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NOTE

CHARTERS' DISREGARD FOR DISABILITY: AN EXAMINATION OF PROBLEMS AND SOLUTIONS SURROUNDING STUDENT DISCIPLINE

MARYROSE ROBSON*

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INTRODUCTION

I.L. was a four-year-old when he first enrolled at Success Academy in New York after winning the charter school's lottery.¹ He has a speech disability as well as attention-deficit/hyperactivity disorder ("ADHD").² Like many charter schools, Success Academy has a strict Code of Conduct and school officials removed I.L. "from class on an almost daily basis" before evaluating him to see if he has a disability under the Individuals with Disabilities Education Act ("IDEA").³ During the evaluation process, however, the principal informed I.L.'s parents that I.L. was not a "good fit" for the school and barred I.L.'s father, who persistently advocated for his son's rights, from the classroom.⁴ The school began to call I.L.'s parents daily, almost immediately after drop off, to inform them I.L. had been excluded from the classroom and to threaten removals and suspensions.⁵ As a result, I.L.'s parents ultimately removed him from Success Academy.⁶ Similarly, I.L.'s classmate, C.S., who has ADHD, oppositional defiant disorder ("ODD"), autism spectrum disorder, and learning disability, "was suspended once or twice per week."⁷ Success Academy repeatedly pressured C.S.'s mother to remove her son from school and threatened to turn him over to state protective services if she failed to do so.⁸ After only a year with Success Academy, C.S.'s mother decided to enroll him in a public school.⁹

¹ Memorandum & Order at 4, *Lawton v. Success Acad. Charter Sch.*, No. 1:15-cv-07058(FB)(SMG) (E.D.N.Y. Aug. 1, 2018).

² *Id.*

³ *Id.*

⁴ *Id.* at 4–5.

⁵ *Id.* at 5.

⁶ *Id.*

⁷ *Id.* at 7.

⁸ *Id.* at 7–8.

⁹ *Id.* at 8.

There are countless similar stories across the country, particularly in the charter school¹⁰ environment.¹¹ In June 2017, the American Civil Liberties Union filed a complaint in Washington Superior Court alleging the state failed “to exercise adequate supervision and take appropriate action” in cases like I.L.’s and C.S.’s.¹² Traditional public schools and charter schools alike across the state allegedly used “excessive and discriminatory exclusionary discipline against students with special education needs,” “depriv[ing] them of their right to an appropriate public education.”¹³ Comparable class action lawsuits alleging disproportionate discipline of students with disabilities have arisen across the country in recent years, particularly in the charter school environment.¹⁴

Excessive discipline is an issue for all students. In the 2011–12 school year, out of 5,250 charter schools surveyed in a study by the Center for Civil Rights Remedies, 374 suspended at least 25% of their student body, and 68 of those charter schools suspended more than 50% of their enrolled students with disabilities.¹⁵ Furthermore, many charter schools favor zero-tolerance policies, “which mandate the use of exclusionary discipline on first offense, regardless of

¹⁰ Office of Innovation and School Choice, *Frequently Asked Questions About Charter Schools and Charter School Lottery*, ALBUQUERQUE PUBLIC SCHOOLS (Feb. 17, 2020), <https://www.aps.edu/innovation/internal-oisc-documents/faq-charter-schools-lottery> (“A charter school is a tuition-free school that is publicly funded but independently run. In exchange for exemptions from many of the state laws and regulations that govern traditional public schools, charters are bound to the terms of a contract”); see, e.g., *Massachusetts Charter Schools*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (Mar. 2019), <http://www.doe.mass.edu/charter/about.html> (explaining that, in 1993, Massachusetts enacted the Education Reform Act, authorizing “independent public charter schools that operate under five year charters granted by the Commonwealth’s Board of Elementary and Secondary Education”).

¹¹ See DANIEL J. LOSEN & KACY MARTIN, *THE UNEQUAL IMPACT OF SUSPENSION ON THE OPPORTUNITY TO LEARN IN CALIFORNIA: WHAT THE 2016–17 RATES TELL US ABOUT PROGRESS 11* (2018) (finding that students with disabilities of all races lost more days of instruction than their non-disabled peers).

¹² Complaint at 2, A.D. *ex rel.* Madison v. Reykdal (Wash. Super. Ct. June 8, 2017).

¹³ *Id.*

¹⁴ See New Jersey Department of Education Office of Special Education Policy and Procedure Complaint Form from Deanna Christian, Clinical Law Fellow & Staff Att’y, H.E.A.L. Collaborative, *Students with Disabilities v. North Star Academy Charter Sch.* (Aug. 17, 2018), http://www.edlawcenter.org/assets/files/pdfs/Charters%20and%20Vouchers/Complaint_Investigation_Final_.pdf; Elizabeth A. Harris, *Lawsuit Accuses Brooklyn Charter School of Failing to Provide Special Education Services*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/nyregion/lawsuit-accuses-brooklyn-charter-school-of-failing-to-provide-special-education-services.html>.

¹⁵ DANIEL J. LOSEN, ET AL., *CHARTER SCHOOLS, CIVIL RIGHTS AND SCHOOL DISCIPLINE: A COMPREHENSIVE REVIEW* 6 (2016).

how severe the infraction is or the context surrounding the noncompliance.”¹⁶ Zero tolerance policies are directly connected to the School-to-Prison Pipeline, a phenomenon that often turns a routine disciplinary proceeding in grade school into an increased likelihood of incarceration, especially for students from low socioeconomic backgrounds, students of color, and students with disabilities.¹⁷ More recent data suggests that these trends have not changed,¹⁸ despite recent departures from zero-tolerance policies over the last several years.¹⁹

However, students with disabilities experience notable disparities in treatment compared to students without disabilities.²⁰ For example, according to a study by the Government Accountability Office, students with disabilities in traditional public schools were overrepresented in disciplinary actions in the 2013–14 school year by 13.2% in out-of-school suspensions, 15.5% in referrals to law enforcement, 12.1% in expulsions and 15.5% in school related arrests.²¹ In the charter context, however, these figures become even more drastic.²² As of 2017, students ages three to five with disabilities comprise 12% of early childhood program populations, but “represent 75% of suspensions and expulsions.”²³ These suspensions and expulsions deprive students “of valuable early opportunities that can help them overcome early challenges” and of crucial services they need to become more independent and integrated in their

¹⁶ Elizabeth M. Chu & Douglas D. Ready, *Exclusion and Urban Public High Schools: Short- and Long-Term Consequences of School Suspensions*, 124 Am. J. of Educ. 479, 479 (2018).

¹⁷ PUBLIC POLICY AND EDUCATION FUND OF NEW YORK, SYSTEMIC RACISM & NEW YORK STATE’S SCHOOL TO PRISON PIPELINE 12 (2019) (finding that one report stated that “New York’s laws and policies on school discipline favor harsh, exclusionary punishments that unfairly target students of color, students with disabilities, and LGBTQI students, limit academic achievement, and push students out of the classroom and into the web of the criminal justice system.”); Mikki L. Smith, *A Generation at Risk: The Ties Between Zero Tolerance Policies and the School-to-Prison Pipeline*, 8 MCNAIR SCHOLARS RES. J. 131, 134 (2015).

¹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 21 (2018).

¹⁹ See Joshua Wachtel, *Colorado Bill Ends Zero Tolerance in Schools*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (June 25, 2012), <https://www.iirp.edu/news/colorado-bill-ends-zero-tolerance-in-schools> (explaining that some states, like Colorado, have approached the “zero tolerance” problem through the legislature, passing bills that forbid summary suspension or expulsion for minor offenses).

²⁰ Losen, *supra* note 15, at 6.

²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 17 (2018).

²² *Id.* (finding that the average suspension rate for all charter schools was 7.8%, compared to 6.7% for all non-charter schools, amounting to 16% difference).

²³ Cristina Novoa & Rasheed Malik, *Suspensions Are Not Support: The Disciplining of Preschoolers with Disabilities*, CENTER FOR AMERICAN PROGRESS (Jan. 17, 2018, 6:00 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2018/01/17/445041/suspensions-not-support/>.

classrooms.²⁴ This is due in part to the selected freedom from certain state and local regulations that charter schools enjoy.²⁵ Even if a charter school is more closely under control of the local education agency or public school system, it is often run by non-profit corporations that operate with “substantial freedom from public school bureaucracy and financial oversight.”²⁶

Although charter schools are free from the constraints of certain local regulations, as recipients of federal funding, they must follow all federal laws that apply to public schools, including the Individuals with Disabilities Education Act (“IDEA”), the Americans with Disabilities Act (“ADA”), and the Rehabilitation Act.²⁷ Under the IDEA specifically, charter schools have a responsibility to make a free and appropriate and public education available to all students in the least restrictive environment possible.²⁸ Although “charter schools are subject to all of the mandates of [the] federal disability” laws listed above, questions remain about the extent to which they are in compliance.²⁹ The situation is further complicated by some charter schools’ lack of resources, especially in providing appropriate services for students with disabilities.³⁰ As recently as 2017, data suggest that charter schools continue to “suspend children with disabilities at a higher rate than public schools,” and fail to comply with federal standards “due to a lack of resources, experience, and insensitivity.”³¹

Charter schools have contributed to the school-to-prison pipeline³² by disproportionately disciplining, suspending, and expelling students with disabilities, especially disabled students of color.³³ Certain schools’

²⁴ *Id.*

²⁵ WILLIAM J. MATHIS, RESEARCH-BASED OPTIONS FOR EDUCATION POLICYMAKING, NATIONAL EDUCATION POLICY CENTER 1 (2016) (“A founding premise of charter schools is that deregulation will free teachers, principals and schools to excel. Regulation or accountability in the conventional sense would be unnecessary, as competition and the market model would be the driving quality control force”).

²⁶ Preston C. Green III, et al., *The Legal Status of Charter Schools in State Statutory Law*, 10 U. MASS. L. REV. 240, 252 (2015).

²⁷ See, e.g., 20 U.S.C. § 1400, § 1401, § 1412, § 1413, § 1414, § 1415 & § 7221b; 42 U.S.C. § 12101, § 12132, & § 12182; 29 U.S.C. § 794.

²⁸ See 20 U.S.C. § 1412(a)(1)(A); § 1412(a)(5)(A).

²⁹ See 20 U.S.C. § 7221i(2)(G), (K) (2017); Mary B. Estes, *Charter Schools and Students With Disabilities: How Far Have We Come?*, 30 REMEDIAL AND SPECIAL EDUC. 216, 216 (2009).

³⁰ Zachary Jason, *The Battle Over Charter Schools*, HARVARD ED. MAG. (2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools>.

³¹ *Id.*

³² Smith, *supra* note 17, at 134–35; Camden Copeland, *The Dangers of the “School-To-Prison Pipeline,”* PUBLIC POLICY INITIATIVE, WHARTON UNIVERSITY OF PENNSYLVANIA (Aug. 13, 2015), <https://publicpolicy.wharton.upenn.edu/live/news/831-the-dangers-of-the-school-to-prison-pipeline> (“school-to-prison pipeline . . . refers to the relationship between punitive disciplinary measures and later involvement in the criminal justice system.”).

³³ *Id.*; Losen & Martin, *supra* note 11, at 3.

contributions to the school-to-prison pipeline are exacerbated by their ideologies of strict discipline and highly-regulated environments.³⁴ Instead of construing the misbehavior of students with disabilities as an expression of their special needs that requires the attention of special education professionals, many charter schools typically view the misbehavior as defiant or criminal.³⁵ Some states, such as Texas, have granted charter schools “the legal right to exclude children with behavioral problems, including those who suffer from emotional disorders.”³⁶

This Note argues that both state enforcement agencies and charter schools should do more to rectify these striking disparities in disciplining students with disabilities.³⁷ Namely, this Note proposes that (1) Congress should work quickly to reauthorize the IDEA to include additional enforcement measures and clearer guidance for students’ Behavior Intervention Plans; (2) individual states should clarify ambiguities in state charter law regarding roles and responsibilities for disciplinary issues in charter schools; and (3) charter schools should limit the use of ineffective and harmful alternative education programs, specifically by separating students with disabilities from the classroom only as a last resort.

This Note provides a brief background on issues that students with disabilities face in the disciplinary context in charter schools. Part IA reviews the differences between charter schools and traditional public schools, and Part IB discusses problems charter schools face with strict student discipline policies. Part II reviews the federal legal protections available for students with disabilities provided by the IDEA, the ADA, and the Rehabilitation Act. Finally, Part III proposes solutions to combat disproportionate discipline of students with disabilities in charter schools based on both legislative reform and school-by-school improvement strategies.

I. DISABILITY AND DISCIPLINE IN CHARTER SCHOOLS: AN OVERVIEW OF THE ISSUES

Charter schools are unique among primary and secondary educational institutions for a number of reasons.³⁸ This Part reviews the legal differences

³⁴ A. CHRIS TORRES & JOANNE W. GOLANN, NEPC REVIEW: CHARTER SCHOOLS AND THE ACHIEVEMENT GAP 7 (2018).

³⁵ Richard Mora & Mary Christianakis, *Feeding the School-to-Prison Pipeline: The Convergence of Neoliberalism, Conservatism, and Penal Populism*, 7 J. OF EDUC. CONTROVERSY 1, 4 (2013) (“School choice is also resulting in exclusion of students with special needs, undoing decades of progress toward mainstreaming.”).

³⁶ *Id.* at 5.

³⁷ See, e.g., Losen & Martin, *supra* note 11, at 25 (outlining potential steps for state administrators and educators).

³⁸ MICHELLE CROFT, ET. AL., CHARTER SCHOOLS: A REPORT ON RETHINKING THE FEDERAL ROLE IN EDUCATION 2, 4 (2010) (“[C]harter schools tend to attract a disproportionate number of students eligible for free or reduced price lunch as well as minority students, especially African Americans,” and “[c]harters generally operate on a tighter public budget for current

between charter schools and traditional public schools and outlines specific challenges charter schools face in creating appropriate disciplinary policies for their students that comply with federal regulations.

A. What Makes Charter Schools Special?

As of 2019, forty-five states and the District of Columbia had enacted legislation to create charter schools.³⁹ To create a charter school, individual groups may apply to a local school board for a charter that enables them to “operate a school with public funds, free of certain administrative requirements applicable to traditional public schools.”⁴⁰ Charter schools resemble private schools in many ways because they often have separate authorities who have the final say on issues of policy and operations, and are frequently exempt from state and local regulation.⁴¹ Nonetheless, charter schools also resemble public schools in that they receive public funding⁴² and operate within boundaries that are coterminous with the local public school district.⁴³ As a result, courts have difficulty determining the legal status of charter schools.⁴⁴

Further confusion arises because “most state statutes exempt charter schools from school district discipline policies, [and] allow[] charter schools to devise their own policies subject to the approval of its authorizing authority.”⁴⁵ Overarching Supreme Court precedent, however, maintains that the basic requirements of due process and notice attach no matter the policy determination.⁴⁶ For example, in *Goss v. Lopez*, the Court held that students must “be given oral and written notice of the charges against [them] and, if [they] deny them, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.”⁴⁷

expenditures than traditional district schools, receiving by one estimate only about 80 percent of the per pupil amount received by district schools, and by another only about 60 percent.”).

³⁹ EDUC. COMM’N OF THE STATES, 50—*State Comparison: Charter School Policies* (2018), <https://www.ecs.org/charter-school-policies/>; see also Green III, et al., *supra* note 26, at 243.

⁴⁰ Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Statute or Regulation Governing Charter Schools*, 78 A.L.R. 5th 533 (2000).

⁴¹ Green III, et al., *supra* note 26, at 243.

⁴² “F. HOWARD NELSON, ET. AL., VENTURESOME CAPITAL: STATE CHARTER SCHOOL FINANCE SYSTEMS I (2000) (“At the heart of charter school funding is per-pupil base funding,” which is “based on state average per-pupil expenditure,” “district average revenue or expenditures,” or a negotiation “between charter schools and the chartering agency.”).

⁴³ See Green III, et al., *supra* note 26, at 243; Charles J. Russo, et al., *Financing Education: An Overview of Public School Funding*, SCHOOL BUSINESS AFFAIRS 17 (2015) (illustrating that public schools also receive funding based on variety of formulas that vary state by state).

⁴⁴ Green III, et al., *supra* note 26, at 243.

⁴⁵ *Id.* at 266.

⁴⁶ See *Goss v. Lopez*, 419 U.S. 565, 581 (1974).

⁴⁷ *Id.*

Charter schools have a unique organizational structure and provide alternate educational models that appear “particularly effective in raising the achievement of low-income and minority students in urban areas.”⁴⁸ Although charter schools may be effective in certain underfunded districts,⁴⁹ deep disparities in discipline practices render charter schools ineffective for other populations of students, especially for students with disabilities.⁵⁰ To counter this ineffectiveness, the legislature has put in place federal laws designed to protect disabled students.⁵¹ Broadly, charter schools must comply with the same federal mandates as traditional public schools, and students with disabilities within charter schools have enumerated rights to a free and appropriate and public education, equal treatment in extracurricular activities, and accessibility accommodations.⁵² Federal laws also require both traditional public schools and charter schools to provide an Individualized Education Program (“IEP”) to students with disabilities and a manifestation determination review in order to determine whether the child’s disability or the school’s failure to implement the IEP caused any inappropriate behavior.⁵³

B. Current Problems with Student Discipline

Most schools have exclusionary discipline policies, such as out-of-school suspensions and expulsions, as part of their disciplinary procedures.⁵⁴ “[S]uspension rates have been on the rise for virtually all student subgroups,” and more than three million students each year lose instructional time due to suspension or expulsion.⁵⁵ Whether students with disabilities attend traditional public schools or charter schools, officials discipline them “at significantly higher rates than their peers without disabilities.”⁵⁶ One study of key trends in charter schools found that officials suspended students with disabilities nearly

⁴⁸ Croft, *supra* note 38, at 1.

⁴⁹ Croft, *supra* note 38 at 1 (“Research suggests that charter schools are particularly effective in raising the achievement of low-income and minority students in urban areas.”).

⁵⁰ Losen, et al., *supra* note 15, at 6 (“Student demographics and baseline scores play a role in this – urban schools are most effective for minority students and students with low baseline scores – but nonurban charters appear to be ineffective for most subgroups.”); Joshua D. Angrist, Parag A. Pathak, & Christopher R. Walters, *Explaining Charter School Effectiveness*, AM. ECON. J.: APPLIED ECONOMICS 2 (2013).

⁵¹ See 20 U.S.C. §§ 1412(a)(4), 1415(k)(1)(E)-(F).

⁵² See 20 U.S.C. §§ 7221i(1)(G), 7221i(1)(K) (2017); DEP’T OF EDUC, Know Your Rights: Students with Disabilities in Charter Schools (Jan. 13, 2017), <https://sites.ed.gov/idea/files/dcl-factsheet-201612-504-charter-school.pdf> (last visited Feb. 7, 2020).

⁵³ 20 U.S.C. §§ 1412(a)(4), 1415(k)(1)(E)-(F).

⁵⁴ Chu & Ready, *supra* note 16, at 479.

⁵⁵ *Id.* at 480.

⁵⁶ LAUREN MORANDO RHIM & SHAINI KOTHARI, KEY TRENDS IN SPECIAL EDUCATION IN CHARTER SCHOOLS: A SECONDARY ANALYSIS OF THE CIVIL RIGHTS DATA COLLECTION 16 (2018).

twice as often as their nondisabled peers.⁵⁷ According to the Department of Education, students with disabilities represented 12% of the overall student enrollment in the 2015–16 school year, but accounted for “28[%] of students referred to law enforcement or arrested.”⁵⁸ The same study found that students with disabilities represented 66% of the students secluded and 71% of the students physically restrained as part of the disciplinary process.⁵⁹

Schools of all types find it difficult “to balance establishing a positive school culture while effectively disciplining students whose behaviors are disruptive to the learning environment.”⁶⁰ However, charter schools that are their own Local Education Agency (“LEA”), separate from the traditional public school district within the same geographical boundaries, have much higher rates of both suspensions and expulsions for students with and without disabilities than charter schools who are connected with and supported by the public school district LEA.⁶¹

At independent charter schools, students with disabilities are suspended at a rate of 14.11%, compared to 10.08% who attend charter schools associated with local education agencies.⁶² For students without disabilities, those numbers are much lower in both settings, 7.37% versus 4.52% respectively.⁶³ Essentially, students with disabilities enrolled in independent charter schools are spending significantly less time in the classroom after disciplinary incidents, putting them at further risk of falling behind academically.⁶⁴

Expulsions follow a similar pattern, where 0.54% of students with disabilities are expelled at independent charter schools compared with 0.20% at charters associated with the public school district.⁶⁵ Importantly, charter schools overall expel students with disabilities at a lower rate than traditional public schools, but tend to compel parents to remove their children who start to manifest disciplinary problems.⁶⁶ Again, the expulsion numbers drop for students without disabilities in both settings, at 0.28% versus 0.08%.⁶⁷ Certainly, the use of exclusionary disciplinary policies disproportionately affects marginalized

⁵⁷ *Id.*

⁵⁸ U.S. DEP’T OF EDUC., 2015–16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 4 (2018).

⁵⁹ *Id.* at 12.

⁶⁰ Rhim & Kothari, *supra* note 56, at 16.

⁶¹ *Id.* at 17.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Smith, *supra* note 17, at 135.

⁶⁵ Rhim & Kothari, *supra* note 56, at 18.

⁶⁶ *Id.*; see, e.g., Memorandum & Order at 7–8, *Lawton v. Success Acad. Charter Sch.*, No. 1:15-cv-07058(FB)(SMG) (E.D.N.Y. Aug. 1, 2018).

⁶⁷ Rhim & Kothari, *supra* note 56, at 18.

student populations already at risk for juvenile court referrals due to intrinsic bias⁶⁸—including African Americans, males, and students with disabilities.⁶⁹

A 2018 study underscored a consensus among scholars “that discipline gaps can alienate disadvantaged students from school . . . and result in achievement gaps.”⁷⁰ This study further found evidence that suspensions are “ineffective as an approach to modifying the suspended students’ behavior.”⁷¹ Moreover, the author concluded that suspension rates are higher for students from vulnerable populations—findings that should deepen concerns about the consequences of exclusionary discipline practices.⁷² Differences in suspension rates across subgroups are also problematic because suspensions “actually may be counterproductive for [disabled] students’ academic development.”⁷³

Although some institutions have attempted discipline reform to reduce suspensions, there have been instances where schools have succumbed to chaos and disorder after failing to address the underlying behavioral challenges that students with disabilities face.⁷⁴ Charter schools with limited resources may find the continuing requirements onerous, but they “are free to choose the method by which they will provide services” after a behavioral incident, while remaining within the confines of federal mandates.⁷⁵ Thus, charter schools must uphold their responsibility to provide a free and appropriate education for students with disabilities after a need for discipline arises.

II. FEDERAL LEGAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

Federal laws, including the Individuals with Disabilities Education Act, Americans with Disabilities Act, and Rehabilitation Act, serve to protect the interests, safety, and educational outcomes of students with disabilities.⁷⁶ This Part reviews each in turn.

⁶⁸ NAT’L RESEARCH COUNCIL AND INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 231 (2001) (“Although black youth represented approximately 15 percent of the U.S. population ages 10-17 in 1997, they represented 26 percent of all juvenile arrests, 30 percent of delinquency referrals to juvenile court, 45 percent of preadjudication decisions, 33 percent of petitioned delinquency cases, 46 percent of cases judicially waived to adult criminal court, and 40 percent of juveniles in public long-term institutions.”).

⁶⁹ Chu & Ready, *supra* note 16, at 481.

⁷⁰ Na Young Hwang, *Suspensions and Achievement: Varying Links by Type, Frequency, and Subgroup*, 47 EDUC. RESEARCHER 363, 363 (2018).

⁷¹ *Id.*

⁷² *Id.* at 370.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Joseph R. McKinney, *Charter Schools’ Legal Responsibilities Toward Children with Disabilities*, 126 ED. LAW REP. 565, 571 (1998).

⁷⁶ See generally, 20 U.S.C. §§ 1400, 1401, 1412, 1413, 1415; 29 U.S.C. § 794; 42 U.S.C. §§ 12101, 12132.

A. *Individuals with Disabilities Education Act*

The most important legal development in the provision of education for students with disabilities⁷⁷ was the passage of the Education for All Handicapped Children Act in 1975.⁷⁸ Now titled the Individuals with Disabilities Education Act ("IDEA"), the Act's purpose is to increase the effectiveness of education for students with disabilities by "having high expectations" and "ensuring their access to the general education curriculum in the regular class, to the maximum extent possible."⁷⁹ Students aged three to twenty-one⁸⁰ with intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities all fall under the protection of the IDEA as long as they need special education and related services.⁸¹ IDEA ensures that a free and appropriate and public education is available to all students with disabilities, including those who have been suspended or expelled from school.⁸² Furthermore, IDEA stipulates that students with disabilities should be "educated with children who are not disabled" to the maximum extent appropriate.⁸³ Under IDEA, educators should only remove students with disabilities "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."⁸⁴

1. Free and Appropriate Public Education Requirements

Recently, the Supreme Court has reaffirmed that students with disabilities have a "substantive right to a 'free appropriate public education'" in the landmark *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* decision.⁸⁵ Petitioner Endrew F. has autism, and received annual Individualized Education

⁷⁷ *What Laws Do Special Education Teachers Need to Know?*, ARKANSAS STATE UNIV. (Jan. 16, 2017), <https://degree.astate.edu/articles/k-12-education/what-laws-do-special-education-teachers-need-to-know.aspx> ("[The Act] ensure[s] basic rights for children with disabilities . . . by requir[ing] all special education students to participate in state testing; IDEA also holds special education teachers to higher standards.").

⁷⁸ 20 U.S.C. § 1400 (2004).

⁷⁹ § 1400(c)(5)(A).

⁸⁰ *Differences between IDEA IEPs, 504 Plans, and College Accommodations*, BRYN MAWR COLL. (2020), <https://www.brynmawr.edu/access-services/students/differences-between-idea-ieps-504-plans-and-college-accommodations>.

⁸¹ § 1401(3)(A).

⁸² § 1412(a)(1)(A).

⁸³ § 1412(a)(5)(A).

⁸⁴ *Id.*

⁸⁵ *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 993 (2017) (citing *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982)).

Programs (“IEPs”) in his school district that his parents considered unsatisfactory.⁸⁶ The Court determined that both the statutory language of the IDEA and the 1982 decision in *Rowley* suggest that “to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁸⁷ While “[t]he instruction offered must be ‘specifically designed’ to meet a child’s ‘unique needs’ through an ‘[i]ndividualized education program,’” review of an IEP must focus on whether it is reasonable, not whether a court finds it ideal.⁸⁸

An IEP must consider a student’s scholastic attainment, what assistance or accommodations the student will receive, and future goals and expectations.⁸⁹ More specifically, there must be:

(I) a statement of the child’s present levels of academic achievement and functional performance . . . (II) a statement of measurable annual goals, including academic and functional goals . . . (III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals . . . (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child . . . (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV) . . . (VI) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments . . . (VII) the projected date for the beginning of the services and modifications . . . [and] (VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter – (aa) appropriate measurable postsecondary goals . . . (bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and (cc) . . . a statement that the child has been informed of the child’s rights under this chapter.⁹⁰

The Supreme Court clarified that the IEP sets out a “plan for pursuing academic and functional advancement” after “careful consideration of the child’s present levels of achievement, disability, and potential for growth.”⁹¹ To determine whether the standards for a free and appropriate and public education are met, the Supreme Court concluded that “the provisions governing the IEP

⁸⁶ *Id.* at 996.

⁸⁷ *Id.* at 999 (citing 20 U.S.C. § 1401(29), (14)).

⁸⁸ *Id.* at 992, 999 (emphasis added).

⁸⁹ See 20 U.S.C. § 1414(d)(1)(A)(i) (2016).

⁹⁰ See *id.*

⁹¹ *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

development process are a natural source of guidance,” because the IEP is the mechanism for utilizing education tailored to the unique needs of a student with disabilities.⁹²

In addition to ensuring access to a free and appropriate and public education, the IDEA emphasizes that charter schools must place students with disabilities in the least restrictive environment, a classroom with their peers, whenever possible.⁹³ The Supreme Court recognized that the IDEA “was passed in response to Congress’[s] perception that a majority of handicapped students in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’”⁹⁴ Moreover, to form an IEP with maximum effect, the IDEA stresses the importance of the involvement of a number of actors, including “the student’s parents or guardian, a school district representative, the student’s regular and special education teachers, a person able to interpret the student’s results and evaluations, and, when appropriate, the student.”⁹⁵ The requirements for a least restrictive environment, measured separately from substantive educational benefits, “facilitate[] the IDEA’s strong ‘preference for “mainstreaming” handicapped children.”⁹⁶ Although students with disabilities under the IDEA should be separated from a general education class only in rare circumstances, the preference is not absolute, as in cases when “(1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class.”⁹⁷

2. Excessive Discipline

IDEA also includes important documentary and procedural requirements for the student disciplinary processes.⁹⁸ Local schools must include “a statement of any current or previous disciplinary action that has been taken against the child” outlining “a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child” in the student’s records.⁹⁹ Moreover, states must institute procedural safeguards, including adequate notice requirements, to

⁹² *Id.* at 1000.

⁹³ *See* *K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639, 654 (1st Cir. 2018).

⁹⁴ *Id.* (quoting *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982)).

⁹⁵ *See* *L.H. v. Hamilton Cnty. Dep’t of Educ.*, 900 F.3d 779, 788 (6th Cir. 2018) (citing § 1414(d)(1)(B)).

⁹⁶ *Id.* at 789 (quoting *Rowley*, 458 U.S. at 181 n. 4 (1982)).

⁹⁷ *Id.* (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

⁹⁸ *See* 20 U.S.C. § 1415 (2005).

⁹⁹ 20 U.S.C. § 1413(i) (2016).

protect students with disabilities' access to a free and appropriate and public education.¹⁰⁰

[W]ithin 10 days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team . . . shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine – if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.¹⁰¹

School personnel do have additional discretion to remove a child from the classroom for up to 45 days “in cases where a child – (i) carries or possesses a weapon to or at school . . . (ii) knowingly possesses or uses illegal drugs . . . or (iii) has inflicted serious bodily injury upon another person while at school.”¹⁰² If the conduct was a manifestation of the student's disability, the IEP Team must conduct a functional behavioral assessment (“FBA”)¹⁰³ and implement a behavioral intervention plan (“BIP”)¹⁰⁴ under the mandate of *Honig v. Doe*.¹⁰⁵ Otherwise, the relevant disciplinary procedures applicable to students without disabilities may be applied.¹⁰⁶

In *Honig v. Doe*, the landmark disability disciplinary case, students with disabilities argued that their indefinite suspensions constituted a change in placement substantial enough to violate the “stay-put” provision of the

¹⁰⁰ See 20 U.S.C. § 1415(a) & (k)(1)(H) (2005).

¹⁰¹ 20 U.S.C. § 1415(k)(1)(E) (2005).

¹⁰² See 20 U.S.C. § 1415(k)(1)(G) (2005).

¹⁰³ See The University of the State of New York, *Functional Behavioral Assessments*, N.Y. STATE EDUC. DEP'T, <http://www.p12.nysed.gov/specialed/publications/topicalbriefs/FBA.htm> (last updated May 23, 2011) (stating that New York, for example, mandates the use of FBAs “whenever: a student with a disability is exhibiting persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; the student's behavior places the student or others at risk of harm or injury; the Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) is considering more restrictive programs or placements as a result of the student's behavior; and/or the student is subject to disciplinary actions and a determination has been made that the behavior is related to the student's disability.”).

¹⁰⁴ See *Behavior Supports*, N.Y.C. DEP'T OF EDUC., <https://pws.nycenet.edu/learning/special-education/supports-and-services/behavior-supports> (last visited Feb. 18, 2020) (stating that after conducting a FBA, the IEP team develops a BIP that “includes: the target behavior(s) and goal(s), positive behavioral interventions and strategies, accommodations or modifications, [and] how the plan will be monitored and updated if needed.”).

¹⁰⁵ *Honig v. Doe*, 484 U.S. 305, 323 (1988) (reiterating § 1415(e)(3)'s “unequivocal” language that “the child *shall* remain in the then current educational placement” under the stay-put provision).

¹⁰⁶ See 20 U.S.C. § 1415(k)(1)(C) & (F) (2005).

Education of the Handicapped Act, the precursor to IDEA.¹⁰⁷ The Supreme Court agreed and reemphasized that the language of the Act was “unequivocal . . . stat[ing] plainly that during the pendency of any proceedings initiated under the Act . . . the child *shall* remain in the then current educational placement.”¹⁰⁸ While educators have the power to use normal procedures to discipline students who endanger themselves or others or to suspend the student for up to ten days “where a student poses an immediate threat to the safety of others,”¹⁰⁹ any suspension greater than ten days constitutes a “change in placement” that violates the Act and deprives students of a free and appropriate public education.¹¹⁰

A more recent letter from the United States Department of Education re-emphasized *Honig*’s determination that “[t]he IDEA authorizes school personnel to implement a short-term disciplinary removal from the current placement, such as an out-of-school suspension . . . for up to 10 consecutive school days” for students with disabilities who violate a code of student conduct.¹¹¹ The Code of Federal Regulations also limits a school’s ability to remove a student for more than “10 consecutive school days in that same school year for separate incidents of misconduct,” but removals cannot be a change of placement.¹¹²

[A] change in placement occurs if 1) the removal is for more than 10 consecutive school days; or 2) the child has been subjected to a series of removals that constitute a pattern (i) because the series of removals total more than 10 school days in a school year; (ii) because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.¹¹³

If students with disabilities have the opportunity to be involved in the general education curriculum, receive services as mandated by their IEP, and participate with their peers without disabilities, the Department of Education will “not consider the use of exclusionary disciplinary measures to be disciplinary removals from the current placement.”¹¹⁴

¹⁰⁷ *Honig*, 484 U.S. at 312.

¹⁰⁸ *Id.* at 323.

¹⁰⁹ *See id.* at 325–26 n. 8.

¹¹⁰ *Id.* at 328–29.

¹¹¹ Ruth E. Ryder, *Letter to Carrie Mason: Discipline Procedures 2*, U.S. DEP’T OF EDUC. (July 27, 2018), <https://sites.ed.gov/idea/idea-files/osep-letter-july-27-2018-letter-to-carrie-mason/>.

¹¹² *Id.*

¹¹³ Ryder, *supra* note 111, at 2 (citing 34 C.F.R. §300.536(a)).

¹¹⁴ *Id.*

B. Americans with Disabilities Act and Rehabilitation Act

Title II of the ADA and its predecessor, the Rehabilitation Act,¹¹⁵ also provide protections for students with disabilities in public schools.¹¹⁶ In passing the ADA, Congress sought to prevent discrimination against individuals with disabilities in a multitude of critical areas, including education.¹¹⁷ Furthermore, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits, services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,” which includes public schools.¹¹⁸ Section 504 of the Rehabilitation Act similarly protects people with disabilities from exclusion from “any program or activity receiving Federal financial assistance,” such as charter schools that utilize federal funding to operate.¹¹⁹ Together with the IDEA, both the ADA and Rehabilitation Act promote the philosophy that students with disabilities should be protected from exclusion from a normal classroom setting and interactions with their peers without disabilities.¹²⁰

For students to make a claim that they have been excluded from a free and appropriate public education under the ADA, they must first establish their eligibility to participate in the educational setting “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.”¹²¹ Next, they must satisfy the definition of disability by either (1) proving that they have “a physical or mental impairment that substantially limits one or more major life activities,” (2) relying on “a record of such an impairment,” or (3) proving that schools regard them “as having such an impairment” by discriminating against them “because of an actual or perceived physical or mental impairment.”¹²² Finally, the students must demonstrate that the school deprived them of access to the proper education setting by denying

¹¹⁵ See *Americans with Disabilities Act (ADA)/Section 504 of the Rehabilitation Act*, NIAGARA CTY. CMTY. COLL. (last visited Feb. 18, 2020), <http://niagaracc.suny.edu/compliance/ada-504.php> (stating that while the ADA “prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications,” the Rehabilitation Act “prohibits discrimination on the basis of disability in programs receiving federal financial assistance and in the employment practices of federal contractors.”).

¹¹⁶ See 42 U.S.C. §§ 12101–12213 (2013); 29 U.S.C. § 701 (2014).

¹¹⁷ See 42 U.S.C. § 12101(a)(3) (2013).

¹¹⁸ 42 U.S.C. § 12132 (2013).

¹¹⁹ 29 U.S.C. § 794(a) & (b)(2)(B) (2014).

¹²⁰ See *Protecting Students with Disabilities*, U.S. DEP’T OF EDUC.: OFFICE OF CIVIL RIGHTS (Apr. 19, 2019 7:29 PM), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

¹²¹ 42 U.S.C. § 12131(2) (2013).

¹²² 42 U.S.C. § 12102(1)(A), (B) & (C) (2012); 42 U.S.C. § 12102(3)(A) (2012).

them a “reasonable modification” that would not have “fundamentally alter[ed] the nature” of the educational program.¹²³

III. POTENTIAL SOLUTIONS FOR COMBATING DISPROPORTIONATE DISCIPLINE

While charter schools continue to have problems with forming and implementing appropriate disciplinary policies for students with disabilities, there are a number of steps that Congress, individual states, and charter schools themselves can take to increase the protections for some of the most vulnerable students.¹²⁴ This Part will suggest that (1) Congress reauthorize the IDEA to include additional enforcement measures and guidance, (2) individual states clear up ambiguities in their charter laws, and (3) charter schools limit the use of harmful alternative education programs.

A. Congress Should Work to Reauthorize the IDEA to Include Additional Enforcement Measures and Clearer Guidance for Students' Behavior Intervention Plans

IDEA has not been fully reauthorized since December 2004.¹²⁵ Since then, it has only been amended a handful of times, most recently in December 2015 through the Every Student Succeeds Act.¹²⁶ Although smaller amendments still have the potential to protect students with disabilities prior to, during, and after disciplinary proceedings, it is also important to give federal enforcement agencies the power to act under the IDEA in addition to the ADA and Rehabilitation Act. Whereas the ADA and Rehabilitation Act provide more general protection for people with disabilities, enforcement provisions under the IDEA should more carefully target the student population and their needs. A reauthorization of IDEA should also include clearer guidance as to what elements teachers should implement in Behavior Intervention Plans (“BIPs”). Without such clarification outlining what both charter schools and traditional public schools have to include within BIPs, those schools will have a harder time combating their own institutional obstacles to effective implementation.

¹²³ 28 C.F.R. § 35.130(b)(7) (2015); see PACER Center, Inc., *The ADA, Section 504 & Postsecondary Education*, PACER'S NAT'L PARENT CTR. ON TRANSITION AND EMP'T (2015), <https://www.cpec.edu/sites/default/files/2019-05/ADA%20Section%20504%20and%20Post%20Secondary%20Q%20and%20A.pdf> (“[T]here are not many practical differences” between the ADA and Section 504, as “[o]nly private . . . institutions that do not receive government funds are not covered by the broader 504 or ADA Title II requirements.”).

¹²⁴ See Losen, et al., *supra* note 15, at 24.

¹²⁵ *Reauthorization of the IDEA 2004*, CAL. DEP'T OF EDUC., <https://www.cde.ca.gov/sp/se/lr/ideareathzn.asp> (last visited Sept. 18, 2018).

¹²⁶ See *About IDEA*, DEP'T OF EDU., <https://sites.ed.gov/idea/about-idea/> (last visited Mar. 16, 2020).

1. Enforcement Measures

The burden for enforcement of federal law in the educational sphere falls to the U.S. Department of Education, Office for Civil Rights (“OCR”),¹²⁷ whose “mission is to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools.”¹²⁸ In the disability discrimination context, the OCR is primarily responsible for enforcing Title II of the ADA and Section 504 of the Rehabilitation Act, both of which “prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.”¹²⁹ Going forward, the IDEA should authorize OCR to investigate and evaluate schools’ implementation of IDEA provisions to determine whether a student with a disability is discriminated against in the disciplinary context. Moreover, OCR must be able to guide charter schools with past disproportionate disciplinary problems in forming future disciplinary policies that may be administered in a nondiscriminatory manner so that charter schools may continue enhance school choice for students with disabilities in a meaningful way.

The executive branch is not the only government actor involved, however; Congress has begun to review the problem of unequal enforcement of the federal legal protections between traditional public schools and charter schools for students with disabilities by passing the Every Student Succeeds Act.¹³⁰ The Act mandates that every state create a plan to review its schools and districts for the “overuse of discipline practices that remove students from the classroom” and “the use of aversive behavioral interventions that compromise student health and safety.”¹³¹ When applying for a federal grant, a state must submit a plan that imposes challenging academic standards and academic assessments, create a statewide accountability system, implement school support and improvement

¹²⁷ *What is the United States Department of Education Office for Civil Rights (OCR) and what do they do?*, UNIV. OF WASH. (2020), <https://www.washington.edu/accesscomputing/what-united-states-department-education-office-civil-rights-ocr-and-what-do-they-do> (stating that the “U.S. Department of Education Office for Civil Rights (OCR) is a federal agency with the responsibility of ensuring equal access to education through the enforcement of civil rights.”).

¹²⁸ U.S. DEP’T OF EDUC.: OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/index.html> (last visited Feb. 19, 2019).

¹²⁹ *About OCR*, U.S. DEP’T OF EDUC.: OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Feb. 19, 2019).

¹³⁰ *Every Student Succeeds Act*, MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUCATION (last visited Feb. 18, 2020), <http://www.doe.mass.edu/federalgrants/essa/> (“On December 10, 2015, President Obama signed the Every Student Succeeds Act (ESSA) into law. . . ESSA requires every state educational agency to include a state plan articulating its vision for implementing key provisions and requirements of the ESSA as part of its application for funding.”).

¹³¹ 20 U.S.C. § 6311(g)(1)(C) (Supp. V 2018).

activities, and provide assistance to local educational agencies.¹³² A reauthorized IDEA should promote the peer-review approval process and state plans that provide a unique evaluative and communicative opportunity for states to clarify their expectations for charter schools and for the federal government to correct improper disciplinary proceedings or discriminatory practices.¹³³

First, the multidisciplinary peer-review teams that approve state grants must include researchers familiar with “how to meet the needs of . . . children with disabilities”¹³⁴ Second, the state may “adopt alternate academic achievement standards for students with the most significant cognitive disabilities,” which must be consistent with the other provisions of the IDEA.¹³⁵ Finally, states should separately assess “children with disabilities as compared to children without disabilities” within each school or local education agency.¹³⁶ After the evaluative process, IDEA should authorize OCR or other federal civil rights enforcement agencies to closely monitor charter schools that have allowed overly harsh policies and practices based on discipline standards set forth by the government.

Once an enforcement agency, such as OCR, identifies a charter school that utilizes zero-tolerance approaches, it should mandate that the school consider less discriminatory alternatives. Typically, zero-tolerance policies create strict rules that impose predetermined consequences, such as out-of-school suspensions or expulsions, for certain acts without considering surrounding circumstances, such as a student’s disability.¹³⁷ These consequences then result in students losing learning time and ultimately dropping out of school because of they are unable to keep up with classwork or because of stigma in the classroom.¹³⁸ Research has continually illustrated that suspended students are “less likely to advance to the next grade level or enroll in college” and “more likely to drop out, commit a crime, get arrested, and become incarcerated as an adult.”¹³⁹ Thus, schools risk equating minor infractions committed by students with disabilities to criminal acts.¹⁴⁰ Charter schools should therefore refrain

¹³² § 6311(b)–(d).

¹³³ § 6311(a)(4).

¹³⁴ § 6311(a)(4)(A).

¹³⁵ § 6311(b)(1)(E).

¹³⁶ § 6311(b)(2)(B)(xi).

¹³⁷ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. L. REV. 919, 933 (2016).

¹³⁸ Russell W. Rumberger & Daniel J. Losen, THE CTR. FOR C.R. REMEDIES, THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT 5 (2016) (“While it is established in the research that graduating from high school has substantial benefits over dropping out . . . for both individuals and society, few realize that being suspended from school or the classroom significantly increases the likelihood of dropping out, even after controlling for a myriad of other factors that also increase dropout rates.”); Smith, *supra* note 17, at 134.

¹³⁹ Nance, *supra* note 137, at 956.

¹⁴⁰ Smith, *supra* note 17, at 138.

from unnecessarily suspending or expelling students and work to find individual solutions that do not involve zero-tolerance measures.

Furthermore, a reauthorization of IDEA should explicitly prohibit charter schools from denying students admission based on disability. Nationwide, a disparity exists between the enrollment of students with disabilities in charter schools and the enrollment of students with disabilities in traditional public schools.¹⁴¹ Research has determined that charter schools “routinely discourage the enrollment of students with language or disability needs.”¹⁴² Some charter schools have considered students with disabilities less desirable for enrollment “given the emphasis on performance as well as the financing of special education providing few incentives,” which ignores the reality that there are gifted students with disabilities who perform at or above grade level.¹⁴³

Although adapting to the needs of students with disabilities may create a fundamental alteration to the education program or an undue financial burden on the school in some rare circumstances, “OCR has never excused a school or district from providing a service because its provision was unduly burdensome,” at least in part because the burden of proof is very difficult to overcome.¹⁴⁴ A reauthorization of IDEA should protect students with disabilities’ access to charter schools and prevent the practice of inverted school choice, where schools directly and indirectly influence student selection, “rather than parents selecting schools for their students amongst schools that compete with each other for students.”¹⁴⁵ Moreover, refusing to authorize grants to charter schools without a representative population of students with disabilities could discourage “counseling out” students once the schools learn the student has a disability and counter the free market principles operating behind for-profit charter schools.¹⁴⁶

When considering the next reauthorization of IDEA, Congress should keep in mind Section 104.4 of the Code of Federal Regulations, which covers the

¹⁴¹ Robert A. Garda, *Disabled Students’ Rights of Access to Charter Schools Under the IDEA, Section 504 and the ADA*, 32 J. OF THE NAT’L ASSOC. OF ADMIN. L. JUDICIARY 517, 518–19 (2012).

¹⁴² Lucy Barnard-Brak, Marcelo Schmidt & M. Hasan Almekdash, *Enrollment of Students with Disabilities in Charter Schools: Contemporary National and State Level Findings*, 26 EDUC. POL’Y ANALYSIS ARCHIVES 1, 4 (April 2018).

¹⁴³ *Id.* “Some students with disabilities are never taken out of general education classrooms; others never enter a regular school building . . . Some graduate from high school with a full academic course load and go on to highly competitive colleges; others drop out of high school entirely; and still others receive special diplomas or certificates of attendance.” *Educating One & All: Students with Disabilities and Standards-Based Reform* 68 (Lorraine M. McDonnell, Margaret J. McLaughlin, & Patricia Morison, eds., National Academy Press 1997).

¹⁴⁴ Garda, *supra* note 141, at 533–34.

¹⁴⁵ Barnard-Brak et al., *supra* note 142, at 4.

¹⁴⁶ *Id.* at 4–5. (“In the case of counseling out of students, charter schools may suggest to parents that their school is not an appropriate fit for their child . . . or that the child’s needs exceeded the resources available at the school.”).

Rehabilitation Act and mandates that “no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”¹⁴⁷ To comply with the Code of Federal Regulations and keep their federal funding, charter schools must conduct an evaluation for students who “need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.”¹⁴⁸ A reauthorization of the IDEA should make clear, using explicit language, that charter schools that continually have a problem with long-term suspensions or expulsions risk their federal funding by continuing the discriminatory practices against students with disabilities.

2. Behavioral Intervention Plans

A reauthorization of the IDEA should provide clearer guidance as to what elements school officials should include in BIPs for students with emotional or behavioral disabilities. During the IEP creation process, the current version of the IDEA mandates that the IEP team “consider the use of positive behavioral interventions and supports, and other strategies” to address behavior that “impedes the child’s learning or that of others.”¹⁴⁹ If the IEP team “make[s] the determination that the conduct was a manifestation of the child’s disability, [it] shall – conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child.”¹⁵⁰ If the student already has a BIP in place, the IEP team must review it to determine whether it still matches the student’s needs.¹⁵¹ Finally, the IEP team must “return the child to the placement from which the child was removed,” except in situations where the parents and IEP team conclude a change of placement is an appropriate modification of the BIP.¹⁵²

Although the current version of IDEA does have certain procedural protections, a reauthorization of IDEA should include more specific requirements for BIPs to combat institutional obstacles for effective development. First, while most education professionals are dedicated to the creation of an effective BIP for students with disabilities, other facility staff, such as security and administration officials, continue “to adhere to an emphasis on strict discipline and punitive punishment” to address misbehavior, even if that misbehavior was a manifestation of a student’s disability.¹⁵³ Going forward,

¹⁴⁷ 34 C.F.R. § 104.4 (2017).

¹⁴⁸ 34 C.F.R. § 104.35 (2017).

¹⁴⁹ 20 U.S.C. § 1414 (2012).

¹⁵⁰ 20 U.S.C. § 1415 (2012).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ ERICA EVANS & ROBERT GABLE, EFFECTS OF IMPLEMENTING SCHOOL WIDE POSITIVE BEHAVIORAL INTERVENTION AND SUPPORTS IN AN ALTERNATIVE SCHOOL SETTING 21 (2013).

the IDEA should state that higher local education agency officials must educate administrative personnel on the benefits of creating comprehensive BIPs and needed funding, and reassure parents of students with disabilities that the BIP process is a priority within charter schools.¹⁵⁴

Second, there is the pervasive problem of differing philosophies about discipline, specifically involving “zero-tolerance and other exclusionary policies.”¹⁵⁵ IDEA’s reauthorization should mandate that charter schools move toward “stabilizing the connections between youth and schools rather than jeopardizing those connections” by tailoring a student’s discipline to their disability needs through the effective use of a BIP.¹⁵⁶

Third, there remains a negative implicit bias against individuals with intellectual disabilities, despite “positive explicit attitudes towards individuals with intellectual disabilities,” which could impact the development of an effective BIP.¹⁵⁷ In one study, “nearly 35% of participants held moderate to strong negative implicit attitudes.”¹⁵⁸ Of these, nearly eight percent held strong negative implicit attitudes.¹⁵⁹ IDEA’s reauthorization should encourage additional training for charter school officials to prevent ableism,¹⁶⁰ which occurs when “widespread negative stereotypes that prevail because people behave in subtly prejudiced ways which actually reinforce” those stereotypes, even if, on the surface, they believe students with disabilities “should be treated equally.”¹⁶¹

Finally, there may be a lack of knowledge about special education law requirements that may impede the effective development of a BIP after an FBA is conducted with the student.¹⁶² Effective BIP legislation within a reauthorized IDEA would emphasize the need for limited suspension and expulsion, procedures to identify students with disabilities at greater risk for violence, and “preventive programs that teach students alternative strategies for solving their

¹⁵⁴ *Id.* at 23–24.

¹⁵⁵ DANYA CONTRACTOR & CHERYL STAATS, KIRWAN INST., *INTERVENTIONS TO ADDRESS RACIALIZED DISCIPLINE DISPARITIES AND SCHOOL “PUSH OUT,”* 2 (2014).

¹⁵⁶ *Id.*

¹⁵⁷ Michelle C. Wilson & Katrina Scior, *Implicit Attitudes towards People with Intellectual Disabilities: Their Relationship with Explicit Attitudes, Social Distance, Emotions and Contact*, PLOS ONE, Sept. 2015, at 9.

¹⁵⁸ *Id.* at 13.

¹⁵⁹ *Id.*

¹⁶⁰ JAY TIMOTHY DOLMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* 7 (2017) (Ableism renders disability as abject, invisible, disposable, less than human, while able-bodiedness is represented as at once ideal, normal, and the mean or default.”); Wilson & Scior, *supra* note 157, at 13.

¹⁶¹ *Id.*

¹⁶² Russell J. Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 BEHAVIORAL DISORDERS 81, 85 (2002) (“[I]n the absence of a well-developed technology and lacking trained personnel, it may be some time before school districts have the capability to conduct functional behavioral assessments that fulfill the law’s intent.”).

problems.”¹⁶³ Furthermore, new legislation would suggest a wider array of responses to disruption in the classroom, equal treatment for students of different minority groups for similar offenses, databases for disciplinary incidents for measuring student outcomes, and “effective alternative schools and in-school suspension programs . . . to keep students who must be removed from class engaged in learning.”¹⁶⁴

The academic literature continues to “reflect a notable misunderstanding of the legal requirements for FBAs and BIPS (i.e., the minimum that must be done) and fail to differentiate professional best practice (i.e., the optimum amount to do).”¹⁶⁵ An effective reauthorization of the IDEA would aim to better align “the ‘should’ of [educators’] professional norms and the ‘must’ of the IDEA’s legal requirements”¹⁶⁶ to bring about better student outcomes, especially to address charter schools’ lack of experienced special education teachers and to attend to student behavior proactively.¹⁶⁷ In 2006, after issuing a number of changes in the regulations, the Office of Special Education Programs (“OSEP”) was careful to differentiate recommendations and requirements of the IDEA: “while the Act requires that an IEP Team consider the use of positive behavioral interventions and supports, and as such, emphasizes and encourages the use of such supports, it does not contain a flat prohibition on the use of aversive behavioral interventions.”¹⁶⁸ Several years later, the Office of Special Education and Rehabilitative Services (“OSERS”) under the Department of Education, did strengthen its previous position by creating more concrete recommendations for the timing and consent requirements for FBAs and BIPs.¹⁶⁹ These recommendations should become legal requirements within a reauthorized IDEA that have funding consequences for schools that do not follow the mandate.¹⁷⁰

In a more recent Dear Colleague Letter, OSERS reaffirmed that “[i]n the case of a child whose behavior impedes the child’s learning or that of others, the IEP Team must consider – and, when necessary to provide a [free and appropriate

¹⁶³ *Id.* at 92.

¹⁶⁴ *Id.* at 92–93.

¹⁶⁵ Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 177 (2011).

¹⁶⁶ *Id.*

¹⁶⁷ Robert A. Garda, *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 696–97 (2012) (“Charters cannot succeed unless given access to strategies for managing the procedural and administrative aspects of special education law and mechanisms the existing system has devised for compliance with the legal mandates. Compelling charters to partner with existing [local education agencies] or each other provides charters with this necessary access and will help them overcome their knowledge gap.”).

¹⁶⁸ Letter from John H. Hager to Barbara Trader, Exec. Dir., TASH (Oct. 9, 2006) (on file with Office of Special Education and Rehabilitative Services); see also Zirkel, *supra* note 165, at 189.

¹⁶⁹ Zirkel, *supra* note 165, at 189–90.

¹⁷⁰ *Id.*

and public education], include in the IEP – the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”¹⁷¹ The letter acknowledged that many students “with disabilities may not be receiving appropriate behavioral interventions and supports.”¹⁷² A reauthorized IDEA should mandate that BIPs should “support[] [the] use [of] proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors [that] are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.”¹⁷³ Moreover, a reauthorized IDEA should state that educators should utilize “predictable and contextually relevant school and classroom routines and expectations, acknowledge[] [students] clearly and consistently for displaying positive academic and social behavior, [and] consistently prompt[] and correct[] [students] when behavior does not meet expectations.”¹⁷⁴ For some students with disabilities, program modifications “may also be necessary to support the child’s involvement and progress in the general education curriculum, advancement towards attaining the annual goals specified in the IEP, and participation in extracurricular and other nonacademic activities.”¹⁷⁵ Although the Department of Education has issued a Behavioral Intervention Implementation Blueprint,¹⁷⁶ charter schools are not obligated in any way to critically self-evaluate using the resource.¹⁷⁷ A reauthorized IDEA should adequately reflect and anticipate charter schools’ failures in including positive behavioral interventions, scheduling IEP Team meetings to review behavioral concerns, discussing parental concerns about the child’s behavior, implementing behavioral supports, and correcting inappropriate behavioral supports already in place.¹⁷⁸

¹⁷¹ Sue Swenson, Acting Assistant Sec’y, Office of Sec’y, Special Educ. & Rehabilitative Servs., & Ruth E. Ryder, Acting Director, Office of Special Educ. Programs, U.S. Dep’t of Educ., Dear Colleague Letter Regarding Education of Children with Disabilities Attending Public Virtual Schools (Aug. 5, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps—08-01-2016.pdf>; *see also* 34 C.F.R. §§ 300.324, 300.320 (2016).

¹⁷² U.S. Dep’t of Educ., Off. of Special Educ. and Rehabilitative Servs., Opinion Letter (Aug. 1, 2016).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; *see also* 34 C.F.R. § 300.320(a)(4)(i) & (ii) (2019).

¹⁷⁶ U.S. Dep’t of Educ., Off. of Special Educ. and Rehabilitative Servs., Opinion Letter (Aug. 1, 2016) (describing the Implementation Blueprint as “a guide to develop local capacity for sustainable, culturally and contextually relevant, and high-fidelity implementation of multi-tiered practices and systems of support”).

¹⁷⁷ Swenson, *supra* note 171; Dep’t of Educ., Off. of Special Educ. and Rehabilitative Servs., Opinion Letter (Aug. 1, 2016) (“Significant guidance” from the Department of Education “is non-binding and does not create or impose new legal requirements.”).

¹⁷⁸ Swenson, *supra* note 171.

B. Individual States Must Clarify Ambiguities in State Charter Law

To ensure uniformity and to prevent discriminatory effects on students with disabilities in charter schools, individual states should clarify charter schools' roles and responsibilities for disciplinary issues. Because each state creates charter schools with varied legislative mechanisms, it falls on each individual state to pass legislation that protects its students by offering appropriate procedural safeguards.¹⁷⁹ *Goss v. Lopez* reiterated that the Constitution requires schools to provide procedural due process safeguards when suspending or expelling students, including students with disabilities.¹⁸⁰ A survey of state legislation demonstrates, however, "[w]ith the exception of Oregon, state legislatures do not compel charter schools to follow constitutional guidelines with respect to due process."¹⁸¹ In the states where "constitutional due process does not govern the charter school-student relationship, . . . it is quite possible that a court will find that contract law applies, as in the case of private schools."¹⁸² While "[a]ll 41 state charter school laws contain specific language (with minor semantic variations) prohibiting charter schools from rejecting students on the basis of their disability," some states' charter laws have no other mention of students with disabilities other than an antidiscrimination clause.¹⁸³ States with unclear charter laws should make amendments to ensure that all students, including with students with disabilities, are adequately protected in case a disciplinary problem does arise and should provide appropriate guidance for schools inexperienced in progressive disciplinary solutions.¹⁸⁴

Although charter school operators generally have fewer locally-based funding sources, they still receive additional state and federal funding for special education.¹⁸⁵ Thus, they are required to create a sufficient special education infrastructure to meet the needs of students with disabilities in their

¹⁷⁹ Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69, 69–70 (1998). For example, Virginia has enacted regulations specifically ensuring that "[e]ach local education agency shall establish, maintain, and implement procedural safeguards." VA. ADMIN. CODE Code § 8-181, 170 (2010).

¹⁸⁰ *Goss v. Lopez*, 419 U.S. 564, 574 (1974); see also Preston C. Green, et al., *Charter Schools. Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. C.R. & SOC. JUST. 253, 272–73 (2012).

¹⁸¹ Green, *supra* note 180, at 272.

¹⁸² *Id.* at 273.

¹⁸³ Lauren Morando Rhim et al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. OF SPECIAL EDUC. 50, 55 (2007).

¹⁸⁴ Some school districts have instituted restorative justice practices, including student mediation, school community service, or verbal or written apologies, along with referrals to professionals or counselors "whose goal is to help reduce students' barriers to learning and provide integrated health/mental health supports to students and their families." *School Interventions for Handling Disruptions of the Education Process and Unacceptable Conducts*, ALBUQUERQUE PUBLIC SCHOOLS (last visited Feb. 18, 2020), <https://www.aps.edu/schools/student-handbook/student-interventions>.

¹⁸⁵ Estes, *supra* note 29, at 217.

communities.¹⁸⁶ Addressing student disciplinary policy in charter law at the outset is beneficial to the public because “unaddressed special education needs can lead to truancy and are one of the common factors among juveniles in the criminal justice system.”¹⁸⁷ States should construct their charter law to provide a source of technical assistance for dealing with the unique needs of students with disabilities during the disciplinary process, perhaps by organizing “special education cooperatives” through which experts provide pathology, psychology, and assessment services.¹⁸⁸ Moreover, charter schools should work to properly evaluate students that may have disabilities so that they can provide services to match their needs.¹⁸⁹ If charter schools take this preliminary step, they can reduce disciplinary problems in the first place and lower the number of youth with disabilities within the criminal justice system, whose rate currently stands at four to five times more than the general population of youth in public schools.¹⁹⁰ Additionally, charter schools may benefit from connection with a local education agency to find additional strategies for disciplining students with disabilities and support services through pooled resources and experience.¹⁹¹

Moreover, state legislatures should facilitate additional support and training for charter school teachers and other administrative officials so as to focus on new approaches, such as restorative justice, instead of continuing the practice of disciplinary exclusion.¹⁹² In states where charter schools were required to report special education and discipline data to the state, “expertise and compliance with federal law were associated with formal training and experience in traditional public school settings.”¹⁹³ State legislatures should mandate similar formal training in charter school settings so that teachers and administrators may become more familiar with federal law standards and their applicability in disciplinary settings. Ultimately, states and policy makers within the legislature have the responsibility to ensure charter schools protect the rights of students with disabilities and provide a free and appropriate education in the least restrictive setting.¹⁹⁴

¹⁸⁶ *Id.*

¹⁸⁷ Erin H. Diaz, *Is it Really a Choice? How Charter Schools Without Choice May Result in Students Without a Free Appropriate Public Education*, 2016 BYU EDUC. & L.J. 25, 29 (2016).

¹⁸⁸ Estes, *supra* note 29, at 217.

¹⁸⁹ *Id.* Evaluation measures should include “direct observations of children during classroom activities; evaluation of samples of work; asking questions orally; and asking informed adults about the child” and will serve to improve classroom instruction, identify special needs, inform the public of educational programming, and hold school officials accountable. NAT’L RESEARCH COUNCIL, TESTING, TEACHING, AND LEARNING: A GUIDE FOR STATES AND SCHOOL DISTRICTS 51 (1999).

¹⁹⁰ Estes, *supra* note 29, at 217.

¹⁹¹ *Id.* at 64.

¹⁹² Losen et al., *supra* note 15, at 23.

¹⁹³ Estes, *supra* note 29, at 218.

¹⁹⁴ Rhim et al., *supra* note 183, at 51.

C. Charter Schools Must Limit the Use of Ineffective and Harmful Alternative Education Programs and Separate Students with Disabilities from the Classroom Only as a Last Resort

Once a charter school begins disciplinary proceedings against a student with a disability, it sometimes removes that student into an alternative education setting.¹⁹⁵ Alternative education settings may be useful to special education students who require “more individualized, intensive focus on instructional delivery,” which may not be available in charter schools due to lack of funding.¹⁹⁶ However, charter schools should limit the use of alternative education settings in order to avoid a less than ideal outcome for students who should be kept in general education to the greatest extent possible¹⁹⁷ as well as a violation of the least restrictive environment requirement.¹⁹⁸ Within the current system, “only 30% of students with learning disabilities are able to achieve grade level performance standards . . . , and longitudinal studies of post-school outcomes for students with learning disabilities indicate that a significantly higher percentage drop out of school, or do not attain basic levels of literacy that will enable them to become successful in work or post-secondary school.”¹⁹⁹ Because some alternative education settings are equally ineffective, however, charter schools should only use alternative education settings for disciplinary issues as an absolute last resort.

Although “alternative schooling” is a broad term, the vast variety of educational placements may be generally broken down into three categories: Type I, Type II, and Type III.²⁰⁰ Type I schools “have an adapted curriculum and teaching strategies . . . [and] provid[e] extra supports to students who are behind in gaining credits or struggling academically in school, who are at risk of dropping out of school, and who choose this type of school.”²⁰¹ Type II schools take students with disciplinary problems “as a last chance before expulsion . . . who were suspended long term, or who would otherwise be expelled from their regular school.”²⁰² “Type III schools serve students with emotional or behavioral problems, and mental health needs where their behavior may make continuing in general education classes difficult.”²⁰³ Charter schools

¹⁹⁵ EMILY MOSS ET AL., *ALTERNATIVE SCHOOLING 2* (2014).

¹⁹⁶ Evelyn S. Johnson & Carrie Semmelroth, *Alternative Service Delivery Models for Students with Learning Disabilities*, 2 INT’L J. OF ACADEMIC RESEARCH IN PROGRESSIVE EDUC. AND DEV. 235, 236 (2013).

¹⁹⁷ Moss et al., *supra* note 195, at 2.

¹⁹⁸ See 34 C.F.R. § 300.114 (2006).

¹⁹⁹ Johnson, *supra* note 196, at 240.

²⁰⁰ Moss et al., *supra* note 195, at 2.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Such “schools can serve as a ‘day treatment’ setting similar to what might be found in a psychiatric hospital day treatment program,” and “serve students in special education who have behavioral needs which are not met in the typical school environment.” *Id.*

that have encountered significant populations of students with emotional or behavioral disabilities use alternative schooling practices as an attempt to comply with existing case law and IDEA by avoiding long-term suspensions or permanent expulsions.²⁰⁴

Although well-organized alternative education settings may benefit some students with disabilities after a disciplinary proceeding,²⁰⁵ one criticism of alternative schools is that they essentially serve as “warehouses” for students with disabilities who could be better served in other ways.²⁰⁶ Additionally, there is a significant drawback with the training of teachers employed at alternative schools. One survey reported that only 60% of alternative schools employed licensed special education teachers, leaving a significant portion of students with disabilities without appropriate care while in attendance.²⁰⁷

Some educators have argued that the needs of special education students are best met with small student-teacher ratios and with readily available individualized education, while others insist that those students would best be served in traditional schools in inclusive settings.²⁰⁸ Although “[s]tudents in alternative schools have reported higher rates of educational achievement, self-esteem . . . earned credits . . . social competence . . . self-actualization . . . attendance, and good attitudes towards education,”²⁰⁹ a substantial risk remains that students with disabilities will be placed there solely because of resultant criminal offenses that may perpetuate delinquent behavior without interaction with peers in a more traditional setting.

Alternative schools may be effective for students with disabilities who otherwise would be at risk for long-term suspension or expulsion, but only if the alternative setting is catered towards those students’ needs.²¹⁰ There must be appropriately trained special education teachers on the staff at the alternative schools.²¹¹ Furthermore, there must be a “clearly stated discipline code coupled

²⁰⁴ *Id.*

²⁰⁵ *Frequently Asked Questions and Promising Practices*, MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUCATION (last visited Feb. 18, 2020), <http://www.doe.mass.edu/alted/faq.html?faq=general> (“Alternative Education has the potential to offer a smaller and more personalized environment in which to learn and form strong connections with school staff and peers” and “may also enable districts to maximize their use of teachers who are skilled in and dedicated to educating at-risk students.”).

²⁰⁶ Moss et al., *supra* note 195, at 3.

²⁰⁷ *Id.* at 5; see Leah Washburn-Moses, *An Investigation of Alternative Schools in One State: Implications for Students with Disabilities*, 44 J. OF SPEC. EDUC. 247–55 (2011).

²⁰⁸ Moss et al., *supra* note 195, at 5.

²⁰⁹ *Id.* at 6.

²¹⁰ *Id.* at 7–8. (stating that schools may accomplish such efforts through providing “support, development opportunities, . . . flexibility . . . and teaching techniques” for staff members, “holistic . . . multicultural . . . and student focused” curriculum for students, “a clearly stated discipline code . . . coupled with a set of norms for acceptable behaviors,” and “a sense of community.”).

²¹¹ *Id.* at 7.

with a set of norms for acceptable behavior” that improves upon the more traditional atmosphere that a charter school nominally offers.²¹² Schools “with a full day of school, small student bodies, small classes, a student-centered atmosphere, alignment of curriculum and assessment, availability of special education services, training and support for teachers, and connections with multiple external agencies,” are proven to be successful, but only for those students who cannot remain in a traditional classroom.²¹³ Alternative schools should be used as a last resort for student with disabilities that may otherwise be better served in charter schools with more robust special education programs that have the capacity to address severe emotional or behavioral needs, but they should remain available for those students who would otherwise face severe disciplinary action and exclusion from typical classrooms.

CONCLUSION

When it comes to effectively protecting students with disabilities during disciplinary procedures, charter schools are not exempt from the requirements of the IDEA, ADA, or Rehabilitation Act.²¹⁴ Schools across the board have disciplined students with disabilities, especially those intersectional students who are also poor or of a racial or ethnic minority group, at a higher rate, and the problem is even worse in charter schools.²¹⁵ Although modern statutory and case law protections exist, charter schools have failed to enact widespread change and students with disabilities often have to chase justice on an individual basis with long and grueling procedures that put them further behind in the classroom.

Thus, Congress should work quickly to reauthorize the IDEA to include additional enforcement measures and clearer guidance for elements in students’ BIPs. Additionally, individual states should clarify ambiguities within their own charter laws to explain the roles and responsibilities for school officials when a disciplinary issue does arise with a student with a disability. Finally, charter schools must limit the use of ineffective and harmful alternative education programs and separate students with disabilities from the classroom only as a last resort. Great strides have been made for students with disabilities in the disciplinary context over the last several decades, but there remains a great distance to go before their rights are fully protected.

²¹² *Id.* at 8.

²¹³ JENNI OWEN, JANE WETTACH & KATIE HOFFMAN, *INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE* 36 (2015).

²¹⁴ 20 U.S.C. § 7221i(2)(G), (K) (2017).

²¹⁵ Losen, et al., *supra* note 15, at 17.

