at 45 (framing this argument in terms more instrumental and perhaps cynical, noting that economic and political elites feared that industrialization and immigration in urban areas created problems of potential unrest and thus pursued educational reform as an instrument of order).



Common-school reform replaced the practice of providing free education only to the very poor; “public school” thus shed much of its previous stigma.<sup>42</sup> By the end of the 19th century, most states made primary schooling universally available—“at least for white children.”<sup>43</sup> By 1918, every state had adopted compulsory attendance laws.<sup>44</sup> The Supreme Court has recognized the centrality of education to American life, finding public schools to be, variously, “a most vital civic institution for the preservation of a democratic system of government,”<sup>45</sup> “the most important function of state and local governments,”<sup>46</sup> and to play “a fundamental role in maintaining the fabric of our society.”<sup>47</sup> Education spending currently represents the largest budget item in most state budgets.<sup>48</sup>

### B. THE REALITY OF EXCLUSION

The social-cohesion goal of the common-school movement has rested uncomfortably next to the reality of systematic exclusion of entire groups of students from the project of universally available public education.<sup>49</sup> The most prominent historical examples are the widespread practice of banning, and later segregating, groups of students based on classifications of race and

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42. *Id.* (describing how education was formerly reserved for “paupers”).

43. KATZNELSON & WEIR, *supra* note 31, at 58. Southern states were generally slower to adopt the idea of state-sponsored education than elsewhere in the country. *See* McConnell, *supra* note 33, at 1039 (noting that public schools that did exist in the pre-War South “served only a fraction of the school-age population”). *See generally* ANDERSON, *supra* note 35 (noting that pre-War southern politicians resisted state-administered, mandatory public education for white and Black youth, viewing it as an improper intervention in the natural social hierarchy).

44. William Galston, *Parents, Government, and Children: Authority over Education in a Pluralist Liberal Democracy*, 5 LAW & ETHICS HUM. RTS. 284, 291 (2011).

45. *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

46. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

47. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). While the Supreme Court stopped short of holding that compulsory school attendance required parents to send their children to public schools, it granted states a broad right to regulate public school alternatives. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002) (upholding a voucher program providing tuition aid for students attending private schools); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 254 (3d Cir. 2008) (upholding Pennsylvania law governing reporting and review requirements of home school children). *Cf. Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (striking down extensive regulation of Japanese schools because the regulation, as a whole, was “a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason”).

48. KAHLBERG, *supra* note 32, at 3.

49. *See infra* notes 51–82 and accompanying text.

disability.<sup>50</sup> Implicit in the resistance of states to making education widely available is a notion that public education properly may be provided to or withheld from particular groups based on popular notions regarding the worthiness of those groups.<sup>51</sup> This vision of education as a “grand State charity”<sup>52</sup> to be distributed only to groups deemed deserving found early expression in the criminalization of literacy for enslaved people,<sup>53</sup> as well as practices barring students with disabilities from school.<sup>54</sup>

### 1. Race and Ethnicity

The Jeffersonian vision of public education was of schooling only for free citizens.<sup>55</sup> From 1800 to around 1830, many southern states passed legislation criminalizing teaching literacy to enslaved children.<sup>56</sup> Indeed, the education policies and practices of the antebellum South reflected a belief that peace and prosperity depended on repression of literacy among its enslaved population.<sup>57</sup>

Immediately after Emancipation, Black<sup>58</sup> southerners, supported by the Freedmen’s Bureau and Congressional Radical Republicans, laid a

50. LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 8 (2010) (documenting historical examples of denial of access to education).

51. *Id.* (“[I]t is our continuing comfort with profound inequality that is the Achilles heel of American education.”).

52. *Ward v. Flood*, 48 Cal. 36, 40 (1874).

53. See, e.g., A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only As An Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1020 (1992) (describing the extent to which criminal law prevented the literacy and education of Black persons in Virginia); see also Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN ST. L. REV. 611, 615 & n.15 (2015) (citing the 1740 South Carolina “Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province,” which stated that teaching slaves to read or write “may be attended with great inconveniences” and imposed a one hundred pound fine).

54. See, e.g., *Watson v. Cambridge*, 32 N.E. 864 (Mass. 1893) (upholding state’s exclusion from the public schools of a student deemed “weak of mind”); *State ex rel. Beattie v. Bd. of Educ. of Antigo*, 172 N.W. 153 (Wis. 1919) (subordinating the individual rights of a student with disabilities to the school board’s determination of what is in the general welfare of the school).

55. DAVID TYACK ET. AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 134 (1987); see also ANDERSON, *supra* note 35, at 1 (noting Jefferson’s argument in 1787 to the Virginia legislature in support of three years of public schooling for residents of the commonwealth and enrollment of the brightest students in publicly funded grammar school and college was reserved for free citizens).

56. ANDERSON, *supra* note 35, at 2.

57. See *id.*

58. This Article adopts a scholarly convention of using the upper-case “B” when discussing Black people because “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1710 n.3 (1993) (quoting Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988)).

foundation for public education that would be available to white and newly emancipated Black citizens.<sup>59</sup> The Reconstruction Act of 1867 established that no state that had seceded would be readmitted to the Union until Congress had examined its state constitution and found it to be “in conformity with the Constitution of the United States in all respects.”<sup>60</sup> As a result, Southern states amended their constitutions to make clear that Black citizens could not be barred outright from public education.<sup>61</sup>

However, throughout the next near century, states across the country segregated schools by race and ethnicity. At the time, commentators defended segregation as advancing the best interests of both the excluded and dominant group.<sup>62</sup> In support of a separate-school law for children of Black, Chinese, and Indian descent, a California newspaper editorial opined:

[The codes] let us keep our public schools free from the intrusion of the inferior races. If we are compelled to have Negroes and Chinamen among us, it is better, of course, that they should be educated. But teach them separately from our own children. Let us preserve our Caucasian blood pure. We want no mongrel race of moral and mental hybrids to people the mountains and valleys of California.<sup>63</sup>

Racially segregated schools were often characterized by massive race-based disparities; adequate and equitable funding never took hold.<sup>64</sup> Just three years after his famous dissent in *Plessy v. Ferguson*,<sup>65</sup> Justice Harlan voted to uphold

59. TYACK ET AL., *supra* note 55, at 136.

60. McConnell, *supra* note 33, at 962 & n.51 (citing Reconstruction Act of 1867, ch. 153, 14 Stat. 428) (“Tennessee was readmitted before passage of the Act, and is therefore the only Confederate state to be readmitted under its antebellum state constitution . . .”).

61. *Id.* at 963 (discussing the fact that the question of whether education should be racially integrated was not explicitly decided in all Southern states but noting that “no constitutional convention of a Southern state seeking readmission to the Union openly adopted a policy of racially segregated education”).

62. See, e.g., *Roberts v. Boston*, 59 Mass. 198, 209 (1849) (upholding an order requiring a Black child to attend a “colored” school instead of a white school, even though the white school was closer to her home, because the city schools committee had considered “the best interests of both classes of children placed under their superintendence” when it decided to segregate the schools).

63. Joyce Kuo, Note, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 190 (1998) (alteration in original).

64. TYACK ET AL., *supra* note 55, at 135 (noting that in the Black schools in the South, “no more than 30% of school-age children were enrolled, [and] salaries of teachers declined”; white schools, by contrast, gained more resources); see also Kiel, *supra* note 53, at 615 (“In Alabama, . . . as Reconstruction waned, spending on teacher salaries in white and Black schools, which had once been roughly equal, diverged to the point that teacher spending was \$30 per white student and less than \$1 per African American student.”).

65. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.”).

the system of separate and unequal schools.<sup>66</sup> *De jure* segregation remained the law of the land for the next five decades.<sup>67</sup> One historian describes the development of separate public-school systems as constituting “two contradictory traditions of American education”: “schooling for democratic citizenship and schooling for second-class citizenship.”<sup>68</sup>

## 2. Disability

Until the passage of the Education for All Handicapped Children Act in 1975,<sup>69</sup> states regularly barred students from mainstream classrooms on the ground that their differences in physical, emotional or intellectual ability<sup>70</sup> rendered them unworthy of inclusion.<sup>71</sup> Public schools instead consigned these students to classrooms with “severely substandard academic programs . . . separated from the general student population . . . [and] often located in basements or boiler rooms.”<sup>72</sup> Additionally, students with disabilities were

66. *Cumming v. Richmond Cty. Bd. of Educ.*, 175 U.S. 528, 544 (1899) (upholding a local school board’s decision to close a Black public high school for financial reasons, despite the fact that the white public high school remained open). Pre-*Brown* courts upheld segregated schooling of other racial and ethnic minorities. *See, e.g.*, *Gong Lum v. Rice*, 275 U.S. 78, 81–82 (1927) (holding that a Chinese student was “not entitled” to attend a white school, even though it was the only school in her school district, but instead was required to attend a colored school in her county). I focus in this Article primarily on examples of segregation of Black students as this population is disproportionately represented in AEPs.

67. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 491 (1954) (noting that American courts labored with the “separate but equal” doctrine for over half a century).

68. *See* ANDERSON, *supra* note 35, at 1.

69. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

70. While “disability” has many possible meanings, in this Article I follow the definition from the federal Individuals with Disabilities Education Act. *See* 20 U.S.C. § 1401(3)(a) (2012) (defining “child with a disability” as including “a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities”); *see also* 20 U.S.C. § 1401(30)(a)–(b) (2012) (A “specific learning disability [is] a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. . . . Disorders . . . include[] such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”). At the time of the enactment of The Education for All Handicapped Children Act, advocates wanted to include in the category a broader range of problems, including those that result from poverty or other environmental circumstances that impair a child’s learning. However, the statute as enacted explicitly excludes such conditions. For a critique of the definition of disability that excludes environmental conditions, *see generally* RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* (2013) (describing the need for a definition of disabilities that includes environmental circumstances or poverty). For an examination of the changes in the definition of disability and how they affect legal claims, *see* Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 402–16 (2000).

71. Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1811 (2008).

72. *Id.*

often enrolled in institutions that played “multiple roles as school, hospital, [and] penal institution.”<sup>73</sup> Disability advocates and scholars estimate that prior to 1975, when the law was passed, three million school-aged children with disabilities were not receiving adequate educational services.<sup>74</sup>

Well into the 20th century, courts did not interfere with schools’ exclusionary practices for children with disabilities. The exclusion was typically justified as necessary for the orderly maintenance of classrooms and acceptable because students with disabilities could not benefit from, and thus did not merit, education. In 1893, the Massachusetts Supreme Judicial Court affirmed the exclusion of a child who was deemed “so weak in mind as not to derive any marked benefit from instruction.”<sup>75</sup> In *Beattie v. Board of Education*, the Supreme Court of Wisconsin upheld the exclusion of a student who was “slow and hesitating in speech . . . [and] ha[d] a nervous and excitable nature,” because his presence was claimed by the school to be bothersome to both teachers and students.<sup>76</sup>

Some state legislatures *required* that schools exclude students with disabilities. At least one state made it a crime for parents to seek to enroll their excluded disabled children in public school.<sup>77</sup> Policies that permitted and facilitated exclusion based on disability can be seen in cases from the previous two centuries that otherwise appear to promote inclusion. In a 1947 case upholding Mexican students’ rights to attend public schools, the Ninth Circuit noted, “[a]ll petitioners are taxpayers of good moral habits, *not suffering from disability* . . . and are qualified to be admitted to the use of the schools and facilities within their respective districts and systems.”<sup>78</sup> In a case from the 19th century, *Tape v. Hurley*, a San Francisco school district barred an Asian student from enrolling.<sup>79</sup> The plaintiff challenged the ban, arguing that her residence in the district meant she should have been permitted to attend.<sup>80</sup> The California Supreme Court agreed.<sup>81</sup> The code at the time stated: “Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district . . . Trustees shall have the power to exclude children of *filthy or vicious habits* . . . .”<sup>82</sup> The code did not define the italicized phrase; its failure

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73. ROBERT L. OSGOOD, *THE HISTORY OF INCLUSION IN THE UNITED STATES* 55 (2005).

74. Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 344 (1999).

75. *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893).

76. *State ex rel. Beattie v. Bd. of Educ. of Antigo*, 172 N.W. 153, 154 (Wis. 1919).

77. See generally MARK C. WEBER, *SPECIAL EDUCATION LAW AND LITIGATION TREATISE* (1992) (describing statutory ban in North Carolina).

78. *Westminster Sch. Dist. of Orange Cty. v. Mendez*, 161 F.2d 774, 776 (9th Cir. 1947) (emphasis added).

79. *Tape v. Hurley*, 66 Cal. 473, 473 (1885).

80. *Id.*

81. *Id.* at 473–74.

82. *Id.* (emphasis added).

to do so presumably opened the door for school districts to exercise their discretion to exclude children whose physical condition or otherwise bothersome demeanor rendered them displeasing to administrators.

### 3. The Compounding Effect of Poverty

A student's poverty has never subjected her to exclusion in the way that race, ethnicity, and disability have. States have never barred poor students from receiving a public education. Nor have they explicitly consigned them to substandard settings.<sup>83</sup> Even prior to the common-school movement, free education was provided to indigent people.<sup>84</sup> The vision of common-school proponents was that free and widespread public education would in fact promote economic mobility.<sup>85</sup>

Nonetheless, poverty functions to prevent poor students from realizing the full benefits of public education.<sup>86</sup> Poverty makes it more likely that a child will experience multiple challenges that hamper her readiness for school and performance as a student. "These include homelessness . . . ; exposure to environmental pollutants; lack of access to healthcare . . . ; and . . . chronic stress and depression. Some studies suggest poverty-induced stress can stunt brain growth."<sup>87</sup>

As a result of these challenges, students from economically disadvantaged backgrounds struggle to attain academic success.<sup>88</sup> The effects of poverty are compounded in "high-poverty" schools, defined as those in which more than 75% of students qualify for a free or reduced-price lunch.<sup>89</sup> High-poverty

83. KATZNELSON & WEIR, *supra* note 31, at 15–16 (noting that U.S. schools have no class-based barriers to access).

84. THE INST. FOR EDUC. EQUITY & OPPORTUNITY, *supra* note 37, at 32–33 (noting that stigma attached to attending free school, as it was conceptualized as charity for paupers).

85. See, e.g., Eduardo Porter, *For Schools, Long Road to a Level Playing Field*, N.Y. TIMES (May 20, 2014), <https://www.nytimes.com/2014/05/21/business/economy/for-schools-long-road-to-a-level-playing-field.html> (noting egalitarian aspirations of public education in the United States); see also *supra* note 40 and accompanying text.

86. See Henry M. Levin, *On the Relationship Between Poverty and Curriculum*, 85 N.C. L. REV. 1381, 1389–95 (2007) (discussing significant limitations on educational opportunities of low-income children).

87. Barbara Fedders & Jason Langberg, *School-Based Legal Services As a Tool in Dismantling the School-to-Prison Pipeline and Achieving Educational Equity*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 212, 219, 222–23 (2013) (noting that over 20% of children live in poverty).

88. Osamudia R. James, *Business As Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 797–98 (2008); Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps in Our Public Schools*, 85 N.C. L. REV. 1315, 1316 (2007).

89. See SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2013, at 78–79 (2013), <http://nces.ed.gov/pubs2013/2013037.pdf>. These "high-poverty" schools presently constitute around 20% of all schools and are increasing; *id.* at 79; see SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2010, at 82 (2010), <https://nces.ed.gov/pubs2010/2010028.pdf>; GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY

schools struggle to recruit and retain qualified teachers.<sup>90</sup> Facing multiple challenges of their own, parents in poverty are unable to contribute to the functioning and operation of the school in the same manner as parents not comparably disadvantaged. Students in these schools typically experience lower academic achievement, lower graduation rates, and less employment success than those in non-high-poverty schools.<sup>91</sup>

The current funding structures of public education make it difficult for high-poverty schools to offset the deleterious impact of poverty on learning.<sup>92</sup> Because local property taxes are primary revenue sources for school districts,<sup>93</sup> disparities exist between property-rich and property-poor districts. These disparities have become more pronounced as socioeconomic segregation has increased.<sup>94</sup> Districts with low property tax bases typically cannot generate the same revenue for schools as wealthier districts and thus cannot offset the disadvantages that accompany poverty.<sup>95</sup> Despite successful challenges to

16 (2005), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf>; James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2094–95 (2002).

90. Charles Clotfelter et al., *High Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1356 (2007).

91. Levin, *supra* note 86, at 1389–95; Gregory J. Palardy, *High School Socioeconomic Segregation and Student Attainment*, 50 AM. EDUC. RES. J. 714, 715 (2013); Russell W. Rumberger, *Parsing the Data on Student Achievement in High-Poverty Schools*, 85 N.C. L. REV. 1293, 1306 (2007). While some high-poverty schools defy these trends, studies suggest that public schools that do not have private funding sources and that cannot select their students, as charter schools can, do not sustain success over the long term. See Fedders & Langberg, *supra* note 87, at 225 (citing Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1547–48 (2007)).

92. Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1838–40 (2007).

93. *Id.* at 1840 n.11 (citing a study that showed that, “[n]ationally, local revenues account for 43.5% of total public school expenditures,” but also noting discrepancies in how much local property tax reliance exists in each state); see NAT’L RESEARCH COUNCIL, EQUITY AND ADEQUACY IN EDUCATION FINANCE 1 (Helen F. Ladd et al. eds., 1999).

94. See SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 95–96 (2004) (describing that socioeconomic segregation intensified after World War II when Americans left urban centers and settled in homogeneous suburbs); Reynolds, *supra* note 92, at 1840 n.12 (noting that “many school funding systems were created in the nineteenth century to finance schools in predominantly rural communities” when “population and property wealth were distributed more evenly” and that, “[a]s a result the local property tax produced far less inequality than it does today, since American communities are now heavily segregated along socioeconomic lines”).

95. Reynolds, *supra* note 92, at 1838 n.5 (noting a General Accounting Survey finding that, “on average, wealthy districts spend at least 24% per-pupil more than poor districts”); see also Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1444–45 (2014) (arguing that “gross fiscal disparities persist between neighboring school districts” because “districts . . . encompass[ing] higher valued property can levy taxes at a lower rate yet still collect large sums of money while . . . districts . . . encompass[ing] lower valued property must levy taxes at a higher rate but still collect less [revenue]”).

unequal funding formulas in some states,<sup>96</sup> and notwithstanding federal funding to supplement funds available to students in low-income schools,<sup>97</sup> it remains the case that schools have been unable to obtain funding that might offset the impact of poverty on learning.<sup>98</sup>

In addition to regressive tax structures, the inability or unwillingness of districts to implement student assignment plans that create socioeconomic integration has been another barrier to poor students taking full advantage of the promise of public education. The most effective means of assisting low-income students has proven over time to be socioeconomic integration of a school.<sup>99</sup> Students' academic achievement correlates with the background and aspirations of the other students in the school.<sup>100</sup> Research makes clear that one of the best ways to improve academic achievement of low-income students is to integrate them into majority middle-class schools.<sup>101</sup> What is more, because Black students are disproportionately likely to be poor,<sup>102</sup> poverty and race can combine to hamper educational outcomes.<sup>103</sup> Thus, while states and school districts have not prevented the enrollment in schools of students in poverty as they once did for Black students and students with disabilities, poverty nonetheless functions to exclude poor students from achieving the full promise of public education.

96. See *infra* notes 262–74 and accompanying text.

97. See *infra* notes 306–08 and accompanying text.

98. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) (describing that economic status predicts economic success).

99. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 429–30, 437 (2012) (discussing study data that revealed that school districts with a racially equitable distribution of middle income students had smaller achievement gaps than districts with inequitable distributions); see also KAHLENBERG, *supra* note 32, at 48–58.

100. Black, *supra* note 99, at 437–39.

101. Ryan & Heise, *supra* note 89, at 2106.

102. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1473 (2007) ("Latino and Black students comprise 80% of the student population in extreme poverty schools (90 to 100% poor) . . . ." (quoting GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, *WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* 21 (2005))).

103. MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., *PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES* 12 (1997) ("School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.").



### III. THE “UNDESERVING CHILD” AND THE NORMALIZATION OF CONTEMPORARY EXCLUSION

#### A. HALTING STATE-SANCTIONED, GROUP-BASED EXCLUSION

Over the past six decades, courts and legislatures have taken important steps to counteract the most blatant forms of intentional exclusion based on race, ethnicity, and disability.<sup>104</sup> *De jure* racial segregation is now impermissible.<sup>105</sup> In *Plyler v. Doe*, the Supreme Court invalidated a Texas statute that denied enrollment to undocumented immigrant children.<sup>106</sup> In 1997, Congress passed the Individuals with Disabilities Education Act (“IDEA”), which requires states to provide a free appropriate public education to all students with disabilities in the least restrictive environment.<sup>107</sup> These legal precedents and statutes constitute legal tools advocates have used to counter exclusion based on race and disability. While imperfect measures for insuring meaningful and widespread inclusion,<sup>108</sup>

104. See generally CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2004) (summarizing limitations of equity efforts).

105. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

106. *Plyler v. Doe*, 457 U.S. 202, 238 (1982) (“[V]isiting . . . condemnation on the head of an infant for the misdeeds of the parents is illogical, unjust, and contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing” (quotation omitted)).

107. See 20 U.S.C. § 1412(a)(1)(A) (2012).

108. Numerous commentators have noted the lingering effects of *de jure* segregation and bans on students with disabilities. See, e.g., GARY ORFIELD, *THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 9–13 (2009), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>; Osamudia James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1088; (2015); Ryan & Heise, *supra* note 89, at 2095; RICHARD ROTHSTEIN, *ECON. POL’Y INST., FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE* (2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation>. An exploration of the causes of and impacts of the failure of case law and statutes to ameliorate the causes and impacts of race and disability-based exclusion is beyond the scope of this Article. For a discussion, see Daniel J. Losen & Gary Orfield, *Racial Inequity in Special Education*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, at xv, xxiii (Daniel J. Losen & Gary Orfield eds., 2002) (“[T]rends include the following: (a) pronounced and persistent racial disparities in identification between [W]hite and [B]lack children in the categories of [intellectual disability] and emotional disturbance, compared with far less disparity in the category of specific learning disabilities; (b) a minimal degree of racial disparity in medically diagnosed disabilities [such as deafness, blindness, and orthopedic impairment] as compared with subjective cognitive disabilities; (c) dramatic differences in the incidence of disability from one state to the next; and (d) gross disparities between [B]lacks and Hispanics, and between [B]lack boys and girls, in identification rates for the categories of [intellectual disability] and emotionally disturbed.”). See 1 U.S. DEP’T OF EDUC., *27TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT*, 2005, at 47–48 (2007), <https://www2.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf> (discussing data for students ages 6 to 21, and noting that “[b]lack students with disabilities were . . . more likely to be educated in separate environments” (emphasis omitted)); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1419 (2011) (discussing the

they nonetheless express an important repudiation of the notion that Black students and students with disabilities are undeserving of enrollment.

*B. PERSISTENCE OF THE TROPE OF THE UNDESERVING CHILD*

While the state-sanctioned barring of students based on classifications of race and disability has ended,<sup>109</sup> school districts seem not to have fully abandoned the idea that students from these groups are undeserving of education. Contemporary school exclusionary practices tend to be justified on the basis that they are a response to student misbehavior, as well as to personal and family circumstances of students seen as troubling.<sup>110</sup> Yet while many if not most students engage in in-school misbehavior, the students bearing the brunt of the new exclusion are disproportionately from the same groups formerly barred: African-American students and students with disabilities.

In removing students from school, whether through suspension or transfer to a separate and inferior educational setting, school districts are engaging in a form of sorting that is familiar from other areas of social policy. In health care,<sup>111</sup> and in the distribution of welfare payments and food stamps,<sup>112</sup> private and public actors seem to engage in a practice of arranging individuals on a continuum of deserving and not deserving in order to justify the grant or withholding of benefits.

For example, studies indicate that emergency-room doctors are less likely to prescribe needed pain medications to young Black men hurt while involved in an encounter with law enforcement than they are to young men who sustain injuries in organized sports.<sup>113</sup> Experts suggest that long-standing beliefs about the higher tolerance for pain of Black people, combined with biased attitudes on the part of treating health professionals toward Black male

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limitations of IDEA and private enforcement. *See generally* CLOTFELTER, *supra* note 104 (summarizing limitations of equity efforts).

109. *But see generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017) (detailing ongoing discrimination based on *de jure* segregation).

110. *See infra* Part III.C.

111. *See* Mary Crossley, *Black Health Matters: Disparities, Community Health, and Interest Convergence*, 22 MICH. J. RACE & L. 53, 60 (2016) (“Health inequality for Black people and other minorities is pervasive—it permeates measures of health care access, health status, and health outcomes.”); Ruqaiyah Yearby, *Breaking the Cycle of “Unequal Treatment” With Health Care Reform: Acknowledging and Addressing the Continuation of Racial Bias*, 44 CONN. L. REV. 1281, 1291 (2012) (noting pervasive and ongoing disparities between African Americans and whites in health status and access to care because of racial bias).

112. *See, e.g.*, MICHAEL B. KATZ, *THE UNDERSERVING POOR* 102–03 (1989) (discussing early efforts to tie welfare programs to work requirements).

113. Susan W. Hinze et al., *Hurt Running from Police? No Chance of (Pain) Relief: The Social Construction of Deserving Patients in Emergency Departments*, 27 RES. SOC. HEALTH CARE 235, 254 (2009).

patients, help to explain this phenomenon.<sup>114</sup> That is, notions that these patients are less deserving animate disparate treatment.<sup>115</sup>

The government's response to poverty is similarly inflected with considerations of worthiness.<sup>116</sup> In the early part of the 19th century, for example, "poor laws" conditioned aid receipt on crude distinctions between the deserving (old and ill) and undeserving (nearly everyone else) poor.<sup>117</sup> Those in the latter group were not entitled to any assistance, no matter how difficult their economic circumstances.<sup>118</sup> Unless one was very old or very sick, the condition of poverty was seen as a moral failing.<sup>119</sup> Over a century later, single mothers assumed the status of undeserving, as attacks on Aid to Families with Dependent Children ("AFDC") become politically expedient.<sup>120</sup>

Ironically, *Plyler v. Doe*,<sup>121</sup> a case celebrated as a "high water mark of immigrant rights in the U.S.,"<sup>122</sup> makes a similar rhetorical space for exclusion based on notions of blameworthiness.<sup>123</sup> In its ruling, the Court notes that the children in the plaintiff class had done nothing wrong, describing them as "innocent children."<sup>124</sup>

[The Texas statute denying enrollment to undocumented children] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children . . . .<sup>125</sup>

The implicit reference to blameworthiness finds echoes in the new exclusion. Misbehavior—even developmentally normative misbehavior—

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114. See, e.g., Carlos Ballesteros, *Racism Might Have Spared Black and Latino Communities from Drug Abuse, Expert Says*, NEWSWEEK (Nov. 17, 2017), <http://www.newsweek.com/racism-opioid-epidemic-blacks-latino-trump-704370> (Dr. Andrew Kolobny, co-director of opioid policy research at the Heller School for Social Policy and Management at Brandeis University stated: "[We know] that doctors prescribe narcotics more cautiously to their non-white patients,' he said on NPR on Saturday. 'It would seem that if the patient is black, the doctor is more concerned about the patient becoming addicted, or maybe they're more concerned about the patient selling their pills, or maybe they are less concerned about pain in that population.'").

115. Hinze et al., *supra* note 113, at 252–53.

116. See KATZ, *supra* note 112, at 26–28.

117. See *id.* at 5.

118. *Id.*

119. *Id.* at 6–7.

120. *Id.* at 68–69.

121. *Plyler v. Doe*, 457 U.S. 202, 202 (1982).

122. Kevin Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twentieth Century*, 8 LA RAZA L.J. 42, 44 (1995).

123. Professor Raquel Aldana argues that, indeed, once undocumented students move beyond high school, it is "as if, suddenly, they inherited their parent's 'illegality,' and with it, the subordination of law." *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Story in the Twenty-First Century*, 7 NEV. L.J. 713, 728 (2007).

124. *Plyler*, 457 U.S. at 224.

125. *Id.* at 220.

along with difficult personal and family circumstances now function to keep students out of regular public school. To be sure, contemporary school districts likely do not think of themselves as “blaming” students; these policies instead are steeped in the language of educational administration and theories of pedagogy. And suspensions and AEP transfers are not the same kind of systematic, group-based exclusion in which states are now prohibited from engaging. Yet their impact on individually affected students works a similar kind of harm.

### C. MISBEHAVIOR-BASED EXCLUSION

Over the last twenty years, in-school misbehavior by students has spurred a new and widespread set of exclusionary practices: suspension and expulsion. Suspension is the temporary removal of a student from the regular educational setting for a violation of school policies or rules.<sup>126</sup> During a suspension, a student may not attend school for a specified length of time, which can vary from days to weeks.<sup>127</sup> Expulsion is a longer removal of a student from the regular educational setting for a major rule infraction. The length of and reasons for expulsion vary by state and school district.<sup>128</sup> Some expulsions result in a complete cessation of educational services.<sup>129</sup> Other expelled students receive educational services in an alternative setting pursuant to local policies.<sup>130</sup>

In the 2011–2012 school year, the most recent for which nationwide data are available, 3.3 million students—nearly 7% of the total number of enrolled students<sup>131</sup>—were suspended at least once, while over 100,000 students were

126. *Suspension*, NAT’L CLEARINGHOUSE ON SUPPORTIVE SCH. DISCIPLINE, <http://supportiveschooldiscipline.org/learn/reference-guides/suspension> (last visited Dec. 27, 2017) (citing CIVIL RIGHTS DATA COLLECTION, U.S. DEP’T OF EDUC., MASTER LIST OF 2015–2016 CRDC DEFINITIONS 12 (2016)).

127. *Id.*

128. *Expulsion*, NAT’L CLEARINGHOUSE ON SUPPORTIVE SCH. DISCIPLINE, <http://supportiveschooldiscipline.org/learn/reference-guides/expulsion> (last visited Dec. 27, 2017).

129. The Office for Civil Rights (“OCR”) refers to this as “Expulsion without educational services,” defined as “an action taken by the local educational agency of removing a child from his/her regular school for disciplinary purposes, and not providing educational services to the child for the remainder of the school year or longer in accordance with local educational agency policy.” CIVIL RIGHTS DATA COLLECTION, *supra* note 126, at 9–10. OCR collects this data and publishes in the Civil Rights Data Collection (“CRDC”). Per the most recent national estimation published by OCR, 40,989 students were expelled without education services. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION 2011–12, <https://ocrdata.ed.gov/downloads/projections/2011-12/States/National%20Totals.xls>.

130. CIVIL RIGHTS DATA COLLECTION, *supra* note 126, at 9. For a discussion of expelled students in AEPs, see *infra* notes 292–96 and accompanying text.

131. CIVIL RIGHTS DATA COLLECTION, 2011–12 STATE AND NATIONAL ESTIMATIONS, [http://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2011\\_12](http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12) (noting that the total enrollment of students nationwide during the 2011–2012 school year was estimated at 49,605,534) (select “Student Enrollment,” then “Enrollment” to download an excel spreadsheet; select “Overall Enrollment” on the Excel spreadsheet).

expelled.<sup>132</sup> Nearly 50% of expelled students were completely denied educational services.<sup>133</sup> These numbers have significantly increased in the past two decades.<sup>134</sup>

This increase in suspensions is based not on more, or more serious, student misbehavior, but instead on schools expanding the range of behaviors permitting or requiring suspension.<sup>135</sup> The principal source of these policy changes is the 1994 federal Gun Free Schools Act (“GFSA”).<sup>136</sup> Enacted amidst that decade’s “moral panic”<sup>137</sup> about school shooters and juvenile crime,<sup>138</sup> the GFSA required states to impose a one-year expulsion for any student found in school with a firearm.<sup>139</sup> The statute represented a validation by the federal government of the concept of “zero tolerance” in school disciplinary practices.<sup>140</sup> Borrowed from a law-enforcement approach,<sup>141</sup> zero tolerance “mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”<sup>142</sup>

Many states and schools have adopted laws and policies, modeled after the GFSA’s zero-tolerance approach, that impose suspension or expulsion for

132. *Id.*; see also NAT’L CLEARINGHOUSE ON SUPPORTIVE SCH. DISCIPLINE, *supra* note 128.

133. See CIVIL RIGHTS DATA COLLECTION, *supra* note 131.

134. Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 835–36 (2015).

135. See CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 78–79 (2010).

136. Gun-Free Schools Act of 1994, § 14601, 108 Stat. 3907 (codified as 20 U.S.C. § 7151 (2012)).

137. In *Folk Devils & Moral Panics: The Creation of the Mods and Rockers*, Stanley Cohen offered the foundational definition of moral panic:

(i) *Concern* (rather than fear) about the potential or imagined threat; (ii) *Hostility*—moral outrage towards the actors (folk devils) who embody the problem . . . ; (iii) *Consensus*—a widespread agreement (not necessarily total) that the threat exists, is serious and that ‘something should be done’ . . . (iv) *Disproportionality*—an exaggeration of the number or strength of the cases, in terms of the damage caused, moral offensiveness, potential risk if ignored. . . (v) *Volatility*—the panic erupts and dissipates suddenly and without warning.

STANLEY COHEN, *FOLK DEVILS & MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS*, at xxvi–xxvii (Routledge 3d. ed. 2002) (1972).

138. Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1058–61 (2001). See generally Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME L. & SOC. CHANGE 147 (1999) (summarizing empirical data to argue that schools are in fact extremely safe places for children).

139. 20 U.S.C. § 7151(b).

140. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 932 (2016).

141. *Id.* at 933.

142. *Id.* (quoting *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008)).

a range of offenses that extend beyond those mandated by the statute.<sup>143</sup> These include a multitude of comparatively minor offenses, including possession of alcohol and tobacco, fighting, and dress-code violations.<sup>144</sup> For example, under a zero-tolerance policy, an Indiana school suspended a student for a full school year for “inserting the ‘f-word’ multiple times in a single sentence” on the Internet—“even though he did not direct his language toward” any particular individual and the post was made “in the middle of the night” while he was at home.<sup>145</sup> Zero-tolerance policies have also resulted in the suspension of a “middle school student who brought an over-the-counter medicine to school to treat an illness, [a] six year old who ate his lunch with his beloved cub scout tool, and [a] girl whose first aid kit in her car contained a small knife.”<sup>146</sup>

Exclusion for misbehavior is arguably a less troubling form of exclusion than those discussed in the previous Part. The justification for exclusion seems more compelling—the child, after all, is not technically blameless, and the exclusion is not based on a group classification as in the case of race and disability but on the seemingly volitional act of misbehavior.<sup>147</sup>

In addition to seeming more justifiable, this form of exclusion also appears less egregious in the degree of harm it inflicts on the student. After all, suspension is not a *permanent* removal from school or consignment to a substandard setting. However, even when the removal from school is short in duration, the negative impact of suspension on a student can be long lasting. Studies indicate that roughly 40% of the student suspensions in any school year are issued against students who have already been suspended at least once.<sup>148</sup> In Texas, for example, “students who were suspended . . . just once during middle or high school were subsequently suspended . . . on median, three more times.”<sup>149</sup> Multiple suspensions for the same child do not necessarily occur because the child is incorrigibly misbehaving; instead, as indicated by key longitudinal studies, suspension reinforces both a student’s poor behavior and a teacher’s subjective perception that the child is inherently a troublemaker.<sup>150</sup> “[S]uspension becomes a predictor, rather than a deterrent, of later suspension and discipline problems.”<sup>151</sup>

143. *Id.* at 933.

144. *Id.*

145. Black, *supra* note 134, at 836.

146. *Id.* at 837.

147. Recent developments in neuroscience suggest adolescents in fact have less control over their behavior than was once thought. See Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court’s “Age Matters” Jurisprudence*, 46 LOY. L.A. L. REV. 933, 935 (2013) (summarizing Supreme Court jurisprudence citing neuroscience in finding juveniles categorically less culpable than adults).

148. Black, *supra* note 134, at 833.

149. *Id.*

150. *Id.*

151. *Id.*

Removing a student from school decreases the chances that she will graduate or enroll in college.<sup>152</sup> Not graduating from high school leads to a host of other problems, including an increased likelihood of unemployment, substance abuse, and poverty.<sup>153</sup> Finally, suspension can trigger or exacerbate juvenile or criminal court involvement.<sup>154</sup>

Along with the significant and serious harm from what seems to be a short-term form of exclusion, the justification for the exclusion reveals itself upon closer examination often to be thin. Few would dispute that engaging in violence at school that poses a threat to other students or teachers could warrant a student's removal from a regular educational setting for some period of time. However, in-school violence constitutes a small percentage of student misbehavior.<sup>155</sup> In fact, data suggest that students are less violent in school now than in the past.<sup>156</sup> Today, "schools . . . report that [relatively] minor misbehaviors, like disruption and disrespect, account for ninety-five percent of suspensions and expulsions."<sup>157</sup>

Furthermore, evidence suggests that the new exclusion has roots in school districts' resistance to court-ordered desegregation. In the aftermath of *Brown*, reports of discipline problems were more common in racially integrating schools than in single-race schools, white or Black.<sup>158</sup> In newly integrating schools, Black students were two to three times more likely to be suspended from school than whites.<sup>159</sup> Advocates noted multiple instances of

152. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 321 (2016) (summarizing studies indicating correlation between suspension and dropping out).

153. See FABELO ET AL., *supra* note 10, at 61–72 (discussing positive correlations between suspension and contact with the juvenile justice system); Comm. on Sch. Health, Am. Acad. of Pediatrics, *Policy Statement: Organizational Principles to Guide and Define the Child Health Care System and/or Improve the Health of All Children—Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003) (noting that students subjected to out-of-school suspensions are more likely to commit crime, get in fights, use illicit substances, have sexual intercourse, and are more susceptible to suicidal tendencies); Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from Antoine v. Winner School District*, 54 N.Y. L. SCH. L. REV. 955, 956 (2009/10) ("Being suspended or expelled from school increases the likelihood of failing a grade, dropping out, engaging in criminal activity, or later incarceration.").

154. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 18–19 (2010), [https://b3cdn.net/advancement/do5cb2181a4545db07\\_r2im6caqe.pdf](https://b3cdn.net/advancement/do5cb2181a4545db07_r2im6caqe.pdf); BUREAU OF RESEARCH & PLANNING, FLA. DEP'T OF JUVENILE JUSTICE, DELINQUENCY IN FLORIDA'S SCHOOLS: AN EIGHT-YEAR STUDY 14 (2013), <http://www.iacpyouth.org/Portals/o/Resources/FloridaDelinquency.pdf>; Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 347–48 (2011) (discussing the school-to-prison pipeline).

155. Black, *supra* note 134, at 835.

156. *Id.*

157. *Id.* at 825.

158. ROBERT J. HAVIGHURST ET AL., A PROFILE OF THE LARGE-CITY HIGH SCHOOL, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS BULLETIN 76 (1971).

159. Brief of the NAACP and the Southern Christian Leadership Conference as Amici Curiae in Support of Respondents at 3–4, *Goss v. Lopez* 419 U.S. 565 (1975) (No. 73-898), 1974 WL 185916.

school staff, resistant to integration mandates, treating Black children differently and escalating conflicts when they occurred.<sup>160</sup> Today, evidence suggests that bias continues to affect the decision-making process preceding a suspension or expulsion. 17% of Black school children are suspended at least once, compared with 5% of white children.<sup>161</sup> Suspensions are also heavily concentrated in the South.<sup>162</sup> Of the 1.2 million Black students suspended from K-12 schools, 55% occurred in 13 southern states.<sup>163</sup> School districts in the South are also “responsible for 50% of Black student expulsions from public schools in the United States.”<sup>164</sup> Furthermore, in 2015, more than 13% of students with disabilities were suspended.<sup>165</sup> This rate is approximately twice that of non-disabled students.<sup>166</sup> While nationwide data are not disaggregated based on socioeconomic status, a study of public and charter schools in the District of Columbia demonstrates that suspensions are disproportionately likely to be administered to poor students.<sup>167</sup>

Overwhelmingly, low-income Black students suffer the consequences of harsh exclusionary disciplinary policies not because they misbehave more, but because the schools they attend are disproportionately likely to rely on school exclusion to manage misbehavior.<sup>168</sup> Black students are increasingly likely to

160. See, e.g., CHILDREN’S DEFENSE FUND, *SUSPENSIONS: ARE THEY HELPING CHILDREN?* 13 (1975), [http://diglib.lib.utk.edu/cdf/data/0116\\_000050\\_000205/0116\\_000050\\_000205.pdf](http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf) (noting disparate and unfair treatment of Black students and recounting incident in which a white teacher confiscated from a Black student a metal pick used to comb out Afro hair styles).

161. DANIEL J. LOSEN & JONATHAN GILLESPIE, *OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL* 6 (2012), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crr-research/losen-gillespie-opportunity-suspended-2012.pdf> (comparing suspension rate risks for different groups of students: “1 in 13 (8%) risk for Native Americans; 1 in 14 (7%) for Latinos; 1 in 20 (5%) for Whites; [and] 1 in 50 (2%) for Asian Americans”).

162. See LOSEN ET AL., *supra* note 3, at 6 (finding that the states with the highest rates of suspension for secondary students were Florida at 19%, and Alabama, South Carolina, and Mississippi at 16%).

163. EDWARD J. SMITH & SHAUN R. HARPER, *DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES* 1 (2015), [https://equity.gse.upenn.edu/sites/default/files/publications/Smith\\_Harper\\_Report.pdf](https://equity.gse.upenn.edu/sites/default/files/publications/Smith_Harper_Report.pdf).

164. *Id.*

165. *Id.* at 3.

166. *Id.*

167. OFFICE OF THE STATE SUPERINTENDENT OF EDUC., *REDUCING OUT-OF-SCHOOL SUSPENSIONS AND EXPULSIONS IN DISTRICT OF COLUMBIA PUBLIC AND PUBLIC CHARTER SCHOOLS* 12 (2013), [https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/OSSE\\_REPORT\\_DISCIPLINARY\\_G\\_PAGES.pdf](https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/OSSE_REPORT_DISCIPLINARY_G_PAGES.pdf).

168. U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* 4 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (“[I]n our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.”). See, e.g., Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1566 n.29 (2004) (describing a Seattle study finding that controlling for the factors of “poverty



attend racially isolated schools.<sup>169</sup> These schools are disproportionately likely to be poor.<sup>170</sup> The educational harms caused by racially isolated, high-poverty schools play a significant role in both the behavior that students exhibit and the consequences they in turn receive.<sup>171</sup> For example, students with acute and unaddressed educational needs may fall behind their peers or become disengaged with the educational process and act out as a result.<sup>172</sup> Teachers and administrators at racially isolated high-poverty schools are more likely to respond to this kind of misbehavior with school suspension and expulsion.<sup>173</sup> Teachers and administrators in these schools often lack, or believe they lack, the resources to meet the needs of all of their students. As a result, they adopt an “exclusionary ethos,” preserving their limited resources for the students whom they believe are more deserving and have a better chance of success.<sup>174</sup> Other evidence suggests that suspensions disproportionately affect Black students because of lack of cultural awareness of teachers and administrators, different communication styles between white teachers and Black students, and a curriculum that fails to engage students.<sup>175</sup>

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and living in a single-parent family” did not eliminate disparities in the suspension and expulsion of African-American students); Russell Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335 (2002) (“What is especially clear is that neither this nor any previously published research studying differential discipline and rates of behavior by race has found any evidence that the higher rates of discipline received by African-American students are due to more serious or more disruptive behavior.” (citations omitted)).

169. GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION (2006), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/racial-transformation-and-the-changing-nature-of-segregation> (describing how from the 1980–1981 school year to the 2005–2006 school year, the percentage of Black students attending schools in which a majority of the students are minorities rose from 66% to 73%); Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REPORT (Jan. 28, 2015, 12:01 AM), <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal> (noting that in 2015 “[m]ore than 2 million black students attend[ed] schools where 90 percent of the student body [was] made up of minority students”).

170. Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2428 (2004).

171. Nance, *supra* note 152, at 326–27.

172. *Id.* at 324.

173. Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 341–42 (2003).

174. Nance, *supra* note 140, at 945 (“[As] [t]eachers are often bereft of not only sufficient resources but also a cogent narrative of opportunity that can help them gain voluntary compliance from students . . . it is understandable that teachers and administrators often perceive little choice but to summon repressive means to swiftly remove disruptive students from the classroom and the school.” (alterations and omission in original) (quoting Paul J. Hirschfeld, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 93 (2008))); see also Teresa Watanabe & Howard Blume, *Why Some LAUSD Teachers Are Balking at a New Approach to Discipline Problems*, L.A. TIMES (Nov. 7, 2015, 10:00 AM), <http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html> (documenting teachers in Los Angeles Unified School District who assert attempts to implement more progressive, non-exclusionary disciplinary policies were ineffective largely because of insufficient resources and training).

175. See, e.g., Kate McGee, *Why Do Black Students Get More Suspensions? Here Are 3 Possible Reasons*, KUT (May 20, 2014), <http://kut.org/post/why-do-black-students-get-more-suspensions>.

## D. ALTERNATIVE EDUCATION PROGRAMS

In addition to suspending students, school districts over the past twenty years increasingly have relied on separate and typically inferior schools or programs to deal with students they deem troubled or troubling. These AEPs are defined by the U.S. Department of Education as schools and programs for students at risk of educational failure.<sup>176</sup> For the 2007–2008 school year, 64% of school districts reported having at least one such program.<sup>177</sup> This figure represents an increase of 25% from the 2000–2001 school year, and is dramatically higher than the estimated 464 such programs nationwide in 1973.<sup>178</sup> Districts in southeastern states are particularly likely to have alternative schools, as are urban districts, high-poverty districts, and districts with high concentrations of minority students.<sup>179</sup> Well over half a million students attend AEPs each year.<sup>180</sup>

## 1. The Child as the Problem

In contrast to earlier alternative educational experiments, which identified students' academic struggles as arising not from their own flaws and weaknesses but instead from uninspiring curricula or overly rigid teachers,<sup>181</sup> AEPs typically embody no pedagogical critique of mainstream public education.<sup>182</sup> State laws defining alternative education establish criteria that make a student eligible. The criteria typically are vague, thus conferring significant discretion on schools to decide which students they believe can

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here-are-3-possible-reasons (featuring an interview with education professors Dr. Daudi Abe and Dr. Richard Reddick).

176. CARVER ET AL., *supra* note 8, at 3.

177. *Id.*

178. BRIAN KLEINER ET AL., U.S. DEP'T OF EDUC., PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000–01, at 5 (2002) (showing 39% of schools had alternative school programs); LES CARNINE & JOSHUA H. BARNETT, ALTERNATIVE EDUCATION: A CONTINUED EXAMINATION OF HOW STATES ARE ADDRESSING ALTERNATIVE EDUCATION IN THEIR SCHOOLS 2 (2004) (“The federal government got involved in 1973 when only 464 identifiable alternative programs existed.”).

179. CARVER ET AL., *supra* note 8, at 5.

180. *Id.* at 7. “There were 646,500 students enrolled in public school districts attending alternative schools and programs for at-risk students in 2007–08.” *Id.* at 3.

181. See MARY MAGEE QUINN & JEFFREY M. POIRIER, AM. INSTS. FOR RESEARCH, STUDY OF EFFECTIVE ALTERNATIVE EDUCATION PROGRAMS: FINAL GRANT REPORT 1 (2006) (citing a newsletter of the Central Park East Secondary School in New York, an earlier, progressive alternative school, stating: “[i]t is our school and its way of teaching that is alternative, not [the] students”).

182. See Jeong-Hee Kim & Kay Ann Taylor, *Rethinking Alternative Education to Break the Cycle of Educational Inequality and Inequity*, 101 J. EDUC. RES. 207, 207, 212 (2008) (describing contemporary AEPs as reflecting a “deficit-thinking paradigm” that ignores systemic factors such as “[s]chool tracking, inequalities in school financing, curriculum differentiation, and low teacher quality”).

and should be removed from regular public school.<sup>183</sup> Some state statutes simply establish that AEPs are for “at-risk” students without defining the term.<sup>184</sup> Others define the term by reference to academic performance or a history of truancy.<sup>185</sup> A student’s living situation—homelessness, a prior placement in a child welfare or juvenile justice facility, or unstable housing because of multiple child welfare placements or changes in custody—can subject her to an AEP assignment.<sup>186</sup> Pregnancy and parenting may do the same.<sup>187</sup> In at least one state, students who are refugees and of limited English proficiency are automatically assigned to AEPs.<sup>188</sup> The behaviors triggering AEP assignment include the oft-cited, vague category of in-school “disruption,”<sup>189</sup> as well as off-campus incidents that result in delinquency or criminal charges, regardless of whether the charges result in conviction.<sup>190</sup> A small number of states permit expelled students to attend AEPs; an even

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183. See, e.g., ARK. CODE ANN. § 6-20-2303(2) (West 2017) (“Alternative learning environment’ means a student intervention program in compliance with § 6-48-101 et seq. that seeks to eliminate traditional barriers to learning for students.”).

184. See, e.g., IDAHO ADMIN. CODE 08.02.03.110 (2009) (“Alternative secondary programs are those that provide special instructional courses and offer special services to eligible at-risk youth. . . .”).

185. See, e.g., *Alternative Education*, MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/alted> (last visited Dec. 27, 2017) (“‘At-risk’ students may include those who are pregnant/parenting teens, truant students, and suspended or expelled students, returned dropouts, delinquent youth, or other students who are not meeting local promotional requirements.”).

186. See CARVER ET AL., *supra* note 8, at 1, 4; PATRICK KEATON, NAT’L CTR. FOR EDUC. STAT., SELECTED STATISTICS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2011–12 app. B (2013), <https://nces.ed.gov/pubs2013/2013441.pdf>; Michelle Reichard-Huff & Perry A. Zirkel, Commentary, *State Laws for Alternative Education: An Updated Policy Analysis*, 305 EDUC. L. REP. 1, 14 (2014).

187. MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC., *supra* note 185.

188. See Complaint at 1, *Khadidja Issa v. Sch. Dist. of Lancaster*, (2016) (No. 16-03881) 2016 WL 3912989.

189. CARVER ET AL., *supra* note 8, at 4; see, e.g., LA. STAT. ANN. § 17:416.2(2)(C) (2013) (“[A]lternative education programs” are for “students who are unmotivated[,] . . . unsuccessful[,] . . . [or] disruptive . . . . Alternative programs may include but not be limited to programs that hold students to strict standards of behavior in highly structured and controlled environments, sometimes referred to as ‘boot camps’, ‘police schools’, or ‘court schools’.”).

190. See, e.g., TEX. EDUC. CODE ANN. § 37.006 (West 2012) (requiring placement of students in disciplinary alternative education when, *inter alia*, “the superintendent or the superintendent’s designee has a reasonable belief that the student has engaged in a conduct defined as a felony offense in Title 5, Penal Code”).

smaller number require them to do so.<sup>191</sup> Available data<sup>192</sup> suggest that the population of AEPs is divided between students seen as having troubling personal circumstances and those exhibiting behaviors deemed problematic, and that these categories overlap.<sup>193</sup>

## 2. Inferior by Design

The settings and characteristics of AEPs create a distinct impression that the children assigned to them are undeserving of a typical public-school education. Most AEPs do not look like typical schools.<sup>194</sup> Only 37% of AEPs are housed within regular schools or are separate schools; the rest are housed within other facilities.<sup>195</sup> 17% of the non-school-based group utilize online instruction as the sole means of education—regardless of students' ability or need.<sup>196</sup> For students in school-based AEPs, books may be unavailable,<sup>197</sup> and extracurricular opportunities are typically nonexistent.<sup>198</sup> In Georgia, the state houses AEP programs in poor-quality buildings that formerly served as schools for Black students during the time of *de jure* segregation.<sup>199</sup> Students in AEPs express frustration at being denied some of the basic elements of a

191. CAL. EDUC. CODE § 48915(f) (West 2013) (providing alternative education to students who are expelled); CONN. GEN. STAT. ANN. § 10-233d(d) (West 2010) (providing alternative education to all students under age sixteen while expelled, but for students who are sixteen or older, providing it only if the students meet certain conditions imposed by the local or regional school board); GA. CODE ANN. § 20-2-751.1(b) (West 2014) (authorizing the placement of a student who brings a firearm or dangerous weapon to school in an alternative education program); MO. REV. STAT. § 167.164 (2016) (making clear that suspensions and expulsions do not relieve the state of its duty to educate students); N.J. STAT. ANN. § 18A:37-2.2 (West 2013) (requiring the placement of any student who commits an assault at school or brings a weapon to school in an alternative education program or, if none is available, in home-bound instruction); 16 R.I. GEN. LAWS ANN. § 16-21-27 (West 2016) (requiring each school district to establish continued education for students suspended for longer than ten days or who are chronically absent); TEX. EDUC. CODE ANN. § 37.008(a) (West 2012) (requiring each school district to create a disciplinary alternative education program).

192. The data set on AEPs is slim, not comprehensive, and inconclusive, given the differences in alternative education from state to state and the minimal reporting requirements for AEPs. See Lehr et al., *supra* note 5, at 22.

193. *Id.* at 27 (suggesting that states may be increasingly using AEPs for disruptive students); Reichard-Huff & Zirkel, *supra* note 186, at 20 (“The most prevalent—and overlapping—populations are students who are suspended or expelled from their home school districts and students who disrupt the general education environment.”).

194. See Reichard-Huff & Zirkel, *supra* note 186, at 6 (explaining how AEPs contain students with at-risk behaviors such as truancy or dropping out, past suspension or expulsion from traditional schools, disruptive tendencies, lack of success in regular school settings, and referrals to the juvenile justice or court system).

195. CARVER ET AL., *supra* note 8, at 3.

196. *Id.*; Letter from Educ. Law Ctr. to Anurima Bhargava 6 (Aug. 7, 2013), [http://www.elc-pa.org/wp-content/uploads/2013/09/ELC\\_DOJ\\_AEDYComplaint\\_8\\_7\\_13.pdf](http://www.elc-pa.org/wp-content/uploads/2013/09/ELC_DOJ_AEDYComplaint_8_7_13.pdf).

197. ACLU, *supra* note 17, at 37–38.

198. *Id.*

199. *Id.*

typical school experience—lockers, yearbooks, sports teams and school dances.<sup>200</sup> Surveillance cameras, police officers, and daily searches—common features of AEPs—combine to turn an already stigmatizing experience<sup>201</sup> into a correctional one.<sup>202</sup> While some AEPs utilize positive behavioral supports and other non-punitive forms of discipline,<sup>203</sup> most deal with in-school misbehavior punitively, through suspensions and referrals of students to the juvenile and criminal systems.<sup>204</sup> Although students in AEPs have been identified as “at risk,” school districts typically do not provide sufficient supports and services to assist them. Only 14 states provide for counseling services in AEPs.<sup>205</sup>

The perception that AEP students are less deserving is further reflected in the statutes and regulations that govern them. Compulsory attendance laws, intended to ensure that students receive the benefits of education articulated in the common-school movement and affirmed by courts, do not apply to all AEP students.<sup>206</sup> Moreover, state regulatory schemes on curricula, instruction, and teacher certification requirements frequently incorporate explicitly or implicitly lower standards for AEPs than for traditional schools.<sup>207</sup> These regulatory regimes can be grouped into three categories.<sup>208</sup>

200. On the lack of extracurricular activities at AEPs, see Audrey Knight, *Redefining Punishment for Students*: Nevares v. San Marcos I.S.D., 20 REV. LITIG. 777, 791, 794–95 (2001).

201. See Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 125 (2009) (noting that the Supreme Court has articulated stigma as an independent harm and basis for standing in key race discrimination cases).

202. See, e.g., Verified Second Amended Complaint—Class Action at 36, M.H. v. Atlanta Indep. Sch. Sys., 2009 WL 10674830 (N.D. Ga. 2009) 1:08-cv-01435-BBM.

203. QUINN & POIRIER, *supra* note 181, at 47.

204. See, e.g., Complaint at 1–2, A.M. v. Jackson Pub. Sch. Bd. of Trs., No. 3:11 CV 344 TSL-MTP (S.D. Miss. June 8, 2011) (alleging that students were shackled and handcuffed to a railing for violations of minor school rules); ACLU, *supra* note 17, at 42 (noting AEP in DeSoto County, Mississippi that employed a policy of prohibiting students from exchanging personal information—addresses, phone numbers, and emails—with each other or “solicit[ing] friendships with other students”); TONY FABELO ET AL., *supra* note 10, at 21–22; JASON LANGBERG, ALTERNATIVE EDUCATION IN NORTH CAROLINA: A REPORT ON ALTERNATIVE LEARNING PROGRAMS IN NORTH CAROLINA DURING THE 2013–14 SCHOOL YEAR 14–15 (2015), <http://youthjusticenc.org/download/education-justice/prevention-intervention-alternatives/ALP%20Report-Final.pdf> (noting that alternative learning programs suspend students at rates significantly higher than do traditional public schools). Notwithstanding the strict discipline policies and law enforcement presence, schools report high rates of crime plague some AEPs. A complaint filed by the American Civil Liberties Union on behalf of students at an Atlanta AEP alleged rampant violence at the school, including instances of staff members physically assaulting students. Verified Second Amended Complaint—Class Action, *supra* note 202, at 4.

205. POROWSKI ET AL., *supra* note 9, at 8, 11.

206. *Id.* at 15–17. For an example of such a law, see TENN. CODE ANN. § 49-6-3402(c) (2016) (“Attendance in an alternative school shall be voluntary unless the local board of education adopts a policy mandating attendance in either instance.”).

207. See *infra* notes 209–13 and accompanying text.

208. See, e.g., Reichard-Huff & Zirkel, *supra* note 186, at 20.

The first category establishes explicitly lower standards for AEPs. Tennessee, which falls into this category, has adopted statutes and administrative regulations specific to AEPs that are decidedly less rigorous than those that apply to traditional schools.<sup>209</sup> The state requires only that classroom instruction in AEPs “shall be as nearly as practicable in accordance with the instructional program in the student’s regular school,”<sup>210</sup> but even this minimal goal is often unachieved.<sup>211</sup> Similarly, several other states have enacted statutory exceptions to the minimum number of instructional hours otherwise required in public schools.<sup>212</sup> School districts in some states even assign teachers to alternative schools as punishment for unspecified infractions.<sup>213</sup>

The second category outlines standards, but leaves them largely advisory. One state in this category, North Carolina, enacted laws requiring state and local boards of education to develop standards for AEPs.<sup>214</sup> However, much of the law is advisory rather than mandatory.<sup>215</sup> One statute “urges” boards of education to refrain from assigning substandard teachers to alternative schools, but does not actually bar them from doing so.<sup>216</sup> Perhaps as a result of the advisory nature of such statutes, the administrative standards in North Carolina are very broad, including such generalities as “[h]ave highly qualified and effective faculty and staff.”<sup>217</sup>

Finally, the third category prescribes no specific standards for AEPs.<sup>218</sup> For example, Connecticut has no standards whatsoever for alternative

209. See, e.g., TENN. CODE ANN. § 49-6-3405(a)(1) (standardized testing); TENN. COMP. R. & REGS. 0520-01-02-09(2)(a) (2017) (curriculum); TENN. COMP. R. & REGS. 0520-01-02-09(2)(f) (teacher certification).

210. TENN. COMP. R. & REGS. 0520-01-02-09(2)(a).

211. JOHN G. MORGAN, TENNESSEE’S ALTERNATIVE SCHOOLS 26 (2005), [http://comptroller.tn.gov/repository/RE/final\\_alt\\_school.pdf](http://comptroller.tn.gov/repository/RE/final_alt_school.pdf) (“[M]ost alternative school programs attempt to model the core curriculum of the regular school system. However, the inability to provide comparable instruction . . . is a problem. . . . Providing course offerings other than core subject instruction is challenging for alternative schools, mostly because of shortages of teachers, space, money, and technology.”).

212. Georgia, for example, grants waivers from state requirements setting the minimum number of instructional hours “and the awarding of course credit.” KIM ET AL., *supra* note 135, at 107. Similarly, Pennsylvania school districts are permitted to reduce by seven hours per week the instructional hours available to AEP students. Educ. Law Ctr., *supra* note 196, at 5–6. By contrast, “[28] states legislatively mandate that alternative schools and programs comply with core-curriculum content standards or standards adopted by the state.” KIM ET AL., *supra* note 135, at 107.

213. ACLU, *supra* note 17, at 40.

214. N.C. GEN. STAT. § 115C-12(24) (2015).

215. *Id.* § 115C-47(32a).

216. *Id.* (“The General Assembly urges local boards to adopt policies that prohibit superintendents from assigning to any alternative learning program any professional public school employee who has received within the last three years a rating on a formal evaluation that is less than above standard.”).

217. N.C. POLICIES AND PROCEDURES, *supra* note 9, at 6.

218. See, e.g., Complaint at 3, *Alicia B. ex rel. Cynthia B. v. Malloy*, No. CV15-5040967, (Conn. Super. Ct. 2015) (stating that no standards exist for AEPs in Connecticut).

schools. In fact, the Connecticut Education Commissioner has gone so far as to testify *against* requiring alternative programs to offer specific subjects and minimum hours of instruction taught by qualified teaching staff in the Connecticut General Assembly.<sup>219</sup>

### 3. Perpetuation of Race- and Disability-Based Exclusionary Practices

School districts typically have broad discretion in deciding whether a student is sufficiently “at risk” to require assignment to an AEP.<sup>220</sup> In addition, while districts may have policies governing placement decisions, most do not afford students due process protections before making the assignment.<sup>221</sup> The largely unbounded discretion school districts enjoy in making AEP assignments makes room for biased decision-making.<sup>222</sup> The students who attend AEPs are overwhelmingly students of color (African American in particular), from low-income families, and with disabilities.<sup>223</sup> North Carolina data are illustrative. In 2013–2014, for example, Black students received 46% of all AEP placements, even though they made up only were 26% of the total student population.”<sup>224</sup> In addition, students with disabilities are

219. Jacqueline Rabe Thomas, *Educating Students During an Expulsion: Tutoring, Alternative Schools or Nothing?*, CONN. MIRROR (Dec. 22, 2015), <http://ctmirror.org/2015/12/22/educating-students-during-an-expulsion-tutoring-alternative-schools-or-nothing>.

220. CARVER ET AL., *supra* note 8, at 6.

221. See, e.g., CHAPEL HILL-CARRBORO CITY SCHS. BOARD POL’YS., <https://boardpolicyonline.com/bl/?b=chaphill> (last visited Dec. 27, 2017) (noting that the school district may institute a voluntary referral or involuntary referral; in the latter case, “[a] student may be required to be transferred from the regular educational setting to an alternative learning program” for any circumstance in which the superintendent determines that a transfer is in the best interest of the student or the school system). For further discussion of due process protections, see *infra* Part IV.E.

222. A similar dynamic exists in juvenile justice. See, e.g., Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization As a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1288–89 (2012) (noting initiative to reduce racial disparities in and overall rates of juvenile detention through the use of structured decision-making and describing successes in both aggregate detention and racial disparities); see also NAT’L JUVENILE JUSTICE NETWORK, REDUCING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE SYSTEMS: PROMISING PRACTICES 3 (2014), <http://www.njjn.org/our-work/reducing-racial-and-ethnic-disparities-in-juvenile-justice-systems-promising-practices> (describing “[o]bjective, structured decision-making tools, such as detention risk assessment instruments, [which, b]y reducing individual discretion, . . . can help to mitigate unconscious bias and reduce racial and ethnic disparities” (footnote omitted)).

223. See Lehr, *supra* note 5, at 20 (noting state-level research finding that students with disabilities were in AEPs in “higher proportions than traditional public schools”); Hassan Tajalli & Houmma A. Garba, *Discipline or Prejudice? Overrepresentation of Minority Students in Disciplinary Alternative Education Programs*, 46 URB. REV. 620, 628–30 (2014).

224. LANGBERG, *supra* note 204, at 10, 12 (noting also that students eligible for free and reduced lunch were 57% of the statewide student population but made up 91% of the alternative learning program population); see also Alexia Fernández Campbell, *Can a Private Company Teach Troubled Kids?*, ATLANTIC (Aug. 27, 2016), <http://www.theatlantic.com/business/archive/2016/08/outsourcing-education/497708> (“Nearly all of the students at Richmond Alternative are black (97 percent) and most are poor (87 percent qualify for free lunches).”).

disproportionately likely to be assigned to AEPs, and to stay in the programs for longer durations than their nondisabled counterparts.<sup>225</sup> AEPs are also disproportionately comprised of economically disadvantaged students.<sup>226</sup>

While ostensibly created to fulfill the benign, even commendable goal of assisting “at risk” students, the reality of AEPs suggests instead a perpetuation of exclusionary practices that case law and legislation developed in the non-AEP educational context sought to remedy.<sup>227</sup> As the next Part demonstrates, this body of law—of limited impact for regular public schools—will be even less effective in the service of AEP reform.

#### IV. ELUDING REFORM

This Part demonstrates that the new exclusion is resistant to legal reform through the typical tools of educational equity. It analyzes the procedural protections provided to students facing suspension and shows that students who seek to use them to regain admission to school are rarely successful. Further, this Part focuses on three key examples of law reform that have promoted inclusion (the Individuals with Disabilities Education Act (“IDEA”) and equity (school-finance cases and Title I of the Elementary and Secondary Education Act, designed to compensate for economic disadvantage). It considers the ways in which each of these mechanisms could conceivably be used to ensure students are not improperly transferred to AEPs and that the AEPs are providing an appropriate education. It concludes that these mechanisms cannot be relied on to create meaningful AEP reform. This Part further explains that the procedural due process protections that must precede suspension should—but often do not—precede AEP assignment.

##### A. LEGAL CHALLENGES TO SUSPENSION

Legal challenges to suspensions are generally unsuccessful,<sup>228</sup> in large part because courts traditionally defer to schools in the imposition of discipline.<sup>229</sup> The Supreme Court “has repeatedly emphasized the need [to] affirm[] the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”<sup>230</sup> Initially, courts held that the *in loco parentis*

225. LANGBERG, *supra* note 204, at 10.

226. *Id.*

227. *See supra* Part III.A.

228. Black, *supra* note 134, at 860–64 (noting study documenting students’ slim chances of prevailing on a legal challenge to suspension).

229. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”); William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 570 (1971) (noting that historically, schools have been “enshrined with a mystical immunity from judicial interference”).

230. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).



doctrine—which gave teachers the authority to act in the stead of parents—justified any discipline, including corporal punishment, as long as it was “reasonable”.<sup>231</sup>

While the implementation of compulsory attendance laws rendered the *in loco parentis* doctrine less persuasive as a means to justify discipline, the Supreme Court offered a new justification for the imposition of misbehavior-based suspension in *Goss v. Lopez*.<sup>232</sup> In that case, the first in which the Court addressed school suspension,<sup>233</sup> the Court held that school discipline proceedings are subject to procedural due process protections<sup>234</sup> and that suspensions for periods between one and ten days require notice and a hearing.<sup>235</sup> Acknowledging that these protections are comparatively minimal,<sup>236</sup> the Court reasoned that unlike other forms of state sanctions, school discipline serves a pedagogical purpose: “Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.”<sup>237</sup> Thus, the notion that suspension could function as a pedagogical device replaced the *in loco parentis* doctrine as a justification for deference by

231. *Ingraham v. Wright*, 430 U.S. 651, 661 (1977).

232. *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

233. *See id.* at 577 (listing cases where the Supreme Court denied cert). *Wood v. Strickland* was the subsequent and only other Supreme Court case to address school discipline. *Wood v. Strickland*, 420 U.S. 308, 309 (1975).

234. *Goss*, 419 U.S. at 581. In its discussion, the Court stated that “[a] short suspension is, of course, a far milder deprivation than expulsion. But, ‘education is perhaps the most important function of state and local governments’ and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.” *Id.* at 576 (citation omitted) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The Court therefore reasoned that “[a]t the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.” *Id.* at 579.

235. *Id.* Many lower courts have applied the *Matthews v. Eldridge* three-part test when determining what procedural process requirements are necessary in cases of long term suspensions and expulsions. Amy P. Meek, Note, *School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School*, 28 YALE L. & POL’Y REV. 155, 165–66 (2009).

236. *Goss*, 419 U.S. at 583 (“[W]e have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”). Scholars have argued that the implementation of zero tolerance—and the routine presence of police officers in schools—justify rethinking the notion that school discipline serves only pedagogical goals. *See, e.g.*, Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 863 (2012).

237. *Goss*, 419 U.S. at 580; *see also id.* at 596 n.15 (Powell, J., dissenting) (“The Court itself recognizes that the requirements it imposes are, ‘if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.’”). The Supreme Court yet again assumed benevolence and good faith on the part of school administrators when the Court rejected the notion that a school must provide due process prior to imposing corporal punishment, because “traditional common-law remedies are fully adequate to afford due process.” *Ingraham v. Wright*, 430 U.S. 651, 672, 677 (1977) (holding that severe paddling that resulted in a hematoma requiring medical attention was “an aberration”).

courts to schools.<sup>238</sup> In its subsequent case on misbehavior-based school exclusion, the Supreme Court affirmed this deferential approach.<sup>239</sup>

Like the Court in *Goss*, lower courts focus almost exclusively on procedural due process in school discipline cases, often at the expense of substantive due process. This emphasis is fully evident in the Fourth Circuit case *Ratner v. Loudoun County Public Schools*.<sup>240</sup> The student in that case was suspended for being in possession of a knife, which the Court found he had taken from a classmate who had brought it to school in a moment of suicidal despair.<sup>241</sup> Nonetheless, the Fourth Circuit rejected the student's challenge to the suspension, finding that he had received the required procedural due process protections and that he was entitled to nothing more.<sup>242</sup> Lower courts have found, like the *Ratner* Court, "that so long as a student receives some rudimentary procedural due process they will not 'second-guess' the substance of school rules or their application."<sup>243</sup> Procedural due process protections have not acted as much of a check on misbehavior-based exclusion; since the 1970s, many students' rates of suspension have doubled and tripled.<sup>244</sup>

One Massachusetts case involving a legal challenge to a suspension demonstrates how courts conceptualize the trope of the undeserving child in the context of student misbehavior. In 1995, the Supreme Judicial Court let stand a suspension of a student for possession—not use—of a lipstick case knife on school property.<sup>245</sup> The student had previously demonstrated emotional problems and had engaged in self-injurious behavior in the past, including slashing her wrists.<sup>246</sup> The lipstick knife had been given to her by her mother's boyfriend, and the student believed the knife was a "joke."<sup>247</sup> The Court noted with approval the reasoning of the superintendent who imposed the suspension: "In making his decision, [the superintendent] considered the lipstick knife itself, the opinion of the plaintiff's social worker

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238. See *Goss*, 419 U.S. at 580; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) ("In *T. L. O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, 'is not entirely "consonant with compulsory education laws," . . . ." (citations omitted) (quoting *Ingraham*, 430 U.S. at 662)).

239. *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

240. *Ratner v. Loudoun Cty. Pub. Sch.*, 16 F. App'x 140, 142 (4th Cir. 2001) (per curiam).

241. *Id.* at 141–42.

242. *Id.* at 142.

243. Black, *supra* note 134, at 826, 865–67 (describing and criticizing the trend of courts passing on substantive due process claims and focusing only on whether students received procedural due process protections).

244. LOSEN ET AL., *supra* note 3, at 6.

245. *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088, 1088 (Mass. 1995).

246. *Id.* at 1091.

247. *Id.*

that the plaintiff was unstable, the plaintiff's disciplinary record, and her troubled family as factors favoring expulsion."<sup>248</sup>

Here, the court did not consider the extenuating circumstances, except insofar as they suggested that she had a troubled history.<sup>249</sup> Her difficult home life might have cautioned against suspension. A school true to the early vision of education as a means of promoting upward mobility<sup>250</sup> would want to keep a child from a difficult family situation enrolled; classes, extracurriculars, and caring teachers could offer the stability and structure that such a family might struggle to provide. Instead, her troubled family life was a strike *against* her,<sup>251</sup> functioning as an aggravating, rather than a mitigating factor in a counterintuitive way. One can see the trope of the undeserving child operating in the background of this decision to take action of excluding the child from school. In relying not only on her misbehavior, but also her problematic family and home life, as justification to keep her out of school, the administration defaults to stereotypes about students based on family profile.

#### B. *THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: HOPE BUT MINIMAL HELP*

The guiding principle of the Individuals with Disabilities Education Act<sup>252</sup> is that students with disabilities are entitled to free, appropriate education in the least restrictive environment appropriate to meet their needs.<sup>253</sup> Despite the protections afforded by the IDEA, the law facilitates disproportionate representation of students with disabilities in AEPs. In *Honig v. Doe*, the Supreme Court interpreted IDEA's predecessor statute to mean that students with disabilities who misbehave in ways consistent with their diagnosis may not be suspended from an educational setting for more than ten days.<sup>254</sup> However, administrators *can* unilaterally remove students with disabilities from their public school and place them in an "interim alternative

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<sup>248</sup>. *Id.* at 1092.

<sup>249</sup>. *Id.*

<sup>250</sup>. *See supra* Part II.A.

<sup>251</sup>. *Superintendent*, 653 N.E.2d at 1094, 1096 (justifying her exclusion by invoking the "broad disciplinary authority historically conferred on school officials" and affirming "the authority of the Legislature and school officials to exclude students who misbehave").

<sup>252</sup>. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1401 (2012)). The Education for All Handicapped Children Act of 1975 was later renamed the Individuals with Disabilities Education Act.

<sup>253</sup>. 20 U.S.C. § 1412(a)(5). The statute's operational mechanism is the individualized education program ("IEP"), a written statement for each child with a disability that is developed, reviewed, and revised by a team of teachers and administrators.

<sup>254</sup>. *Honig v. Doe*, 484 U.S. 305, 323-24 (1988) (holding that the "stay-put" provision of the Education of the Handicapped Act prohibited local school district from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct stemming from their disabilities during the pendency of the review proceedings).

educational setting” for up to 45 days, without parental consent, if the behavior leading to the suspension recommendation involved weapons, drugs, or serious bodily injury.<sup>255</sup> This placement can occur even if the behavior was directly related to the disability.<sup>256</sup> In addition, absent misbehavior serious enough to warrant suspension, the school can initiate proceedings to change a disabled student’s placement into an AEP.<sup>257</sup> In such an event, the student’s ability to challenge this recommendation is severely constrained by labyrinthine IDEA procedures.<sup>258</sup>

In addition, AEPs sometimes impose requirements that disproportionately burden students with disabilities. In many cases, students in AEPs may not return to their base schools unless they first demonstrate conformity with some specified set of behavioral criteria established by the AEPs.<sup>259</sup> Students with emotional or behavioral disabilities, who by definition

255. 20 U.S.C. § 1415(k)(1)(G).

256. *Id.*; see also Lehr, *supra* note 5, at 29 (reporting that 40% of surveyed states indicate that their AEPs are used as interim alternative educational settings for students with disabilities); Russell J. Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 BEHAVIORAL DISORDERS 81, 83 (2002) (discussing tension between preservation of school safety and protection of rights of students with disabilities).

257. Michele Scavongelli & Marlies Spanjaard, *Succeeding in Manifestation Determination Reviews: A Step-by-Step Approach for Obtaining the Best Result for Your Client*, 10 U. MASS. L. REV. 278, 289 (2015) (“A school may be utilizing the disciplinary process in an effort to remove a difficult student that the school is unable or unwilling to adequately serve.”). A U.S. Department of Justice investigation into Georgia’s alternative education program found that rather than provide students with disabilities in general education settings the necessary therapeutic and educational supports to enable them to succeed in those settings, schools sent these students to AEPs. The investigation further uncovered that students with disabilities were sent to these AEPs after sporadic and minor episodes of misbehavior and in lieu of less restrictive and drastic options, as the law requires. Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice Civil Rights Div., to Ga. Governor Nathan Deal and Ga. Att’y Gen. Sam Olens (July 15, 2015), [https://www.ada.gov/olmstead/documents/gnets\\_lof.pdf](https://www.ada.gov/olmstead/documents/gnets_lof.pdf). Similarly, a report by the Massachusetts Department of Elementary and Secondary Education found that the state’s Springfield Public School system inappropriately removed students with disabilities from general education environments and did not appropriately train its general education staff on special education topics. *S.S. v. City of Springfield*, 146 F. Supp. 3d 414, 419 (D. Mass. 2015).

258. See Pasachoff, *supra* note 108, at 1419 (acknowledging that constraints are more prevalent on low-income children compared to wealthy children).

259. CARVER ET AL., *supra* note 8, at 4; see, e.g., Complaint Under Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973, & Title II of the Americans with Disabilities Act at 14–15, 26, *ex rel.* W.P. v. Jefferson Par. Pub. Sch. Sys. (Dep’t of Educ. May 17, 2012), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/complaint\\_o.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/complaint_o.pdf) [hereinafter Title VI Complaint] (In one Louisiana AEP, there exist “three levels of behavior management, and a student cannot move from one level to the next unless they receive a certain number of points by performing specific compliance behaviors for a particular number of consecutive days. If a student achieves some progress in earning points based on good behavior and then has a behavior incident at school, he or she may be bumped down to a previous level and required to start again. In order to exit this tri-level program, a student must achieve 65% compliance with Level 1 for 15 consecutive days, 75% compliance with Level 2 for 15 consecutive days, and 85% compliance with Level 3 for 15 consecutive days, a daunting task for any student and particularly students with emotional or behavioral disabilities” (footnotes omitted)).

have difficulty demonstrating appropriate behavior even under normal circumstances, must comply with these criteria in order to “earn their way” back to their base school.<sup>260</sup> As a result, students with disabilities often stay in AEPs for longer periods than their non-disabled counterparts.<sup>261</sup>

### C. SCHOOL-FINANCE PRECEDENT: A STRAINED FIT

As the Supreme Court began to erect ever more barriers to meaningful school integration after the initial wave of desegregation consent decrees,<sup>262</sup> the need for methods other than desegregation injunctions to ameliorate the harms of racially isolated high-poverty schools became apparent. Advocates in the early 1970s thus began to challenge school-finance systems that result in funding disparities for school districts.<sup>263</sup>

Litigation challenging school-finance systems proceeded in three “waves.”<sup>264</sup> The first wave, relying on the Equal Protection Clause, was short-lived and ended when the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right and that inequitable school-financing schemes trigger only rational-basis review.<sup>265</sup> In

260. Title VI Complaint, *supra* note 259, at 26.

261. *Id.* at 2 (In the Jefferson Parish Public School System, “[t]he average length of stay . . . for African American high school students is 115.3 days as compared to an average length of stay of 74.4 days for white high school students. The average length of stay . . . for students with disabilities is 223.9 days as compared to an average length of stay of 94.5 days for students without disabilities.” (footnote omitted)).

262. See John Charles Boger, *Education’s “Perfect Storm”? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1379 & n.6 (2003) (discussing Supreme Court cases that have signaled federal disengagement from court-ordered desegregation).

263. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 253 n.11 (1999) (noting that Derrick Bell, who had worked on “school desegregation cases with the NAACP Legal Defense Fund from 1960 to 1966” also “work[ed] on one of the earliest school finance cases”). The story of school finance cases has been well told. See generally NAT’L RESEARCH COUNCIL STAFF, *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* (Helen F. Ladd et al. eds., 1999); *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* (Martin R. West & Paul E. Peterson eds., 2007); Heise, *supra* note 170; William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006); James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POLY REV. 463 (2004); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision As a Model*, 35 B.C. L. REV. 597 (1994); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

264. Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995).

265. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29, 35, 40 (1973). Despite this holding, there remains a substantial scholarly interest in arguing that a fundamental right to education exists under the U.S. Constitution. See, e.g., Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (concluding that federal courts have been “tragically wrong” in failing to find a constitutional right to education); Friedman & Solow, *supra* note 32, at 149 (“Interpreting the Constitution as judges do, especially

the second wave, lasting roughly from 1973 to 1989, plaintiffs argued that state equal protection clauses, combined with the education clauses in state constitutions, require states to equalize per-pupil spending.<sup>266</sup> These so-called “equity claims” had modest success, with plaintiffs prevailing in seven of twenty-two cases filed.<sup>267</sup>

In the third wave,<sup>268</sup> plaintiffs largely abandoned equity claims in favor of arguments based on the education clause included in every state constitution.<sup>269</sup> The majority of state courts reaching the merits of these claims<sup>270</sup> determined that state educational clauses require states to deliver

in Due Process cases, there is a federal constitutional right to a minimally adequate education.”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education).

266. William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1189 (2003); see also *San Antonio Indep. Sch. Dist.*, 411 U.S. at 70 (Marshall, J., dissenting) (referencing “recent state . . . court decisions concerning the unconstitutionality of state educational financing schemes”). “[N]othing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.” *Id.* at 133 n.100.

267. Rebell, *supra* note 102, at 1500–05 (discussing the results in state cases and the substantive meaning of the constitutional right to education in those cases). Commentators argue that the results in these early cases demonstrated judicial unwillingness to interfere with school finance policy, because of some of the same separation of powers concerns cited by the *Rodriguez* court. See, e.g., Koski, *supra* note 266, at 1189.

268. But see James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229–30 (2008) (arguing that the cases should not be seen as falling into distinct waves and that most cases involve claims of comparability).

269. See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. 14, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. 6, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. 11, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. Michael Rebell argues that courts ruling for plaintiffs in these cases have “revived and given major significance to the long-dormant provisions that were originally incorporated into state constitutions as part of the common school movement of the mid-nineteenth century.” Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 81 (2012).

270. States that have held school finance challenges nonjusticiable are Florida, Illinois, Nebraska, Oklahoma, Pennsylvania, and Rhode Island. See *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 169 (Neb. 2007); *Okla. Educ. Ass’n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1065–66

some basic substantive level of education.”<sup>271</sup> For instance, in *Rose v. Council for Better Education*, the Kentucky Supreme Court became the first to articulate a qualitative right to education, holding that a constitutionally adequate education included several specific skills and outcomes in each major subject of the school curriculum.<sup>272</sup> Numerous other state courts borrowed from *Rose*’s standards in defining their own.<sup>273</sup> These so-called adequacy claims have met with more success than equity claims.<sup>274</sup>

James Ryan posits that race has played an important role in determining the outcome of school-finance cases.<sup>275</sup> He writes:

Based on my review of the pertinent data, it appears that minority school districts—particularly urban minority districts—do not fare as well as white districts in school finance litigation. More precisely, minority districts do not win school finance cases nearly as often as white districts do, and in the few states where minority districts have successfully challenged school finance schemes, they have encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced. As this and additional evidence suggests, there are strong reasons to believe that the racial composition of the school district plays an influential role in determining its success or failure in school finance litigation and legislative reform.<sup>276</sup>

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(Okla. 2007); *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 787 (R.I. 2014); *Pawtucket v. Sundlun*, 662 A.2d 40, 58–59 (R.I. 1995).

271. *Conn. Coal. for Justice v. Rell*, 990 A.2d 206, 249–50 n.55 (Conn. 2010) (cataloguing cases). The states that have reached the merits and determined that no substantive level of education is required include Indiana, Louisiana, and Maine. *See Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) (“[T]he [e]ducation [c]lause of the Indiana [c]onstitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality.”); *Charlet v. Legislature of La.*, 97-0212, (La. Ct. App. 1 Cir. 6/29/98); 713 So. 2d 1199, 1207; *Sch. Admin. Dist. No. 1 v. Comm’r, Dep’t of Educ.*, 659 A.2d 854, 857 (Me. 1995).

272. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989).

273. *See, e.g.*, *Opinion of the Justices*, 624 So. 2d 107, 165–66 (Ala. 1993); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 485–87 (Ark. 2002); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734–35 (Idaho 1993); *McDuffy v. Sec’y for Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359–60 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999).

274. *See* Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal, in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1, 2 (Martin R. West & Paul E. Peterson eds., 2007) (“Adequacy plaintiffs have won victories in twenty-five states, including ten of the fourteen cases decided between 2003 and 2005.”).

275. *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 434 (1999).

276. *Id.* at 433–34 (footnote omitted).

If one accepts Professor Ryan's analysis,<sup>277</sup> one can see a manifestation of the trope of the undeserving child. Professor Ryan suggests that courts' implicit understanding of students as falling into more or less "deserving" and "undeserving" categories—which map on to past exclusionary practices—is reflected in the outcomes of facially colorblind adequacy claims.<sup>278</sup> Other commentators, too, argue that adequacy claims have succeeded where equity claims have failed *precisely because* they avoid specifically referencing the historically undeserving and instead emphasize the universality of the need for adequate education.<sup>279</sup>

These cases inform AEP reform in their development of the state-constitution-based right to education. Courts that have reached the merits of adequacy claims have held that the education clauses in state constitutions create educational rights in students.<sup>280</sup> However, courts have afforded different levels of weight to that right.<sup>281</sup> 16 states have declared education to be a fundamental right;<sup>282</sup> seven states have held the contrary.<sup>283</sup> The scope and content of the right in the remaining 37 states is unclear.

277. *Id.* at 435 ("This Article thus represents a first look at the evidence and an invitation to those with the appropriate analytical skills to take a closer inspection of the data.")

278. A subsequent empirical analysis, conducted in response to Ryan's argument and hypothesis, yielded preliminary findings suggesting that his hypothesis is correct. *See generally* Yohance C. Edwards & Jennifer Ahern, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326 (2004).

279. Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 38–41 (Martin R. West & Paul E. Peterson eds., 2007) ("In the aftermath of the publication of *A Nation at Risk* in the early 1980s, excellence (or its lack) replaced equity as the public's 'top concern' about education."); Heise, *supra* note 264, at 1174–75 (stating that adequacy "exhibits greater appeal to widely accepted norms of fairness and opportunity" and "cohere[s] with the emerging educational standards movement").

280. Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 89–95 (2010) (surveying the outcomes in school finance litigation).

281. Robyn K. Bitner, Note, *Exiled from Education: Plyer v. Doe's Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 780–81 (2015).

282. *Id.* at 766 n.15 (listing Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming). *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975); Leandro v. State, 488 S.E.2d 249, 255–56 (N.C. 1997); Bismarck Pub. Sch. Dist. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Brigham v. State, 692 A.2d 384, 391–95 (Vt. 1997); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d 340, 346 (W. Va. 1997); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

283. Bitner, *supra* note 281 at 779 n.97 (listing Colorado, Georgia, Idaho, Illinois, Indiana, Massachusetts, and Rhode Island); *see* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018–19 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking,



The fact that so few courts explicitly recognize a fundamental right to education presents two separate but related problems in the AEP context. The first is that without recognition of education as a fundamental constitutional right, courts have been reluctant to hold that the right to education includes a right to alternative education. In multiple states that do not consider education to be a fundamental right, students who are suspended or expelled are not provided alternative education in any setting.<sup>284</sup> In several of these states, students have challenged the denial, arguing that the right to education is not forfeited upon misbehavior.<sup>285</sup> These students seek access to AEPs, for the understandable reason that they and their parents view some education—albeit in a demonstrably inferior AEP—as better than no education at all.<sup>286</sup> However, courts have been unsympathetic to these claims. For example, in Massachusetts and Nebraska—two states in which education is not considered a fundamental right—the state supreme courts have held that the right to education is conditioned on a student’s good behavior in school.<sup>287</sup> Since claims filed in states where education has less than fundamental-right status receive a lower standard of review, states easily can show that the denial of education is rationally related to the base school’s goal of maintaining order.<sup>288</sup>

Even in states that do recognize a fundamental right to education, courts have found that a student’s misbehavior can cause her to forfeit that right. In *King ex rel Harvey-Barrow v. Beaufort County Board of Education*, the plaintiff argued that because the right to education had been earlier found to be fundamental under the North Carolina constitution, she was entitled to attend an alternative school rather than be totally excluded from all educational settings.<sup>289</sup> The North Carolina court reasoned, as had the Massachusetts and Nebraska courts, that the right to education is contingent

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537 P.2d 635, 647 (Idaho 1975); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194 (Ill. 1996); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009); *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088, 1095–97 (Mass. 1995); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55 (R.I. 1995); see also Black, *supra* note 13, at 13 (noting that even courts that do not declare education to be a fundamental right still “obligate the state to deliver certain educational opportunities” but grant the legislature broad discretion in doing so).

284. Bitner, *supra* note 281, at 767.

285. See Meek, *supra* note 235, at 180–83 (discussing some of these cases).

286. See *supra* notes 123–24 and accompanying text.

287. *Superintendent*, 653 N.E.2d at 1096–97 (providing no alternative education to ninth grade student who brought a knife to school); *Kolesnick v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807, 813 (Neb. 1997).

288. *Superintendent*, 653 N.E.2d at 1097 (holding that since an expulsion was rationally related to the maintenance of order in the school, the defendants’ decision not to provide the plaintiff with an alternate education does not render her expulsion unconstitutional); *Kolesnick*, 558 N.W.2d at 813; see also Meek, *supra* note 235, at 180 (discussing the challenges related to alternative education).

289. *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.* 704 S.E.2d 259, 261–63 (N.C. 2010).

on a student's compliance with school rules and may be forfeited.<sup>290</sup> Notwithstanding fundamental-right status, the Court in *King* declined to apply strict scrutiny to the decision to deny the plaintiff alternative education.<sup>291</sup> It did so on the grounds that strict scrutiny would impose an unworkable burden on school administrators, citing the history of affording deference to schools.<sup>292</sup>

The *King* Court's analysis understates the significance of affording education fundamental-right status. While deference to schools may apply in routine matters of school administration, the outright denial of all education services surely requires strict scrutiny, as argued in the dissenting opinion.<sup>293</sup> As one commentator notes, "[t]he North Carolina Constitution does not limit th[e] right to [education to] children who thrive in a traditional learning environment."<sup>294</sup> While the analysis of the majority opinion seems doctrinally incoherent, it is perfectly consistent with the notion that education can be reserved for blameless children, as suggested in *Plyler*.<sup>295</sup>

In any event, without a constitutional right to alternative education, courts are unlikely to find for a hypothetical plaintiff in an AEP who argues that the substandard offerings in AEPs do not comport with constitutional requirements.<sup>296</sup> In a challenge to AEPs serving suspended students in Tennessee,<sup>297</sup> the plaintiffs argued that certain components of the AEP violated the equal protection and education clauses of the Tennessee

290. *Id.* at 265. Commentators have critiqued the application of forfeiture theory to education. Robyn Bitner for example, argues that the traditional justifications for criminal and civil forfeiture are inapposite to youth. Criminal forfeiture is justified on the basis that the convicted criminal received constitutional protections, including proof beyond a reasonable doubt. Bitner further argues that the Supreme Court's recognition that children's characters are in formation, that they are susceptible to peer pressure, and that they are impulsive, should caution against the application of civil forfeiture theory, which is based on social contract theory. Bitner, *supra* note 281, at 799–801.

291. *King*, 704 S.E.2d at 267–68 (Timmons-Goodson, J., concurring in part and dissenting in part). Strict scrutiny is ordinarily the applicable level of review in assessing the denial of a fundamental constitutional right. *See, e.g.,* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (reaffirming that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right).

292. *King*, 704 S.E.2d at 262 (majority opinion) (“[S]chool districts are in the best position to judge the student's actions in light of all the surrounding circumstances and tailor the appropriate punishment to fit the unique circumstances of each student's situation.” (quoting *RM v. Washakie Cty. Sch. Dist. No. One*, 102 P.3d 868, 876 (Wyo. 2004))).

293. *Id.* at 267 (Timmons-Goodson, J., concurring in part and dissenting in part).

294. Mary Kenyon Sullivan, *Long-Term Suspensions and the Right to an Education: An Alternative Approach*, 90 N.C. L. REV. 293, 302 (2011).

295. *Plyler v. Doe*, 457 U.S. 202, 220 (1982); *see also supra* notes 121–25 and accompanying text.

296. Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 284 (2008) (predicting that challenges to adequacy of education in AEPs will fail).

297. *C.S.C. v. Knox Cty. Bd. of Educ.*, No. E2006-00087-COA-R3CV, 2006 WL 3731304, at \*1 (Tenn. Ct. App. 2006).

Constitution.<sup>298</sup> The plaintiffs objected to their placement in a nighttime program that was computer-based, while other suspended students were placed in a daytime program with traditional instruction.<sup>299</sup> They further objected to the fact that the school district did not provide public transportation to the night program.<sup>300</sup>

In ruling for the state, the court noted that while the Tennessee Supreme Court had recognized that its constitution guarantees a right to an education, “[w]e are not aware . . . of any authority creating a right to *alternative* education in and for a suspended or expelled student.”<sup>301</sup> The court further concluded that there was a rational basis for denying transportation,<sup>302</sup> noting that the state’s AEPs were never intended to be the same as other public schools:

The legislature has determined that students who do not follow the rules at their regular schools may be suspended or expelled from those schools . . . [and that] suspended . . . students may receive instruction at an alternative school. These alternative schools are *different* from regular public schools. Alternative education students have broken the rules of their respective schools; therefore, they are subject to losing certain services (*e.g.*, transportation) and opportunities (*e.g.*, extracurricular activities). They are not entitled to receive the same instruction and services that are provided to students who have continued to follow the rules.<sup>303</sup>

In sum, the school-finance precedent fleshing out a state Constitution-based right to education offers little hope of relief for students who wish to challenge their assignment to an AEP.

#### D. THE “EVERY STUDENT SUCCEEDS” ACT: A MISSED OPPORTUNITY FOR REFORM

A final example of legislators’ relatively minimal consideration for AEP students is found within the 2015 Every Student Succeeds Act (“ESSA”)<sup>304</sup> and its predecessor, the Elementary and Secondary Education Act (“ESEA”).<sup>305</sup> Through the ESEA, the Johnson Administration sought to improve educational opportunity for low-income students by providing states with

<sup>298</sup>. *Id.* at \*12–13.

<sup>299</sup>. *Id.* at \*7.

<sup>300</sup>. *Id.* at \*13.

<sup>301</sup>. *Id.* at \*10.

<sup>302</sup>. *Id.* at \*14.

<sup>303</sup>. *Id.* (citations omitted).

<sup>304</sup>. See Every Student Succeeds Act, Pub. L. No. 114–95, § 1005, 129 Stat. 1802 (2015) (to be codified at 20 U.S.C. § 6311(d)(1)(B)(i)) (providing for the implementation of state accountability systems for underperforming schools).

<sup>305</sup>. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (amended and reauthorized as NCLB in scattered sections of 20 U.S.C. in 2002).

supplemental funding.<sup>306</sup> Title I of the statute authorized the provision of federal funds to all school districts in which at least ten children and 2% of the overall student population are classified as poor.<sup>307</sup> This low threshold enables nearly all school districts to receive some federal funding.<sup>308</sup>

Amid a growing concern over the perceived mediocrity of American schools,<sup>309</sup> Congress imposed new requirements on states when it reauthorized ESEA in 1994 as the Improving America's Schools Act ("IASA").<sup>310</sup> IASA highlighted the importance of ensuring that students "acquire the knowledge and skills contained in challenging State content standards."<sup>311</sup> Specifically, IASA required all school districts both to identify schools that were not making what it deemed "Adequate Yearly Progress" ("AYP") toward the goal of proficiency for all students and to demonstrate the formal steps that those schools were taking to improve.<sup>312</sup>

The No Child Left Behind Act ("NCLB"), the 2001 revision, intensified the standards-based orientation of the IASA. For the first time, Congress tied provisions of Title I funds to states' adoption of teaching, testing, and accountability programs.<sup>313</sup> NCLB required teachers to be "highly qualified," defined by demonstrated competence in the subjects they taught.<sup>314</sup> Additionally, it required states to administer annual tests to students in math, reading, and science.<sup>315</sup> While commentators have praised NCLB's accountability standards for the light they shone on low-performing schools

306. Derek Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 605 (2012).

307. *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/programs/titleiparta/legislation.html> (last modified Sept. 29, 2016).

308. See *Grant Distribution Formulas*, NEW AMERICA, <http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-distribution-formulas> (last visited Dec. 27, 2017).

309. The 1983 report "A Nation at Risk: The Imperative for Educational Reform" described American children far behind their peers in other countries, minority children in the United States far behind their white peers, and an overall increase in illiteracy. DAVID P. GARDNER ET AL., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 8–9 (1983), <https://permanent.access.gpo.gov/lps3244/ED226006.pdf>. Among several solutions, the report recommended performance standards and assessments for all students and teachers. *Id.* at 28.

310. Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 657 (2011).

311. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1001(d), 108 Stat. 3518.

312. *Id.*

313. 20 U.S.C. § 6311(b)(2)(J) (2012) (describing the process by which states develop accountability and curriculum plans that must be approved by the Department of Education in return for Title I funds).

314. *Id.* §§ 6314(b)(1)(C), 6315(c)(1)(E).

315. *Id.* § 6311(b)(2)(B)(v)(I)–(II). In 2011, President Obama through executive action created a waiver program permitting states flexibility from NCLB's mandates in exchange for creating their own plans to set high standards, improve accountability, and support the evaluation and development of teachers and principals. EXEC. OFFICE OF THE PRESIDENT, EVERY STUDENT SUCCEEDS ACT: A PROGRESS REPORT ON ELEMENTARY AND SECONDARY EDUCATION 8 (2015), <http://blogs.edweek.org/edweek/campaign-k-12/ESSA%2BProgress%2BReport.pdf>.

and students,<sup>316</sup> the implementation of these standards generated ample criticism for disproportionately emphasizing testing and unfairly stigmatizing low-performing schools.<sup>317</sup>

Accountability standards also create incentives for regular public schools to transfer academically struggling students to AEPs rather than address their learning difficulties in the first instance.<sup>318</sup> Critics note that these standards encourage public schools to use AEPs as a “silent release valve” when “straining under the pressure of accountability reform.”<sup>319</sup> Yet, as will be shown, these same standards then fail to function effectively to promote the success of students once they are sent to AEPs.

The ESSA,<sup>320</sup> the 2015 revision of the ESEA, aims to maintain a focus on accountability while turning over the task of how to measure accountability to states.<sup>321</sup> While the purpose of the law is to promote and provide tools for measuring accountability of regular schools, it will be of limited utility in improving AEPs. For example, ESSA requires states to administer annual or semi-annual tests to students in math, reading, and science.<sup>322</sup> Each state must then implement a system that “meaningfully differentiat[es]” between schools’ academic performances.<sup>323</sup> These academic performances are determined in large part by aggregate test results for every grade and for several specific demographic groups, including minorities, English language learners, migrant students, and economically disadvantaged students.<sup>324</sup> Overall and disaggregated test results, along with other metrics such as attendance and graduation rates, are used to assess whether a school is in need of “comprehensive support and improvement” from the state.<sup>325</sup> Schools that fall into this category are required to implement locally designed

316. Boger, *supra* note 262, at 1440 (summarizing favorable commentary).

317. *Id.* at 1450 (discussing how NCLB encourages parental flight from schools deemed low-performing, demoralizes teachers, and creates incentives for schools to exclude students deemed low-performing); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932–33 (2004) (describing NCLB as “at war with itself” because while its goals are laudable, it creates incentives that undercut those goals).

318. Vogell & Fresques, *supra* note 2 (describing practice of school district in Orlando, Florida, of transferring struggling students to AEPs as a means of bolstering the graduation rates of the regular public school in order to comply with accountability standards).

319. *Id.* In the related context of criminal justice, Professor Erin Collins argues that so-called problem-solving courts, which ostensibly replace typical criminal court processing with a system that focuses on the problems that led individuals to the system, function in a similar way—as “permanent, institutionalized release valves [which] help the broken system continue to operate in perpetuity despite its flaws.” Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1508 (2017).

320. Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat. 1802 (2015) (codified as amended at 20 U.S.C.A. § 6311(b) (West 2017)).

321. *See* 20 U.S.C.A. § 6311(b).

322. *Id.* § 6311(b)(2)(B)(v)(I)–(II).

323. *Id.* § 6311(c)(4)(C).

324. *Id.* § 6311(c)(2).

325. *Id.* § 6311(c)(4)(D)(i).

improvement plans and are monitored by the state educational agency.<sup>326</sup> If a school's performance does not improve after several years on the improvement plan, ESSA permits states to take more drastic action, including direct action at the school level.<sup>327</sup> The Act further requires states to make public the performance of such schools and offer remedial measures to students enrolled in them.<sup>328</sup> These remedial measures include the opportunity for an inter-district transfer to a better-performing public school, including charter schools.<sup>329</sup>

Provisions of the ESSA make it more difficult for policymakers to hold AEPs accountable for student academic progress. First, the law permits states to exclude, for accountability purposes, the test scores of students who attend a school for less than a full school year.<sup>330</sup> Since AEPs are often designed as temporary placements,<sup>331</sup> the full-year provision can result in excluding the test scores of students attending such schools. Alternatively, the test scores of AEP students may be attributed to the base schools rather than to the AEPs.<sup>332</sup> Second, ESSA holds schools accountable for graduation rates,<sup>333</sup> yet AEPs may send students back to their base school prior to graduation<sup>334</sup> or fail to track what happens to them after they leave the AEP.<sup>335</sup> Third, the provision for identification and improvement of low-performing schools appears not to apply to AEPs because of qualifying language.<sup>336</sup> Specifically, this language

326. *Id.* § 6311(d)(2).

327. *Id.* § 6311(d)(3)(A)(i)(I).

328. *Id.* § 6311(h); see, e.g., *Education First N.C. School Report Cards*, N.C. PUB. SCHS., <http://www.ncreportcards.org/src/main.jsp> (last visited Dec. 27, 2017) (displaying North Carolina public school report cards); *K-12 Public Schools Report Card*, GA. GOVERNOR'S OFF. STUDENT ACHIEVEMENT, <https://gaawards.gosa.ga.gov/analytics/saw.dll?dashboard> (last visited Dec. 27, 2017) (displaying Georgia public school report cards); *School Report Cards*, TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/perfreport/src> (last visited Dec. 27, 2017) (displaying Texas public school report cards).

329. 20 U.S.C.A. § 6303b (West 2017).

330. *Id.* § 6311(c)(4)(F)(I).

331. See Vogell & Fresques, *supra* note 2.

332. ACLU, *supra* note 17, at 19.

333. Every Student Succeeds Act, Pub. L. No. 114-95, § 1111, 129 Stat. 1820, 1835 (2015) (to be codified at 20 U.S.C. § 6311(b)(4)(A)(i)(I)(bb)).

334. CARVER ET AL., *supra* note 8, at 16.

335. MARY MAGEE QUINN ET AL., AMERICAN INSTS. FOR RESEARCH, STUDY OF EFFECTIVE ALTERNATIVE EDUCATION PROGRAMS: FINAL GRANT REPORT 3 (2007), <http://files.eric.ed.gov/fulltext/ED522072.pdf> ("Little is know [sic] about whom alternative programs serve and why, how they function, the degree to which they are responsive to all children's education needs, and the extent to which children enrolled in these schools benefit from positive experiences and outcomes."); Vogell & Fresques, *supra* note 2.

336. Every Student Succeeds Act § 1111, 129 Stat. at 1838 (requiring states to establish a system to identify the lowest performing 5% of schools and all public high schools failing to graduate one third or more of their students). For each school identified by the state, the LEA must develop and implement a school level targeted support and improvement plan to improve student outcomes. *Id.* ESSA also authorizes states to take additional action in LEAs with "a

indicates that states have more discretion when dealing with schools that serve mostly students who are returning to education or are off track to graduate, and districts can choose not to implement improvement plans for schools with fewer than 100 students.<sup>337</sup> AEPs are typically much smaller than regular schools, and in many cases they specifically serve students returning to education or students who are off-track academically.<sup>338</sup> This exemption further permits AEPs to slip beneath the radar of accountability that ESSA purports to provide.<sup>339</sup>

Many AEPs flouted the provisions of NCLB that applied to them, and they appear to have done so with impunity. In several states, districts failed to publish required data on test scores and graduation rates. In North Carolina, the grades required by ESSA are not publicly available for AEPs.<sup>340</sup> In New York, AEPs are not required to publish report cards.<sup>341</sup> In Mississippi, the state makes “essential facts about each of [the state’s public] schools: population, demographics, and test scores” available to members of the public through an easily accessible database.<sup>342</sup> Yet the state’s AEPs do not appear on the database in any form.<sup>343</sup> A dearth of easily accessible data in Georgia led an

significant number of schools that are consistently identified by the State” using the previous criteria. *Id.*

337. *Id.*; see NAT’L CONFERENCE OF STATE LEGISLATURES, SUMMARY OF THE EVERY STUDENT SUCCEEDS ACT, LEGISLATION REAUTHORIZING THE ELEMENTARY AND SECONDARY EDUCATION ACT 5 (2016), [http://www.ncsl.org/documents/capitolforum/2015/onlineresources/summary\\_12\\_10.pdf](http://www.ncsl.org/documents/capitolforum/2015/onlineresources/summary_12_10.pdf).

338. CARVER ET AL., *supra* note 8, at 6.

339. That districts regularly flout without consequence the federal publication requirement with respect to AEPs suggests several possibilities. One is that districts understand that AEPs are poorly regarded by parents and that publication of data confirming parents’ perception serves no practical purpose. Another possibility is that the underlying intent of the NCLB publication requirement—to enable parents to “shop around” to avoid poorly-performing schools—is irrelevant in a context where parents and students are without choice. Susan DeJarnatt argues that the school-choice movement in any event offers “hollow hope” for low-income parents in racially isolated neighborhoods. Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 41–42 (2008) (“Many proponents of school choice explicitly argue for choice as a means of equalizing opportunity and giving poor kids the choices now only available to those with the funds to attend private school or buy houses in high-performing school districts. But this equality is an illusion if schools and parents are still motivated by a desire to exclude the poor. NCLB offers a hollow hope to parents in failing multi-school districts because it does not enable those parents to escape the district itself. . . . Vouchers offer a similar hollow hope: no politically viable voucher proposal will offer voucher amounts sufficient to pay tuition at an elite private school, and none is likely to require those schools to admit struggling poor students.” (citations omitted)).

340. See N.C. SCH. REP. CARDS, [https://ncreportcards.ondemand.sas.com/SASVisualAnalyticsViewer/VisualAnalyticsViewer\\_guest.jsp?reportPath=/ReportCard/NC\\_SRC&reportName=NC+Report+Cards](https://ncreportcards.ondemand.sas.com/SASVisualAnalyticsViewer/VisualAnalyticsViewer_guest.jsp?reportPath=/ReportCard/NC_SRC&reportName=NC+Report+Cards) (last visited Dec. 27, 2017) (highlighting there is no publically available information on AEPs).

341. Elisa Hyman, *School Push-outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684, 685 (2005).

342. ACLU, *supra* note 17, at 18–19.

343. *Id.*

audit to conclude that the state's AEPs are improperly unaccountable for student performance and to question their cost effectiveness. In 1000-plus pages of text of the ESSA, there is no substantive discussion of alternative education.<sup>344</sup> This omission may encourage states to continue their practices of failing to report statutorily required information about AEPs.

In addition to the issues identified with the ESSA, a loophole in a different federal regulation exists that compounds the ways in which AEPs elude accountability. Federal regulations require districts to report all requested data. The Office for Civil Rights maintains that it requests demographic data about all public schools, including alternative schools.<sup>345</sup> Such data is critical in enabling the Department of Education to monitor compliance with federal statutes, including statutes that are designed to protect students from discrimination. However, OCR's definition of "alternative" is narrow; it includes only "schools that are adjunct to a regular school, e.g., are located on the same campus as a regular school but have a separate principal or administrator."<sup>346</sup> Yet, as noted previously, most AEPs are not on the campus of a regular school. This means that an important tool for data collection and compliance monitoring that is available in the regular education context is not available for AEPs.

*E. THE NEED FOR AND ABSENCE OF PROCEDURAL DUE PROCESS IN AEP TRANSFERS*

The absence of due process protections for students and their parents prior to an AEP transfer means that they have no meaningful ability to contest a decision. While a school administrator may meet with a family and allow for input, formalized procedures are absent and families have no right of appeal should they disagree with the decision made. The justification for this practice tends to be that an AEP transfer is merely an assignment to a school, and so the student should have no more right to contest it than she would if she were being sent to a different school subject to, for example, a districting change imposed by a school board.

Yet that justification ignores the fact that AEPs are designed to be different and frequently are substandard. Students have challenged the denial

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344. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, § 1005, 129 Stat. 1802, 1838 (to be codified at 20 U.S.C. § 6311 (d)(1)(A)).

345. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, <https://www2.ed.gov/about/offices/list/ocr/data.html> ("Since 1968, the U.S. Department of Education (ED) has conducted the Civil Rights Data Collection (CRDC) to collect data on key education and civil rights issues in our nation's public schools. . . . The CRDC collects a variety of information including student enrollment and educational programs and services, most of which is disaggregated by race/ethnicity, sex, limited English proficiency, and disability [and] is a longstanding and important aspect of the ED Office for Civil Rights (OCR) overall strategy for administering and enforcing the civil rights statutes for which it is responsible.").

346. U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS, 2011-12 CIVIL RIGHTS DATA COLLECTION DEFINITIONS, <https://ocrdata.ed.gov>.



of due process in transfers to AEPs, largely on these grounds.<sup>347</sup> They have argued that an AEP assignment constitutes a deprivation of a protected property interest in education and liberty interest in reputation in the same manner as a suspension, and so the due process protections guaranteed by *Goss* should apply.<sup>348</sup> Most courts to take up the issue have ruled that students are not entitled to due process when being transferred to an AEP, absent a showing that the education received at the AEP is significantly inferior to that received at the student's regular public school,<sup>349</sup> or, in some circuits, is so poor as to be tantamount to expulsion.<sup>350</sup>

The Fifth Circuit case of *Nevares v. San Marcos Consolidated Independent School District* typifies the analysis employed in most circuits.<sup>351</sup> In this 1997 decision, the plaintiff faced transfer to an AEP and challenged this transfer in court.<sup>352</sup> In ruling against the plaintiff, the Court held that a transfer to the AEP need not be preceded by procedural due process protections because “[h]e was only to be transferred from one school program to another program with stricter discipline.”<sup>353</sup> Consistent with post-*Goss* courts’ deference to the notion that schools maintain near-total discretion to suspend in order to promote school safety, the court characterized the plaintiff as one among a class of students “who for reasons of safety and order must be removed from the regular classroom.”<sup>354</sup> The court overlooked the fact that the incident triggering his transfer—allegedly throwing rocks at a car and injuring passengers—had occurred off campus, and thus there was no

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347. See Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 212 (1996); Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 906–14 (2011) (discussing cases).

348. See Blackburn Tillman, *supra* note 347, at 212; Carroll, *supra* note 347, at 906–14 (discussing cases).

349. See *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996) (finding no right to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school absent showing that education received at the alternative school is significantly different from or inferior to that received at his regular public school). But see Carroll, *supra* note 347, at 914 (arguing that these negative due process decisions do not constitute a consensus).

350. *Marner ex rel. Marner v. Eufaula City Sch. Bd.*, 204 F. Supp. 2d 1318, 1324 (M.D. Ala. 2002).

351. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26–27 (5th Cir. 1997); see also *Chyma v. Tama Cty. Sch. Bd.*, No. Co7-0056, 2008 WL 4552942, at \*3 (N.D. Iowa Oct. 8, 2008) (noting “the consensus of the circuits . . . that placement in an alternative school does not implicate procedural due process rights unless there is a showing that the education provided by the alternative school is substantially inferior”).

352. *Nevares*, 111 F.3d at 26.

353. *Id.*

354. *Id.* at 26, 27 (“We recognize the importance of trust and confidence between students and school administrators. For that reason the student and parents must be treated fairly and given the opportunity to explain why anticipated assignments may not be warranted. But that is for Texas and the local schools to do. We would not aid matters by relegating the dispute to federal litigation.”).

showing that the student in fact posed any threat to safety and order within the classroom.<sup>355</sup>

The *Nevares* court further held, employing reasoning adopted by multiple courts subsequently, that assignment to an AEP was a *de minimis* deprivation,<sup>356</sup> finding that students have no protected interest in attending a particular school.<sup>357</sup> This conclusion glossed over the significant educational problems inherent in the AEP that the lower court had outlined.<sup>358</sup>

The *Nevares* opinion evinces a denial of, or indifference to, the problematic features of AEPs. As a Pennsylvania court held some 40 years ago in ruling that due process protections *should* precede an AEP transfer<sup>359</sup>:

To transfer a pupil during a school year . . . would be a terrifying experience for many children . . . . Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities. Realistically, I think many if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer . . . .<sup>360</sup>

Of course, it is possible if not likely that even with procedural due process protections, school districts would continue to be able to transfer students largely at will; after all, students seeking to contest suspensions typically do not succeed. Nonetheless, even the semblance of a formal proceeding could function to provide students a sense of agency and meaningful participation in their educational decisions. Such a sense of agency and participation could ultimately lead the student to invest more effort during her time at an AEP, thus improving her potential educational outcomes.<sup>361</sup>

355. *Id.* Furthermore, the court embraced—without carefully analyzing—the putative rationale behind zero-tolerance policies: “it is generally recognized that students [other than those being assigned to AEPs] are being deprived of their education by lack of discipline in the schools.” *Id.* at 26–27.

356. *See id.* at 27.

357. *Id.*; see, e.g., *C.B. v. Driscoll*, 82 F.3d 383, 389 n.5 (11th Cir. 1996) (holding that the right to a public education does not encompass “a right to choose one’s particular school” (quoting *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994))).

358. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162, 1166 (W.D. Tex. 1996) (noting the limited amount of lecturing time, dearth of textbooks, and constant surveillance by teachers).

359. *Everett v. Marcuse*, 426 F. Supp. 397, 400 (E.D. Pa. 1977).

360. *Id.*; see also *D.C. v. Sch. Dist. of Phila.*, 879 A.2d 408, 409, 418–19 (Pa. Commw. Ct. 2005) (holding that state law that automatically consigned all youth returning to school from detention facilities to a transition center without a hearing violates due process).

361. In the related context of juvenile justice, scholars have argued that procedural justice theory recognizes that “when a child feels that the system has treated her fairly, she is more likely to accept responsibility for her actions and take steps towards reform.” Tamar Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF L. REV. 1447, 1508 (2009). Such insights are difficult to test, but they find support in the AEP context. See *infra* notes 365–66 and accompanying text.

## F. VOLUNTARY REFORMS (AND THEIR INADEQUACIES)

While effective legal remedies do not appear to exist for meaningfully challenging the new exclusion, states and school districts are in some cases taking voluntary steps to improve. These efforts were emboldened when the Obama Administration issued powerful guidance for school districts urging the adoption and implementation of non-exclusionary discipline. In the face of significant criticism from advocates, scholars, and policymakers, some school districts have backed away from “zero tolerance” suspension policies.<sup>362</sup> In some instances, districts have simply replaced these policies with policies that grant administrators significant discretion to suspend students for a wide array of minor and subjective infractions.<sup>363</sup> In other cases, however, districts have implemented policies designed to reward good behavior and create non-exclusionary means of resolving conflict. So, for example, restorative-justice programs exist, as do meditation programs. Of course, as other scholars have pointed out, these kinds of voluntary changes will last only as long as there is administrative support; the absence of meaningful legal recourse for students means that they have no enforceable rights to contest exclusion, should schools revert to suspension in the future.<sup>364</sup>

Relatedly, one possible solution to the absence of effective legal mechanisms to contest AEP transfer and argue that AEPs do not meet students’ legally recognized needs would be to rely entirely on voluntary efforts to improve the programs. Qualitative evaluations of AEPs have revealed that students reporting satisfaction with their programs consistently note similar characteristics: small class size, flexibility in administration, good teacher training, parental involvement in decision-making, and a process for

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362. In January 2014, the U.S. Department of Education’s Office of Civil Rights issued a resource guide for improving school climate and discipline, suggesting that schools employ a tiered approach to discipline and reminding schools that the Federal Gun-Free Schools Act “does not require that states or schools implement wide-ranging zero-tolerance policies or rely on exclusionary discipline” for acts that do not involve firearms. U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 15 (2014); Black, *supra* note 134, at 837–41 (discussing criticism of zero-tolerance policies).

363. See, e.g., TENN. CODE ANN. § 49-6-3401(b)(1)(C) (2016) (listing behavior “[p]rejudicial to good order” as an offense triggering suspension); ACLU OF FLA. ET AL., STILL HAVEN’T SHUT OFF THE SCHOOL-TO-PRISON PIPELINE: EVALUATING THE IMPACT OF FLORIDA’S NEW ZERO-TOLERANCE LAW 4, 8 (2011), [http://b3cdn.net/advancement/be89ef01bcb350c7fc\\_z5m6btbgo.pdf](http://b3cdn.net/advancement/be89ef01bcb350c7fc_z5m6btbgo.pdf) (discussing changes to the Florida zero tolerance policies which include giving more discretion to school administrators before punishing a student, but also noting that these changes have still failed to adequately protect students); Rebecca Morton, Note, *Returning “Decision” to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation*, 91 WASH. U. L. REV. 757, 759 (2014) (discussing new school discipline laws enacted in Texas, North Carolina, Colorado, and Massachusetts, which permit or require consideration of other factors before disciplining a student, including “a student’s intent, self-defense, disability, and disciplinary history”).

364. Black, *supra* note 134, at 864–65 (noting some positive voluntary change in large school districts but describing the courts’ decades-long trend away from seriously entertaining students’ procedural or substantive due process claims).

admission that permits students to exercise some degree of choice before attending.<sup>365</sup> Some states and school districts may in fact commit to running high-quality AEPs and working to ensure that students within them can succeed.<sup>366</sup>

While reform efforts may improve individual AEPs, however, undertaking them is a task that elides two, more fundamental problems. First, designating a student “at risk” is a process involving subjectivity and permitting administrator discretion. Data indicate that the designation thus far has resulted in AEPs that closely track historical patterns of exclusion of students of color and students with disabilities.<sup>367</sup> The creation and administration of separate and demonstrably inferior educational settings thus seems to constitute a politically palatable way for schools to continue to engage in long-standing patterns of exclusion.<sup>368</sup>

Second, the underlying logic of AEPs seems to be, in some measure, to deter student misbehavior and academic failure;<sup>369</sup> if the student would only conform to academic and behavioral norms, then no AEP assignment would be necessary. Some courts have reasoned that paring down the educational experience to the most basic elements helps deter misbehavior.<sup>370</sup> Yet such logic then creates a problematic and arguably unethical bind for administrators and educators, who presumably must create and administer schools that are in fact undesirable enough to deter bad behavior.<sup>371</sup>

As mentioned, students are more likely to report satisfaction with their AEPs when they believe they had some say about whether to attend.<sup>372</sup> This finding suggests that it is not necessarily the *existence* of a separate and different school that is problematic, but rather the process of being forced to

365. QUINN & POIRIER, *supra* note 181, at 16 (explaining that these characteristics are in need of further empirical study—it is unclear whether they produce or are simply correlated with positive outcomes—but arguing that because they frequently appear in the evaluative literature, they warrant further discussion and examination).

366. *See id.* at 7–10.

367. *See supra* notes 220–27 and accompanying text.

368. India Geronimo, *Deconstructing the Marginalization of “Underclass” Students: Disciplinary Alternative Education*, 42 U. TOL. L. REV. 429, 445 (2011) (“Placing students in [AEPs] is an effective method for getting rid of students who are difficult to teach. This structure allows school officials to claim that they have not given up on at-risk students without actually committing to the task of educating these students effectively.” (footnote omitted)).

369. SOLEIL GREGG, *SCHOOLS FOR DISRUPTIVE STUDENTS: A QUESTIONABLE ALTERNATIVE?* 6 (1998).

370. *See, e.g.*, Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 916 (1996) (“We wish to make it crystal clear that pupils who misbehave should not be rewarded for their conduct. [They] should and do forfeit . . . all the privileges typically associated with being a regular student, such as, interscholastic and intermural athletics; music, drama and speech programs; and all other extracurricular activities.”).

371. GREGG, *supra* note 367, at 6 (“[A] punitive purpose may put educators in the awkward—if not unconscionable—position of creating schools undesirable enough to deter bad behavior.”).

372. *See supra* notes 367–68 and accompanying text.

attend it. Ultimately, deciding the best educational policy for students struggling with behavior or deemed at risk of educational failure is beyond the scope of this Article. But given the problems that seem endemic to the system of AEP transfer, policymakers should consider abandoning this educational innovation.

## V. CONCLUSION

The vision of public schools as a mechanism for promoting social cohesion remains to be fulfilled. While group-based exclusion according to classifications of race or disability is now prohibited, the practice of exclusion persists. Over the last thirty years, schools have suspended, and transferred into separate schools, far too many students.

The existence of research showing that suspending students improves neither the behavior of the suspended student nor the overall school climate offers some hope that the tide will turn toward the direction of retaining rather than pushing out troubled and troubling students. In addition, recent scrutiny of AEPs<sup>373</sup> may offer hope for change. Yet states and school districts will need to commit to a notion that all students truly are deserving of the full promise of public education envisioned by common-school proponents.

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373. See, e.g., Vogell & Fresques, *supra* note 2.