Disparities in School Discipline in Maryland

Maryland Advisory Committee to the U.S. Commission on Civil Rights

October 2019

The United States Commission on Civil Rights

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The State Advisory Committees

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Letter of Transmittal

Maryland Advisory Committee to the
U.S. Commission on Civil Rights

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The Maryland Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report, "Disparities in School Discipline in Maryland." This report was adopted by a vote of 9 to 1.The dissenting member was provided an opportunity to prepare a dissenting statement, which is appended to the report.

Thomas M. Mackall, Chairperson
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Maryland Advisory Committee to U.S. Commission on Civil Rights

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Introduction

The Maryland State Advisory Committee to the U.S. Commission on Civil Rights held a briefing on August 24, 2018, to examine the disproportionate use of discipline for students with disabilities and students of color in Maryland public schools. The briefing included testimony from a range of stakeholders and featured five panels of speakers, including a panel describing the state's approach, and the approach of a large school district, to addressing the disproportionate use of discipline for students with disabilities and students of color, a panel describing the perspectives of advocates for students with disabilities and students of color concerning the reasons for disproportionate discipline, parents of students of color with disabilities, researchers with expertise in this area, and experts with on-the-ground experience addressing behavior issues in schools—including a former school principal and a former teacher.[1] The committee also heard public comments and received written comments from a number of current teachers, parents of students of color or students with disabilities, and others.

The Committee also researched available information and data sources. Based on this work, the Committee concludes that the use of school discipline poses significant civil rights concerns with respect to students with disabilities and students of color.[2]

The information gathered by the committee is set forth below.

Background

Federal

The disproportionate impact of disciplinary measures on communities of color in the education system has been a topic of national concern for more than a decade. A growing body of research has demonstrated that exclusionary discipline, and the consequent loss of in-class instruction time, has negative effects on learning environments, student achievement, graduation rates, and rates of juvenile crime.[3] The U.S. Government Accountability Office observed:

[1] Representatives of the Maryland State Department of Education (MSDE) were invited to speak at the briefing but declined to appear. However, Dr. Edward Fergus, the consultant working with MSDE on implementing its obligations to address disproportionality by race or ethnicity in identification of students with disabilities, placement in particular educational settings, and disciplinary measures under Sections 1416(a)(3) and 1418(d) of the Individuals with Disabilities Education Act (IDEA), spoke at the briefing and described the state's activities and approach.

[2] The committee has neither the tools nor the charge to investigate and determine that civil rights violations are in fact occurring.

[3] *See* Daniel Losen, Cheri Hodson, Michael A. Keith II, Katrina Morrison, and Shakti Belway, "Are We Closing the School Discipline Gap," *Center for Civil Remedies*, Feb. 2015, https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf; Russell Skiba, Choong-Geun Chung, Megan Trachok, Timberly Baker, Adam Sheya, Robin L. Hughes, "Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School

> Research has shown that students who are suspended from school lose important instructional time, are less likely to graduate on time, and are more likely to repeat a grade, drop out of school, and become involved in the juvenile justice system. The effects of certain discipline events, such as dropping out, can linger throughout an individual's lifetime and lead to individual and societal costs.[4]

According to the Federal Government, data reflects substantial racial disparities in the use of exclusionary discipline that "are not explained by more frequent or more serious misbehavior by students of color."[5] These disparities cannot be explained entirely by socioeconomic factors either. The American Psychological Association highlighted:

> The evidence shows that such disproportionality is not due entirely to economic disadvantage (Skiba et al., 2002; Wu et al., 1982), nor are there any data supporting the assumption that African American students exhibit higher rates of disruption or violence that would warrant higher rates of discipline. Rather, African American students may be disciplined more severely for less serious or more subjective reasons (Gregory & Weinstein, in press; McCarthy & Hoge, 1987; McFadden et al., 1992; Skiba et al., 2002). Emerging professional opinion, qualitative research findings, and a substantive empirical literature from social psychology suggest that the disproportionate discipline of students of color may be due to lack of teacher preparation in classroom management (Vavrus & Cole, 2002), lack of training in culturally competent practices (Ferguson, 2001; Townsend,

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Suspension and Expulsion," American Educational Research Journal 51, no. 4 (August 1, 2014): 640-670; Maryland State Department of Education, School Discipline Policy and Regulations, prepared by M. Gable and E.M. Kameen for the Members of the State Board of Education, Sept. 25, 2018, p. 18 (cataloguing national reports and research that influenced the Maryland State Board of Education), http://marylandpublicschools.org/stateboard/Documents/09252018/TabK%20-SchoolDisciplineALookBackwardForward.pdf (hereinafter cited as Maryland Education, *Gable Memo*).

[4] Government Accountability Office, *Report to Congressional Requesters: K-12 Education, Discipline Disparities for Black Students, Boys, and Students with Disabilities*, March 2018, p. 1, https://www.gao.gov/assets/700/690828.pdf (hereinafter cited as GAO, *Discipline Disparities*).

[5] U.S. Department of Justice and U.S. Department of Education, *Letter on the Nondiscriminatory Administration of School Discipline*, January 8, 2014, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf (citing Michael Rocque & Raymond Paternoster, "Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline," *Journal of Criminal Law and Criminology* 101, no. 2, (March 2011): 633-666); Russell J. Skiba et al., "Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline," *School Psychology Review* 40, no. 1, (2011): 85-107; T. Fabelo, M.D. Thompson, M. Plotkin, D. Carmichael, M.P. Marchbanks & E.A. Booth, "Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement," *Council of State Governments: Justice Center*, 2011, https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf, 31; A. Gregory & A.R. Thompson, "African American High School Students and Variability in Behavior Across Classrooms," *Journal of Community Psychology* 38, no. 3, (April 2010): 386-402; R.J. Skiba, R.S. Michael, A.C. Nardo & R.L. Peterson, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment," *The Urban Review* 34, no. 1, (December 2002); 317-342; Michael Rocque, "Office Discipline and Student Behavior: Does Race Matter?," American Journal of Education 116, no. 4 (August 2010): 557-581.

> 2000), or racial stereotypes (Bargh & Chartrand, 1999; Graham & Lowery, 2004).[6]

A landmark study of nearly one million Texas students conducted by the Council of State Governments and Public Policy Research Institute between 2010 and 2011 was particularly influential in drawing attention to this issue. The authors of that study observed:

> Nationwide, the large number of suspensions and expulsions has prompted state and local policymakers, people working on the front lines of schools and juvenile justice systems, parents, students, and community leaders to ask for data explaining the impact this practice is having on students. Increasingly, observers are also asking about the consequences of suspending or expelling large numbers of students, such as whether these policies contribute to high drop-out rates or to students' involvement in the juvenile justice system—particularly students of color or those who have special needs.[7]

This study, while controlling for factors such as teacher experience, district wealth, and attendance rates,[8] found that nearly six in ten public school students studied were suspended or expelled at least once between seventh and twelfth grade.[9] In particular, African-American students and those with disabilities were more likely to be removed from the classroom for disciplinary reasons.[10] Further, the study concluded that students who were suspended or expelled were more likely to be held back a grade or drop out and were significantly more likely to be involved in the juvenile justice system the following year.[11] Given the size, diversity, and disciplinary rates of the Texas school system, many believed this study to be indicative of trends in a host of states nationwide.[12]

The American Psychological Association concluded that the evidence shows that removing students from school does not make schools safer, foster a more conducive learning

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[6] American Psychological Association Zero Tolerance Task Force, "Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations," *American Psychologist* 63, no. 9, (December 2008): 852-862. The report also noted that while students with disabilities—particularly those with emotional or behavioral disabilities—were suspended and expelled at rates disproportionate to their representation in the population, at the time there was insufficient data to allow conclusions about the causes of that disproportionality. *Id*. at 855. To be clear, however, school systems may violate the civil rights of students with disabilities by failing to provide services required by the Individuals with Disabilities Education Act and/or the Americans with Disabilities Act, regardless of whether school system policies are shown to result in the use of discipline at disproportionate rates.

[7] Fabelo, "Breaking Schools' Rules," 5.

[8] Ibid., Appendix A.

[9] Ibid., ix.

[10] Ibid., x. (75 percent of students with an educational disability (qualifying for special education services) were suspended or expelled, compared with 55% of student without disabilities. Ibid., 50. 90 percent of students labelled as having "emotional disturbance," and 76 percent of students with a learning disability were disciplined. Ibid. Nearly half of students with an emotional disturbance label were suspended or expelled more than 11 times. Ibid.)

[11] Ibid., xi-xii.

[12] Ibid., 1-2.

environment, or improve overall student behavior.[13] In fact, the American Psychological Association stated that "recent research indicates a negative relationship between the use of school suspension and expulsion and schoolwide academic achievement, even when controlling for demographics such as socioeconomic status."[14]

Federal Civil Rights Implications of Disproportionate Discipline

Title VI of the Civil Rights Act of 1964 prohibits a school system receiving federal funds from using:

> criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program [in] respect [to] individuals of a particular race, color, or national origin.[15]

Further, a violation of Title VI may occur when a disciplinary practice has a disparate impact based on race and is not necessary to meet an important goal.[16] Even if that practice is necessary, it may still violate Title VI if there are comparably effective methods that would have less of a disparate impact.[17]

Based on the apparent disparate impact of discipline policies on African American students—as well as the existence of more effective strategies—failure to adjust disciplinary practices may violate Title VI.[18] Although the Trump Administration has rescinded some guidance on Title VI enforcement issued by the Obama Administration's Departments of Justice and Education, the Title VI disparate impact regulations remain in effect.

For students with disabilities, a similar disparate impact analysis may apply under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA).[19] The Individuals with Disabilities Education Act (IDEA) and Section 504 impose additional obligations on school systems to provide special education and related services to ensure that students with disabilities

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[13] American Psychological Association Zero Tolerance Task Force, "Zero Tolerance," 860.
[14] Ibid., at 854.
[15] DoEd Nondiscrimination Under Programs Receiving Federal Assistance, 34 C.F.R. § 100.3(b)(2).
[16] U.S. Department of Justice, "Title VI Legal Manual," January 25, 2016 https://www.justice.gov/crt/fcs/Title-6-Manual#B.%20Disparate%20Impact/Effects.
[17] Ibid.
[18] Project of the Children's Rights Litigation Committee, "Disparate Impact under Title VI and the School-to-Prison Pipeline," *American Bar Association Section on Litigation & Accountability*, https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/disparate-impact-memo-2015.authcheckdam.pdf.
[19] *See Alexander v. Choate*, 469 U.S. 287 (1985) (recognizing that Section 504 prohibits disparate impact discrimination); DoEd Nondiscrimination on the Basis of Handicap, 34 C.F.R. § 104.4(b)(4); American Disabilities Act of 1990, P.L. 101-336, 104 Stat. 337 (codified as 42 U.S.C. § 12132); DOJ Nondiscrimination on the Basis of Disability, 28 C.F.R. § 35.130(b)(3).

receive a free and appropriate public education, and to identify students who have disabilities so that they can receive the services they need.[20] The ADA and Section 504 require public schools to provide the services necessary to afford students with disabilities an equal education and make reasonable modifications to avoid discrimination.[21] Therefore disciplinary action occurring because students with disabilities have not been offered the services they need, reasonable modifications have not been made, or their disabilities have not been identified may violate the student's civil rights *regardless* of whether there is evidence of disproportionality.

Maryland

The harm caused by out-of-school suspension and expulsion has been a key concern of the Maryland State Department of Education (MSDE) and the state legislature for nearly two decades. During this time, these entities undertook several initiatives[22] to examine and address disparities in the use of school discipline as well as limit the use of expulsion and suspension in schools. Although the use of these practices has decreased over time, the disparities in their use remain significant.

In 2004, Maryland passed legislation requiring elementary schools with a suspension rate above a specified standard to implement either a program of positive behavioral interventions and support or an alternative behavior modification program.[23] In 2008, a legislatively mandated task force convened to study the issue of multiple suspensions of individual students in a single school year.[24]

In 2009, a Maryland student was expelled by his local school board and was provided with periodic homework assignments as the student's only educational service during that time. Although the

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[20] Individuals with Disabilities Education Improvement Act of 2004, 108 Pub. L. 446, 118 Stat. 2647 (codified as 20 U.S.C. §§ 1401(a)(1), (a)(3), 1412; *Endrew F. v. Douglas County School Dist.*, 137 S. Ct. 988 (2017); 34 C.F.R. § 104.33-36.

[21] 42 U.S.C. § 12132, 28 C.F.R. §§ 35.130(b)(1), (b)(7); U.S. Dep't of Justice and U.S. Dep't of Education, "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools," p. 3-4, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf; U.S. Department of Justice, *Statement of Interest filed in S.S. v. City of Springfield, Massachusetts*, August 27, 2014 https://www.ada.gov/briefs/springfield_ma_soi.pdf; U.S. Department of Justice, *Letter to Gov. Nathan Deal*, prepared by V. Gupta for the Civil Rights Division, July 15, 2015, p. 6, 17-19 (public school system violated the ADA by failing to provide needed services to ensure equal opportunity for students with behavioral disabilities, https://www.ada.gov/olmstead/documents/gnets_lof.pdf.

[22] MSDE's school discipline initiatives have focused on Positive Behavior Interventions and Supports (PBIS) since 1998, http://www.pbismaryland.org/documents/PBISMarylandNewsletter20089.pdf, as well as on other strategies such as Multi-Tiered Systems of Support (MTSS), described later in this report.

[23] Md. Ed. Art. §7-304.1; State of Maryland, Board of Education, *PBIS in Maryland*, 2008 (hereinafter cited as Maryland Education, *PBIS*).

[24] Task Force to Study Multiple Suspensions, *The Use of Student Support Teams and Other Interventions in the Reduction of Multiple Suspensions*, Dec. 31, 2008, http://dlslibrary.state.md.us/publications/Exec/MSDE/HB139Ch252_2008.pdf (hereinafter cited as Task Force, *Reducing Multiple Suspensions*).

Maryland State Board of Education affirmed the local board's decision, they did so "by the barest of margins," and used the opportunity to put "all school systems on notice, that future expulsion-sans-education cases will be reviewed most carefully for abuse of discretion."[25]

In 2010, MSDE and the State Board began to study the use of long-term suspension and expulsion and student access to educational services during those punishments.[26] The State Board invited educators, administrators, families, and advocates to provide comments on these issues. MSDE observed that "students with disabilities and minority students are placed on long-term suspensions or expelled at alarming rates compared to other sub-groups in the school population."[27] Based on this study, MSDE recommended revisions to the school discipline regulations and increased data collection long-term suspensions and expulsions.[28]

Amidst growing concern regarding disproportionate school discipline in Maryland, the State Board issued a draft report on the issue, *A Safe School, Successful Students, and a Fair and Equitable Disciplinary Process Go Hand in Hand*,[29] which explained the negative effects of suspension and expulsion, found that over 63 percent of out-of-school suspensions were for non-violent offenses. Further, the report cited data showing the disproportionate use of these practices on students of color and students with disabilities.

The State Board's final report, *School Discipline and Academic Success: Related Parts of Maryland's Education Reform,* called for an end to this disproportionate use of discipline on minority and special education students.[30] The Board recognized that "[n]o student comes to school perfect, academically or behaviorally. We do not throw away the imperfect or difficult students…. In order for our students to get a world class education they need to be in school."[31]

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[25] Maryland State Board of Education, *Atanya C. v. Dorchester County Board of Education*, Aug. 25, 2009, p. 7, http://archives.marylandpublicschools.org/NR/rdonlyres/A6C6BF4E-F762-4490-AA41-B4C5611461A5/21105/CrockettAOpinion0926.pdf (hereinafter cited as Maryland Education, *Atanya*).
[26] For additional history, *see* Maryland Education, *Gable Memo*, *supra* note 3.
[27] Maryland State Department of Education, *Report to the Maryland State Board of Education on Provision of Educational Services in Maryland Schools*, August 2010, p. 3, http://www.marylandpublicschools.org/about/Documents/OCP/Publications/ReporttoMDStateBoardEdLTSE2010.pdf (hereinafter cited as Maryland Education, *Educational Services*).
[28] Maryland Education, *Gable Memo*, *supra* note 3, at 1 (describing 2010 MSDE report entitled *Study of Student Long Term Suspensions and Expulsions*).
[29] Maryland State Department of Education, "A Safe School, Successful Students, and a Fair and Equitable Disciplinary Process Go Hand in Hand: A Study of School Discipline Practices and Proposed Regulatory Changes," Feb. 2012, http://marylandpublicschools.org/stateboard/Documents/StudentDiscipline/SchoolDisciplineReport02272012.pdf.
[30] Maryland State Department of Education, "Report of the Maryland State Board of Education, School Discipline and Academic Success: Related Parts of Maryland's Education Reform," July 2012, p. ii, http://www.marylandpublicschools.org/stateboard/Documents/StudentDiscipline/SchoolDisciplineandAcademicSuccessReport0712.pdf.
[31] Ibid., i.

Further, the Board stated that it had "serious doubts that suspension is a technique that is working to help the student correct his/her behavior[,]"[32] when students were suspended more than twice.

After evaluating the economic and societal impact of suspension, the State Board called for Maryland schools to reduce the number of suspensions for non-violent offenses and end the disproportionate use of school discipline on minority and special education students.[33] To accomplish that objective, it directed MSDE to develop a way to analyze the disproportionate impact of these punishments and charged the school systems with reducing disparities in one year and eliminating them in three years.[34]

Following the 2012 final report, the State Board and MSDE convened a number of work groups to address school discipline issues. As a result of these efforts, the MSDE adopted new regulations in January of 2014 (2014 Regulations) meant to address the overuse of exclusionary practices and identify alternatives.[35] The State Board made it clear that it supported a philosophy of positive behavioral interventions with a focus on keeping children in school.

The 2014 regulations sought to promote disciplinary practices that recognize positive behavior and minimize suspensions and expulsions. The regulations (1) standardized and minimized the length of student removals, (2) established a uniform appeal timeline, (3) specified the minimal education services schools must provide to students who received out-of-school suspensions or expulsion,[36] (4) required the collection of school-based arrest data,[37] and (5) required the establishment of a process for identifying and eliminating the disproportionate impact of school discipline policies on students of color and students with disabilities.[38] The regulations also required the twenty-four Maryland school systems to review and revise their school discipline policies; and in July 2014, the MSDE adopted the *Maryland Guidelines for a State Code of Discipline*.[39]

Findings of the Maryland State Advisory Committee

We commend the MSDE for their ongoing efforts to address the disproportionalities in the use of school discipline. Maryland began addressing this issue before it became one of national concern and has exceeded the efforts of many other states in trying to address the civil rights concerns for students of color and students with disabilities. Further, the committee heard testimony regarding

[32] Ibid., 8.
[33] Ibid., ii.
[34] Ibid., ii, 6.
[35] Md. Code Regs. § 13A.08.01-.08.04.
[36] *Id*. at § 13A.08.01.11.
[37] *Id*. at 13A.08.01.12(F).
[38] *Id*. at § 13A.08.01.21.
[39] Maryland State Board of Education, "The Maryland Guidelines of a State Code of Discipline," July 22, 2014, http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/MDGuidelinesforStateCodeDiscipline08072014.pdf.

promising district-level initiatives to combat the disproportionate use of discipline in Maryland schools. These initiatives included:

- Baltimore City Schools launching a pilot program to train their school police on restorative justice practices rather than traditional policing approaches. As a result, school-based arrests of students declined significantly, with 90 arrests in 2015-16, compared with 393 in Baltimore County and 588 in Prince George's County.[40]
- Baltimore City Public Schools beginning to use certain schools as "model sites" for focusing on preventative approaches to discipline such as Positive Behavioral Intervention and Supports (PBIS), Multi-Tiered Systems of Support (MTSS), and Social and Emotional Learning.[41]
- Wicomico County, pursuant to a settlement agreement with the Justice Department, planning initiatives to resolve allegations of disability and race discrimination in the imposition of exclusionary discipline.[42] The settlement requires the county to develop a system of positive school climate including PBIS and corrective action plans at the school level, increased availability of mental health services for students, crisis intervention teams within each school to respond to serious disciplinary violations or problems, and a revised discipline code.[43]

While these initiatives seem promising, no data is currently available to confirm their success in fully addressing disproportionalities in the use of exclusionary discipline. Further, information gathered by the Committee in our briefings highlighted the existence of ongoing concerns regarding disproportionate school discipline.

Finding 1: Disciplinary Removals Remain High Among All Students

Rates of exclusionary discipline have continued to be high for *all* students in Maryland. Some critics have suggested that one possible reason for this is the inconsistent implementation and application of the 2014 regulations and guidelines. Although the state guidelines led school districts to increase non-exclusionary discipline options, exclusionary practices remained available

[40] Amanda White, testimony, *Briefing Before the Maryland Advisory Committee to the U.S. Commission on Civil Rights, Baltimore, MD*, Aug. 24, 2018, transcript, pp. 108, lines 13-22 (hereinafter cited as *Baltimore Briefing*); Maryland State Department of Education, "*Maryland Public Schools Arrest Data School Year 2015-2016*, p. 5, http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/StudentArrest/MarylandPublicSchoolsArrestData011218.pdf. (Between 2008 and the 2016-17 school year, due to policy changes, arrests made by Baltimore City Schools police declined by 91%); "Baltimore City Schools' Police Officer Arrest Rate Drops 91 Percent," *Campus Safety Magazine*, July 19, 2017, https://www.campussafetymagazine.com/safety/baltimore-city-schools-police-officer-arrest-rate-drops-91-percent/.

[41] Dr. Sarah Warren Testimony, *Baltimore Briefing*, p. 52.

[42] U.S. Department of Justice, *Settlement between the United States of America and Wicomico County Public Schools*, Jan. 19, 2017, https://www.justice.gov/crt/case-document/file/930511/download (hereinafter cited as DOJ, *Wicomico Settlement*).

[43] Peter Leone Testimony, *Baltimore Briefing*, p. 173.

for approximately the same number of offenses as before the guidelines were adopted. Moreover, school districts imposed in-school suspensions—a form of exclusionary discipline—for an *increased* number of offenses after the state guidelines went into effect.[44]

To prevent and limit the occurrence of unnecessary exclusionary discipline, the state regulations require basic due process protections for students. These protections include notice and evidence of the charges, hearings with school administrators, and, if the punishment is either expulsion or a suspension longer than ten days, a conference with a district-level decision-maker.[45] Students, parents, and family advocates have reported failures by school districts to meaningfully implement these due process protections.[46] For example, in a recent student discipline appeal, the State Board of Education found that Prince George's County Public Schools failed to hold a conference with the principal, and did not hold the district-level conference until 54 days after the initial suspension, 6 weeks later than the required 10 school days.[47] The State Board concluded that the school system's delays subjected the student to "due process violations caused by a careless disregard for the rules applicable to the disciplinary process."[48]

In addition to due process protections, the state guidelines impose substantive standards in determining when long-term suspensions or expulsions are appropriate. A suspension greater than ten days may only be imposed if (1) "the student's return to school prior to the completion of the suspension period would pose an imminent threat of serious harm to other students and staff," or (2) "the student has engaged in chronic and extreme disruption of the educational process that has created a substantial barrier to learning for other students across the school day, and other available and appropriate behavioral and disciplinary interventions have been exhausted."[49] A school may impose an expulsion of greater than 44 days only under the first circumstance.[50] Anecdotally, the Committee heard that school systems do not always comply with these standards.

For example, Harford County Public Schools had a policy of imposing extended suspensions automatically in response to certain conduct, not allowing the decision-maker to apply the

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[44] F. Chris Curran & Maida Finch, "Maryland Schools' Codes of Conduct: Comparing Discipline Codes Across Districts," *School of Public Policy at UMBC*, July 15, 2018, p. 40, https://edpolicylab.umbc.edu/files/2018/04/Maryland-Schools-Codes-of-Conduct-Comparing-Discipline-Policy-Across-Districts.pdf.
[45] Md. Code Regs. § 13A.08.01.11.C.
[46] Cara McClellan, "Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore," NAACP Legal Defense & Education Fund & Thurgood Marshall Institute, June 26, 2018, p. 17, https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf.
[47] Maryland State Board of Education, *M.S. v. Prince George's County Board of Education,* March 20, 2018, p. 5, http://marylandpublicschools.org/stateboard/Documents/legalopinions/032018/M.S.Opin.No.18-09.pdf (hereinafter cited as Maryland Education, *M.S.*).
[48] Maryland Education, *M.S.*, p. 6.
[49] Md. Code Regs. 13A.08.01.11.B(3).
[50] *Id*. at B(2).

mandated standards to the particular facts of the case.[51] In one disciplinary appeal opinion, the State Board concluded that the school system had essentially adopted a zero-tolerance discipline policy. They stated that this allowed for little evaluation of the continued threat posed by the student, the presence of mitigating factors, or the availability of more effective non-exclusionary rehabilitative punishments.[52] This blunt approach directly contravened the 2014 regulations, which effectively banned zero-tolerance discipline policies.[53]

Because of noncompliance with the due process protections and substantive standards set forth in the 2014 regulations, Maryland school systems continue to use suspension and expulsion to respond to conduct that would be better addressed through non-exclusionary means. The consequences of this misuse are exacerbated by the lack of awareness among students and parents of their right to an attorney in disciplinary proceedings as well as their inability to access legal help.[54] Despite a legislative mandate that school systems supply students facing disciplinary removal with information about legal help, many school systems have failed to provide the proper resources.[55]

Finally, the use of law enforcement in the education system contributes to the increased removal of students from schools. One panelist testified that teachers and administrators that lack the appropriate resources often turn to nearby officers to help resolve student behaviors that could have been resolved differently.[56] This police involvement in school disciplinary actions can lead to removal via arrest.[57] Further, another panelist noted that the Baltimore City Schools police are sometimes used as an auxiliary force on the streets. Because street policing requires a different approach, this dual use of school officers often undercuts the training they receive on addressing student behavior.[58]

Finding 2: Disproportionate Use of Exclusionary Discipline

Data collected by the MSDE shows that the disproportionate use of exclusionary discipline remains significant and is greater today than it was a decade ago.[59] African American students

[51] Maryland State Board of Education, *Alexander and Arlene A. v. Harford County Board of Education*, July 24, 2018, p. 8 http://marylandpublicschools.org/stateboard/Documents/legalopinions/072018/AlexanderArleneA.Opin.No.18-21.pdf (hereinafter cited as Maryland Education, *Arlene*).
[52] Ibid.
[53] Ibid. (In this particular case, the district-level decision-maker had made an individualized determination that the student did not pose a future safety risk, but still imposed an extended suspension based on the conduct-based policy, which the State Board found was an abuse of discretion. Ibid., at 9).
[54] McClellan at 17.
[55] Ibid.; Md. Code Ann., Educ. § 7–305.
[56] Kimberly Humphrey Testimony, *Baltimore Briefing*, p. 105.
[57] Ibid., 104.
[58] Cara McClellan Testimony, *Baltimore* Briefing, p. 105.
[59] *See infra* note 66.

and students with disabilities have consistently accounted for a significantly higher percentage of exclusionary discipline incidents than the percentage of the student population they represent.[60]

In the years prior to the enactment of the 2014 statewide regulations, students of color and students with disabilities were significantly overrepresented in those subjected to exclusionary discipline. For example, in 2009-10, African American students accounted for 59 percent of suspensions and expulsions and students with disabilities accounted for 22 percent; however, these groups represented only 38 and 12 percent of the student population, respectively. These numbers increased in 2014-15 with African American students accounting for 62 percent of exclusionary discipline cases and students with disabilities accounting for 27 percent. These groups represented 35 and 12 percent of the population, respectively.[61]

This disproportionality remained largely unchanged in the years following the promulgation of the 2014 regulations and Guidelines for a State Code of Discipline. In 2015-16, African American students and students with disabilities represented 64 percent and 25 percent of suspensions and expulsions, respectively, but only 34 percent and12 percent of the total population. Further, in the last academic year – 2017-18 – students of color represented 33 percent of the population and 59 percent of exclusionary discipline cases, while students with disabilities accounted for 12 percent of the population and 27 percent of suspensions and expulsions.[62]

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[60] Ibid.

[61] Maryland State Board of Education, Maryland Public School Suspensions by School and Major Offense Category, November, 2010, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20092010Student/2010SuspensionsbySchoolCOMBINED.pdf; Maryland State Board of Education, Maryland Public School Enrollment by Race/Ethnicity and Gender, September 30, 2009, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20092010Student/2010EnrollbyRace.pdf; Maryland State Board of Education, Maryland Public School Suspensions By School and Major Offense Category, October, 2015, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20142015Student/2014-2015_Suspensions_by_School_IN.pdf; Maryland State Board of Education, Maryland Public School Enrollment by Race/Ethnicity and Gender, September 30, 2014, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20152016Student/20152016Enrollment.pdf; Maryland State Board of Education, Maryland Special Education/Early Intervention Services, October 1, 2014, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20152016Student/20152016SPED.pdf.

[62] Maryland State Board of Education, Maryland Public School Suspensions By School and Major Offense Category, November 2016, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20152016Student/20152016SuspensionsbySchoolIn.pdf; Maryland State Board of Education, Maryland Public School Enrollment by Race/Ethnicity and Gender, September 30, 2015, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20152016Student/20152016Enrollment.pdf; Maryland State Board of Education, Maryland Special Education/Early Intervention Services, October 1, 2015, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20152016Student/20152016SPED.pdf; Maryland State Board of Education, Maryland Public School Suspensions By School and Major Offense Category, September 2018, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018SuspensionsbySchoolIN.pdf; Maryland State Board of Education, Maryland Public School Enrollment by Race/Ethnicity and Gender, September 30, 2017, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018EnrollbyRace.pdf;

In the last several years, these significant disparities for African American students and students with disabilities have existed across each of the four biggest school systems (Montgomery County, Prince George's County, Baltimore County, and Baltimore City). Similar disparities are not reflected in any other racial or ethnic groups tracked by the state (Latino, Asian American, and white students).

The simplest measure of these disparities is the relative risk ratio. This ratio is the proportion of one identified group disciplined divided by the proportion of those in a different group who are disciplined.[63] In other words, a ratio of 3.0 means the target group is three times more likely to be subject to exclusionary discipline than the comparative group. Maryland uses these ratios, as well as comparisons of the removal rate for a particular student group in a school to statewide removal rates, to determine whether disproportionality in a particular school district requires remediation.[64] Maryland has decided that a relative risk ratio of 3.0 or greater requires remediation.[65]

State-wide relative risk ratios demonstrate that African-American students and students with disabilities are consistently at or above the state's remedial threshold. In 2009-10, African American students were 2.5 times as likely as white students to be subjected to exclusionary discipline, and students with disabilities were 2.3 times as likely as students without disabilities. Over time, the relative risk ratios increased, despite the state's reform efforts. In 2014-15, the ratios were 3.4 for African-American students and 3.0 for students with disabilities. In 2015-16, the respective ratios were 3.6 and 3.0. In 2016-17, the ratios were virtually unchanged at 3.4 and 3.0. In 2017-18, ratios improved to 3.1 and 2.9, but were still higher than the relative risk ratios in 2009-10.[66]

The committee finds that the disproportionate use of school discipline is significant and its persistence is a cause for concern. We do not purport to propose targets for reductions of risk ratios and do not suggest that discipline rates should mirror precisely the population rates of particular

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Maryland State Board of Education, Maryland Special Education/Early Intervention Services, October 1, 2017, http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018SPED.pdf.

[63] Daniel A. Powers, and Yu Xie, *Statistical Methods for Categorical Data Analysis* (San Diego, CA, 2000); Chris Curran, testimony, *Baltimore* Briefing, Aug. 24, 2018, transcript, pp. 180 lines 2-18.

[64] Maryland State Department of Education, *Code of Maryland Regulations (COMAR) 13A.08.01.21 Reducing and Eliminating Disproportionate/Discrepant Impact*, prepared by K.B. Salmon, Jan. 24, 2017, p. 1-2, http://marylandpublicschools.org/stateboard/Documents/01242017/TabM.pdf (hereinafter cited as Maryland Education, *Salmon Memo*).

[65] *Id*. at 2. Remediation is triggered when the risk for the student group within the school compared to the risk of all students within that school and the risk for the student group within the school to the statewide risk for all students are both 3.0 or greater (measuring the statewide rate separately for elementary schools and middle/high schools, over a period of three years).

[66] Calculations based on the data reports cited in note 61.

groups. We do note that the state-wide risk ratios are at or above the remedial threshold established by the MSDE and that the evidence we heard reveals significant levels of disparity.[67]

Finding 3: Statewide Disciplinary Guidelines

State and local school discipline frameworks have had a limited impact on reducing the disproportionate use of school discipline. Despite the work of the MSDE, data show that the 2014 Regulations and Guidelines for a State Code of Discipline did very little to reduce disparities in the use of exclusionary discipline. This is due in part to the large amount of discretion they grant to the school authorities administering these disciplinary codes.[68] Information provided to the Committee suggests that the Regulations and Guidelines may be too broad to have a positive impact on school specific policies.

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[67] The methodology used to measure and compare the use of discipline may affect the analysis. Dr. Chris Curran pointed out that comparing relative risk ratios across school districts may yield different results than comparing percentage point differences (for example, the percentage of one racial or ethnic group disciplined compared with the percentage of another racial or ethnic group disciplined). In this report, we reference both percentage point differences as well as relative risk ratios and highlight parallel trends across school districts.
Further, the suspension and expulsion data reported by MSDE may not provide a complete picture of disciplinary removals in Maryland school systems. Many schools use unofficial methods of removal that are not reported in the data but have the effect of excluding students from their educational program. (Testimony of Maureen Van Stone, Tr. 81, lines 11-14.) These practices sidestep the legal procedures and standards that are aimed at limiting disciplinary removals. (White Testimony, *Baltimore Briefing*, 90.) There are several such forms of unofficial exclusion:

- The undocumented send-home, which is the practice of sending a student home or contacting a parent to pick up their child without treating it as an official suspension (Ibid., 88; Education Equity Plan, Public Justice Center, Spring 2017, pages 2-3, http://www.publicjustice.org/uploads/file/pdf/Education_Equity_Plan_PJC.pdf; Cara McClellan, NAACP Legal Defense & Education Fund & Thurgood Marshall Institute, *Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*, at 17, available at https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf.
- The do-not-admit list, which is an unofficial list of students that school security staff do not allow into the school building, is a means of prolonging and enforcing undocumented send-homes (*Our Girls, Our Future*, *supra* note 46, at 17.)
- The involuntary administrative transfer to an alternative program such as an online program or an alternative school, which often provide a lower quality education and lack essential coursework and programming compared to a comprehensive school (White Testimony, *Baltimore Briefing*, p. 90; Education Equity Plan at 3.)
- The practice of sending a student to sit in a school administrator's office for an extended period of time without providing educational services or behavioral interventions (White Testimony, *Baltimore Briefing*, p. 88.)
- The modified schedule, which is the practice of placing a student on a reduced schedule such as half-days and particularly impacts young students with disabilities (Ibid.)

Though we think mentioning this limitation is important, we have no option but to base our assessment on the data that is kept, with the recognition and recommendation that any plan of action work to control more closely alternative forms of exclusion that may be used and to report instances of their use.

[68] Curran Testimony, *Baltimore Briefing*, p. 158.

While the 2014 guidelines offer a model disciplinary code, each county board of education adopts its own disciplinary procedures.[69] Under this framework, Maryland law provides broad discretion to school districts in shaping and using their disciplinary practices.[70] Further, because the guidelines deemed nearly every possible response as appropriate for nearly every offense,[71] there is wide variation among school districts concerning how closely their disciplinary codes align with the guidelines.[72] For example, school districts have latitude to determine what disciplinary measures are appropriate for various types of misconduct. Except in a small set of circumstances, such as those related to attendance, alternatives to exclusionary discipline are encouraged but not required.[73] The use of suspension and expulsion, however, is restricted for students in pre-kindergarten through second grade.

The county discipline codes are required to provide for educational and behavioral interventions, counseling, and student and parent conferencing. Further, they must provide alternative programs, which may include suspension, expulsion, or other disciplinary measures that are deemed appropriate. Each county board must provide "a continuum model of prevention and intervention activities and programs that encourage and promote positive behavior and reduce disruption."[74] Implementation of a Positive Behavioral Interventions and Support (PBIS) program or alternative behavior modification program is specifically required only for elementary schools with suspension rates that exceed 10 percent of their enrollment and schools with truancy rates exceeding one percent of enrollment.[75]

Finding 4: Providing Necessary Resource to Students with Disabilities

One reason removal of students with disabilities in particular continues to be high is a systemic failure to ensure that they receive the services necessary to address disability-related behaviors. Factors identified by the Committee as contributing to this issue are (1) a lack of access to behavioral specialists, (2) school system's failing to identify students with disabilities, (3) school systems identifying disabilities incorrectly, and (4) families struggling to assess the sufficiency of a behavior intervention plan.

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[69] Ibid.
[70] Maryland Commission on the School-to-Prison Pipeline and Restorative Practices, *Final Report and Collaborative Plan Action*, Dec. 20, 2018, p. 15, https://www.law.umaryland.edu/media/SOL/pdfs/Programs/ADR/STPP%20%20RP%20Commission%20Final%20Report.pdf (hereafter cited as Maryland Commission, *STPP Commission Report*).
[71] Curran and Finch, "Comparing Discipline Codes Across Districts," p. 5, 40.
[72] Ibid., 40.
[73] Ibid., 15.
[74] Ibid., 15-16; Md. Code Ann., Educ. § 7-304 (1983).
[75] Maryland Commission, *STPP Commission Report*, *supra* note 70, at 16.

In Maryland, 106,000 students are eligible to receive help from a behavioral specialist; however, there are fewer than 400 certified behavioral analysts in the state.[76] In some counties, particularly on the eastern shore, entire school systems have no access to behavioral specialists or similar community resources. As a consequence, administrators and teachers often turn to law enforcement to intervene when they themselves cannot effectively address particular behaviors.[77]

One panelist testified that despite improved information and data collection, data analysis, and policies protecting students with disabilities, she often sees behavioral assessments that fail to properly identify and address behavioral problems. Further, failing to implement behavioral intervention with fidelity can reinforce improper behaviors rather than improve them.[78] Additionally, when school systems do not properly implement behavior intervention plans children are referred for more restrictive placements in separate non-public and day schools, which sometimes includes out of state schools.[79]

The Committee heard anecdotal testimony that failing to identify a student who has a disability, and consequently not providing them with the necessary resources, can contribute to these students facing disproportionate rates of disciplinary action. For example, one panelist described an incident where a student who had a disability but had not been identified by the school as having one engaged in a verbal altercation with an administrator after becoming agitated when he arrived to class late and was not allowed in. Based on this verbal altercation, the student was recommended for expulsion. While a district-level decision-maker did not approve this punishment, they did impose an administrative transfer, which meant the student would have to engage in online learning from home rather than attend school. [80] Disability Rights Maryland, an advocacy organization, was able to help the student to be identified as having a disability and avoid this outcome. Upon receiving an Individualized Education Plan that properly addressed his needs, the student was able to succeed academically, graduate from high school, and ultimately enroll in community college. [81]

Several panelists further noted that poor behavioral assessments that fail to identify correctly the type of disability contributing to a student's behaviors can lead to students missing out on necessary resources. For example, a nine-year-old girl, who was identified as having an emotional disability, was being educated in a segregated classroom. Based on her behavior, she was recommended for a more restrictive placement. Disability Rights Maryland was able to secure additional evaluations that identified that the student had cognitive limitations and was on the autism spectrum. Knowing this, the school system was better able to shape a behavioral

[76] Maureen Van Stone Testimony, *Baltimore Briefing*, p.108.
[77] Stone Testimony, *Baltimore Briefing*, p 107.
[78] Ibid., 82.
[79] Ibid., 83.
[80] Amanda White Testimony, *Baltimore Briefing*, p. 89.
[81] Ibid., 91.

intervention plan to suit the student's needs. The resulting change in strategies and additional supports to address her behaviors "completely altered her experience" and "she was able to see success after a year of failure" and limited academic progress.[82]

The human and emotional consequences of students with disabilities being assessed improperly and subject to exclusionary discipline was highlighted in the testimony of two mothers of students with disabilities. Both women testified that the school districts largely ignored their pleas for services to help their children and that their sons experienced exclusionary discipline that interfered with their learning. One of their sons ultimately dropped out of school during the second semester of his senior year due to his frustration, while the other mother's son is now being home schooled because of his anxiety about returning to school.

One mother testified that despite efforts beginning in first grade, her son was not identified as having a disability and did not receive an Individualized Education Plan (IEP) until middle school.[83] Even then, despite his diagnosed cognitive and speech delays, his IEP addressed only organizational skills and homework completion.[84] Her son was disciplined and removed from class to work in the hallway, and given in-school suspensions, as he "wasn't disruptive enough to get services for bad children as they say[, b]ut he was too disruptive to keep him in class."[85] The mother perceived that, despite the IEP, "discipline was always the first option. I needed it to be the last option."[86]

Another woman testified that her son was constantly teased and bullied in school after his teacher at Charles County Public School disclosed his disability to the class, resulting in withdrawal and behavior issues.[87] Behavior assessments were conducted after repeated requests, but rather than implementing the goal of the plan, he was placed in a program that was supposed to help with social interaction but did not work.[88] Bullying continued, and when her son responded in kind with a similar threat to the child who had been threatening him, he was immediately arrested, at age 11. The juvenile justice system recognized that the charge was inappropriate and dismissed it.[89]

The mother stated:

> This was going on for years. I did what a parent is supposed to do. I had him in therapy. I tried to reach out to the teachers. I even came in to help

[82] Ibid., 91.
[83] Sandra Keemer Testimony, *Baltimore Briefing*, p. 125.
[84] Ibid.,1257.
[85] Ibid., 127-129.
[86] Ibid., 130.
[87] Kisha King Testimony, *Baltimore Briefing*, p. 131.
[88] Ibid., 133.
[89] Ibid., 134.

> them. They did nothing for my child. And now we are in a place trying to figure out where he can go because he doesn't want to go back to school.[90]

She observed, "I wish my son could have gotten the help that he needed and thrived at school to learn and progress rather than [being] punish[ed] and being arrested."[91]

Other parents of children with disabilities also testified about their experiences with what they saw as avoidable discipline. One father testified that his five-year-old son with ADHD was repeatedly suspended from school throughout kindergarten and was placed in physical restraints ten times. The father further testified that he was asked multiple times to come pick his son up from school before the end of the school day, costing him his job and causing his son to miss out on valuable instructional time.[92]

Families also frequently have difficulty identifying the appropriateness of a behavioral assessment and articulating how a behavior intervention plan is not being implemented with fidelity. Parents are typically not in the school building, do not have the necessary data to support these assertions, and, unless they have an outside psychologist, social worker, advocate, or attorney, may not be able to effectively describe the problems and ensure that they are addressed.[93] Moreover a family with a non-verbal child may have an even greater challenge addressing such problems because the child cannot articulate what has happened throughout the school day.[94]

Finding 5: Implicit Bias and Disproportionate Rates of School Discipline

Information presented to the Committee consistently suggested that implicit bias contributes to disproportionate rates of exclusionary discipline of African-American students. One panelist testified about the impact of implicit racial bias and stated that bias and discretion in disciplinary practices contributes to disproportionate rates of discipline.[95] For example, the panelist described a study that reviewed disciplinary actions imposed on students involved in the same incident and concluded that "black students are likely to be suspended for longer periods than their white counterparts even in what is arguably the exact same disciplinary situation."[96]

Another panelist testified about a 2018 report of the NAACP that evaluated Baltimore City Schools to investigate causes of the disparate use of discipline for African American girls,[97] one of the

[90] Ibid., 137.
[91] Ibid., 135.
[92] William Brian Sander Testimony, *Baltimore Briefing*, p. 253.
[93] Ibid., 101.
[94] Ibid., 102.
[95] Curran Testimony, *Baltimore Briefing*, p. 160.
[96] Ibid., 160-161.
[97] McLellan, "Our Girls, Our Future," *supra* note 46. (The report offers statistical analysis of data gleaned from Public Information Act requests, stakeholder interviews, and surveys).

fastest growing populations experiencing exclusionary discipline. The report concluded that Baltimore City Schools over-rely on exclusionary discipline for this group,[98] making them four times more likely than white girls to be suspended, twice as likely to be expelled, and more likely to be suspended for longer terms. For example, African American girls accounted for all suspensions of girls for more than 80 days.[99] Further, African American girls are more likely to be punished for offenses falling into the disciplinary category of "defiance, disobedience, disrespect, and threatening others," where there is the greatest degree of subjectivity in disciplinary decisions.[100] These offenses accounted for one out of four disciplinary offenses for African American girls.[101] The report found that discipline of African American girls for "defiance" included punishments for things such as these girls' complaining about what they considered unfair conditions, including locked bathrooms that placed girls at risk of health problems.[102] The report also noted that African American girls were sometimes suspended for dress code violations, absenteeism and lateness, despite the prohibition in Baltimore City Schools' code of conduct on suspending students for these things.[103]

Further, the report highlighted a limited investment in engaging African American girls in a challenging curriculum. For example, in 2016-17, white girls were nearly five times as likely as African American girls to be in gifted programs and more than twice as likely to be in advanced placement classes.[104]

The NAACP also found that Baltimore City Schools over-rely on law enforcement and underinvest in conflict resolution programs and restorative justice. Baltimore schools spent nearly $13 million in 2016 and $7 million in 2017 on school police but only $346,000 in 2016 and $217,000 in 2017 on guidance and school counseling.[105] Although school-based arrests decreased after 2014, racial disparities remained.[106]

Robin McNair, a teacher who serves as the Restorative Practices Program Coordinator in Prince George's County, testified about how factors such as implicit and cultural biases, habitual practices focused on punishment rather than correcting behavior, and zero tolerance approaches can lead to disparities in the imposition of discipline.[107] Ms. McNair's testimony used the lens of her own

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[98] McClellan Testimony, *Baltimore Briefing*, p. 74; *Our Girls, Our Future*, *supra* note 46, at 5 (citing National Women's Law Center & NAACP Legal Defense Fund, "Unlocking Opportunity for African American Girls," 2014, 18, 20, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).
[99] McClellan Testimony, *Baltimore Briefing*, p. 74.
[100] Ibid., 75.
[101] Ibid.
[102] Ibid., 76; McLellan, "Our Girls, Our Future," *supra* note 46, p. 13, 15-16.
[103] McClellan Testimony, *Baltimore Briefing*, p. 75; *Our Girls, Our Future*, *supra* note 46, at 16.
[104] McLellan, "Our Girls, Our Future," *supra* note 46, p. 12-13.
[105] McClellan Testimony, *Baltimore Briefing*, p. 77; McLellan, "Our Girls, Our Future," *supra* note 46, p. 19.
[106] McLellan, "Our Girls, Our Future," *supra* note 46, p. 16.
[107] Robin McNair Testimony, *Baltimore Briefing*, p. 115.

evolution as a teacher—from over-relying on discipline to using restorative justice practices to create an equitable learning environment.[108]

Testimony heard by the Committee is consistent with the conclusion that implicit bias, "cultural mismatch" between teachers and students, classroom management skills, and instruction that is not engaging for some students all contribute to disparities in discipline.[109] In a study published in October 2018 examining district-level and school-level factors associated with high rates of exclusionary discipline, Dr. Sunderman concluded that the data suggests that the use of disciplinary consequences is "related to contextual variables that go beyond individual student behavior," that either "staff may view similar behaviors differently based on a student's race, income level, or disability status" or that "schools with a higher proportion of Black and low-income students and [students with disabilities] tend to use more punitive discipline and may have fewer supportive resources and interventions," and that districts with large numbers of high-suspending schools "either have a culture where exclusionary discipline is condoned or are not providing the leadership, resources and training needed to prevent inappropriate behavior."[110]

Recommendations of the Maryland State Advisory Committee

The testimony heard by the committee points to two primary avenues for reducing the disproportionate use of exclusionary discipline for African American students and students with disabilities in Maryland. One avenue is to create more specific policies concerning the imposition of exclusionary discipline, as the current state guidelines allow a broad range of responses to most conduct, and have had limited impact on reducing disproportionate discipline.[111] Another avenue is to expand the use of preventative approaches designed to reduce the incidence of student behaviors that result in discipline—such as Positive Behavioral Interventions and Support (PBIS), multi-tiered systems of support (MTSS), and restorative justice practices. These strategies are not new to Maryland,[112] but they have not been implemented as widely as they should be.

We encourage the Commission to request that MSDE take a pragmatic approach to implementing these recommendations as expeditiously as practicable, including considering how and where to sequence actions so as to achieve immediate impact where possible and to lay the foundation for plans that may require longer-term implementation.

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[108] Ibid., 115.
[109] Gail Sunderman, testimony, *Baltimore Briefing*, p. 188.
[110] Gail R. Sunderman & Robert Croninger, "High Suspending Schools in Maryland: Where are They Located and Who Attends Them?," *Maryland Equity Project*, Oct. 2018, p. 17, https://education.umd.edu/sites/education.umd.edu/files/MEP_Out-of-School%20Suspensions2_Oct%202018_0.pdf.
[111] Curran Testimony, *Baltimore Briefing*, p. 167.
[112] Maryland Commission, *STPP Commission Report*, *supra* note 70, at 16. lines 1-4.
[112] Maryland Commission, *STPP Commission Report*, *supra* note 470, at 16.

Recommendation 1: Enact More Specific Policies to Limit the Use of Exclusionary Discipline

We recommend to the Commission that the state develop more specific policies designed to reduce disparities in exclusionary discipline. As the committee did not receive testimony or evidence about particular policy recommendations for adding specificity that would be effective, we do not offer a particular recommendation concerning how to add specificity. We believe the state is equipped to identify strategies for doing so.

Recommendation 2: Expand the Use of Preventative Approaches to Deal with Behavioral Issues

The MSDE has recognized the importance of preventive measures in reducing disproportionality in school discipline, such as implementing initiatives to "change culture, climate, and school discipline practices," and implementing alternatives to removal.[113]

One panelist testified that preventive approaches to school discipline can "decrease the frequency of behavior problems and reduce the development of more serious problems."[114] Programs with preventive frameworks focus on "creating positive and inclusive school communities," and include peer mediation, conflict resolution, restorative practices, multi-tiered positive behavior interventions and support, social-emotional learning strategies, and supporting teachers to develop behavior management skills.[115] The Committee heard testimony on preventative approaches such as (1) positive behavioral interventions and support, (2) multi-tiered systems of support, (3) social and emotional learning strategies, (4) positive school climate initiatives, and (5) restorative justice practices.

Panelists underscored the need for improved data collection on existing disparities and disproportionalities regarding school discipline. They pointed out that doing so would enable MSDE and local education agencies to more effectively track the effectiveness of behavioral

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[113] Maryland State Department of Education, *Reducing and Eliminating Disproportionate Impact*, June 2017, p. 12, http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/TA/MDGuidelinesStateDisproportionalityPerformancePlan.pdf ("The implementation of alternatives to removal at the school level is critical to reducing, and ultimately eliminating disproportionality.") (hereinafter cited as Maryland Education, *Disproportionate Impact*).
[114] Sunderman Testimony, *Baltimore Briefing*, p. 189.
[115] Ibid; Ibid., 193; Allie McCullen et al., "Do the Harder Work- Create Cultures of Connectedness in Schools," *Communities for Just Schools Fund*, December 5, 2018, p. 44, https://docs.wixstatic.com/ugd/a6179c_c1ac4c928f8a40639db518484aa55b14.pdf (states and local districts should focus on creating cultures of connectedness through strategies including relationship-building between students, administrators, and teachers; investment in mental and emotional health supports; support for social and emotional development of students and adults in and out of schools; culturally responsive education; restorative justice; development of safe communities in schools and neighborhoods; and engagement with youth, parents, educators, and surrounding communities).

intervention and support programs to successfully reduce challenging behavior by addressing underlying causes and functions of that behavior.[116]

Recommendation 2.1: Positive Behavioral Interventions and Support (PBIS)

PBIS, which has been endorsed by school systems across the country, is a three-tiered approach to preventing behavioral problems. Tier 1 focuses schoolwide on "rules, routines, and physical arrangements that are developed and taught by school staff to prevent initial occurrences of behavior the school would like to target for change." [117] Tier 2 focuses on "intensive or targeted interventions to support students who are not responding to Tier 1 Support efforts."[118] Tier 3 focuses on intensive, highly individualized support for the small group of children with the most serious behavioral problems. This includes assessment-based intervention strategies and "wraparound" services involving team-based support for the child and family.[119] "Research has demonstrated the effectiveness of PBIS in addressing the challenges of behaviors that are dangerous, highly disruptive, and/or impeded learning and result in social or educational exclusion."[120]

PBIS must involve every layer of a school's staff and administration and seek to support students with varying levels of challenging behaviors through universal, targeted, and intensive individualized support.[121] Further, this approach depends upon school personnel having adequate training and resources to apply the appropriate levels of intervention.[122] Maryland schools have adopted PBIS, but lack consistent implementation, particularly of multi-tiered interventions and support, or effective monitoring.[123] One panelist noted that MSDE should evaluate whether schools identified as having disproportionalities in discipline have implemented multi-tiered levels of intervention at all.[124]

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[116] Edward Fergus Testimony, *Baltimore Briefing*, p. 54.
[117] OSEP Technical Assistance Center, *Positive Behavioral Interventions and Supports, Tier 1 Supports*, https://www.pbis.org/pbis/tier-1.
[118] OSEP Technical Assistance Center, *Positive Behavioral Interventions and Supports, Tier 2 FAQs, What is Tier 2 Support?*, https://www.pbis.org/pbis/tier-2.
[119] OSEP Technical Assistance Center, Positive Behavioral Interventions and Supports, What is Tier 3 PBIS?, https://www.pbis.org/pbis/tier-3.
[120] Ibid.
[121] Denise Stile Marshall Testimony, *Baltimore Briefing*, p. 240- 241; *see also* Sunderman Testimony, *Baltimore Briefing*, p. 189. ("One of the most widely used of these is PBIS [positive behavioral interventions and supports] which is a comprehensive approach to school discipline that includes a range of systemic as well as individualized strategies.").
[122] Sunderman Testimony, *Baltimore Briefing*, p. 196- 197.
[123] Curran Testimony, *Baltimore Briefing*, p. 165. ("[I]t turns out the guidelines of the state are not all that specific. In a sense they developed a five-tiered system but then they allocate multiple tiers to multiple infractions to a point where almost every response is applicable or potentially part of the guidelines for almost every infraction. With some of the exceptions being the out of school suspension which you kind of see is that more white set of columns on the right-hand side.").
[124] Alyssa Fieo Testimony, *Baltimore Briefing*, p. 47.

These types of positive interventions and supports focus on identifying triggers for challenging behavior rather than emphasizing a need for punitive consequences that may not lead to behavioral changes. Effective implementation requires training and support systems to be in place for teachers and administrators to learn how to identify and address antecedents.[125] The integration of these positive behavioral supports into the culture and policies of a school require involvement from every level of school personnel. Schools that escalate to exclusionary discipline when PBIS are available may be doing so because administrators or other personnel lack the training and resources necessary to feel as though PBIS is a viable intervention alternative.[126]

PBIS have a proven track record of success in reducing overall disciplinary infractions in schools. Schools more commonly adopt first and second tier approaches; however, implementation of third tier approaches – those targeted at students with the most intense behavioral support needs and the most likely to be subject to exclusionary discipline – appears to be less common. When MSDE launched its PBIS initiative in 1999, it scaled implementation only through the first tier primarily in elementary and middle schools. It was only expanded to high schools, where more challenging behavior is likely to occur, in recent years, though still primarily within the first tier.[127] Furthermore, while MSDE has adopted PBIS as its "Response-to-Intervention" (systematic schoolwide effort to prevent academic and behavioral difficulties) approach throughout the state, continued disproportionalities in discipline underscore the need for emphasis on developing competency in second and third tier approaches.

Recommendation 2.2: Multi-Tiered Systems of Support

The committee heard testimony on the importance of multi-tiered systems of support (MTSS), which integrate PBIS with targeted interventions for students struggling academically.[128] MTSS progress in levels of intensity while creating a unified support system for each individual student across the spectrum of academic achievement and challenges. MTSS recognize the importance of addressing behavioral and academic challenges simultaneously through a coordinated approach. Some strategies of this include the integrated assignment of a class job to promote a sense of achievement or one-on-one reading instruction.[129]

As with PBIS, it is generally easier for schools to implement the broader tiers of MTSS than to delve into the most intensive and individualized approaches necessary to support students with the highest need. It is not enough for schools to merely adopt the basic principles of MTSS; they must

[125] Ibid., 55.
[126] Curran Testimony, *Baltimore Briefing*, p. 196.
[127] Catherine P. Bradshaw, Elise T. Pas, Jerry Bloom, Susan Barrett, Patricia Hershfeldt, Andrea Alexander, Milton McKenna, Ann E. Chafin, & Philip J. Leaf, "A State-Wide Partnership to Promote Safe and Supportive Schools: The PBIS Maryland Initiative," *Administration and Policy in Mental Health and Mental Health Services Research* 39, no. 4, (July 2012): 225, 227-228.
[128] Marshall Testimony, *Baltimore Briefing*, p. 241.
[129] Ibid.

follow through in cultivating the skills and resources necessary to provide the proper support for students with the most intense behavioral issues.

Recommendation 2.3: Implement Social and Emotional Learning Strategies

Panelists discussed the importance of social and emotional learning strategies designed to support students in developing the capacity to self-regulate their behavior and build relationships of mutual trust and engagement with staff.[130] Students capable of successful peer mediation, self-initiated and appropriately supported conflict resolution, and behavioral self-regulation in turn decrease incidents and frequency of challenging behavior that school personnel respond to with punitive disciplinary measures. Social and emotional learning strategies—a key element of a positive school climate—additionally enable schools to take more holistic approaches to education by working to support student success beyond conventional academic indicators or mere behavioral compliance.[131]

For instance, one panelist testified that her office has identified 20 model site schools in Baltimore City focusing on integrating social and emotional learning strategies as a means of addressing disproportionalities in discipline.[132] Additionally, Baltimore City includes the development of social-emotional understanding and skills as a core component of school-wide prevention practices aimed at supporting students and teachers in reaffirming relationships by developing skills to address behavioral and interpersonal issues before they escalate.[133] Baltimore City also includes social-emotional capacity-building to repair relationships as a core component of targeted interventions within a restorative practices framework.[134]

Recommendation 2.4: Five Elements of Positive School Climate

One panelist named five elements of a positive school climate: "trauma responsive educational practices, restorative and healing approaches, racial justice and equity, social/emotional learning, [and] student and family community voice."[135] Each of these elements are interconnected, as restorative practices require both trauma responsiveness and relationship-building, which both require social-emotional capacity on the parts of students as well as adults, which in turn requires understanding of racial equity and biases that impact students' lives.[136]

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[130] Sunderman Testimony, *Baltimore Briefing*, p. 189.
[131] Shantay McKinily testimony, *Baltimore Briefing*, p. 232.
[132] Warren Testimony, *Baltimore Briefing*, p. 52.
[133] Open Society Institute– Baltimore, "Baltimore City Public Schools Restorative Practices Report," 10, https://www.osibaltimore.org/wp-content/uploads/RP-plan-and-appendix.pdf.
[134] Ibid.
[135] McKinily Testimony, *Baltimore Briefing*, p. 232.
[136] Ibid., 232-233.

A whole-school preventative behavioral approach involves each member of a school community in creating and sustaining positive school climate. This begins with developing a welcoming physical and social environment where students, staff, and families should feel respected and valued from the moment they enter the building.[137] School superintendents must take a top-down approach prioritizing the integration of restorative practices and multi-tiered supports into their schools' culture. They can do so by investing or advocating for the necessary funds for training, resources, and tools, and holding school personnel accountable for their roles and responsibilities in creating a positive school climate.[138]

Recommendation 2.5: Integrate Restorative Justice Practices

Restorative justice is a set of practices that help students solve problems and resolve conflicts together. Restorative justice includes both strategies to prevent infractions and strategies to address harm after the fact.[139] As articulated by the School to Prison Pipeline and Restorative Practices Commission, "[a]ccountability in a restorative framework means 'taking responsibility and taking action to repair the harm and to prevent it from happening again. This is in contrast to a definition of accountability in our (current) systems as: taking your punishment.'"[140] The Commission reported that Maryland schools that have implemented restorative justice have reduced student misbehavior and disruption and decreased the need for exclusionary discipline.[141]

The Commission heard testimony that while teachers learn to differentiate instruction for varied learning strategies and needs, they do not always learn how to differentiate behavior or respond with alternatives to punishment, which restorative justice emphasizes.[142] In contrast to a teaching approach that emphasizes behavioral control and punitive consequences, panelists urged the use of restorative justice to "create just and equitable learning environments, nurture [student-teacher] relationships, and repair harm and transform conflict."[143]

As with PBIS, Maryland's state guidelines list restorative justice practices in several tiers of intervention, yet lack meaningful direction in applying it. This can ultimately result in school personnel either declining to implement restorative practices at all or attempting to do so but doing it ineffectively.[144] To successfully integrate restorative justice practices in school cultures, policies, and practices, we recommend that the state require districts to work with experts in implementing

[137] Ibid., 235.
[138] Ibid., 239.
[139] Zehr, Howard. 2002. The Little Book of Restorative Justice. Intercourse, PA: Good Books.
[140] Maryland Commission, *STPP Commission Report*, *supra* note 70, at 46 (quoting Carolyn Boyes-Watson & Kay Pranis, Circle Forward: Building a Restorative School Community, 2018).
[141] Ibid.
[142] Ibid., 119 -120.
[143] Maryland Commission, *STPP Commission Report*, p. 120 lines 6-17.
[144] Curran Testimony, *Baltimore Briefing*, p. 196- 197.

restorative justice practices and training school personnel to ensure large-scale adoption of these practices across all schools.

Recommendation 3: Improve Data Collection and Reporting

A number of panelists highlighted limitations in the discipline data that is collected and reported. Informal methods of removal, such as sending students home from school before the end of the day, are not included as part of the disciplinary data. [145] Further, despite the fact that many disciplinary decisions occur after a student has been referred to an administrator's office, these office referrals are not tracked in Maryland. One panelist urged that for each particular office referral, Maryland should track both the teacher's response and the number of suspensions the student referred has. [146] The Committee recommends that Maryland expand the discipline data that is collected and reported to include:

- Students in alternative schools
- Informal methods of removal from school
- Disciplinary office referrals
- Student-level (de-identified) and classroom-level data
- Better accessibility of the data so that it may be more easily used by researchers

This data should be reported annually. Collection and reporting of additional data would provide a fuller understanding of what is happening and enhance the ability to tailor strategies to reduce disproportionate discipline. The state further needs to collect more disaggregated data so that analysis can be done at the district, school, and classroom levels.

Recommendation 4: Improved Accountability

Dr. Sunderman specified that accountability for reducing and eliminating disproportionalities in discipline must apply at multiple levels, including the state, MSDE, districts, and schools. Each of these entities hold different responsibilities and may be responsible for and capable of addressing different determinants of discipline disproportionalities.[147] School actors must be held accountable in a way that does not simply incentivize them to return students to the classroom without any kind of support for behavior, academic needs, and social and emotional development.[148] Rather, school faculty and staff must also be held accountable for failing to provide necessary services and support.

[145] Ibid.; White Testimony, *Baltimore Briefing*, p. 88-90.
[146] Sunderman Testimony, *Baltimore Briefing*, p. 190.
[147] Sunderman Testimony, *Baltimore Briefing*, p. 192-193.
[148] Curran Testimony, *Baltimore Briefing*, p. 183.

Improved accountability is also needed to ensure compliance with federal and state law. The Committee has heard testimony of school districts having a significant disregard for state law with respect to school discipline. Individual student appeals should not be the only mechanism by which the state discovers such violations; additional tracking mechanisms are needed. In addition, accountability for compliance with the IDEA and other laws requires the state and local educational agencies to ensure that school personnel receive appropriate training to be able to conduct effective behavior assessments and develop and implement effective behavior intervention strategies.[149] Among possible steps to promote greater accountability may be a funded commitment to ensure that at least one person on staff is fully trained in and empowered to direct compliance with requirements of federal and state law.

Recommendation 5: Adequate Funding

Finally, the Committee recommends that Maryland review school funding to determine what additional resources are needed to ensure that PBIS, MTSS and restorative justice practices can be expanded and implemented appropriately. While the Kirwan Commission has recently issued its Interim Report discussing the funding necessary to ensure that Maryland can build a world-class education system,[150] it is not clear that the resources needed to address disproportionate discipline have been included in that analysis.

[149] *Supra* notes 19-20 and accompanying text.
[150] Maryland Commission on Innovation & Excellence in Education, *Interim Report*, Jan. 2019, http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019-Interim-Report-of-the-Commission.pdf.

Dissent by George R. La Noue, MDSAC member

This dissent is not intended to impugn hardworking USCCR staff or the other sincere MDSAC members who after all are volunteers with full-time jobs.

My dissent is based on fatal flaws in the SAC process. No one wants to see students unnecessarily suspended from school, but the causes and alternatives are complex. Are disparities the result of different student behavioral problems or the result of unfair rules or application of the rules? If the latter, there is a civil rights problem. The SAC does not know. In a footnote, the report states, "The committee has neither the tools nor the charge to investigate or determine that civil rights violations are in fact occurring." Full stop. The SAC is not a school board nor a panel of social workers, so making sweeping policy recommendations on the basis of a one day hearing and some literature the SAC did not fully review, without a civil rights finding, is not appropriate.

The hearing had a number of procedural flaws. It was aimed at examining disproportionate use of discipline for disabled students and "students of color." The latter term was not defined and available data suggests the problems do not affect Asian-American students. Ethnic and disabled students discipline disproportionality are two different subjects based on different legal frameworks. Each would have required extensive hearings with multiple perspectives and data bases presented. Instead the education establishment (state school board, local school boards, school superintendents and principals, school board attorneys, school psychologists, school safety officers. and teacher union representatives) either because of the timing of the hearing just before the school year or because they feared the neutrality of the process decided not to attend. That left witnesses who were largely advocates and two parents who brought their young disabled children to sit beside them as they testified. The SAC was uncertain whether to treat those appearing as dinner guests where politeness should guide or witnesses who should be carefully examined. The witnesses did not submit testimony before hand and often in hurried presentations showed slides with statistics for a few seconds on a large screen. Each SAC member was permitted to ask only one question of each witness, so no follow up could be achieved. Many documents later cited in the report were not before the committee at that time and often have nothing to do with Maryland.

There are some national and Maryland stories that should concern citizens interested in these subjects. The turnover in public school teachers is at an alarming rate. A federal report shows that 5.8% of the 3.8 million nation's teacher were physically attacked and another 10% were threatened with physical injury in 2015-2016. (Education Week, October 3, 2018). An empirical description of school safety problems in Maryland was not presented in any testimony. After a series of violent assaults by students, the Sun carried a story, "Baltimore teachers union seeks changes to the discipline code: Calls for harsher penalties, notification of the school police in some discipline cases." (May 11, 2019). Parents who naturally care deeply for their children do not always understand the rules and procedures that bind school districts. Another Sun article reported: "Special education legal fight is fraught: Maryland parents lose over 85% vs. districts." (May 5, 2019),

The series of SAC recommended policy changes may be worthwhile, but the SAC had neither the time nor the data to evaluate them. New policies can create unintended consequences and cost-benefit

problems which were not examined. The public should turn to other sources in considering school discipline policy changes.