

Discipline for Students with Disabilities: Support Rather than Exclusion

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INTRODUCTION

Students with disabilities, especially those with attention, behavioral and emotional challenges, are disproportionately subjected to overly harsh and exclusionary discipline practices, rather than provided the positive supports and interventions that will allow them to be educated in classrooms with their peers. This paper discusses the rights of students with disabilities to behavioral supports, and individual and systemic advocacy strategies that provide support for students with disabilities instead of excluding them from school.

ABSTRACT

Across the nation, it is well-documented that students with disabilities are disproportionately suspended from school. In this paper, we will discuss the rights of students to positive supports rather than disciplinary exclusion. We will describe strategies that address the underlying causes of misbehavior and give parents and advocates tools to work with educators to provide supports and interventions to keep students in class, and improve educational outcomes.

After describing the rights of students with disabilities to receive support in the least restrictive classroom and not be excluded, we will examine various educational resources and strategies for that support, including Positive Behavioral Interventions and Supports (PBIS) and other approaches to improving school climate for students with disabilities; academic and behavioral supports and interventions; and alternatives to suspension or other types of classroom removal.

Finally, we will look at a range of approaches to prevent exclusionary discipline for students with disabilities, from filing due process hearings for individual students to state and federal complaints alleging individual and systemic violations of students' rights. As a case study, we will describe how these strategies have been used in New York City, with the goal of parents and advocates using and sharing these advocacy approaches in school settings throughout the country to ensure all students are educated in supportive learning environments.

RIGHTS OF STUDENTS FACING BEHAVIORAL CHALLENGES

A number of federal laws protect students with disabilities to ensure that public schools provide appropriate supports in the classroom and do not exclude students based on their disabilities. The Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq., ("IDEA") and its implementing regulations, 34 C.F.R. § 300, et seq.,

mandate that schools provide students with disabilities a Free Appropriate Public Education (“FAPE”). Schools must create an Individualized Education Program (“IEP”) for each student with a disability that describes the educational plan for the student to receive the appropriate supports and services in the least restrictive environment.

As a result of the requirement for students with disabilities to be educated in the least restrictive environment, schools cannot segregate students with behavioral challenges into specialized classrooms if they are able to learn and progress in general education settings with the appropriate supports. 34 C.F.R. §300.114. These behavioral supports can include, among others, counseling, assistive technology to aid with focus, or a 1:1 behavior or crisis paraprofessional.

Like the IDEA, Section 504 of the Rehabilitation Act and its implementing regulations require that schools receiving federal funding provide a FAPE to students with disabilities. 34 C.F.R. §104.33. Section 504 also prohibits schools receiving federal funding from discriminating against students with disabilities generally. 29 U.S.C. § 794, et seq.

These federal laws, and parallel state laws and regulations, contain specific provisions to ensure that students with disabilities are not removed from their classrooms because of their disabilities, but instead receive necessary behavioral supports. In particular, the laws’ requirements for Functional Behavioral Assessments and Behavior Intervention Plans to analyze and address the functions and causes of behavior, and for Manifestation Determination Reviews to prevent removals based on disability provide safeguards against exclusion.

Functional Behavioral Assessments and Behavior Intervention Plans

Functional Behavioral Assessments (“FBAs”) and Behavior Intervention Plans (“BIPs”) are vital tools in understanding what causes the challenging behavior and what supports could assist a student when the student’s behavior is impeding with learning. 34 C.F.R. § 300.324(a). The purpose of the FBA is to hypothesize and eventually identify the function that the challenging behavior is serving for the individual student and develop a plan to address that underlying trigger for the behavior. To truly understand the function of the behavior, a student’s behavior must be observed and analyzed across various settings and times. A school then can identify the circumstances and triggers surrounding the challenging behavior. Amy Bobrow, *Problem Behaviors in the Classroom: What They Mean and How to Help—Functional Behavioral Assessment*, 7 Child Study Center Letter 2 (Nov./Dec. 2002).

After the FBA is conducted, a BIP creates a plan to address and prevent the concerning behavior. By addressing the triggers and causes for the student's challenging behavior identified in the FBA, the BIP serves two purposes: first, the BIP creates a plan so that all members of the school staff consistently address the student's behavior proactively during the school day to try to prevent the concerning behavior from occurring. Second, the BIP creates a plan for the school to implement if the student exhibits the concerning behavior so that behavior does not escalate. The use of effective FBAs and BIPs has been shown to decrease behaviors that often result in removing students from the classroom and/or suspending students. Lee Kern, *Addressing Persistent Challenging Practices*, www.challengingbehavior.org/do/resources/documents/rph_pers_chall_beh.pdf (accessed January 5, 2016). Like all other evaluations, a parent can request an FBA if a school does not conduct an FBA on its own initiative. 34 C.F.R. §§ 300.301, 300.303.

Manifestation Determination Reviews

The IDEA prohibits students from being removed from their instruction for more than ten days because of their disabilities. 20 U.S.C. §1415(k)(1)(E). This means that a school cannot remove a student if the behavior that led to the removal was caused by or had a direct and substantial relationship to the student's disability. In addition, a school cannot remove a student if the behavior was the result of a failure to implement the student's IEP. *Id.*

A Manifestation Determination Review ("MDR") is the process by which a school determines whether a student is being removed because of his or her disability. An MDR is a meeting with the student's parent and school to determine the relationship, if any, between the student's disability and the behavior leading to the suspension. If the participants at the MDR conclude that the behavior is a manifestation of the student's disability, the student cannot be suspended.¹ 20 U.S.C. §1415(k)(1)(F).

An MDR must be conducted when a student is removed for disciplinary reasons from his or her classroom for more than ten consecutive school days. In addition, a school must conduct an MDR when a student is subjected to a series of classroom removals or suspensions that result in the student being excluded from his or her classroom for more than ten cumulative school days in the school year. The exclusions

¹ Even if a student's behavior is found to be a manifestation of the student's disability, the student still can be placed in an interim alternative educational placement for up to 45 days in certain circumstances involving the student's use or possession of weapons or illegal drugs, or the student's infliction of serious bodily injury. 20 U.S.C. §1415(k)(1)(G).

must constitute a “pattern”. Schools must determine whether the exclusions are a pattern by looking at whether the behaviors in the prior removals are substantially similar to the behavior for which the student is currently being removed and “additional factors” including the length of each removal, the amounts of time for which the student was removed, and the proximity of the removals to each other. 34 C.F.R. § 300.536.

The parent must be invited and allowed to participate at the MDR and may bring an advocate and any providers who have knowledge about the relationship between the student’s behavior and disability. The school team, comprised of “relevant members” of the IEP team, must review and consider all relevant information in the student’s file, including the IEP, evaluations, teacher observations, and other relevant information provided by the parent, such as medical or school progress reports. If the student has an FBA and/or BIP, the team must review these documents. 20 U.S.C. §1415(k)(1).

If the MDR team determines that the behavior was a manifestation of the student’s disability and the school had not yet conducted an FBA, the school must conduct an FBA and implement a BIP. If the school had already developed a BIP, the school must review and revise the BIP as necessary. 20 U.S.C. § 1415(k)(1)(F).

If the team concludes that the behavior is not a manifestation, the student may be suspended. While suspended, the student must receive the appropriate supports and services to allow the student to progress in a general education setting. Although these services may not be the full implementation of the student’s IEP, the student must still receive appropriate services to allow the student to progress. The school should also consider conducting an FBA and preparing a BIP. 34 C.F.R. § 340.

MDRs Under Section 504 of the Rehabilitation Act

Although not expressly identified as an MDR in the statute, Section 504 of the Rehabilitation Act also has a requirement for a manifestation determination review before removing a student with a disability from a classroom. Under the implementing regulations for Section 504, a school district must conduct a “re-evaluation” prior to any significant change in placement. 34 C.F.R. § 104.35(a). The United States Department of Education Office of Civil Rights has interpreted this requirement to mean that prior to a disciplinary removal of a student with a disability for 10 consecutive days and possibly 10 cumulative days, a school district must conduct a manifestation determination review. Letter of Finding re: OCR Docket # 15-14-1071, U.S. Dep’t of Educ. Office of Civil Rights (Aug. 13, 2014); Letter of Finding re: OCR Complaint No. 11-13-1266, U.S. Dep’t of Educ. Office of Civil Rights (Mar. 11, 2014).

USE OF POSITIVE BEHAVIOR SUPPORTS

When amending the IDEA in 1997 and 2004, Congress explicitly recognized the benefit of positive behavioral supports and interventions to prevent exclusion and improve educational outcomes for students with disabilities. Positive Behavioral Interventions and Supports (PBIS) is the only approach to behavior specifically mentioned in the IDEA. When a student with a disability exhibits behavior that impedes the student's learning or that of others, the IDEA requires the IEP Team "to consider the use of positive behavioral interventions and supports, and other strategies, to address the student's behavior." 20 U.S.C. § 1414; 34 C.F.R. § 300.324. To encourage implementation of PBIS, the IDEA authorizes states to use professional development funds to provide training in the methods of PBIS to improve student behavior. 20 U.S.C. § 1454(a)(3)(B)(iii)(I). Although the IDEA encourages using PBIS and other strategies to address the behavior of students with disabilities, the IDEA does not describe PBIS or other strategies in detail. This section discusses some of the myriad educational resources and strategies to support students with disabilities in the least restrictive classroom.

School-wide PBIS

School-wide PBIS is a multi-tiered approach that helps schools achieve social and academic gains while minimizing problem behavior for all children. U.S. Dep't of Educ., *Restraint and Seclusion: Resource Document, 3 (2012)*, available at www2.ed.gov/policy/seclusion/restraints-andseclusionresources.pdf. It provides a school-wide prevention framework that guides the implementation of evidence-based academic and behavioral practices and often leads to significant reduction in the behaviors that result in disciplinary removals. *Id.* The first tier focuses on preventing the development of problem behaviors by implementing high quality learning environments for all students and staff. U.S. Dep't of Educ. Office of Special Education Programs Technical Assistance Center on Positive Behavioral Interventions and Supports, *Positive Behavioral Interventions and Supports (PBIS) Implementation Blueprint: Part 1—Foundations and Supporting Information, 6 (2015)*, available at www.pbis.org. The second tier focuses on reducing the problem behaviors that are high risk or not responsive to primary intervention practices by providing more focused, intensive, and frequent small group-oriented responses in situations where problem behavior is likely. *Id.* The third tier focuses on reducing problem behaviors that are resistant to, or unlikely to be addressed by, primary and secondary prevention efforts by providing individualized responses to problem behavior. *Id.*

Academic and Behavioral Supports, Services, and Interventions

A growing body of research indicates that the implementation of social and emotional learning in school is an effective approach to promoting a positive school climate, improving students' positive behaviors and reducing students' negative behaviors, and preparing young people for success in school and life. See, e.g., Durlak, J. A., & Weissberg, R. P., *The Impact of After-School Programs that Promote Personal and Social Skills*, Collaborative for Academic, Social, and Emotional Learning (CASEL) (2007); Durlak, J. A., Weissberg, R. P., Dymnicki, A. B., Taylor, R. D., & Schellinger, K. B., *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of Schoolbased Universal Interventions*, *Child Development*, 82, 405-432 (2011). Social and Emotional Learning (SEL) is the process of acquiring knowledge and skills related to five core competencies: 1) recognizing emotions, values, strengths, and limitations; 2) managing emotions and behaviors; 3) making ethical, constructive choices about personal and social behavior; 4) forming positive relationships, working in teams, and dealing effectively with conflict; and 5) showing empathy for others. Weissberg, R. P., *Strategies to Support Social, Emotional, and Behavioral Needs of Students*, Collaborative for Academic, Social, and Emotional Learning School Climate Technical Assistance Symposium, New Orleans, LA, (March 11, 2011).

Studies indicate that students receiving quality SEL instruction in schools demonstrated decreased disruptive class behavior, aggression, emotional distress, and disciplinary referrals. The studies also showed improved classroom behaviors and attitudes, as well as better academic performance. In particular, students receiving SEL instruction gained achievement scores averaging 11 percentile points higher than students who did not receive SEL instruction. See *id*; see also www.casel.org/social-and-emotional-learning/outcomes (accessed Jan. 7, 2016).

An intervention model that focuses on addressing the needs of students with significant behavioral problems is Therapeutic Crisis Intervention (TCI). TCI assists in preventing crises from occurring, de-escalating potential crises, effectively managing acute crises, reducing potential and actual injury to children and staff, learning constructive ways to handle stressful situations, and developing a learning circle within the organization. This model gives schools a framework for implementing a crisis prevention and management system that reduces the need to rely on high-risk interventions and complements the Response to Intervention (RTI) approach, which, like PBIS, systematically delivers a multi-tiered range of interventions for students experiencing academic and social challenges. The effectiveness of TCI in schools requires: 1) leadership and administrative support and commitment; 2) social work and clinical services participation; 3) frequent and ongoing supportive staff supervision and post crisis response; 4) comprehensive training and professional development; and 5) data-driven incident monitoring and feedback. Evidence indicates that implementing

TCI with fidelity may result in substantial reductions in the most aggressive child behavior. The Residential Child Care Project, Cornell University, “Therapeutic Crisis Intervention System for Schools” (2012); *see also* <http://rccp.cornell.edu/tcimainpage.html> (accessed Jan. 7, 2016).

Alternatives to Suspension

Restorative Practices is an evidence-based model that emphasizes repairing and preventing the harm that conflict causes, rather than imposing punishment. All people impacted by a conflict are included in the process of identifying and attempting to repair the harm and create a process that promotes reconciliation and solutions that rebuild relationships. In contrast to suspension, which focuses on broken rules, blame, punishment, and exclusion, Restorative Practices allows school officials to consider how students will best learn why they must change their behavior, requires students to take responsibility for their behavior, helps students learn to avoid such behavior, and provides an inclusionary response that keeps students in the classroom.²

<https://safesupportivelearning.ed.gov/events/webinar/stemming-school-prison-pipeline-applying-restorative-justice-principles-school> (accessed Jan. 7, 2016); The Council of State Governments Justice Center, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, 56, 71-84 (2014) (hereinafter “CSGJC Consensus Report”).

The most critical function of Restorative Practices is restoring and building relationships. Students are taught basic social skills to problem solve and de-escalate conflict. Restorative Practices also provide students with meaningful opportunities to be accountable for their actions and responsible for helping to make their school a safe and nurturing place. CSGJC Consensus Report, at 71-84.

Examples of restorative approaches used in schools fall along a continuum of informal to formal practices. The informal practices include affective statements that communicate feelings, as well as questions that cause students to reflect on how their behavior has affected others. More formal Restorative Practices include restorative circles and conferences and fairness committees that bring several students and adults together to talk through a problem and find a solution. *Id.*

² The terms “Restorative Justice” and “Restorative Practices” are frequently used interchangeably, but experts in the field note certain distinctions. Restorative Justice is a subset of Restorative Practices. Restorative Justice refers to reactive responses to wrongdoing after it occurs. Restorative Practices also includes the use of informal and formal processes that precede wrongdoing by proactively building relationships and a sense of community to prevent conflict and wrongdoing. International Institute for Restorative Practices, *What is Restorative Practices?*, available at <http://www.iirp.edu/what-is-restorative-practices.php>.

Another restorative approach includes Peer Mediation. When disputes arise between two or more students, Peer Mediation and Conflict Resolution can be used to prevent problem behaviors, and effectively resolve conflict, as a positive alternative to suspension. Peer Mediation is a structured, confidential process in which students trained to facilitate discussions as neutral student mediators use conflict mediation techniques to help other students in conflict resolve their problem. Students learn peer mediator skills in listening to both sides of a disagreement and paraphrasing the cause of the conflict. Students identify the problems they want to resolve and create their own solutions by developing understanding and empathy for one another. See, e.g., <http://www.creducation.org/cre/home/>; <http://www.cruinstitute.org/>.

Another model called Collaborative Problem Solving (CPS) has demonstrated effectiveness with children who have a wide range of social, emotional, and behavioral challenges across a variety of different settings, including schools. CPS is an evidence-based practice developed at Massachusetts General Hospital based on two beliefs: that students want to do well and their chronic problems are the result of lagging skills and unsolved problems. Similar to students with learning disabilities who struggle with thinking skills in areas like reading, writing or math, research has shown that students with behavioral challenges lack thinking skills related to flexibility, frustration tolerance, and problem solving. CPS teaches these skills primarily through helping children and the adults with them learn to resolve problems in a collaborative, mutually satisfactory manner. See www.thinkkids.org/learn/our-collaborative-problem-solving-approach/.

CPS uses four steps: 1) gather information from the student to better understand the student's concerns that drive the behavior and reassure the student that imposition of adult will is not how the problem will be resolved; 2) identify and share the adult's concerns or perspective about the same problem; 3) invite the child to brainstorm solutions together with the adult; and 4) work together to assess potential solutions and choose one that is both realistic and mutually satisfactory, while the adult helps the student develop the strategy and coaches its use. *Id.*

Use of CPS has helped schools move away from a punitive model to a problem-solving, skill building approach in which students take responsibility for long-term behavioral change in an environment where the adults are trained to support them. Published research has shown that CPS can lead to dramatic decreases in behavior problems with the most challenging children. Other results include significant reductions in time spent out of class, detentions, suspensions, injuries, teacher stress, and alternative placements in schools. *Id.*

What Happens When Support Is Not Provided

Research has demonstrated that positive behaviors and academic achievement increase when students and staff feel safe, connected, fairly treated, and valued. However, when school leaders do not make school climate and behavioral support a priority, disciplinary approaches often rely heavily on the removal of students from school. CSGJC Consensus Report, at xi, xii, 28.

Students face serious consequences when they do not receive the interventions and supports necessary to remain in the classroom. The increasing use of exclusionary discipline such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes. Research indicates that when support is not provided, school suspension and expulsion increases the likelihood that students will be held back a grade, not graduate, drop out of school, receive a subsequent suspension or expulsion, and become involved in the juvenile justice system, proliferating the school-to-prison-pipeline. Higher suspension rates are correlated with lower academic achievement and standardized test scores, even when controlling for factors such as race and socioeconomic status. Council of State Governments Justice Center, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011); Losen, D.J., Gillespie, J., *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at The Civil Rights Project (2012). New research shows that higher suspension rates are also closely correlated with higher dropout and delinquency rates. Losen, D., Hodson, C., Keith II, M.A., Morrison, K., Belway, S., *Are We Closing the School Discipline Gap?*, The Center for Civil Rights Remedies (2015). Additionally, without appropriate supports and interventions, students may be improperly placed on a truncated school schedule, sent to a hospital emergency room for behavior that could be managed by the school, otherwise excluded and, in essence, pushed out of school.

The data is deeply disturbing. Schools suspend students with disabilities at rates that are typically two to three times higher than for their non-disabled peers.³ *Id.* Black students are more than three times as likely as their White peers to be expelled or suspended. Although Black students represent 15% of students in the CRDC, they comprise 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. U.S. Dep't of Justice and U.S. Dep't of Educ., *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, 21 (Jan. 8, 2014). Research suggests that the substantial racial disparities are not explained by

³ Statistics referenced in this section refer to data collected for the 2011-12 school year by the Civil Rights Data Collection (CRDC) conducted by United States Department of Education Office of Civil Rights.

more frequent or more serious misbehavior by students of color. Erik J. Girvan, On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law, 26 Geo. Mason U. C.R. L.J. 1, 5 (2015); see *a/so* Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment, 34 Urban Rev. Vol. 34 No. 4, 317, 334 (2002).

The most disturbing disparities are found in the suspension rates of children who fall into more than one category. For example, when examining racial and gender disparities at any grade level, the highest suspension rates typically are for Black males, followed by Black females and/or Latino males. Black males students with disabilities are at the highest risk for suspension (33.8%), followed by Latino males with disabilities (23.2%). Strikingly, Black females with disabilities are suspended at higher rates (22.5%) than White males with disabilities at both the elementary and secondary level. Losen, D., Hodson, C., Keith II, M.A., Morrison, K., Belway, S., Are We Closing the School Discipline Gap?, The Center for Civil Rights Remedies, 5-6 (2015).

ADVOCACY CASE STUDY ADVOCACY: NEW YORK CITY

New York City is the largest school district in the country with approximately 1.1 million students, approximately a tenth of whom have IEPs. The disparities in suspension rates seen through the country are equally present in New York City.

In the 2014-2015 school year, 38% of suspensions in New York City involved students with IEPs, but students with IEPs comprised only 13% of the student population.⁴ In the same school year, 53% of suspensions in New York City involved Black students, but Black students comprised only 26% of the student population.

While the total number of suspensions are decreasing in New York City, disparities in suspensions are increasing for both students with disabilities and Black students. Students with disabilities were 2.62 times as likely to be suspended as students without disabilities in the 2014 school year as compared to 2.35 times as likely in the 2012 school year. Black students were 4.1 times as likely to be suspended as White students in the 2014 school year as compared to 3.6 times as likely in the 2012 school year. Safety With Dignity, Complete Report by the Mayor's Leadership Team on School Climate and Discipline, Phase I Recommendations, 15-16 (July 2015), available at http://www1.nyc.gov/assets/sclt/downloads/pdf/Safety%20with%20Dignity%20-%20FINAL%20Complete%20Report%207.23_2.pdf.

⁴ Based upon New York City Department of Education Suspension Data reported to the New York City Council in October 2015 pursuant to the Student Safety Act and student enrollment data as of October 31, 2014. N.Y.C. Admin. Code § 8-1104.

A variety of methods have been used to advocate for supportive rather than exclusionary approaches for students in New York City, and can be used as models in other school districts as well.

Advocacy for Individual Students

The first step in ensuring that a student receives the appropriate behavioral supports is advocacy at IEP meetings. Parents can request an FBA if they believe that their child's behaviors are impeding learning in any way, and should request appropriate behavioral supports at the IEP meeting and in the creation of a BIP. It is also important to monitor the implementation of the IEP and BIP to ensure that supports are in place and that the plan for behavior in the BIP is working. Representation of individual students at suspension hearings and MDRs can prevent removals for individual students with disabilities and is another opportunity to advocate for more or different supports.

IDEA and Section 504 administrative due process hearings can be used to challenge MDR findings of no manifestation and to obtain more supportive education for individual students, such as privately done FBAs, training for school staff, changes to more supportive school placements, and compensatory educational services for the time students missed school due to inappropriate disciplinary removals.

Impact Litigation

Advocacy for systemic change can be helpful when students are not receiving behavioral supports because a school or a school district is not complying with the law more globally. Impact litigation can be brought in federal or state court as an individual, class, or group action, or as an administrative complaint to state and federal education agencies. In framing a class action, recent opinions, including *Dukes v. Walmart*, 131 S.Ct. 2541 338 (2011), and *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 498 (7th Cir. 2012), emphasize that any class claims must be based upon a common contention "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S.Ct. at 2552. These advocacy tools have been used in New York City to address disciplinary removals of students with disabilities, push-outs of students with disabilities, inappropriate calls to emergency services, and failures to provide appropriate behavioral supports.

Suspensions and Removals of Students with Disabilities

In 2002, Advocates for Children of New York (AFC) brought the class action, *E.B. v. New York City Department of Education*, 02 CV 5118 (E.D.N.Y.), in federal court against the New York City Department of Education (NYCDOE). The case challenged

the NYCDOE's failure to comply with the requirements under the IDEA and Section 504 to provide due process protections and services to students with disabilities who were disciplined. In particular, schools were not holding MDRs when they were required to do so, and, when the schools were holding MDRs, schools were not analyzing appropriately whether the behavior for which a student was suspended was a manifestation of the student's disability. The complaint also claimed that students with disabilities were being transferred and discharged out of the New York City school system as a means to push out students for disciplinary reasons. The complaint alleged that these failures denied students with disabilities the free appropriate public education to which they are entitled under the IDEA and Section 504.

The court certified a class of all children with disabilities who were excluded from school without proper notice and due process and six subclasses of students with disabilities who were removed, suspended, expelled, transferred and otherwise excluded from school for disciplinary reasons.

In 2015, after almost 13 years, the parties agreed to a settlement that was approved by the court. Among other requirements, as part of the settlement, the NYCDOE agreed to enhanced procedures to ensure that schools are not suspending students with disabilities for behaviors associated with students' disabilities. In addition, schools now must seek approval before removing students with disabilities before suspension hearings and ensure that students with disabilities receive appropriate instruction while suspended. The NYCDOE also agreed to procedures to prevent schools from discharging or transferring from school students with disabilities for disciplinary reasons.⁵

Removals and Calls to EMS

In December 2013, Legal Services of New York City filed a federal lawsuit on behalf of eleven children and their guardians against the NYCDOE, the City of New York, and the Fire Department of New York City in *T.H. v. Fariña*, 13 Civ 8777 (S.D.N.Y.). Plaintiffs alleged that children were improperly removed by Emergency Medical Services (EMS) to psychiatric emergency rooms for behavior that should have been handled by their schools.

Under a settlement approved by the court in December 2014, New York City is required to implement new protocols and provide expanded training in specific schools to staff and appropriate resources to students in order to avoid unnecessary emergency room visits for students experiencing emotional, behavioral or psychiatric events. The settlement agreement includes increased school-based mental health services for

⁵ The settlement papers can be found at www.advocatesforchildren.org/litigation/class_actions/eb_vs_doe.

schools with high EMS referral rates and de-escalation training in therapeutic crisis intervention for more school staff.

As a result of the lawsuit, a new regulation was promulgated that provides guidance to New York City public school staff as to when school officials should call 911 for a child experiencing an emotional, behavioral, or psychiatric event; requires all NYC public schools to develop and maintain a Crisis De-Escalation plan; and requires staff to make every effort to de-escalate the behavior using strategies and interventions for behavioral crisis as well as the resources identified in the school's Crisis De-Escalation Plan. The new regulation also states that in no circumstance should 911 be used as a disciplinary measure because of a student's behavior, and that after any crisis, school officials should meet with the parent (and student if appropriate) to discuss appropriate behavioral supports and interventions for the student.⁶

Students Returning from the Court System

In December 2004, AFC and The Legal Aid Society of New York filed a class action suit, *J.G. et al. v. Mills*, 04 Civ. 5415 (E.D.N.Y.). The lawsuit alleged that the NYCDOE violated federal and state law by depriving students of educational services in certain court-ordered settings or upon their return to New York City schools from court-ordered placement facilities or juvenile detention centers. The complaint also contained allegations on behalf of a subclass of court-involved youth with disabilities who did not receive adequate educational services while in detention in New York City or upon return to New York City schools. Plaintiffs claimed that they were regularly denied the opportunity to return to school or were warehoused in alternative settings where they were segregated and did not receive adequate educational services.

In 2011, *J.G.* settled. In the settlement agreement, the NYCDOE agreed to promptly re-enroll students returning to New York City community schools from court-ordered juvenile justice settings; provide students with disabilities timely and appropriate special education services and placements; and evaluate transcripts of students who attended school in court-ordered placements and award credits earned while in these court-ordered settings. The settlement provided compensatory relief for Plaintiffs including free tutoring, educational services to earn additional credits outside of the regular school schedule, and assistance in math and reading.⁷

⁶ The settlement papers can be found at www.slideshare.net/NelsonMar1/th-v-farina-13cv-8777-stipulation.

⁷ The settlement papers can be found at www.advocatesforchildren.org/litigation/class_actions/jg_vs_mills.

Failures to Conduct FBAs and Develop BIPs

Systemic advocacy does not require a lawsuit in court. In April 2013, AFC filed a complaint with the New York State Education Department (NYSED) against the NYCDOE for its systemic failure to conduct FBAs and create BIPs for students with disabilities, as mandated by state law and regulations. The state complaint attached twenty affidavits of parents of students demonstrating the NYCDOE's failures. In October 2013, NYSED issued a decision finding that 10 out of the 11 investigated schools did not comply with the state regulations on FBAs and BIPs. In addition, NYSED found that the NYCDOE FBA and BIP forms did not comply with the requirements for FBAs and BIPs and that the NYCDOE did not provide sufficient support and guidance on FBAs and BIPs. NYSED ordered the NYCDOE to change its FBA and BIP forms, provide targeted professional development on FBAs and BIPs, and submit to monitoring by NYSED.⁸

Changing Legislation

States are starting to recognize that disciplinary removals alone will not ultimately address students' behavioral challenges and can be detrimental to students. Following the trend of other states, in 2015, a bill was introduced into the New York State Assembly that adds requirements for restorative practices and positive behavioral supports. See <http://legislation.nysenate.gov/pdf/bills/2015/A8396>.

Multi-stakeholder Coalitions and Task Forces

Multi-stakeholder coalitions and task forces can be valuable advocacy strategies for policy changes that decrease the use of suspensions as responses to problem behavior in schools and promote positive approaches to school discipline and social-emotional support.

In November 2009, in response to several years of dramatic increases in the numbers of suspensions and school-based arrests, AFC teamed up with the former Chief Judge of the New York State Court of Appeals, Judith Kaye, and the New York State Permanent Judicial Commission on Justice for Children to convene a symposium on keeping children in school and out of courts. The symposium brought together key government leaders, unions, and advocates to begin to identify common goals and strategies for reducing suspensions, EMS referrals, summonses, and arrests, while improving school climate.

The symposium led to the formation of the School-Justice Partnership Task Force launched in 2011. The Task Force brought together key stakeholders and experts

⁸ The state complaint and decision can be found at www.advocatesforchildren.org/litigation/afc.

from a variety of disciplines to coordinate efforts and develop recommendations to promote school engagement and reduce the flow of New York City students entering the juvenile and criminal justice systems. Representatives from the NYCDOE were at the table, as were Family Court Judges, District Attorneys, advocacy organizations, unions, and researchers. The Task Force spent a year studying strategies in other parts of the country, as well as in New York City and New York State, which have succeeded in keeping at-risk youth in school and out of courts. The Task Force met over two years and produced a report with recommendations in May 2013.

http://www.advocatesforchildren.org/sites/default/files/library/sjptf_report.pdf?pt=1.

Dignity in Schools Campaign-New York is a citywide coalition of students, parents, educators, grass-roots advocates, and lawyers calling for positive, school-wide approaches to discipline that improve school climate and increase learning. Similarly, the Student Safety Coalition has focused on city-level legislation to compel public reporting of data on school discipline, arrests, and summonses.

This advocacy through coalitions and task forces has had a significant impact. The NYCDOE updated its discipline code and trained schools in positive disciplinary strategies like restorative practices. In 2011, the City enacted the Student Safety Act, requiring the NYCDOE and the NYPD to report data to the City Council on suspensions, summonses, and arrests in schools. In 2015, the City Council passed a bill expanding this reporting and making it publicly available. NYC Council, Int. 0730-2015. The City Council also allocated \$2.4 million for restorative practices in schools.

In 2015, the NYC mayoral administration announced school climate reforms that included the formation of a Mayor's Leadership Team on School Climate and Discipline. The implementation plan for the first set of recommendations produced by the Leadership Team includes de-escalation training for police officers, expanded access to behavioral health treatment options in high needs schools, and increased training and support for school personnel in non-punitive school disciplinary strategies.

CONCLUSION

A wide variety of strategies, supports, and advocacy can help prevent exclusions of students with behavioral challenges from the classroom. Despite this advocacy, too many students still are getting suspended or arrested, and troubling disparities by disability and race persist. More advocacy is necessary to protect students' rights to behavioral supports, rather than disciplinary removals.