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## Disrupting the Trajectory: Representing Disabled African American Boys in a System Designed to Send Them to Prison

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# DISRUPTING THE TRAJECTORY: REPRESENTING DISABLED AFRICAN AMERICAN BOYS IN A SYSTEM DESIGNED TO SEND THEM TO PRISON

*Leah Aileen Hill\**

## ABSTRACT

*This Essay presents the narrative of three African American brothers as they journey through the special education system. Their narrative illustrates the human cost of the failure to implement reforms meant to combat the systemic inequality that supports the school-to-prison pipeline. The brothers' narrative is shaped by several factors all too common to the school-to-prison pipeline: unequal treatment of children of color in schools; lack of access to quality health care; structural flaws in the Individuals with Disabilities Education Act ("IDEA"); and poverty. The IDEA is a statute designed to protect the rights of children with disabilities by mandating that states provide students with disabilities with a "free appropriate education" tailored to their unique needs. This Essay recommends interim solutions to address the negative outcomes for students with disabilities caught in the school-to-prison pipeline. Namely, students with disabilities should have access to free interdisciplinary legal services to enforce their rights under the IDEA and to assist with providing access to health care. The Essay suggests that, although there is widespread recognition of the need to implement reforms to address the school-to-prison pipeline, achieving reform is complicated by the deep structural flaws in the systems that contribute to the pipeline. As a result, reform is a slow-moving process. All the while, a whole class of students continues to enter the pipeline and face potentially grave consequences. These students*

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*need solutions now. While access to justice and health care advocacy will not eliminate the pipeline, it can provide much needed relief for individual students and disrupt the pipeline, one case at a time.*

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### INTRODUCTION

It is well known that when some students enter the public school system, they are effectively placed on a track that leads to prison.

Scholars have written extensively about this phenomenon and metaphorically refer to it as the school-to-prison pipeline.<sup>1</sup> The moniker denotes structural factors within and outside of the United States public school system that push certain children out of school and into the criminal justice system.<sup>2</sup> The pipeline “track” begins with laws, policies, and practices that are hyper-focused on enforcing discipline in public schools.<sup>3</sup> These policies then become the vehicle for the implicit biases of school officials charged with enforcing disciplinary codes.<sup>4</sup> As a result, students of low socioeconomic status, students of color, students with disabilities, and male students are disproportionately subjected to discipline and, thus, more likely to be placed on the pipeline track.<sup>5</sup> Once singled out, these students tend to experience harsh disciplinary practices, such as suspension, expulsion, and sometimes even arrest.<sup>6</sup> These students are then more likely to fall behind in their classes or to completely disengage from school.<sup>7</sup> This, in turn, leads to their entry into the criminal justice system.<sup>8</sup>

It is particularly curious that students with disabilities are disproportionately subjected to discipline in public schools given the

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1. See, e.g., Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 4 (2013); Logan J. Gowdey, Note, *Disabling Discipline: Locating a Right to Representation of Students with Disabilities in the ADA*, 115 COLUM. L. REV. 2265, 2265–66 (2015); see also *School to Prison Pipeline*, AM. CIVIL LIBERTIES UNION [hereinafter ACLU], <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline> [https://perma.cc/N2NZ-3D8H].

2. See ACLU, *supra* note 1.

3. See, e.g., Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NW. J.L. & SOC. POL'Y 58, 62–64 (2013); Rocío Rodríguez Ruiz, Comment, *School-to-Prison Pipeline: An Evaluation of Zero Tolerance Policies and Their Alternatives*, 54 HOUS. L. REV. 803, 807–10 (2017).

4. See, e.g., Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 285–86, 289, 297–98 (2016).

5. See *id.*; see also S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 273, 275–76, 291–96 (2014); Comm. on Sch. Health, Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003). See generally Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17, 31 (2003) (finding that two-thirds of poor African American boys with disabilities were suspended at least one time during their sixth-grade year).

6. See, e.g., Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court: A School-Justice Partnership*, 83 N.Y. ST. B. ASS'N J. 26, 33 (2011) (citing evidence that students who are suspended or expelled from school are more likely to become disconnected from school and engage in criminal behavior).

7. *Id.*

8. *Id.*

protections they are afforded under the IDEA.<sup>9</sup> The IDEA authorizes federal funding for states to assist in providing for the educational needs of students with disabilities.<sup>10</sup> In order to receive funding under the IDEA, states must comply with a broad array of substantive and procedural mandates.<sup>11</sup> As implemented, states are required to locate, identify, and evaluate children suspected of having a disability.<sup>12</sup> States must then provide these children with a free appropriate public education (“FAPE”), which includes special education and related services designed to meet their unique needs.<sup>13</sup> The IDEA also provides comprehensive evaluation procedures<sup>14</sup> to ensure that disabilities are correctly identified and that the needs of children found to have disabilities as outlined under the IDEA are met.<sup>15</sup>

School-age students must meet the criteria for one of ten categories of disabilities outlined under the IDEA in order to be protected by its

9. See DANIEL J. LOSEN & JONATHAN GILLESPIE, UCLA CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 2, 14 (2012) (describing the higher risk of suspension for black students with disabilities nationally—sixteen percentage points higher than the risk for white students with disabilities). Losen and Gillespie express surprise that IDEA protections have not prevented these:

[S]obering disparities, given that federal law expressly requires schools to provide a behavioral assessment and behavioral improvement plan for students with disabilities who exhibit behavioral problems to ensure that they receive the supports and services they need. In light of these essential supports and services, and procedural safeguards, one would expect the rates among students with disabilities to be equal to or less than students without disabilities.

*Id.* at 14.

10. 20 U.S.C.A. § 1400(d) (West 2017); see also *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 991 (2017).

11. See generally 20 U.S.C.A. §§ 1414, 1415 (West 2017).

12. For one example of the eligibility requirements for federal funding under the IDEA, see 34 C.F.R. § 300.111(a)(1)(i)–(ii) (2017) (“All children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”).

13. *Andrew F.*, 137 S. Ct. at 994 (“A FAPE, as the Act defines it, includes both ‘special education’ and ‘related services.’ ‘Special education’ is ‘specially designed instruction . . . to meet the unique needs of a child with a disability’; ‘related services’ are the support services ‘required to assist a child . . . to benefit from’ that instruction.” (internal citations omitted)).

14. See 20 U.S.C.A. § 1414(b)(2) (West 2017).

15. See *id.* § 1414(c)(1).

substantive and procedural mandates.<sup>16</sup> Once eligibility is determined, these students are entitled to a panoply of educational services and interventions, along with robust procedural protections that extend to their parents.<sup>17</sup> Students receive services via an Individualized Education Program (“IEP”) developed by a multidisciplinary team.<sup>18</sup> For students whose behavior interferes with their learning, consideration of “positive behavioral interventions and supports, and other strategies, to address that behavior” is required when developing the IEP.<sup>19</sup> There are additional procedural protections for disabled students who are removed from the classroom for a violation of school conduct codes.<sup>20</sup> Ideally, these protections, along with many others outlined in the statute, should prevent students with disabilities from entering the school-to-prison pipeline.<sup>21</sup> In reality, students with disabilities, especially black students and those with emotional or behavioral problems,<sup>22</sup> are more likely to be on the pipeline path.<sup>23</sup>

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16. Under IDEA, ten categories of disability are outlined in the definition of the term “child with a disability,” which means:

[A] child . . . with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A) (West 2017). Each category is further defined in the regulations implemented pursuant to IDEA at 34 C.F.R. § 300.8(c).

17. *See generally* 20 U.S.C.A. §§ 1414, 1415. *See also infra* Part II.

18. *See* 20 U.S.C.A. § 1414 (c), (d)(3).

19. *Id.* § 1414 (d)(3)(B)(i).

20. Such students are entitled to a long list of due process protections including a “manifestation review” within ten days of the decision to remove them from the classroom for more than ten days. *See* 20 U.S.C.A. § 1415(k). The purpose of the review is to determine whether the student was disciplined for behavior connected to his or her disability, or if the behavior results from a failure to follow the student’s IEP. *See id.* If the manifestation review determination finds that the student’s behavior was connected to his disability, or resulted from the failure to follow his IEP, the student cannot be removed from his or her school and is entitled to have a behavior implementation plan added (or amended if one already exists) to his IEP. *See id.*

21. *See generally* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009).

22. *See, e.g.,* Stephanie M. Poucher, *The Road to Prison Is Paved with Bad Evaluations: The Case for Functional Behavioral Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471, 486–87, n.82–83 (2015).

23. *See generally* Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y. L. SCH. L. REV. 909 (2010).

This Essay details the story of three boys' journeys through the school-to-prison pipeline.<sup>24</sup> The boys are brothers and are eight, twelve, and fourteen years old at the time each of their stories unfold. The brothers came to the attention of the Family Advocacy Clinic ("FAC") at Fordham University School of Law when their grandmother, Denise Joseph, sought legal assistance from Lincoln Square Legal Services, Inc., the law firm through which the FAC operates. Ms. Joseph did not seek help for all the brothers at once. She came to the FAC on three separate occasions, each time after she had tried working within the school system.<sup>25</sup>

The brothers' stories are not necessarily unique. They are young black boys who faced multiple obstacles in the public school system—for example, harsh discipline for childhood behavior or suspension from school—and, eventually, they were, in some ways, written off. They attended schools that were underfunded and lacked the resources to provide the services these boys needed most. Their stories are similar to those of countless other children on the school-to-prison pipeline path.<sup>26</sup> This Essay uses the brothers' stories to highlight the human costs of policies and practices that contribute to the pipeline and to animate the discourse on what is at stake for children caught therein. By highlighting the daily experiences of these three brothers, this Essay bears witness to the pain and potential loss that underlie calls for reform. The Essay also sheds light on how access to justice, along with reforms to the IDEA, can shift the course for students.

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24. The narrative in this Essay is based on the actual experience of a client represented by students enrolled in the Family Advocacy Clinic at Fordham University School of Law, an interdisciplinary law practice in which law and social work students work side-by-side to solve client legal problems. Pseudonyms are used to provide anonymity for the client and her family, and some of the non-material facts have been altered to protect their privacy. References to the client's story are not cited throughout this document due to client confidentiality. All confidential references are with the author.

25. This client, an older African American woman, felt a deep connection to her community. Despite some of the challenges she faced advocating for her grandsons, her commitment to her community extended to schools in the neighborhood where she had lived for most of her adult life. It was interesting to observe her efforts to work with school officials and give them the benefit of the doubt regarding their commitment to the children in the community.

26. Many scholars include stories of individual children to highlight on-the-ground casualties of the school-to-prison pipeline. *See generally, e.g.*, Yael Cannon et al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403 (2013); Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373 (2016); Rivkin, *supra* note 23.

This Essay proceeds in five parts. Part I describes the school-to-prison pipeline—its origins and the various risk factors for entering the pipeline. Part II explores how the IDEA, despite its incredible promise, fails to protect some disabled students from being disproportionately affected by policies and practices that contribute to the pipeline. Part III describes the brothers’ narrative. Part IV explores how access to justice, via interdisciplinary legal services, can disrupt the journey of students on the pipeline path and serve as a mechanism for restoring dignity to students with disabilities. Part V returns to the brothers’ narrative to illustrate the promise of access to justice for students previously on track to prison.

## I. SIGNPOSTS ALONG THE SCHOOL-TO-PRISON PIPELINE TRACK

### A. Brief Primer on the School-to-Prison Pipeline

Construction of the school-to-prison pipeline began in the late eighties and early nineties when draconian laws and policies targeting school behavior were introduced, first at the federal level and later implemented at the state level.<sup>27</sup> Many scholars point to “zero tolerance” policies introduced in 1994 through the Gun Free Schools Act (“GFSA”) as the catalyst for the more intense focus on punishing children in schools.<sup>28</sup> The GFSA mandated strict punishments, typically suspension or expulsion, for students who brought guns to school.<sup>29</sup> Although the GFSA was intended to address gun violence, it included provisions that allowed school districts tremendous latitude to determine the kind of infractions that would fall under the zero tolerance umbrella.<sup>30</sup> Thereafter, many schools used that discretion to create disciplinary standards that were harsh and

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27. Beginning in the 1980s during the Reagan Administration, legislators increasingly focused on getting “tough” on crime. *See* McNeal, *supra* note 4, at 288. Lawmakers later crafted “zero tolerance” policies to address the increasing amount of gun violence committed at schools in the early 1990s. *See* Ruiz, *supra* note 3, at 807.

28. Jason P. Nance has written extensively on the school-to-prison pipeline phenomenon, its impetus, causes and implications. *See generally, e.g.*, Jason P. Nance, *Dismantling the School to Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313 (2016); Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063 (2016); Nance, *Students, Security, and Race*, *supra* note 1. *See also* McNeal, *supra* note 4, at 289; Mitchell, *supra* note 5, at 272; Elbert H. Aull IV, Note, *Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison-Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline*, 27 OHIO ST. J. ON DISP. RESOL. 179, 180 (2012).

29. *See* Ruiz, *supra* note 3, at 807.

30. *See id.* at 808–09.



inflexible.<sup>31</sup> These schools mandated strict punishments, often suspension or expulsion for even the most minor infractions, regardless of the individual circumstances.<sup>32</sup> Moreover, the GFSA and zero tolerance policies ushered in an era of increased acceptance of using law enforcement personnel and practices to enforce school disciplinary codes.<sup>33</sup>

Students subject to discipline under zero tolerance regimes are funneled into the criminal justice system through various access points.<sup>34</sup> The most direct route occurs when school officials report students to law enforcement for incidents that occur in school.<sup>35</sup> Some students who are suspended lose valuable instruction time and are more likely to be unsupervised, putting them at risk of contact with the juvenile justice system.<sup>36</sup> Students who are suspended or expelled are more likely to drop out of school and have less access to employment opportunities, making them more socially and economically vulnerable<sup>37</sup> and more likely to engage in criminal activity.<sup>38</sup>

## B. Categorical Markers, Structural Inequality, and the Pipeline Path

Not all students are susceptible to entering the school-to-prison pipeline.<sup>39</sup> Indeed, a student's race, class, gender, and disability status

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31. See Ruiz, *supra* note 3, at 808 (describing zero tolerance policies as regulations that “require specific punishments for outlined student misbehaviors irrespective of the circumstances surrounding the incident”); Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 153 (2015) (explaining that schools apply “pre-determined consequences” regardless of any “mitigating circumstances”).

32. Some examples of these infractions include “wearing too much perfume,” “eating chicken nuggets from a classmate’s tray,” “throwing skittles at another student,” or “doodling on a desk.” Merkwae, *supra* note 31, at 154; see also Ruiz, *supra* note 3, at 808 (describing a school who “suspended a kindergartener for wearing a fireman’s costume that included a plastic ax”). See generally McNeal *supra* note 4, at 291 (providing longitudinal data that indicates school arrests are commonly for minor misconduct); Wolf, *supra* note 3, at 70–71.

33. See generally Merkwae, *supra* note 31. See also Mitchell, *supra* note 5, at 274 (explaining that schools that employ zero tolerance policies require school officials to refer students to law enforcement and that many schools have law enforcement personnel present on school grounds).

34. See Mitchell, *supra* note 5, at 274–76.

35. See generally Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, *supra* note 28.

36. See Mitchell, *supra* note 5, at 283–84.

37. See *id.* at 283–84 n.237.

38. *Id.* at 283–84; see also ACLU, *supra* note 1.

39. See Mitchell, *supra* note 36.

determine the likelihood of placement on the pipeline track.<sup>40</sup> If a student is living in poverty, he is more likely to enter the pipeline.<sup>41</sup> If he is African American, disabled, or male, he is more likely to be affected by the policies and practices that contribute to the school-to-prison pipeline.<sup>42</sup> Individually, each of these markers increases the chances that a student will be suspended or expelled from school and funneled into the criminal justice system.<sup>43</sup> It follows, then, that students who carry more than one marker are at a far greater risk of entering the school-to-prison pipeline.<sup>44</sup>

### 1. Poverty

Poverty is associated with a range of conditions that affect children and increase their chances of entering the school-to-prison pipeline.<sup>45</sup> For instance, students born into poverty do not have access to resources that can support their academic success.<sup>46</sup> They often lack access to quality healthcare, which is a necessary resource for healthy development.<sup>47</sup> As a result, they are more likely to suffer from health conditions that affect their school readiness.<sup>48</sup> The lack of access to quality healthcare is compounded by the fact that children who endure poverty are more likely to live in areas filled with environmental toxins that are detrimental to their health and well-being.<sup>49</sup> Housing conditions in impoverished neighborhoods are often poor and inadequate.<sup>50</sup> Some children do not have homes and

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40. See Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 163, 169 (2011).

41. *See id.*

42. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, *supra* note 28, at 318 (“National, state, and local data across all settings and at all school levels clearly demonstrate that school administrators and teachers discipline minority students, particularly African-American students, more harshly and more frequently than similarly-situated white students.”).

43. *See id.*

44. *See, e.g.*, ACLU, *supra* note 1.

45. *See* Barbara Fedders & Jason Langberg, *School-Based Legal Services as a Tool in Dismantling the School-to-Prison-Pipeline and Achieving Educational Equity*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 212, 221–24 (2013).

46. *See id.*

47. *See id.*

48. *See* Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1472 (2007) (citing RICHARD ROTHSTEIN, *CLASS AND SCHOOLS* 37–43 (2004)).

49. *See id.*

50. *See id.*

are forced to live in homeless shelters, where the lack of permanent housing undermines their sense of security.<sup>51</sup> Children who do not have adequate housing often move more frequently and do not enjoy simple comforts many of us take for granted, such as a quiet study space.<sup>52</sup> Crime and violence are also associated with areas of concentrated poverty.<sup>53</sup> Children growing up under these conditions can develop a “toxic stress response.”<sup>54</sup> This, of course, adds to the deluge of problems children in poverty face—all of which accompany them to school.<sup>55</sup>

Schools in districts where there is a high concentration of poverty face a separate set of challenges. A report by the United States Department of Education (“DOE Study”) released in 2011 reveals that these schools are more likely to be underfunded.<sup>56</sup> The DOE Study included a comparison of spending patterns between high-poverty and low-poverty schools within the same school districts.<sup>57</sup> The DOE Study revealed that spending was more likely to be lower

51. See generally ELLEN L. BASSUK ET AL., NAT’L CTR. ON FAMILY HOMELESSNESS AT AM. INSTS. FOR RESEARCH, AMERICA’S YOUNGEST OUTCASTS: A REPORT CARD ON CHILD HOMELESSNESS (2014).

52. Rebell, *supra* note 48, at 1473.

53. See Kerri Ullucci & Tyrone Howard, *Pathologizing the Poor: Implications for Preparing Teachers to Work in High-Poverty Schools*, 50 URB. EDUC. 170, 172 (2015).

54. Ctr. on the Developing Child, *In Brief: The Impact of Early Adversity on Children’s Development*, HARV. UNIV. (2007), <https://46y5eh1fhgw3ve3ytpwxt9r-wpengine.netdna-ssl.com/wp-content/uploads/2015/05/inbrief-adversity-1.pdf> [<https://perma.cc/VSB8-FSNL>] (explaining that “[w]hen strong, frequent, or prolonged adverse experiences such as extreme poverty . . . are experienced without adult support, stress becomes toxic, as excessive cortisol disrupts developing brain circuits” and that poverty is identified as one of the “common precipitants” of toxic stress).

55. See generally Fedders & Langberg, *supra* note 45, at 213 (stating that children in poverty face “substantial hurdles” to performing well in an academic setting due to poverty’s negative effects). While the data on challenges facing families who experience poverty is bleak, it is also important to recognize that many who live in these environments do not perceive their world in that way. As Christopher Emdin points out, students who live in these neighborhoods often form strong, tight-knit, interconnected bonds based on their shared experiences. CHRISTOPHER EMDIN, FOR WHITE FOLKS WHO TEACH IN THE HOOD . . . AND THE REST OF Y’ALL TOO: REALITY PEDAGOGY AND URBAN EDUCATION 137 (2016). Emdin argues it is possible to use the context in which these connections develop as a pedagogical tool to improve school outcomes for these students. *Id.*

56. See generally RUTH HEUER & STEPHANIE STULLICH, U.S. DEP’T OF EDUC., COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOLS WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES (2011).

57. See *id.* at 22.

per pupil in the high-poverty schools.<sup>58</sup> Moreover, schools in high-poverty districts tend to hire inexperienced teachers who are paid less than their cohorts in wealthier school districts.<sup>59</sup> Other studies have found that teachers in urban, high-poverty school districts are more likely to have failed a certification exam and are more likely to teach a subject outside of their expertise.<sup>60</sup>

Pedro Noguera, a sociologist whose research focuses on public education, race and poverty, looks beyond the debate about funding differences among schools and points to additional factors that undermine the effectiveness of schools in impoverished communities.<sup>61</sup> The first of those factors, a lack of external support for children, describes how the limited resources of low-income parents make it difficult, if not impossible, for those parents to provide the kind of external supports that middle-class parents routinely provide.<sup>62</sup> These include supports like tutoring and enrichment programs that increase a child's ability to succeed.<sup>63</sup>

Noguera identifies what other researchers have acknowledged, namely that schools in poor neighborhoods are further challenged by what he refers to as "environmental obstacles."<sup>64</sup> These obstacles include conditions outside of school that have an impact on the children they serve, such as higher rates of intra-personal violence and increased psychological stress.<sup>65</sup> Noguera identifies "negative social capital" as an additional factor that undermines the ability of parents and schools to work collaboratively to enhance the resources

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58. *See generally id.* (examining school-level expenditures from state and local funds only for total personnel salaries for all school-level instructional and support staff, salaries for instructional staff, salaries for teachers, and non-personnel expenditures, but not comparing expenditures for special education, adult education, school nutrition programs, summer school, preschool, and employee benefits).

59. *See* Sam Dillon, *Districts Pay Less in Poor Schools, Report Says*, N.Y. TIMES (Nov. 30, 2011), <http://www.nytimes.com/2011/12/01/education/us-education-department-finds-salary-gap-in-poor-schools.html> [<https://nyti.ms/2v7mWkJ>].

60. *See, e.g.*, Patrice Iatarola & Leanna Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 22 ECON. EDUC. REV. 69, 73–74 (2003); Hamilton Lankford et al., *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 37, 44 (2002).

61. *See generally* Pedro Noguera, *A Broader and Bolder Approach Uses Education to Break the Cycle of Poverty*, 93 PHI DELTA KAPPAN 8 (2011).

62. *Id.* at 10 (citing ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003)). Noguera points out that middle-class parents routinely provide "a broad assortment of advantages" like tutoring, enrichment camps, and homework help, supports that poor parents are generally not able to provide. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

available to children and transform schools.<sup>66</sup> On the one hand, wealthy parents bring positive connections to outside resources and social networks, as well as a kind of built-in mutual trust across institutions. They can leverage all of this positive social capital to enhance the quality of schools in their neighborhoods.<sup>67</sup> In contrast, low-income parents, strapped by a lack of access to resources and social connections, as well as a kind of reciprocal cycle of mistrust (they do not trust institutions that serve them and the institutional players tend not to trust them), are saddled with “negative social capital.”<sup>68</sup> Noguera points out that this “negative social capital” can actually further undermine schools that serve poor children.<sup>69</sup>

Given the extraordinary needs and challenges families with children living in poverty face—by spending less per student in high-poverty schools and staffing those schools with inexperienced and uncertified teachers—schools that serve poor children are required to do more with less.<sup>70</sup> The end result is that children and schools in high-poverty neighborhoods face an uphill battle. This is not to suggest that it is not possible to provide a wholesome education to meet the needs of children in poverty or that poor children are destined to fail. Many poor children can, and do, succeed despite the odds.<sup>71</sup> Moreover, there are some phenomenal schools throughout the country that have developed successful models for educating children who are poor.<sup>72</sup> However, the vast majority of schools are

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66. *Id.* at 11.

67. *Id.*

68. *Id.*

69. *Id.*

70. When the DOE Study was announced via a press release, Arne Duncan, who was the Secretary of Education at the time, stated what has long been accepted by educators and federal legislators that “low-income students need extra support and resources to succeed.” Press Release, U.S. Dep’t of Educ., More Than 40% of Low-Income Schools Don’t Get a Fair Share of State and Local Funds, Department of Education Research Finds (Nov. 30, 2011), <https://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department-education-research-finds> [<https://perma.cc/9KDE-RBDN>]; see also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 285 (1999) (referring to students from lower socioeconomic backgrounds, Ryan states, “[d]isadvantaged students simply cost more to educate, requiring additional educational programs and non-academic services such as health care and counseling”).

71. See generally Sara DePasquale & Victoria Silver, *Collaboration of a Juvenile Justice Law School Clinic and Legal Services Agency to Fully Serve the Legal Needs of Children*, 41 N. KY. L. REV. 225 (2014).

72. The Harlem Children’s Zone Promise Academy schools in New York City are a model of effective education for children living in poverty. A study on the Promise Academy revealed that the program effectively eliminated the achievement gap in mathematics between poor minority students and white middle school students by

not designed to address the multitude of challenges facing children who live in poverty.<sup>73</sup> Thus, poverty remains an all-encompassing factor allowing the pipeline to develop and flourish.<sup>74</sup>

## 2. Race

Disproportionate use of discipline in schools has the greatest impact on black and Latino children.<sup>75</sup> United States Department of Education data reveals that black and Latino children are disciplined more often, suspended more often, expelled more often, referred to the police more often, and arrested more often than their white counterparts.<sup>76</sup> Black students experience the highest rates of excessive discipline.<sup>77</sup> Black students are more likely to be suspended whether they are in preschools or K-12 schools.<sup>78</sup> Black preschool students are 3.6 times as likely to receive one or more out-of-school suspensions as white preschool children.<sup>79</sup> Black K-12 students are 3.8 times more likely to receive one or more out-of-school suspensions as white students.<sup>80</sup> Racial disparities in the use of discipline exist for both black boys and girls, who are suspended from school at rates that are higher than any of their peers.<sup>81</sup> Black students are also more likely to be expelled from school and more likely to be referred to law enforcement by school officials.<sup>82</sup> It is

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the time they reached ninth grade, and eliminated the achievement gap in language arts for poor minority students in the elementary school programs at Promise. See Will Dobbie & Roland G. Fryer, *Are High-Quality Schools Enough to Increase Achievement Among the Poor? Evidence from the Harlem Children's Zone*, 3 AM. ECON. J.: APPLIED ECON. 158, 158–187 (2011); see also DANIELLE HANSON, HERITAGE FOUND., *ASSESSING THE HARLEM CHILDREN'S ZONE* 1, 5 (2013).

73. See generally Noguera, *supra* note 61.

74. See HB Ferguson et al., *The Impact of Poverty on Educational Outcomes for Children*, 12 PEDIATRIC CHILD HEALTH 701, 702–03 (2007); Helen F. Ladd, *Education and Poverty: Confronting the Evidence*, 31 J. POL'Y ANALYSIS & MGMT. 203, 203, 220–21 (2012); Linda Pagani et al., *Effects of Poverty on Academic Failure and Delinquency in Boys: A Change and Process Model Approach*, 40 J. CHILD PSYCHOL. & PSYCHIATRY 1209, 1210 (1999).

75. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 1 (2016) [hereinafter CRDC], <https://www.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/K4GB-XQBY>].

76. See *id.* at 4.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.* at 3.

81. See *id.*; see also U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014).

82. See CDRC, *supra* note 75.

generally acknowledged that these disparities result from bias against black students.<sup>83</sup> Unfortunately, this acknowledgement does little to help those students who are subjected to bias.<sup>84</sup>

### 3. Disability

Children with disabilities are similarly overrepresented in the population of students subjected to school-to-prison pipeline policies and practices.<sup>85</sup> This holds true even when they are served by the IDEA.<sup>86</sup> Students with disabilities served by the IDEA are more than twice as likely as their nondisabled peers to receive one or more out-of-school suspensions.<sup>87</sup> Many of these students are in a double bind. For example, students classified as emotionally disturbed under the IDEA often have social, emotional, and behavioral difficulties.<sup>88</sup> Thus, the very nature of their disabilities makes it difficult for them to manage their behavior.<sup>89</sup> Yet students with emotional disturbance are suspended or expelled at significant rates compared to their peers.<sup>90</sup> Disproportionate suspensions are only part of the school-to-

83. See Nance, *Dismantling the School to Prison Pipeline: Tools for Change*, *supra* note 28, at 327 (“There is evidence suggesting that some school administrators and teachers believe that some students, particularly African-American male students, simply cannot be taught, are ‘unsalvageable,’ and are prison-bound.”); see also EMDIN, *supra* note 55, at 7. Emdin makes a powerful case for how negative perceptions and misperceptions of socioeconomically disadvantaged students of color pervade pedagogy in urban schools. Emdin presents evidence that students of color in urban schools are generally seen as damaged, and in need of saving. *Id.* He proposes a reality based pedagogy that harnesses the lived experiences of students in urban schools as the antidote to the divide that often pervades student-teacher interactions. *Id.*

84. As S. David Mitchell points out, research shows that students of color subjected to disproportionate exclusionary discipline “suffer various education-interrupting consequences” including the risk that they will not return to school and will ultimately be deprived of a means of upward mobility. Mitchell, *supra* note 5, at 275. Suspension from school, for example, deprives students of critical instruction time, and can cause alienation from peers. *See id.* at 275–76. Students who are suspended are more likely to end up in the juvenile and criminal justice systems. *See id.* Effectively these students go from being disenfranchised in the school environment as youth to being disenfranchised adults. *See id.*

85. *See* CDRC, *supra* note 75.

86. *See id.*

87. *See id.*

88. Emotional disturbance (also referred to as “serious emotional disturbance”) is defined in part as “—a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: . . . (C) Inappropriate types of behavior or feelings under normal circumstances.” 34 C.F.R. § 300.8(4)(i)(C) (2017).

89. *See generally* 20 U.S.C.A. § 1401 (West 2017); 34 C.F.R. § 300.8.

90. *See, e.g.*, Cannon et al., *supra* note 26, at 411, 416–17.

prison pipeline story for disabled students. Students with emotional and learning disabilities are arrested at higher rates than their nondisabled peers.<sup>91</sup> Even though they represent just twelve percent of the student population, they represent a quarter of the students referred to law enforcement or subjected to arrest.<sup>92</sup> Moreover, students who are suspended or expelled have a greater risk of dropping out of school and an increased risk for future incarceration.<sup>93</sup>

Given the disproportionate number of arrests for students with disabilities, it is not surprising that they also experience greater rates of incarceration.<sup>94</sup> Estimates indicate that between thirty and seventy percent of young people in juvenile correction facilities have disabilities.<sup>95</sup> Incarceration of youth with disabilities can have grave consequences. Recidivism is more common than rehabilitation for youth who enter the juvenile justice system.<sup>96</sup> Juvenile offenders can also endure long-term stigma and disenfranchisement.<sup>97</sup>

#### 4. Gender

The final categorical mark of significance for the school-to-prison pipeline is gender. Boys are generally subjected to greater discipline, including suspension and expulsion, than girls.<sup>98</sup> The disproportionate impact starts in preschool, where seventy-eight percent of the students who are suspended are boys.<sup>99</sup> National data also reveals that, “[w]hile boys and girls each represent about half of

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91. *See id.* at 420–22.

92. *See* NANCY A. HEITZEG, *THE SCHOOL-TO-PRISON PIPELINE: EDUCATION, DISCIPLINE, AND RACIALIZED DOUBLE STANDARDS* 82 (2016).

93. *See* Mitchell, *supra* note 5, at 274.

94. *See, e.g.*, Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 229 (2013).

95. *See id.*; *cf.* PATRICIA PURITZ & MARY ANN SCALI, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY* n.56 (1998), <https://www.ojjdp.gov/pubs/walls/sect-03.html> [<https://perma.cc/RYZ6-TQWL>] (explaining challenges with estimating the exact number of disabled children in juvenile facilities and observing that “[w]hat we do know is that the percentage of youth in juvenile correctional facilities who were previously identified and served in special education programs prior to their incarceration is at least three to five times the percentage of the public school population identified as disabled.”).

96. *See* Ruiz, *supra* note 3, at 812–13.

97. *See* Mitchell, *supra* note 5, at 322.

98. *See generally* CDRC, *supra* note 75.

99. *See id.* at 3. While boys represent 54% of the preschool population, they represent 78% of the population of students who receive one or more suspensions.



the student population, boys represent nearly three out of four of those suspended multiple times out of school and expelled.”<sup>100</sup> As is the case with race, bias appears to play a role in the targeting of boys.<sup>101</sup> However, while there is some evidence that boys are often disciplined more harshly than girls because of stereotypes about boys and aggression,<sup>102</sup> most of the research points to the multiple risks associated with being male and black.<sup>103</sup> In educational settings throughout the United States, black males face risks beyond the risk of suspension, expulsion, and arrest. The painful truth is that black males suffer more negative outcomes than any other group.<sup>104</sup> Thus, while male students risk inordinate discipline and expulsion in public schools, for black male students, the risks are manifold and compounding.<sup>105</sup>

## II. DORMANT PROMISES: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Education of Handicapped Children Act of 1975 (“EHC”) was enacted to “provide educational assistance to all handicapped children.”<sup>106</sup> The EHC was amended in 1990 and renamed the IDEA.<sup>107</sup> The plethora of substantive and procedural rights encompassed under IDEA is best summarized through the six core

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100. *See id.* at 5.

101. *See* McNeal, *supra* note 4, at 289.

102. *Id.*

103. *See* PEDRO NOGUERA, THE TROUBLE WITH BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION, at xi (2008); *see also* Nancy E. Dowd, *What Men?: The Essentialist Error of the End of Men*, 93 B.U. L. REV. 1205, 1209 (2013); McNeal, *supra* note 4, at 289; Mendez, *supra* note 5, at 31.

104. NOGUERA, *supra* note 103, at xvii (“School discipline patterns are just one of several troubling indicators commonly associated with Black males. When the full picture of educational performance among Black males is analyzed, the results are even more disturbing. On every indicator associated with progress and achievement—enrollment in honors courses, Advanced Placement, and gifted programs—Black males are vastly underrepresented, and in every category associated with failure and distress—discipline referrals, dropout rates, grade retention—Black males are overrepresented.”).

105. *See id.*

106. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as 20 U.S.C. § 1401 (1976)).

107. The 1990 amendment was a part of the reauthorization of the Act, which included the name change as well as several other small changes. *See* Cong. Research Serv., Summary: S.1824—101st Cong. (1989–1990) (1990), <https://www.congress.gov/bill/101st-congress/senate-bill/1824> [<https://perma.cc/XUR9-R7VS>].

principles identified by some scholars:<sup>108</sup> (1) every child with a disability is entitled to receive a “free appropriate public education,” referred to as the “zero reject” principle;<sup>109</sup> (2) students suspected of having a disability must receive comprehensive, nondiscriminatory evaluations in order to determine the nature and extent of their disabilities;<sup>110</sup> (3) students deemed eligible for services under the IDEA are entitled to an appropriate education through an individualized program with special education and related services designed to meet their unique needs;<sup>111</sup> (4) disabled students are entitled to be educated in the least restrictive environment,<sup>112</sup> signifying a preference for placing students in classrooms with their nondisabled peers;<sup>113</sup> (5) parents and children are entitled to participate in the decision-making regarding the provision of a free appropriate public education;<sup>114</sup> and (6) these children and their parents are afforded procedural protections of their respective rights, including the right to enforcement via a private right of action.<sup>115</sup>

Of the rights conferred by the IDEA, the right to adequate nondiscriminatory evaluation of children suspected of having a disability is paramount.<sup>116</sup> The IDEA evaluation requirements are

108. See H. RUTHERFORD TURNBULL III, MATTHEW J. STOWE & NANCY E. HUERTA, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* 44 (7th ed. 2006); see also Kim Millman, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 465–68 (2007).

109. See U.S.C.A. § 1401(9) (West 2017); see also Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 995 (2017).

110. See *generally* 20 U.S.C.A. § 1414(a).

111. See *id.* § 1401(9) (defining “free appropriate education”); *id.* § 1414(d)(1)(A) (detailing requirements for IEPs).

112. The IDEA requires:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only 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.

*Id.* § 1412(a)(5)(A).

113. See *id.*

114. See *id.* § 1415(b).

115. See *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010).

116. Students do not have access to the appropriate and necessary services until the student is evaluated and deemed eligible for an IEP. Eligibility determinations necessarily depend upon adequate evaluation. “[The] eligibility determination is the most important aspect of the IDEA. It is the lynchpin from which all other rights under the statute flow.” *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007); see also *N.B. v. Hellgate Elementary*

designed to ensure that the nature and extent of the child's disability are fully understood so that they can get appropriate and needed services.<sup>117</sup> Theoretically, students who are properly evaluated would be more likely to be correctly diagnosed, their disabilities correctly understood, and their educational interventions successful since they are tailored appropriately to meet their specific educational needs.<sup>118</sup>

Cracks in the structure of the IDEA undermine the principle of adequate evaluations. First, some provisions related to evaluations are overly vague.<sup>119</sup> Second, Congress has failed to authorize adequate funding to states to implement the IDEA's many mandates, leaving states to fill the gaps.<sup>120</sup> Evaluations of children with complicated disabilities can be expensive,<sup>121</sup> and without funding from the federal government, states have an incentive to curb costs by conducting evaluations using their own personnel.<sup>122</sup> These individuals sometimes do not have the expertise to provide the kind of evaluations that are needed.<sup>123</sup> Third, and perhaps the most challenging flaw for children living in poverty, is the very thing that provides teeth for the IDEA's promises—the private right of action.<sup>124</sup> Without access to quality evaluations and attorneys who

Sch. Dist., *ex rel.* Bd. of Dir., Missoula Cty., Mont., 541 F.3d 1202, 1210 (9th Cir. 2008) (holding that, without evaluative information, it was not possible to develop a FAPE for a child with autism).

117. *See generally V.S. ex rel. A.O.*, 484 F.3d 1230; *N.B.*, 541 F.3d 1202.

118. *See generally V.S. ex rel. A.O.*, 484 F.3d 1230; *N.B.*, 541 F.3d 1202.

119. *See infra* Section III.A. For example, the act requires that school districts “use a variety of assessment tools” and that students be evaluated in “all areas of suspected disability.” 20 U.S.C.A. §§ 1414(b)(2)(A)–(3)(B) (West 2017). Both these phrases are subject to varying interpretations by school districts.

120. *See* Shaun Heasley, *Lawmakers Call for Full Funding of IDEA*, DISABILITY SCOOP (June 19, 2017), <https://www.disabilitycoop.com/2017/06/19/lawmakers-call-full-funding-idea/23826/> [<https://perma.cc/4WPA-5DJF>].

121. *See, e.g.*, Lesley Alderman, *What to Do if You Suspect Learning Disability*, N.Y. TIMES (Feb. 19, 2010), <http://www.nytimes.com/2010/02/13/health/20patient.html> [<https://nyti.ms/2jS53V0>] (estimating the cost of an evaluation by a trained professional to be as much as \$5000, a price tag that is out of reach for many poor Americans).

122. *See generally* MARIA MILLARD & STEPHANIE ARAGON, EDUC. COMM'N OF THE STATES, STATE FUNDING FOR STUDENTS WITH DISABILITIES (2015), <https://www.ecs.org/clearinghouse/01/19/47/11947.pdf> [<https://perma.cc/D92M-BXCY>].

123. One commentator observes that disproportionate representation of culturally and linguistically diverse (“CLD”) children in special education results, in part, from “inadequate examiner preparation in assessment of CLD students . . .” NAT'L EDUC. ASS'N, TRUTH IN LABELING: DISPROPORTIONALITY IN SPECIAL EDUCATION 15 (1st ed. 2007).

124. *See* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1449 (2011).

can help them enforce their rights, the IDEA's promises are empty for low-income parents and their children.

On the one hand, the IDEA's mandates and procedures regarding evaluation of students are laudable. For example, they require that school districts locate, identify, and evaluate *all* students with disabilities, no matter how severe the disability.<sup>125</sup> When conducting evaluations, districts must use a variety of assessment tools and strategies to gather information about a child, including information from the child's parents.<sup>126</sup> The assessments used must be "technically sound."<sup>127</sup> The procedures also prohibit discrimination by mandating that evaluation materials or assessments be administered in a manner that protects against racial or cultural discrimination.<sup>128</sup> Moreover, school districts cannot use a single assessment or measure "as the sole criterion for determining whether a child is" disabled,<sup>129</sup> and they must assess a child in "all areas of suspected disability."<sup>130</sup> On the other hand, the broad aspirational language of these evaluation procedures ends up leaving school districts with considerable discretion to determine what this language means and ultimately results in uneven implementation of these procedures.<sup>131</sup> For example, New York's statute identifies four specific assessments that *must* be conducted for every student who is referred for a special-education evaluation for the first time: (1) a physical exam; (2) a psychological evaluation, unless it is determined to be unnecessary; (3) a social history; and (4) a classroom observation.<sup>132</sup> In our experience representing clients in the FAC, these specifically mandated evaluations are the *only* evaluations

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125. See 20 U.S.C.A. § 1412(a)(3)(A) (West 2017).

126. See *id.* § 1414(b)(2)(A).

127. "[T]echnically sound instruments... assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C).

128. See *id.* § 1414(b)(3).

129. *Id.* § 1414(b)(2)(B).

130. *Id.* § 1414(b)(3)(B).

131. See *generally* Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) (finding courts have admitted that "Congress was rather sketchy in establishing substantive requirements" within the IDEA, and discussing the difficulty in identifying the substantive meaning of the procedures required for adequate IEP development); Raj, *supra* note 26, at 374 (discussing the misidentification of students of color as disabled, Raj describes the murky world of evaluations under IDEA and other federal statutes governing disability and explains that despite the uniform mandates in IDEA, implementation of those mandates can be "drastically differently depending on the school system delivering services, the particular category of disability, and the race or ethnicity of students.").

132. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(i)-(iv) (2017).

conducted by school districts during initial evaluations, raising questions about whether the school officials ever considered any other types of assessments or if the student was *actually* “assessed in all areas of suspected disability.”<sup>133</sup>

### III. THREE BROTHERS’ JOURNEYS ON THE SCHOOL-TO-PRISON PIPELINE

#### A. Jonathan

The first time Ms. Joseph came to the FAC, it was for help with Jonathan, her oldest grandson. He was a fourteen-year-old, eighth-grade student in a New York City public middle school. He lived with his mother, Dana, and two brothers in an apartment in one of the City’s highest poverty neighborhoods.<sup>134</sup> Jonathan’s mother worked as a cashier in the evenings, from 4:00 p.m. to 9:00 p.m. His grandmother, Ms. Joseph, lived in the same building and shared responsibility for caring for Jonathan and his two brothers.

When Jonathan was in the third grade, his mother noticed that he could not read independently. He was often frustrated when doing schoolwork and struggled to control his emotions. His mother asked his classroom teacher to arrange for a special education evaluation.<sup>135</sup>

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133. While courts have found violations of the requirement to assess students “in all areas of suspected disability,” recent decisions demonstrate the disagreements about what this amorphous requirement means. *Compare* Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1123–24 (9th Cir. 2016), *and* N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1205 (9th Cir. 2008) (holding the school district violated the IDEA obligations to evaluate the student in all areas of suspected disability and denied the student FAPE upon failure to conduct an evaluation for autism), *with* Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1032–33 (9th Cir. 2006) (holding that the school district was not required to accommodate parents’ request to assess their student’s vision handicap, nor provide evaluations in the student’s native language, if obtaining such assessments is “not feasible”), *and* Hanson v. Smith, 212 F. Supp. 2d 474, 485 (D. Md. 2002) (finding that the school was not required to conduct a psychological assessment, despite requests by the parents, when student’s educational problems were not considered to be psychological in nature.).

134. *See generally* CITIZENS COMM. FOR CHILDREN OF N.Y., INC., CONCENTRATED POVERTY IN NEW YORK CITY: AN ANALYSIS OF THE CHANGING GEOGRAPHIC PATTERNS OF POVERTY (2012), <https://www.ccnnewyork.org/wp-content/publications/CCCReport.ConcentratedPoverty.April-2012.pdf> [<https://perma.cc/ALT5-N7CF>].

135. From the beginning, the school district did not comply with the IDEA or New York State evaluation procedures implemented pursuant to the IDEA. The IDEA requires that initial evaluations use “a variety of assessment tools and strategies” in an initial evaluation. Further, school districts may not use “any single assessment . . . as the sole criterion” for determining whether a child is disabled or developing that child’s program. 20 U.S.C.A. § 1414(b)(2)(A), (3)(B) (West 2017). Under New York State regulations, implemented pursuant to the IDEA, an initial

The evaluation revealed that Jonathan confused letters and was not able to spell some very basic words, like “who” and “the.” His writing skills were also very weak, and he was experiencing behavioral difficulties in the classroom, likely due to his academic weakness. Following the evaluation, Jonathan was deemed eligible for special education services as a result of a “specific learning disability.”<sup>136</sup> Jonathan remained in a general education classroom, but he received additional assistance with reading following the determination that he was disabled.<sup>137</sup>

Jonathan’s reading skills did not improve. He was held back in the fourth grade when he failed the statewide English exam. Thereafter, Jonathan’s grandmother, Ms. Joseph, lost faith in the school and decided to intervene. She worked very closely with Jonathan to help him develop his reading skills. She sat with him every night to assist him with his homework. She purchased additional reading workbooks and used them to supplement the school assignments. Jonathan continued to have difficulty with reading and writing but his skills improved and he successfully completed the fifth and sixth grade. Notably, Jonathan’s sixth-grade teacher described him as a child with leadership potential, who continued to be frustrated because of his disability. She warned that if he did not get the help he needed, his behavior would worsen.

When Jonathan entered the seventh grade, his schoolwork and behavior declined. At home he avoided schoolwork and resisted the help of his grandmother. His math skills were strong, but he really struggled with reading comprehension and writing. In school, he

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evaluation “must include at least: a physical examination . . . an individual psychological evaluation . . . a social history . . . an observation of the student in the student’s learning environment . . . and other appropriate assessments or evaluations . . .” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(i)–(iv) (2017). Unfortunately, many low-income parents do not have access to information about the broad range of assessments available to evaluate students for disabilities and thus would not necessarily know to object or ask for additional assessments at this stage. See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 109–12 (2011).

136. Specific Learning Disability is defined under the IDEA as “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C.A. § 1401(30)(A).

137. Jonathan received very general assistance with reading, but no other services or programming was offered to help him with his particular reading challenges, or to help address the behavioral concerns identified by his mother, which were confirmed by his classroom teacher.

often expressed frustration with his work and was defiant. He refused to follow directives, used profanity in the classroom, and sometimes cut class. By the time he was in the eighth grade, Jonathan was failing all of his classes and constantly getting into trouble in school. His classroom teachers alternately described him as a sad and depressed kid who was hard to reach or a rude and disrespectful kid who refused to adhere to classroom rules. By the middle of his eighth grade year, Jonathan was suspended from school eight times and missed more than thirty days of school as a result. It was not long after these suspensions that Ms. Joseph came to the FAC to seek legal representation.

In her first meeting with the FAC, Ms. Joseph expressed deep concerns about Jonathan's future. She said Jonathan was smart and charming but unable to keep up with his work. She was worried that his disability made it increasingly difficult to read the more advanced material required for eighth graders. She also noted that he had a hard time following instructions and that he seemed distant and distracted at times. She was concerned that difficult events in Jonathan's life were negatively affecting him and contributing to his decline in school. She reported that, a few years ago, Jonathan's father was arrested and sent to prison for drug possession. Although Jonathan spoke to his father via telephone most days, Ms. Joseph could see that his father's absence was beginning to wear on him. His aunt, who was his babysitter for many years, had died unexpectedly just a few months prior. And his best friend had died after an asthma attack. Furthermore, a recent shooting near his school shattered what little sense of safety he had. In fact, Jonathan was so affected by the shooting that he was transferred to a different school so that he could feel safe.

Ms. Joseph reported that when Jonathan's behavior worsened, she tried to convince school officials to reevaluate him and provide him with additional services, but her efforts were unsuccessful. At first, school officials seemed willing to work with her to figure out what Jonathan needed, but no action was ever taken. Then, Ms. Joseph sensed a changed narrative about Jonathan. Teachers and administrators described Jonathan as a troublemaker—he was subjected to repeated disciplinary actions, including repeated suspensions, sometimes without his family's knowledge. Despite Jonathan's recent challenges, Ms. Joseph remained hopeful that, with the right mix of services, he could thrive. She described him as a "good kid" who just needed to be in a more supportive setting. However, she expressed fear that, if Jonathan did not receive the help

he needed before entering high school, she would lose her battle to get Jonathan the education he deserved.

When the FAC students representing Ms. Joseph obtained Jonathan's school records, they realized the situation was far worse than they imagined. Jonathan had been suspended multiple times and was in danger of being expelled. Many of the incidents for which he was suspended were very minor, such as refusing to follow directions in class or entering the gymnasium without permission.<sup>138</sup> Other incidents were more concerning, like threatening a teacher and fighting with other students. Moreover, the school had noted in Jonathan's records that his promotion to eighth grade was in doubt. He had already repeated the fourth grade. At fourteen years old, his chances of successfully completing high school were growing dim. While the student team was gathering information and investigating legal claims, Jonathan was arrested in connection with an incident at school in which he was accused of stealing another student's property.

### B. James

Unlike Jonathan, his brother James's problems in school were not academic. When he was in kindergarten, his mother requested a special education evaluation because of troubling behaviors. James was fidgety and could not sit still for any length of time. He also had extreme temper tantrums and sometimes fought with his peers. James was evaluated and found eligible for services under IDEA by reason of a "serious emotional disturbance."<sup>139</sup> He remained in a general education classroom with nondisabled students and received counseling services with the school guidance counselor.<sup>140</sup> The school district also provided James with small group instruction once per week through the school's resource room program.<sup>141</sup>

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138. For some of the suspensions minor incidents like refusing to leave the gym and going to the playground instead of detention were bundled to support a single suspension.

139. 20 U.S.C.A. § 1401(3)(A)(i) (West 2017).

140. Once a student is deemed eligible under the IDEA, he is also eligible for a range of "related services" including counseling services. 20 U.S.C.A. § 1400(c)(5)(D) (West 2017). Counseling services are defined broadly as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel." 34 C.F.R. § 300.34(c)(2) (2017); *see also* N.Y.C. DEP'T OF EDUC., FAMILY GUIDE TO SPECIAL EDUCATION SERVICES FOR SCHOOL-AGE CHILDREN: A SHARED PATH TO SUCCESS, [http://schools.nyc.gov/NR/rdonlyres/DBD4EB3A-6D3B-496D-8CB2-C742F9B9AB5C/0/Parent\\_Guide\\_for\\_Students\\_with\\_Disabilites\\_Updated\\_Web.pdf](http://schools.nyc.gov/NR/rdonlyres/DBD4EB3A-6D3B-496D-8CB2-C742F9B9AB5C/0/Parent_Guide_for_Students_with_Disabilites_Updated_Web.pdf) [<https://perma.cc/ESR2-EXWC>].

141. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(f) (2017).



While James continued to stay on track academically, his behavior deteriorated. When James entered third grade at the age of eight, he was doing well academically, even ahead of his peers in some subjects, such as math and science. James was a curious and precocious youngster with an outsized imagination. He asked a lot of questions and seemed to have wisdom beyond his years. His problems in school stemmed from the fact that he was anxious, impulsive, and always on the go. He had boundless energy. He frequently got out of his seat to wander around the classroom. At times he would disappear from the classroom altogether to roam the halls. He asked a lot of questions. He demanded a tremendous amount of attention from his teacher, attention that was not possible for her to provide in a class of thirty children. He reacted intensely to perceived slights or when he did not get his way. There were times when his emotions got the best of him and he simply could not control his reactions. During those times, if he was told he could not have something, such as a piece of paper or a book he wanted, he would simply take it anyway. If he was teased or if he perceived that another student's comment or behavior was intended to attack him, he would lash out by hitting the other student. He would get caught up in a game or activity, and when it was time to transition to another classroom activity, he would become recalcitrant and refuse to stop what he was doing. James seemed to have no way to control his impulses. He could not help but to follow his curiosity. He could not stop what he was doing and could not prevent himself from acting on negative emotions.

As the school year progressed, James's teachers found it very difficult to manage him. As a result, he spent more and more time sitting in the principal's office, a form of detention. Ms. Joseph was getting calls from school about James's behavior on a regular basis. To make matters worse, the school's responses to James seemed to increase the frequency and intensity of his behavior. The more he was placed in detention or otherwise disciplined, the worse his behavior became in the classroom. James, a highly sensitive child, ultimately became defiant in the face of intense scrutiny by school officials. For example, at times he refused to go to the principal's office for detention when asked to leave the classroom. Other times, he would leave the classroom on his own. All of this scrutiny seemed to make James more anxious and clingy at home.

Ms. Joseph worked with the school to implement a system of rewards for good behavior and punishment for bad behavior. James received stars for staying in his seat or completing tasks. He was sent to detention when he was unable to do so. He seemed to respond well to the rewards. Yet, he had a difficult time with the punishment.

On one occasion when James was having a particularly bad day, the consequences for his bad behavior were intensified. He was told he would not be able to go on a trip that he was looking forward to all year. James had an emotional outburst in response. The combination of embarrassment and disappointment was too much for him. He began to cry uncontrollably and proceeded to throw books and paper around the classroom. As a result of his behavior, James was suspended from school.

James was never able to recover from this incident. After the suspension, the frequency and seriousness of his behavior intensified. He spent more time in detention than he did in the classroom. In the meantime, he fell behind in his work and began to fail some tests and miss homework assignments.

When the clinic student team received James's school records, they learned more details about the nature and extent of his behavioral challenges. They also saw a significant prediction from a school psychologist who evaluated James in connection with his eligibility for special education services. In a report she prepared two years prior, she described James as highly impulsive and hyperactive. The school psychologist recommended that the Department of Education arrange for James to be evaluated by a psychiatrist for possible Attention Deficit Hyperactivity Disorder ("ADHD").<sup>142</sup> References to James's impulsivity were evident throughout his records. Ms. Joseph later reported that she was only recently told of the recommendation by the school psychologist that James be evaluated by a psychiatrist and had tried to arrange for an evaluation on her own. She obtained a referral from James's pediatrician and was on a waiting list to see a psychiatrist who accepted James's insurance. The psychiatrist's office told her there was at least a six month wait for an evaluation.

Not long after Ms. Joseph came to the legal clinic for assistance, the student team filed a due process complaint against the school district, alleging a number of violations of the IDEA, including the failure to obtain a comprehensive evaluation. Within days of serving the school district, school officials called the police to assist them with removing

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142. ADHD is "a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development." See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 59 (5th ed. 2013) [hereinafter DSM-5]. In order to receive a diagnosis of ADHD for a child under the age of seventeen, it must be determined that "six or more of the symptoms [of inattention or hyperactivity] have persisted for at least 6 months to a degree that is inconsistent with developmental level, and that negatively impacts directly on social and academic/occupational activities . . . ." See *id.*

James from the classroom after he fought with another student. The incident started when the student threw a pencil that hit James. The two got into a scuffle. The teacher summoned the school principal, who called the police. When the police and paramedics arrived, James was crying uncontrollably. At eight years old, James was placed in handcuffs by police in front of all his classmates and taken to the hospital psychiatric emergency room. The principal later told Ms. Joseph that she called 911 because she thought taking James to the psychiatric emergency room would be the quickest way to get a psychiatric evaluation and help him get the services he needed.<sup>143</sup> Hospital officials determined that James did not require inpatient treatment, and he was sent home with his mother within a few hours. After this incident, James was petrified of returning to school, so terrified that his family sought home instruction while the complaint against the school district was pending.

### C. Jared

Jared's journey is somewhat different than both Jonathan and James's stories. Jared was a quiet child who made it through his primary school years without much notice. Other than a brief period in first grade when he received special education services for reading difficulties, Jared passed from grade to grade with minimal academic challenges. He had a passion for math and technology, and his strength in this area was a great source of confidence for him. Teachers saw Jared as a leader in these subjects because he was able to help other classmates who were struggling. His language skills were weak, but he managed to do well enough to move to the next grade—with the exception of fourth grade when he was held back for

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143. In 2013, a lawsuit was filed against the New York City Department of Education for unlawfully sending children to the emergency room as a form of discipline. Legal Services of New York, which filed the lawsuit, claimed to have documented 3000 cases of children sent to the emergency room per year. The lawsuit garnered significant attention in the local press and was ultimately settled. *See, e.g.*, Beth Fertig, *City Agrees to Stop Schools from Using 911 for Discipline*, WNYC (Dec. 15, 2014), <http://www.wnyc.org/story/settlement-bars-city-schools-using-911-form-discipline/> [https://perma.cc/W2F5-RGMV]; Lisa Fleisher, *Parents Protest Emergency Calls*, WALL ST. J. (Dec. 16, 2013), <https://www.wsj.com/articles/parents-protest-emergency-calls-1387162110> [https://perma.cc/3JVB-653D]; Rachel Monahan, *Psych and Tired of School ER Calls*, N.Y. DAILY NEWS (June 28, 2012), <http://www.nydailynews.com/new-york/education/education-department-statistics-show-schools-called-911-whopping-3-600-times-year-deal-non-suicide-related-mental-health-problems-article-1.1103635> [https://perma.cc/RZ7H-CXBK].

not passing the state standardized exam.<sup>144</sup> Nonetheless, Jared's teachers consistently described him as quiet and respectful.

When Jared reached middle school, things began to change. His reading difficulties became more pronounced. He became frustrated when doing homework, particularly when working on reading and writing assignments. At first, he simply withdrew, shying away from classroom discussions and generally remaining quiet throughout the day. Eventually, his withdrawal turned into mild defiance and, at times, he would refuse to participate in class discussions when called on by his teachers. At the same time, the rules enforced to discipline him seemed disproportionately harsh and punitive. For example, he was reprimanded for wearing a hoodie in the classroom and given detention for stepping out of line during a fire drill. At one point, he was sent to the principal's office for laughing too loudly. He was asked to leave the classroom for other minor incidents as well.

When Jared entered the sixth grade, he became withdrawn and resistant to schoolwork. While he was never aggressive, he began challenging his teachers and other school officials when he felt he was being singled out. He maintained good grades in technology and math, but his grades declined in his other courses and his scores on the statewide standardized language-arts exam were far below proficiency at the end of his sixth-grade year. As a result, Jared was in danger of being held back again. During this period, Ms. Joseph stepped up her advocacy on behalf of Jared. She requested meetings with the principal to discuss Jared's academic challenges and requested an evaluation. When the evaluation was completed, Jared was deemed eligible for special education services because of a specific learning disability. Ms. Joseph was not satisfied that the evaluation was adequate to help the school craft a program to address his needs. She challenged the results as incomplete and asked for an independent evaluation at public expense. She then sought the assistance of the FAC to change Jared's school and program.

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144. In New York City, prior to 2012, students in grades three through eight were required to meet a specific score on the statewide exams in order to be promoted from one grade to the next at the end of each school year. That policy was changed effective July 2012 to a more holistic evaluation of an individual student's progress. N.Y.C. DEP'T OF EDUC., REGULATION OF CHANCELLOR RE: PROMOTION STANDARDS, SUMMARY OF CHANGES (June 2, 2014), <http://schools.nyc.gov/NR/rdonlyres/05F5B0BC-4B78-401B-AFF8-13C0520C557D/0/A501.pdf> [<https://perma.cc/9GQR-PKSA>].

#### D. The Joseph Brothers Were on a Fast Track to Prison

As low-income, African American boys with disabilities, the Joseph brothers fit all four school-to-prison pipeline categorical risk markers.<sup>145</sup> They all attended school in their neighborhood, one of the poorest school districts in the city. The schools they attended were underfunded and repeatedly designated as failing schools.<sup>146</sup> All of the brothers were suspended from school at least once. Jonathan, the oldest of the three, was referred to law enforcement authorities as a result of an incident that occurred at school and later arrested as a result of that incident. His arrest further increased the chances that he would end up in prison. These events set the brothers on the pipeline's fast track.

Their grandmother was determined to find a way to change their trajectory. She monitored their schoolwork, frequently met with school officials to collaborate on creating programs, and did not hesitate to challenge the actions of school officials when she felt their actions did not serve the educational needs of her grandsons. She kept a copy of the New York City Department of Education's guide for families of children with special education needs, complete with her own tabs and post-it notes.<sup>147</sup> Despite all of Ms. Joseph's advocacy efforts, she was unsuccessful until she obtained access to justice via interdisciplinary legal services. While the Joseph brothers' status as low-income African American boys with disabilities offered them a route to a different destination under the IDEA, at least theoretically,<sup>148</sup> the IDEA process for the brothers was flawed.

Their initial evaluations, which only included those assessments that were specifically mandated by New York State law, failed to

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145. See discussion *supra* Section I.B.

146. The New York City Department of Education issues progress reports on all of the city's schools from 2007–2013.

The Progress Reports were the main accountability tool used by the New York City Department of Education from 2007 through 2013. Progress Reports graded each school with an A, B, C, D, or F and were based on student progress (60%), student performance (25%), and school environment (15%). Scores were based on comparing results from one school to a peer group of up to 40 schools with the most similar student population and to all schools citywide.

N.Y.C. DEP'T OF EDUC., SCHOOL QUALITY REPORTS: PROGRESS REPORTS (2007–2013), [http://schools.nyc.gov/Accountability/tools/report/ProgressReport\\_2007-2013.htm](http://schools.nyc.gov/Accountability/tools/report/ProgressReport_2007-2013.htm) [<https://perma.cc/64Z3-QMMY>]. All of the brothers attended elementary schools that received a grade of F on the city progress reports while the brothers were in attendance.

147. See N.Y.C. DEP'T OF EDUC., *supra* note 140.

148. See *supra* Introduction.

capture the nature and extent of their disabilities.<sup>149</sup> Two of the three brothers, Jonathan and Jared, were classified as learning disabled, one of the thirteen eligibility categories under the IDEA. Unfortunately, the school district's determination that they met the criteria for the statutorily defined category did not provide much information about the nature of their learning difficulties. This is, in part, because there can be real differences between being medically diagnosed with a specific learning *disorder* and being eligible for the IDEA because of a specific learning *disability*. Physicians and mental or other health professionals use the Diagnostic and Statistical Manual to diagnose specific learning disorders.<sup>150</sup> According to the manual, in order to be diagnosed with a specific learning disorder, a person must have difficulties in at least one of the specified areas.<sup>151</sup> While an evaluation under the IDEA likely should include the kinds of diagnostic tools used by mental health and medical professionals to diagnose specific learning disabilities, the broad language in the IDEA's evaluation procedures does not necessarily guarantee that the tools used to diagnose specific learning disorders will be used by

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149. The IDEA does not require the school to consider a specific diagnosis, but instead leaves the determination of the nature and extent of the disability to the IEP team who ultimately has the discretion to decide if the school will provide interventions and supports specific to the student's challenges. *See, e.g., E.P. v. Howard Cty. Pub. Sch. Sys.*, No. ELH-15-3725, 2017 U.S. Dist. LEXIS 133780, at \*74 (D. Md. Aug. 21, 2017) (clarifying that federal law gives the IEP team the "sole responsibility" to determine the nature of the special education services to be provided to the student regardless of professional evaluation results); *Parker C. v. W. Chester Area Sch. Dist.*, No. 16-4836, 2017 U.S. Dist. LEXIS 104068, at \*37-38 (E.D. Pa. July 6, 2017) (ruling in favor of the school district, despite the school's admission that the IEP team only considered the results of evaluation but did not implement targeted instruction in an area of weakness identified by the evaluator). The New York State law language doesn't require a psychiatric evaluation, but instead leaves this decision to the discretion of the school. *See M.M. v. Gov't of D.C.*, 607 F. Supp. 2d 168, 173-74 (D.D.C. 2009) (finding that the school district did not violate the IDEA by failing to conduct psychiatric evaluation because a previous educational evaluation only recommended further psychiatric testing if the student's behavioral problems persisted after other interventions were put in place); *Hanson v. Smith*, 212 F. Supp. 2d 474, 485 (D. Md. 2002) (finding that the school was not required to conduct a psychological assessment, despite requests by the parents, when student's educational problems were not considered to be psychological in nature).

150. *See* DSM-5, *supra* note 142.

151. The areas identified include: (1) difficulty reading (e.g., inaccurate, slow and only with much effort), (2) difficulty understanding the meaning of what is read, (3) difficulty with spelling, (4) difficulty with written expression (e.g., problems with grammar, punctuation or organization), (5) difficulty understanding number concepts, number facts or calculation, (6) difficulty with mathematical reasoning (e.g., applying math concepts or solving math problems). *See id.* at 66. The symptoms must have continued for at least six months despite targeted help. *See id.*

school districts.<sup>152</sup> For example, Jonathan and his brothers received only the four evaluations mandated by New York, and, even then, those evaluations were deficient in other ways. The most important deficiency of the evaluations was that they did not provide enough information to help school officials craft a program that included the kind of interventions that would have addressed the boys' various challenges. A fair interpretation of the IDEA's evaluation procedures should have protected the brothers against the inadequate evaluation procedures used by their school. However, once the school district made the decision about the assessment tools they would use to evaluate the boys, the only recourse left for the family was to challenge the decision using IDEA's private enforcement procedures. Under those procedures, parents have the right to file an administrative complaint against the school district for "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education . . . ."<sup>153</sup> While parents can proceed *pro se*, legal representation in these cases is critical.

#### IV. ACCESS TO JUSTICE: INTERDISCIPLINARY ADVOCACY FOR STUDENTS WITH DISABILITIES

A "justice gap" leaves many families throughout the United States without the means to enforce some of their most basic civil rights.<sup>154</sup> The justice gap is defined as "the difference between the civil legal needs of low-income Americans and the resources available to meet those needs."<sup>155</sup> This gap leaves many unable to enforce civil legal rights granted to them by the United States Constitution and state and federal law primarily because they do not have access to the kind of legal assistance necessary for enforcement.<sup>156</sup>

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152. It was the FAC's, and Ms. Joseph's, observation that the tools used by the school were not sufficient for adequate assessments. This observation was based in part on the fact that during the individual psychological evaluations administered by the school district only selected sections of two assessment tools were used. Further, in subsequent evaluations of all three boys, administered by an independent evaluator, multiple assessment tools were administered in full, resulting in more comprehensive diagnoses and detailed recommendations.

153. 20 U.S.C.A. § 1415(b)(6)(A) (West 2017).

154. See LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/UT93-4RXJ>].

155. *Id.* at 6.

156. See *id.* at 30 ("Low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.").

A major contributor to the justice gap is the lack of attorneys available to represent poor people either through nonprofit legal service organizations that offer services free of charge or through pro bono services offered by private attorneys. Nationwide, “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”<sup>157</sup> For low-income parents and their children, the rights and protections afforded under the IDEA can have very little meaning if parents do not have access to attorneys who can pursue legal remedies for inadequate educational programs.<sup>158</sup> In a recent empirical analysis, cases brought under the IDEA concerning program and placement were more likely to result in favorable outcomes for school districts after an impartial hearing.<sup>159</sup> While this study did not address whether the parents were represented by attorneys or acting *pro se* in these cases, the findings indicate that parents who challenge school districts regarding the adequacy of their child’s program or placement face an uphill battle.<sup>160</sup> It follows, then, that parents who do not have access to legal resources at all are at an even bigger disadvantage.

Even the IDEA’s fee-shifting provisions, which permit parents who prevail in due process hearings to obtain attorneys’ fees from school districts, have not increased access to justice for low-income parents.<sup>161</sup> Rather, the available empirical evidence suggests that wealthy parents are the primary beneficiaries of the private enforcement mechanisms of the IDEA.<sup>162</sup>

## V. RECALCULATING ROUTE: PLACING THE JOSEPH BROTHERS ON THE RIGHT TRACK

### A. The Perfect Combination: Holistic Representation and Interdisciplinary Practice

The FAC employs a holistic model of legal representation whereby law and social work students engage in a collaborative, interdisciplinary practice to advocate on behalf of parents of children

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157. *Id.* at 6.

158. *See generally* Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions Under IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014).

159. *See id.* at 565.

160. *See id.* at 563 (findings of research indicated that there was a general “pro-district outcome trend,” or a trend for rulings in favor of school districts, as identified by previous academic research).

161. *See* Pasachoff, *supra* note 124, at 1440.

162. *Id.* at 1426.



with disabilities who seek enforcement of their rights under the IDEA.<sup>163</sup> The integration of legal and social work services for families in need is based on the premise that legal intervention in matters involving special education is most effective when clients have the legal and social work support and services needed to facilitate their decisions. Fordham Law School created one of the first legal clinics in the country to pioneer this fully integrated interdisciplinary model of practice in 1996 when the model was somewhat rare.<sup>164</sup> Since that time, organizations like The Bronx Defenders in New York City have expanded and institutionalized the holistic interdisciplinary practice model and increased its prominence as an exemplary approach to working with clients who are poor.<sup>165</sup>

The FAC model is particularly useful for the economically disadvantaged clients that make up the FAC's special education docket. These clients often lack access to the kind of quality healthcare that can make a huge difference for proper diagnosis and accurately identifying a child's disability.<sup>166</sup> Wealthy parents often sue school districts to challenge programs developed in reliance on faulty evaluations.<sup>167</sup> These parents have the financial means to hire

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163. See generally Mary Ann Forgey et al., *The Professional Mandate for the Use of "Strategic Collaborations" by Lawyers in Child Maltreatment/Intimate Partner Violence Cases*, in SOCIAL WORK IN AN ERA OF DEVOLUTION: TOWARD A JUST PRACTICE (2001) (providing concrete examples of how lawyers and social workers can work collaboratively).

164. The interdisciplinary clinic model pioneered in the late nineties at Fordham was a project of Fordham's Interdisciplinary Center for Family and Child Advocacy, a joint project of the Law School and the Graduate School of Social Services. ROBERT J. KACZOROWSKI, FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY 340 (2012). See generally Ann Moynihan et al., *Parents and the Child Welfare System*, Foreword, 70 FORDHAM L. REV. 287 (2001).

165. See Stephen Wizner, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?: The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1933 (2002) (explaining the rise of law school clinics began in the late sixties and early seventies with only a handful of schools around the country).

166. See Fedders & Langberg, *supra* note 45, at 222-23; Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2130 (1999) (explaining the concept of clinic services was premised on the belief that legal services should be provided to low-income individuals as part of an "anti-poverty program").

167. Experts explain that "[m]ore and more affluent parents hire high-powered lawyers and advocates to sue the city for reimbursement of their kids' tuition." Juan Gonzales, *Class System in the City's Schools*, N.Y. DAILY NEWS (Dec. 15, 2010), <http://www.nydailynews.com/new-york/education/education-department-special-ed-city-rich-article-1.472668> [<https://perma.cc/V5WQ-MHWJ>]. In New York City alone, the Department of Education ("DOE") paid private school tuition for 769 special education students living in the wealthiest school districts, but in a poorer district

healthcare experts to prove their claims.<sup>168</sup> Parents without access to quality healthcare sometimes do not know that their children have not been properly evaluated or diagnosed.<sup>169</sup> In the FAC, social work interns work collaboratively with law student interns under the supervision of law and social work faculty to analyze evaluations for compliance with legal and mental health standards.<sup>170</sup> Social work interns are also able to navigate the complicated rules that govern social welfare programs, including health insurance programs used by poor clients.<sup>171</sup> Further, social work students are trained to explore a broad range of client social service needs, which increases the likelihood that the legal resolution will be successful.<sup>172</sup> Finally, social workers, particularly those with clinical training, understand the diagnostic tools used to evaluate students.<sup>173</sup> For the Joseph brothers, these skills proved invaluable for achieving the goals their grandmother had for them.

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with twice as many students, the DOE paid for only 64 students' private school tuition. *Id.*; see also RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 50–53 (2011).

168. See generally Fedders & Langberg, *supra* note 45 (acknowledging that students from low-income families are less likely to have access to educational services and programs that will alleviate the effects of poverty on these students and prevent them from entering the pipeline).

169. Authors Fedders and Langberg advocate for the use of legal services for low-income families who often lack access to quality healthcare in order to address “unmet legal needs.” See Fedders & Langberg, *supra* note 45, at 221–223, 229. These legal needs include access to special education services, as the authors believe that many low-income families are in need of adequate special education representation for their children, in part because a lack of access to healthcare may result in an unawareness of their child’s educational needs. See *id.*

170. Social workers are particularly helpful in assisting lawyers and their clients in the “interviewing, evaluation, [and] crisis intervention” parts of the clinic. See Galowitz, *supra* note 166, at 2126 (“As a result of social workers’ training and education, they are better equipped than lawyers to provide services such as crisis intervention, evaluation of clients’ needs, referrals to appropriate agencies, and direct casework. With respect to evaluation, a social worker’s training in assessing personality and mental status ‘contributes significantly to the lawyer’s appraisal of the facts.’”).

171. See generally *id.*

172. See generally Cannon et al., *supra* note 26, at 459–63 (noting the importance of social workers in helping the school to develop the IEP and that social work services are often “in short supply,” but are helpful in “assisting in developing positive behavioral intervention strategies” with the child and family).

173. See *id.* at 559.

## B. Using Interdisciplinary Skills to Access Quality Health Care

All three brothers were evaluated by school officials and found to be students with disabilities under the IDEA.<sup>174</sup> All three brothers received the four evaluations mandated by state law—a physical exam, a social history, an individual psychological exam, and a classroom evaluation.<sup>175</sup> The school did not consider any other evaluations, yet each of the boys’ educational histories suggested that additional assessments were necessary.<sup>176</sup> Relying on the law students’ explanation of the IDEA evaluation procedures, the social work students analyzed the records for evidence of “suspected disabilities” and assisted in identifying the additional evaluations the boys needed. The social work students’ understanding of the social welfare programs and systems also made it easier to navigate the various public health insurance requirements and to arrange for evaluations to be conducted. Evaluations by the appropriate experts were critical to the legal argument that the boys’ evaluations were inadequate and that their needs were more extensive than the school officials originally claimed. After extensive evaluations by neuropsychological experts, all three brothers were diagnosed with a Specific Learning Disorder (“SLD”), ADHD, or both.<sup>177</sup> Both disorders are relatively common and should have been easy to detect as possible explanations for the boys’ behavior.<sup>178</sup>

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174. See 20 U.S.C.A. § 1400 (West 2017). The IDEA was enacted in 1990 as an amendment to the Education of Handicapped Children Act of 1975. It has since been amended twice, in 1997 and 2004 to strengthen protections for disabled children and ensure equal access to education.

175. See *supra* Part III.

176. *Id.*

177. Specific Learning Disorder with impairment in reading is also referred to as dyslexia, a neurodevelopmental disorder characterized by difficulty with spelling, recognizing and decoding words. It is a common condition, thought to affect some three to seven percent of the English-speaking population, with more boys than girls affected. See Michael Rutter et al., *Sex Differences in Developmental Reading Disability: New Findings from 4 Epidemiological Studies*, 291 JAMA 2007, 2011 (2004). See generally DSM-5, *supra* note 142, at 66–74.

178. There is some controversy over the frequency of diagnosis, especially since the advent and prevalence of drug treatments. See Susanna N. Visser et al., *Trends in the Parent-Report of Health Care Provider-Diagnosed and Medicated Attention-Deficit/Hyperactivity Disorder: United States 2003–2011*, 53 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 34, 42 (2014) (providing evidence that prevalence of ADHD prescriptions increased by 28% in 2011). While that is worth noting, this paper does not explore the effects, if any, of over-diagnosis.

### C. Placing the Brothers on the Right Track

The interdisciplinary team used the same guidelines to advocate for each of the brothers, with a few tweaks here and there. They filed due process complaints asserting broadly: that the school's evaluations were not sufficiently comprehensive; that the resulting programs, constructed based upon flawed evaluations, were not appropriate; and that the brothers required different placements and services that would better meet their unique needs. The FAC sought relief in the form of alternative programs and compensatory education services to make up for the academic skills that the brothers lost when they did not receive the services they needed. The social work students used their skills to assess the family's needs,<sup>179</sup> to identify experts to conduct evaluations, and to find community-based services to provide support at home. As described below in the story of James, the social work students also worked collaboratively with the experts we used to share information about the family and to provide perspective on the issues with which the boys were struggling.

#### 1. Jonathan

Jonathan eventually received a more nuanced set of diagnoses that significantly helped to identify his needs. His learning disorder was quite severe.<sup>180</sup> It turns out, not surprisingly, that he was also suffering from depression, brought about in part from his painful awareness that he could not read. Finally, he was diagnosed with ADHD, with "predominantly inattentive presentation," meaning that he had more than six of the symptoms of inattention listed in the diagnostic criteria, such as being easily distracted and failing to pay attention to details.<sup>181</sup>

When the due process proceeding was over, Jonathan was placed in a private school that specialized in working with children with learning disorders. He was also awarded over 700 hours in one-on-

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179. Social workers are trained to work collaboratively with clients to assess their needs (i.e., social service, mental health) using a variety of screening tools and create a plan to address those needs. *See, e.g.*, NAT'L ASS'N OF SOC. WORKERS, NASW STANDARDS FOR SOCIAL WORK PRACTICE IN HEALTH CARE SETTINGS 24 (2016), <https://www.socialworkers.org/LinkClick.aspx?fileticket=7Bc0frCTFBM%3D&portalid=0> [<https://perma.cc/36R2-HAWB>]; *see also* Cynthia Bisman, *Social Work Assessment: Case Theory Construction*, 80 FAMS. SOC. 240, 240 (1999) (explaining social work assessment and advocating a "case theory" approach).

180. Jonathan was evaluated and qualified for services under the IDEA due to his learning difficulties. *See* 20 U.S.C.A. § 1401(30) (West 2017).

181. *Id.*

one tutoring with a special education teacher to help him develop his reading and writing skills. The tutor met with Jonathan at home after school and helped him stay on track in his new school. At the end of his first year in the new school, the FAC received a letter from Ms. Joseph thanking the student team for all their help and reporting that for the first time since elementary school, Jonathan seemed happy to go to school. He was on the basketball team, had made new friends, and most importantly, he was passing all his classes. His average for the year was 84.6. Jonathan has since graduated from high school and is in his first year of college.

## 2. James

Because of the severity of James's symptoms, especially his impulsivity and lack of emotional self-control, he received a neuropsychological evaluation and a psychiatric evaluation. Although testing during the neuropsychological evaluation revealed that he was behind academically, he did not have a specific learning disorder. He was diagnosed with severe ADHD with "predominant hyperactive/impulsive presentation," meaning that he had more than six of the symptoms listed as criteria for the diagnosis. The symptoms included behavior such as always being "on the go" and often having difficulty waiting one's turn.<sup>182</sup>

James also received a psychiatric evaluation. The social work intern assigned to the case played a significant role. The intern identified a research institute that was willing to accept the Josephs' public health insurance coverage for a psychiatric evaluation. The intern also collaborated with the psychiatrist to explore additional explanations for some of James's behavior. During the psychiatric evaluation, the social work intern asked the psychiatrist to consider multiple traumatic events in James's life (that were not necessarily a part of his school records) in reaching conclusions about a diagnosis and treatment recommendations. As a result, the psychiatrist focused part of her interview with James on the potential impact of those life events. James expressed significant worry about family members dying, especially his mother. He also expressed concern about something bad happening to him. The psychiatrist confirmed that James had ADHD but also added a diagnosis of Generalized Anxiety Disorder, a condition characterized by excessive worry.<sup>183</sup> The

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182. See DSM-5, *supra* note 142, at 61.

183. See *id.* at 8 (noting that ADHD in children can coexist with other conditions including anxiety and mood disorders).

psychiatrist found that James's experiences with trauma—the absence of his father and the experience with being taken to the hospital by the police—likely contributed to his anxiety. At the administrative hearing held pursuant to the due process complaint filed on behalf of James, the psychiatrist's recommendations were crucial to obtaining psychological counseling as part of James's program. It also helped to shift the school officials toward a more sympathetic view of James.

Ultimately, based on both the psychiatric and neuropsychological evaluations, it was determined that the best environment for James was a therapeutic school, one that would provide him with the structure and support he needed to manage his conditions. Academic testing performed during the evaluation process revealed that James was slightly behind his peers in reading. One-on-one tutoring and psychological counseling with a private provider were awarded to James as compensatory education services.<sup>184</sup> After his first week in the new school, James told his grandmother that he loved his new school. He still has challenging days when his impulsivity gets the best of him, but gone are the harsh punishments he endured in his previous school. He is doing well academically and is on track to successfully complete high school and go on to college.

### 3. Jared

Jared also received a neuropsychological evaluation. He was diagnosed with a “specific learning disorder with impairment in reading” and “impairment in written expression.”<sup>185</sup> Among other findings, the neuropsychological report indicated that Jared was experiencing depression as a result of his learning disability, that he felt like he was not smart, and that he could not do the work no matter how hard he tried. He also felt singled out by school officials, which contributed to his depressed feelings. After an initial appearance before an impartial hearing officer and subsequent settlement discussion with the school district's attorneys, the school

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184. “Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student.” *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003); *see also* *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008).

185. Both the “impairment in reading” and the “impairment in written expression” are subsets of a diagnosis of a specific learning disorder. The impairment in reading includes “possible deficits in: word reading accuracy, reading rate or fluency and reading comprehension.” Impairment in written expression, “includes possible deficits in: spelling accuracy, grammar and punctuation accuracy or, clarity or organization of written expression.” DSM-5, *supra* note 142, at 61.

district authorized a private school placement. Jared was also provided with specialized tutoring to help him catch up to his grade level in reading.

The FAC students assisted the family in locating a school that would meet Jared's needs and then worked with the school district to arrange for Jared to be placed in that school. Jared was also granted a twelve-month school program because of the extent of his disability.<sup>186</sup> As a result, he started his school-year in July instead of September. A few months after Jared started at his new school, the FAC received a call from Ms. Joseph to report that Jared was doing phenomenally well. Ms. Joseph had established a relationship with Jared's guidance counselor early in the school year, and they were in contact weekly to discuss Jared's progress. The guidance counselor had contacted Ms. Joseph days earlier to tell her that Jared was doing so well that he was selected to represent the school, along with several other children, on a school trip abroad. Jared was going to Europe for an exchange trip to Germany and France. Ms. Joseph was ecstatic. She told us that Jared was the first person in the family to obtain a passport. After the trip, Ms. Joseph called to report that Jared had learned some French words and that her grandson, who was a picky eater, had tried escargot.

### CONCLUSION

The Joseph brothers' stories are of tragedy averted. Their experiences illuminate how the targeting of black boys with disabilities often involves "criminalizing childhood."<sup>187</sup> More troubling, when children with disabilities are singled out for excessive discipline, criminalizing disability can be the result. The Joseph brothers suffered significant and unnecessary anguish. Their saving grace was the unrelenting commitment of their grandmother, who served a role that African American grandmothers have served for generations.<sup>188</sup> The brothers' transformation in their new schools was actually not a transformation at all; it merely highlights who they

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186. Federal regulations enacted pursuant to IDEA allow for extended school year services as necessary to provide a FAPE for students with disabilities. 34 C.F.R. § 300.106 (2017).

187. See generally Joyce Aschenbrenner, *Extended Families Among Black Americans*, 4 J. COMP. FAM. STUD. 257 (1973); James M. Frabut, *Parenting in Ethnic Minority Families*, 3 CATHOLIC EDUC.: J. INQUIRY & PRAC. 245 (2013).

188. Aschenbrenner, *supra* note 187. See generally Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on Moore v. City of East Cleveland*, 85 FORDHAM L. REV. 2655 (2017).

were all along. Access to justice through interdisciplinary legal services gave the brothers an opportunity to be appropriately served by the IDEA. It is a solution that can work to disrupt the school-to-prison pipeline for students marked for prison—students who would otherwise become statistics on a pipeline data chart.