



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

**Written Testimony of Daniel J. Losen**  
**Before the U.S. Congress**  
**House of Representatives, Full Committee on Education and Labor**  
**Hearing: “Brown v. Board of Education at 65: A Promise Unfulfilled”**

**April 30, 2019**

I would like to thank Chairman Bobby Scott and the members of the House Committee on Education and Labor for inviting me to testify on this important topic.

I first began working as a law and policy researcher with the Civil Rights Project in 1999, when it was part of both Harvard Law School and the Harvard Graduate School of Education. I now direct the Center for Civil Rights Remedies (CCRR), an initiative of the Civil Rights Project, which is located at UCLA. The CCRR is dedicated to highlighting concerns about inequities in our public education system, and to bringing the best research together to inform efforts to solve these problems. All of my testimony and recommendations are research-based and intended to improve the educational outcomes and lives of children, especially the historically disadvantaged.

With these goals in mind, I’m particularly thankful for this opportunity to express my concerns about excessive and disparate discipline in schools, particularly in terms of the educational impact the research suggests is resulting from unsound and unjustifiable policies and practices. The more we learn about the negative impact discipline disparities are having on the educational outcomes of students of color, the more likely it is that the national debate on school discipline reform will return to sound and reasoned discussion of what works best, and of how to replace counterproductive discipline policies with more effective ones.

Despite the Trump administration’s ongoing efforts to undermine longstanding civil rights protections, I am hopeful that Congress will review the significance of the current disparate impact regulations and take action to strengthen civil rights protections through resolution and legislation. While there are many actions members of Congress can take, restoring what was once a private right of action regarding use of the disparate impact regulations under Title VI of the Civil Rights Act of 1964 would be an important step toward fulfilling the promise of *Brown v. Board of Education*. For this reason and based

on the research I present in my testimony indicating that there are many discipline policies and practices that would likely be deemed racially discriminatory pursuant to disparate impact doctrine, I endorse the Equity and Inclusion Enforcement Act (EIEA).

In my opinion, *Brown* held the promise of remedying racial inequity in educational opportunity in a complete and comprehensive manner. Unfortunately, we need look no farther than the levels of racial and socioeconomic isolation in our schools today to know that the promise of *Brown* remains unfulfilled. By reversing the doctrine of separate but equal embodied in *Plessy v. Ferguson*, *Brown* acknowledged that a policy claiming to support equality but born out of White supremacy would never be just.

Today, we bear witness to a president who makes racist statements about sitting federal judges and nominates numerous others who refuse to indicate that they support the *Brown* decision. Even worse, the appointed Deputy Attorney general charged with enforcing the law, refused to say he supported this landmark decision. It is in this context that the Trump administration has sought to strip children of their federal civil rights protections. One example is the ongoing effort to dismantle disparate impact regulations that have been part of our legal framework since shortly after Congress passed the Civil Rights Act of 1964.

Until 2001, the Title VI disparate impact regulations were regularly used by litigants exercising their private right of action to go to court to challenge the legality of unsound or inadequately justified policies and practices by school districts and other recipients of federal funds where those policies had a disparate impact on children of color. Well aware of this use, in 2001, in an act of judicial activism, 5 justices of the Supreme Court concurred that individuals could no longer challenge the disparate impact of a policy or practice pursuant to the Title VI disparate impact regulations in court. (*Alexander v. Sandoval* (2001))

Despite the fact that the *Sandoval* decision cast doubt about whether the regulations reflected the will of Congress when they passed the Civil Rights Act of 1964, the majority in *Sandoval* stated that it assumed for the purposes of deciding the case that “regulations promulgated under Sec. 602 of the statute may validly proscribe activities that have a disparate impact on racial groups” even though the first section, 601, only prohibits intentional discrimination. Although the disparate impact regulations remain the law, after *Sandoval*, the only recourse for challenging the unlawful disparate impact of a policy was limited to filing administrative complaints with federal enforcement agencies. During the post-*Sandoval* period, many agencies, including the U.S. Department of Education’s Office for Civil Rights, have handled thousands of disparate impact complaints, including challenges to unjustified discipline policies.

Unfortunately, the Trump administration is now engaging in efforts to dismantle the Title VI disparate impact regulations. One of its first actions was to withdraw the nonregulatory and nonbinding letter of guidance on school discipline issued by the Obama administration in 2014. Part II of the guidance provided useful instructions on how to review policies and practices pursuant to the Title VI disparate impact regulations.

The Trump administration based its decision to remove the nonregulatory discipline guidance on an unsubstantiated fear of quotas, along with a discredited study (see the appendix to this written testimony).

Early this year, in an effort to undermine a similar education law that (among several important provisions) calls for interventions to remedy racial disproportionality in discipline among students with disabilities<sup>1</sup> the Trump administration also resorted to raising fear of racial quotas as the basis for rescinding regulations promulgated in 2016 about disproportionality. The IDEA regulations were intended to ensure that states were flagging districts with very large racial disparities. The law requires the identified districts to use part of their federal grant to identify the root cause of those disparities and provide a remedy.

Last month, a federal judge ruled that the education department's rescinding of the special education racial disproportionality regulations was arbitrary and capricious. It is noteworthy that when the Trump administration rescinded the 2014 school discipline guidance, it offered justifications that were nearly identical to the justifications the court found arbitrary and capricious.

Putting legal arguments to the side, I think most policymakers who read Part II of the discipline guidance would agree that the guidance is a good, commonsense approach to reviewing policies.<sup>2</sup> The guidance makes it abundantly clear that racial disparities alone do not constitute discrimination. In fact, despite the misleading statements of the Trump administration and a small handful of vocal polemicists, anyone following Part II's clearly outlined steps for policy review would find that a disparate impact review does not lead to any conclusions based on data alone, nor does disparate impact theory assume that teachers are to blame.<sup>3</sup>

To the contrary, disparate impact looks only at whether a policy or practice caused the racial disparity in question. Therefore, disparate impact assumes that the disparities were not caused by individual bigotry. That may be an issue as well, but intentional racial bias is what a different treatment analysis is designed to surface. Once it can be established that a neutral policy or practice is the cause (i.e., that the policy of meting out suspensions for truancy is contributing to the racial disparity), the disparate impact analysis asks whether the policy causing the disparity is educationally justified in light of the educational goal it is meant to serve. For example, does suspending truant students deter future truancy? If the goal is to encourage truant students to attend school more often, does a policy of suspending truant students serve that goal?

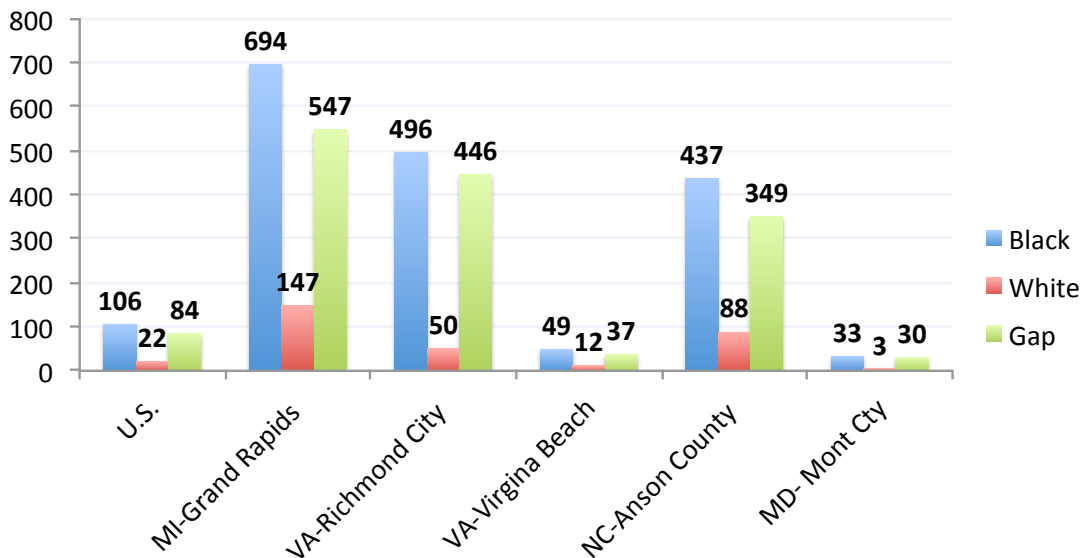
The first principle behind the discipline disparate impact review is that any policy that denies children access to a school the law otherwise mandates them to attend (or otherwise seeks to inflict a punishment) is associated with a harm, and therefore should serve an educational necessity. The second principle is that if the policy of disciplinary removal does not help achieve the goal, the practice should either be eliminated or replaced with an alternative approach that is effective. The third principle is that, once policymakers realize that an ineffective policy is causing a racially disparate harm, their

subsequent failure to eliminate, modify, or replace the problem policy is a form of unlawful discrimination.

As described in the guidance, the review of policies for problematic disparate impact is distinct from concerns that may also be present about how racial bias influences perceptions of behavior or responses to behavior by teachers and administrators in a school. Disparate impact review strictly concerns the justification of a policy responsible for a disparate impact. For this reason, the remedies under disparate impact are to end, replace, or modify the policy or practice in question. Given that the remedy for a disparate impact claim is limited to this type of injunctive relief, if a violation of Title VI is found, the district must either agree to change the policy or practice causing the disparate harm or risk losing its federal education funding.<sup>4</sup>

The focus of my oral testimony was first and foremost to raise awareness of how important disparate impact regulations are to fostering equitable educational opportunity. Therefore, it is critically important to review the actual racial disparities in the number of days of lost instruction due to out-of-school suspensions. The extreme size of the racial gap and profound differences from one district to the next suggest that some portion of these disparities is likely driven by district-level policies and practices.

**Large Racial Gaps in Amount of Lost Instruction  
Per 100 Enrolled  
In the Nation and For Selected Districts at Secondary Level (2015-16)**



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This graph captures the disparate impact of discipline in terms of days of lost instruction due to out-of-school suspensions reported to OCR by every school and district in the nation in 2015-16. To enable comparisons of districts of different enrollment sizes, the number of days lost are divided by the enrollment and then multiplied by 100 to arrive at

a comparable metric. The metric (or rate) is described as days lost per 100 students enrolled. For example, 100 days lost per 100 students is the same as 1 day lost per student. Therefore, it is entirely possible to have rates in excess of 400 days lost per 100 students enrolled. That is the same as 4 days per student. Of course, in most districts most students are not suspended and don't lose any days of instruction. A district where there are 20 suspensions per 100 enrolled is the equivalent of 1/5<sup>th</sup> of one day lost due to suspension per student.

In our report, "11 Million Days of Lost Instruction," we found that, across all grades (K-12) nationwide, Black students lost 66 days per 100 enrolled, which was 52 more days lost (per 100) than Whites<sup>5</sup> (Losen & Whitaker, 2018). The graph above is from our preliminary analysis and describes the days of lost instruction at the secondary level (only middle and high schools). Notably, in comparison to the days lost across K-12, the national average for secondary school students was much higher: Black secondary students lost 106 days per 100 enrolled, compared to 22 for Whites, which means that Blacks lost 84 more days (per 100) than Whites.

In some states, the secondary rate was nearly twice as high as the national average. Among the worst was Missouri, where Blacks lost 200 days per 100 enrolled, compared to 36 for Whites, resulting in a gap between Blacks and Whites of 164 days of lost instruction per 100 enrolled.<sup>6</sup>

The use of out-of-school suspensions and the impact on lost instruction varies even more dramatically for secondary students at the district level. As shown in the graph, in Grand Rapids, MI, Blacks in middle and high schools lost 694 days per 100 enrolled, compared to 147 days lost (per 100) for Whites. This racially disparate impact on instruction can be described as out-of-school suspensions causing Black students to lose 547 more days per 100 enrolled than Whites. Similarly large Black-White gaps were found as follows: Blacks lost 446 more days in Richmond City, VA, and 349 more days in Anson County, NC. These differences are much larger than one might imagine when looking at the national average of 84 more days lost for Blacks than for Whites per 100 enrolled. Still large but relatively much smaller racial gaps are observed in Virginia Beach, VA, and Maryland's Montgomery County. It is worth reiterating that these racial differences in lost instruction due to discipline are pervasive. Although they have many causes, given the disparate impact on instructional time, it is important that districts review whether their local discipline policies and practices are really justified.

Every teacher and principal knows that missing school hurts student achievement. Research on absenteeism has further documented what logic suggests is most likely true. One study found, for example, that missing three or more days of school before taking the NAEP reading test was associated with a score the equivalent of a full grade level lower. (Ginsburg & Chang 2014).

One often overlooked aspect of school discipline policy is that in many cases the length of the suspension is set according to the code of conduct. For example, in one district a fight with injury might yield an automatic 10-day suspension. Given the harm from

missing days of instruction, a disparate impact review should include a review of the justifications for policies that pre-determine the duration.

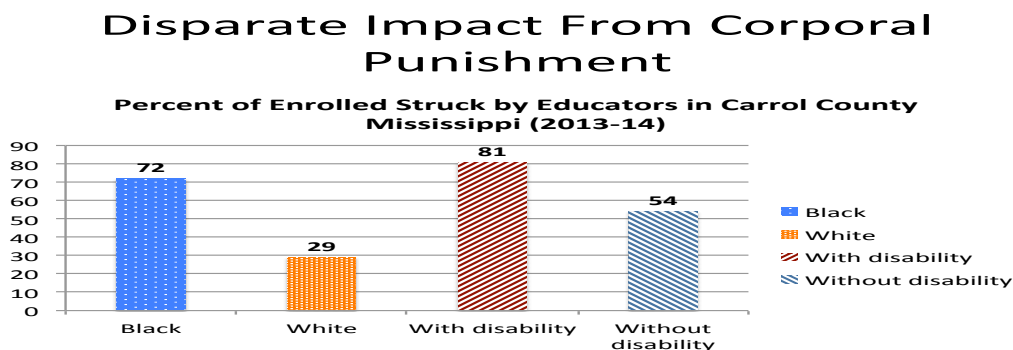
By highlighting the degree to which suspensions contribute to large racial differences in lost instruction time, we hope to make members of Congress aware that the size of the discipline gap varies greatly from one district to the next. This suggests that local context matters a great deal and that differences in policies and practices at the school and district level are probably at least partially to blame. In fact, one of the most rigorous studies of school discipline, in which every middle student in Texas was tracked for six years, found that factors the schools controlled—not poverty—had the greatest influence on the likelihood that a student would be suspended (Fabelo, 2011).

### The Importance of Local Policies and Practices

A high degree of variation is often found between schools within the same district. Although districts typically have a districtwide student code of conduct, in many districts the individual school leaders have the autonomy to respond to student behavior according to their own beliefs and attitudes. A study by Dr. Russ Skiba that surveyed principals from every school in Indiana found that the principal’s attitude on school discipline was not only the most powerful predictor of whether suspension rates were high or low, it was also the strongest predictor of whether racial disparities were large or small (after controlling for poverty and several other factors)(Skiba et al., 2015).

A similar finding in our soon-to-be-released study of corporal punishment was that, within most districts in the 19 states that still allow it, the decision to use corporal punishment is left to the discretion of individual school leaders. Often, we found that fewer than half the schools within a given district still paddled children. In many of the districts we reviewed, there was undeniable evidence that the policy of allowing corporal punishment had a disparate impact by race and by disability status.

The following graph, which depicts just one district, shows that 72% of Black students attending schools that practiced corporal punishment were struck by educators at least once in 2013-14, compared to 29% of the White students. Students with disabilities were also struck by educators at a much higher rate than were their nondisabled peers.



Corporal punishment is a classic example of a locally determined policy that often causes disparate harm along the lines of race and disability, yet lacks educational justification. Corporal punishment is also one of the examples used by the federal guidance of a policy that might be vulnerable to a legal challenge if it resulted in large racial disparities.

An even larger concern regarding the disparate impact of policies and practices are policies that call for the excessive use of suspension for every minor behavior. For a variety of reasons, harsher policies and practices, such as “broken windows,” “no excuses,” and “zero tolerance,” seem to be more common in schools with high concentrations of Black students.

Therefore, if harsh, counterproductive policies are more likely to be put in place in schools serving higher percentages of students of color, then the differences in policies between schools may be at least partially responsible for the racial disparities observed at the district level, even if punishments are meted out in an evenhanded manner within a school.

Considering the huge impact on instructional time, discipline policy differences that drive the use of suspension up or down may also be contributing to the racial achievement gap. Several rigorous studies in which additional factors that contribute to lower achievement were controlled for, including poverty, suggest that fewer suspensions would predict higher achievement. One such study found that school suspensions account for approximately one-fifth of Black-White racial differences in school performance (Morris & Perry, 2016). Meta-analyses have revealed a significant inverse relationship between suspensions and achievement, along with a significant positive relationship between suspensions and dropout (Noltemeyer, Ward, & Mcloughlin, 2015). While exploring school discipline and academic performance in the state, the West Virginia Department of Education found that “students with one or more discipline referrals were 2.4 times more likely to score below proficiency in math than those with no discipline referrals” (Whisman & Hammer, 2014).

Although no national data have been collected on the reasons for suspension disaggregated by race, the CCRR has examined data from every school and district in California and Massachusetts, two of several states that do collect it. Massachusetts provides a breakdown of the days of lost instruction for each code-of-conduct violation. Perhaps the most disturbing finding in our Massachusetts study is that the majority of suspensions (and resulting loss of instruction) come from the catchall category 18, which includes all nonviolent, non-drug, and noncriminal behaviors not already covered by the 17 other categories (Losen, Sun & Keith, 2017). In other words, this vague area covers a wide range of minor behaviors that do not have their own distinct code, from disruption to skipping class. Our report, “Suspended Education in Massachusetts,” found that nearly all the highest suspending districts in the state also had large racial gaps. Moreover, in nearly all of the high-suspending districts, 50% or more of the days of missed instruction were due to category 18 offenses. This begs the question of whether policies that remove students from school for such minor misbehaviors are justifiable. Notably, at least 3

states, Ohio, Texas and California, prohibit suspensions for minor misbehaviors for students in the early grades.

**Proof That Policy Change Works**

Our graphic display of trend analysis for the state of California<sup>8</sup> demonstrates that significant progress can be made in a similar catch-all category. The subjective category, “disruption or defiance” had been the most frequent reason students were suspended.

As Figure 7 from our recent report, *The Unequal Impact of Suspension on the Opportunity to Learn in California: What the 2016-17 Rates Tell Us about Progress*, illustrates, suspension for disruption comprised 49% of all suspensions in 2011-12 and just 20% in 2016-17. During this period of declining use of suspensions many districts, including Los Angeles, changed their local policy to completely prohibit suspensions for this category across all grades. And For both the Black/White and Latino/White gaps, the districts with the largest racial gaps in California in 2016-17 tended to have a rate of suspension for disruption or defiance that was higher than the state average.

**Figure 7: Estimated Number of Days of Lost Instruction by Disruption/Defiance and “All Other” 2011-12 to 2016-17**

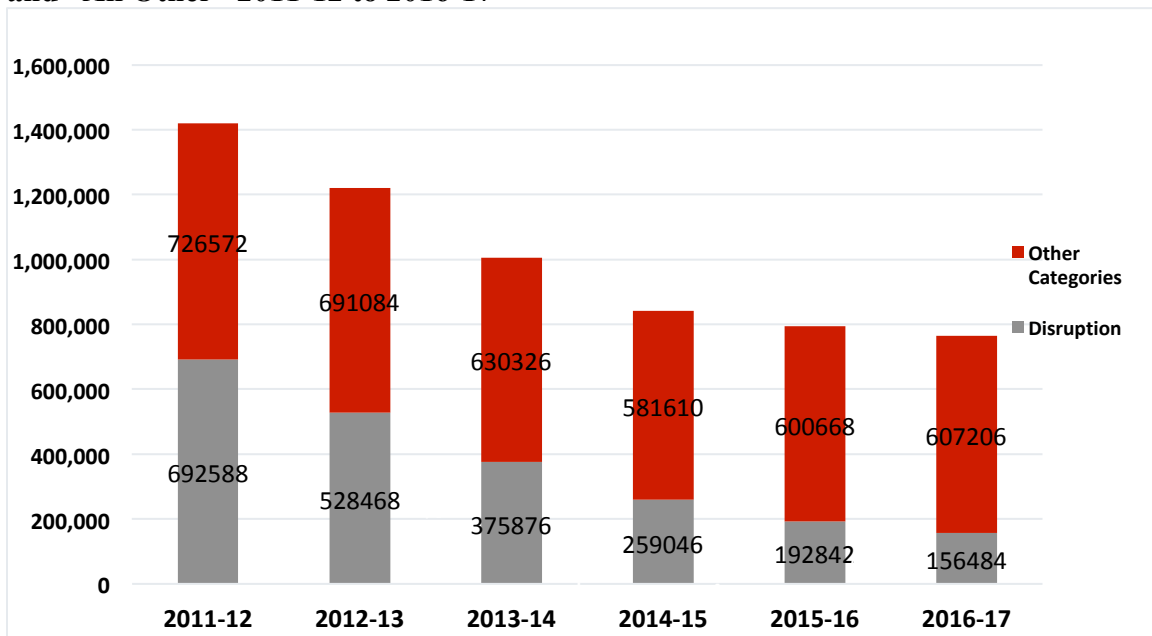


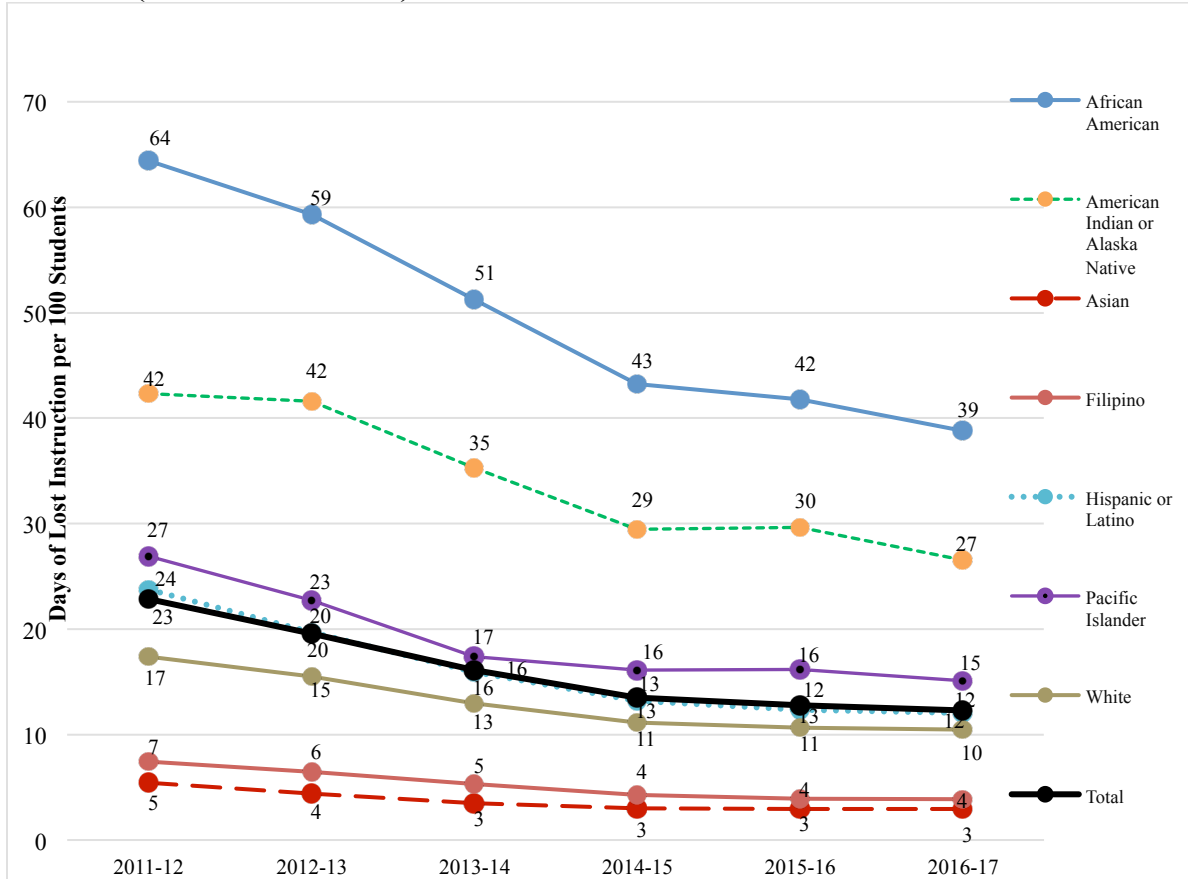
Figure 7 makes clear that the decline in lost days of instruction for disruption or defiance has contributed much more to the total decline than the category “all other” offenses. In the context of a changing culture and new legislation related to discipline in California, it appears that educators increasingly respond to minor misbehaviors in ways other than to exclude students from instruction time.

Most important, as depicted in the next excerpt from our report (Figure 1), during this period of decline in the use of suspensions for disruption or defiance, the largest decline in estimated days of lost instruction from all suspensions was experienced by Black



students. Despite this progress and evidence suggesting that changes to the code of conduct have likely helped address racial disparities in suspension and caused a narrowing of the racial discipline gap, Black students remain the most frequently suspended.

**Figure 1: Six-Year Narrowing of the Racial Gap in Days of Lost Instruction per 100 Students (2011-12 to 2016-17)**



California has been engaged increasingly in discipline reform efforts at the state and local level for well over six years. The subgroup trend lines describing the rates of lost instruction per 100 students make it clear that the racial gap has indeed narrowed. This conclusion may appear to contradict recent media coverage suggesting that, despite a reduction in overall suspensions, the disparities remain unchanged.<sup>9</sup> The six-year trend lines in Figure 1 indicate that Blacks had the highest rate of lost instruction per 100 in 2011-12, and that they have experienced the steepest decline in rates of lost instruction of all racial groups.

Equally important is that there is no evidence of an offsetting statewide increase in serious unlawful or dangerous behavior among students. Of course, if there were such an offset, it would be inappropriate to assume the policy change was the cause. The lack of any large increase in dangerous behavior that offsets the sizeable decrease in suspensions for disruption or defiance casts doubts on the validity of the assertion that frequent suspensions for minor behaviors are necessary to prevent school-based violence or

essential to student safety. The California trends run counter to predictions that reducing suspensions would bring chaos to California’s schools.<sup>10</sup>

A related concern is that the damage from frequently suspending students is not fully comprehended by most engaged in the debate about discipline reform. As our research has demonstrated, suspensions have a devastating economic impact that is often hidden from view.

## The Harm to Our Society from Excessive Suspension

### High Cost of Harsh Discipline and Its Disparate Impact: The Need for a Private Right of Action

|               | U.S.         | Florida     | California  |
|---------------|--------------|-------------|-------------|
| Fiscal Impact | 11 Billion   | 1.9 Billion | 518 Million |
| Social Impact | 35.7 Billion | 6.2 Billion | 1.6 Billion |

6

The table above is an excerpt from the CCRR’s 2016 report, “The High Cost of Harsh Discipline and Its Disparate Impact,”(Rumberger & Losen 2016).<sup>11</sup> Dr. Rumberger’s causal analysis relied on individual student data and tracked similarly situated students while controlling for other factors that also predicted low graduation rates. Across the selected cohorts, suspensions contributed to the lowering of graduation rates by between 5 and 15 percentage points.

Dr. Rumberger and I worked with economist Clive Belfield to calculate the estimated fiscal impact over the lifetime of the cohort members. These costs are to the society at large and include items like lower tax revenues, higher crime rates and higher expenditures due to higher rates of incarceration. They also calculated an estimate of the social costs. The social costs are the fiscal costs plus the costs incurred by the individual that failed to graduate. These include lower employment, lower earnings, and costs associated with poorer health. Both fiscal and the broader social costs could be averted by reducing suspensions. The following excerpt from the report (Rumberger & Losen, 2016) describes the racially disparate impact of these findings:

It is important to point out that these estimated costs are [based on] the “average” student. But, as shown earlier, suspension rates and thus the economic impact of suspensions are disproportionate among students by race, particularly among Black students. In the U.S., for example, Black suspension rates were 30 percent while overall suspension rates were 16 percent [], which means that while Blacks made up

13 percent of all tenth graders, they made up 25 percent of all suspended students. Blacks thus represented 25 percent or \$2.8 billion out of \$11 billion in fiscal losses and \$8.9 billion out of \$35.6 billion in social losses to the U.S. In California, Blacks represented 6 percent of tenth-grade students but 11 percent of suspended students, and therefore they represented 11 percent of the fiscal and social losses to the state. Finally, in Florida, Blacks represented 16 percent of the tenth-grade students but 31 percent of suspended students, and thus 31 percent of the fiscal and social losses to the state.

Two inferences may be drawn from the disparate impact of suspensions. One is that the economic burden of suspensions is currently harming Black children more than others. The second is that greater economic benefits may be realized if efforts to reduce suspensions for all students purposefully include efforts to reduce the racial school discipline gap between Black and White students. Although how to reduce the racial discipline gap is not the focus of this report, numerous studies point to interventions that have helped school districts reduce disciplinary exclusion generally, and in particular to narrow this gap (Losen, 2015).

I encourage readers to read the entire study, as well as the follow-up study, *The Hidden Cost of California's Harsh School Discipline* (Rumberger & Losen, 2017). The more recent study used a similar method to estimate of economic costs from suspensions at the district level. That report drew from a much more robust sample of longitudinal data that enabled nearly every tenth-grade student in the state to be tracked for three years. The economic analysis was also updated with more recent state specific data. It is worth noting that the more recent statewide results predicted substantially larger costs than the estimate for California described in the first study. Specifically, Dr. Rumberger's analysis predicted 4.9 Billion in fiscal losses over the lifetime of one cohort, and 16 Billion in social costs caused by estimated increase in dropouts due to suspensions.<sup>12</sup>

If parents and policymakers in every state knew the true cost to taxpayers of harsh discipline policies and practices, they might be more willing to review the justification for policies like zero tolerance, no excuses, or broken windows. One reason that some well-intended policymakers may be reluctant to make changes to their harsh discipline policies may be an entrenched belief that without harsh measures the alternative is chaos.

### **Calm, Not Chaos:**

In the latest Institute of Education Sciences (IES) report on school crime and safety, which includes data as far back as 1992 and as recent as 2017, all indicators of student victimization at school for 2015-16 were at or equal to an all-time low, far below the rates IES reported for 1994. Similarly, the percentage of teachers threatened with an injury were at the same level as in 1999-2000. (Musu, Zhang, Wang, Zhang, & Oudekerk, 2019).

To further counter the unsubstantiated fear-mongering claim that discipline reform efforts, inspired by the guidance on disparate impact, have caused chaos, I offer the

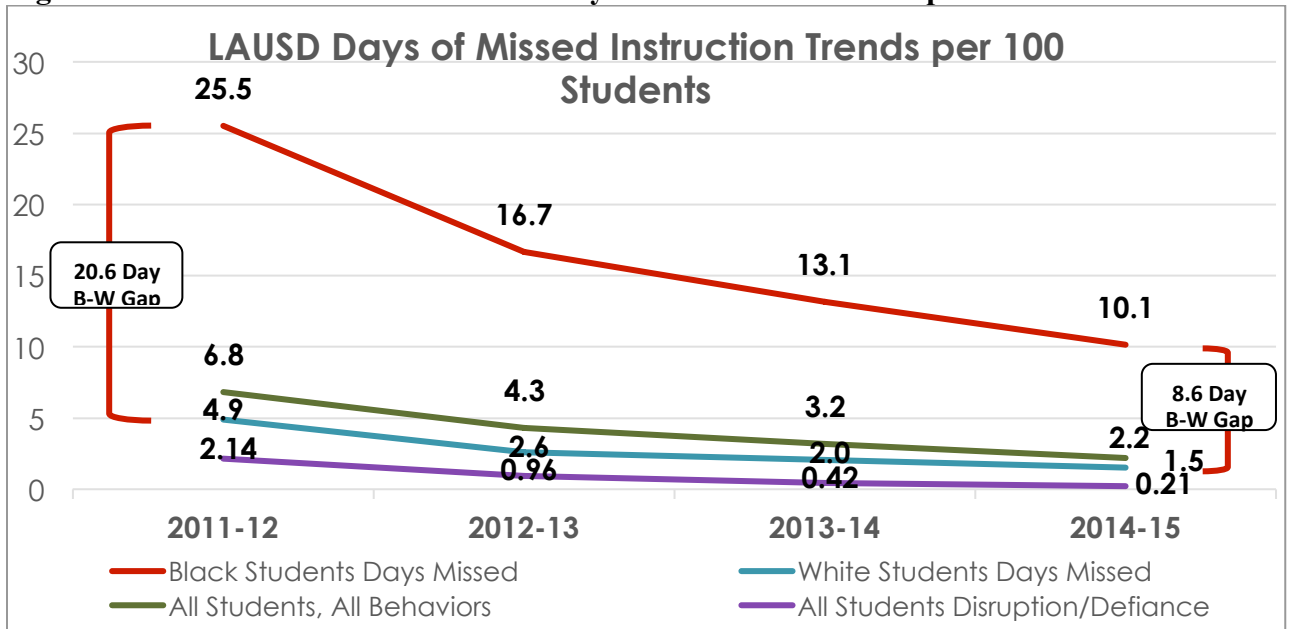
following excerpt from my written testimony before the U.S. Commission on Civil Rights in November 2017, which also contains segments of our California reports.

**Discussion and Conclusion Regarding the Need for Civil Rights Enforcement and District-Level Review of Disparities**

There is no question that discipline reform remedies can help a great deal, whether inspired by research on sound policy, or by state or federal intervenors seeking to help districts end an impermissible racially disparate impact. Most important is the example of what LAUSD has done, which provides important evidence that districts can take the initiative and eliminate disruption and defiance as grounds for suspension at every grade level. Although our analysis did not entail a full study of LAUSD, and while we acknowledge that more improvements need to be made in LAUSD, the data on school climate and suspension rates suggest that real progress was made in reducing suspensions without creating chaos.

Figure 6 from our report *Lost Instruction: The Disparate Impact of the School Discipline Gap in California*, (Losen & Whitaker, 2018) shows our estimate of the overall decrease in lost instruction time in LAUSD. The policy to eliminate disruption/defiance as grounds for suspension was adopted in the 2012-13 school year, but the sharpest decline in the overall use of suspension began at least a year earlier.

**Figure 6: Four-Year Trends in LAUSD Days of Missed Instruction per 100 Students**



In our report, (Losen & Whitaker, 2017), we noted that LAUSD adopted a plan in 2013 to eliminate the use of suspension as a response to disruption or defiance. As Figure 6 demonstrates, the number of suspensions overall and for disruption/defiance declined four years in a row; during the first two years, the only years for which API scores were available, the scores showed a rise in achievement in LAUSD (Losen et al, 2015). We

also noted that the purpose of the plan to eliminate suspension for all disruption/defiance offenses was not simply to reduce the number of suspensions but to improve academic achievement. It should be noted that discipline reform efforts were prompted by local advocates and an OCR investigation and settlement agreement, thus reform efforts to address racial disparities were underway in LAUSD well before the aforementioned federal discipline guidance was issued.

Based on the most recent data we estimate that, by eliminating suspensions for disruption or defiance, LAUSD has avoided the loss of thousands of days of instruction and more than ten thousand hours of instruction time.<sup>13</sup> LAUSD also has experienced what could be the largest increase in graduation rates in its history since the policy to eliminate suspensions for disruption and defiance began four years ago. In 2017, 80% of the district's high school cohort graduated, a full ten percentage-point jump from the 70% rate in 2013-14 (Kohli, 2017).

The use of data out of context to suggest that discipline reform is causing chaos has not been substantiated, but the suggestion has been made in numerous discussions about discipline reform and the 2014 disparate impact guidance. One such noteworthy and relevant reference relates to how the comprehensive Brookings Institution report on suspensions in California's schools conflates research about disruption in general to implicate discipline reform, raising the concern that reform may put orderly classrooms and well-behaved children at risk (Loveless, 2017).

### **Assumption That Reducing Suspensions Necessarily Increases Exposure to Disruptive Students Lacks Evidentiary Basis and Assumes That Suspensions Mitigate Rather Than Exacerbate the Potential Harm from Exposure to Disruptive Students**

The Brookings study, which explored California's school-level discipline data, found extraordinary racial differences. However, the report referenced a study of students in Alachua County, FL, to make the point that being educated with disruptive students puts a burden on nondisruptive peers, a fact that Brookings asserts is often overlooked by discipline reform proponents. The study's relevance to the discussion builds on a tacit assumption that discipline reform will cause greater exposure to disruptive students. Yet, the cited research is not a study of discipline reform but of the broad societal impact of domestic violence. Specifically, the oft-cited Alachua County study examined how children exposed to domestic violence in their home impacted their peers in school. The study treated students from these violent homes as a proxy for disruptive students. The study authors estimated that such exposure had serious economic costs for their nondisruptive peers.

Not mentioned is the fact that Alachua County was among Florida's highest suspending districts. The costs associated with being in a class with disruptive peers in Alachua County might better be described (in context) as the costs incurred in a district that frequently suspended youth for disruptive behavior. Given that youth exposed to domestic violence are probably subjected to a greater risk for re-exposure when they are sent home from school it is more likely that frequent suspensions exacerbate the harm to

these children and thereby also increase the likelihood that they will exhibit problematic behavior when they return. Considering the data showing high rates of suspensions, the study begs the question of whether non-punitive interventions to support traumatized youth displaying problem behavior might have reduced their disruptive behavior and mitigated the costs to peers documented in the Alachua County study.

The Brookings report instead suggests that we take it as a given that high-suspending schools are helping make the learning environment more productive for nondisruptive students by instilling order. Missing is any research demonstrating that frequently suspending children produces the kind of order that improves the learning environment. The author of the Brookings report does point to a working paper by researchers from the University of Arkansas, but in response to published peer-reviewed criticism of their work, the authors issued a statement that their findings should not be used to suggest that suspensions are beneficial or that they boost test scores.<sup>14</sup> To the contrary, the best research available suggests that suspensions generally fail to deter misbehavior and may in fact reinforce the behavior it is intended to deter; neither the suspended students nor their peers appear to improve their behavior in harsh disciplinary environments (Mendez, 2003).

Moreover, the assumption that kicking out the “disruptive” students is likely beneficial is based on a false dichotomy that students are either disruptive or nondisruptive, and that this is some immutable characteristic or deficit within the student. Findings from the Texas study (Fabelo, 2011) referenced earlier suggest that the distinction is false, as more than 60% of Texas middle school students were suspended at least once by the time they left school. This hard data on who gets suspended at some point during their schooling indicates that the majority of secondary students have, at one point or another, been counted among the “bad” or “disruptive.” Most important, as mentioned at the outset, the Texas study concluded that school factors, not students’ characteristics, explained most of the differences in suspension rates among schools. The contribution of school factors is exactly what a disparate impact review would examine.

### **Schools Make a Difference**

Nobody benefits if an educationally unsound response to student misbehavior causes students to miss instruction. Moreover, if even one racial or ethnic group is observed to engage in minor disruptive or defiant behavior more often than others, it would never justify their receiving unsound punishment or a counterproductive response. Nor should one accept the unsupported assumption that the alternatives necessarily increase exposure of peers to disruptive youth. The heart of the civil rights concern about suspensions is that, once it is clear that an unsound policy or practice harms one group more than others, it becomes both a moral and legal imperative to replace the harmful policy with one that is sound and educationally justifiable.

Faced with data showing the deep racial divide in instruction time lost due to discipline, even assuming that most teachers and administrators try to treat students fairly and to avoid the influence of negative stereotypes, we should *not* assume that they succeed in doing so. Our previous report summarized recent research demonstrating that teachers

likely would treat Black students more harshly than similarly situated Whites for the same offenses (Okonofua & Eberhardt, 2015). It is worth noting that they found no significant difference in how teachers of different races responded.

The most recent study examining teacher bias in discipline shows how implicit bias can influence not just our responses but our perceptions as well. The study, conducted by researchers at the Yale University Child Study Center (Gilliam et al., 2016), prompted preschool teachers to look for signs of pending bad behavior, then tracked the eye movements of both Black and White teachers as they watched a screen playing four videos of individual Black and White preschoolers, separated by race with gender, with one video in each of the four corners of a large screen. In the study, no students were misbehaving or about to misbehave, yet all the teachers watched the Black boys far more than the other children. Most teachers and administrators do try to treat students equally, but this study indicates that the negative racial stereotypes about behavior can corrupt our expectations and influence whom we pay attention to and whom we ignore.<sup>15</sup>

These findings suggest that, in light of the deep racial differences in the amount of lost instruction time, another good reason to stop suspending students for disruption or defiance is that doing so involves highly subjective perceptions. It should come as no surprise that, in the highest suspending districts, the most subjective category contributed to more than 40% of the racial gap in lost instruction.

We do not argue that other categories are immune from these concerns or that implicit racial bias is the only kind of injustice reflected in the different outcomes, nor do we know or assert that the reason for observed racial difference in any given district is not some other factor that has nothing to do with bias. However, we do suggest that, when observing the alignment between the largest racial divides and the most subjective category, as documented in this report and many others, there is a legitimate concern that bias may be contributing to the vastly disparate impact on lost instruction. If so, certain discipline policies, such as those permitting suspensions for vaguely defined minor misbehaviors, deserve review to examine their justification in light of alternatives.

### **There Are No Quick Fixes**

I have framed my testimony to align with one of our core research-informed recommendations: that districts should not regard implementing changes in discipline policy or practice as being isolated or distinct from their academic mission (Balfanz, Byrnes, & Fox, 2015). Consistent with what research suggests is most effective, we do not argue here that simply eliminating disruption/defiance as grounds for suspension in all grades will quickly or entirely fix the disparate impact on days of missed instruction. Although we suggest that no single policy change alone would satisfy the need for effective discipline reform, we also argue that the disparate impact from unsound educational policies and practices should compel additional efforts in many districts across the country.

We argue that, given the economic and civil rights implications of inaction, the federal government has an obligation to help states pursue more effective ways of preventing minor misbehaviors, as well as more effective responses to the same.

The belief that remedies inspired by the guidance on disparate impact will beget unlawful quotas, an argument raised by the Trump administration when it removed the federal guidance on school discipline, is also not supported by the evidence. Our book, *Closing the School Discipline Gap*, published by Teachers College Press, provides many potentially effective alternatives, not one of which involved a racial quota. The book compiled studies by researchers across the country who examined the impact of programs and initiatives that address excessive school discipline. These include restorative justice, positive behavioral supports and interventions, improvements to academic engagement, threat assessments, professional development, and more. One randomly controlled study found that teachers who participated in a specific training program used less exclusionary discipline than teachers not receiving the training (Gregory, Allen, Mikami, Hafen, & Pianta, 2014). The racial disparities were all but eliminated. Other studies have found that even brief interventions that encourage empathic discipline cut suspension rates in half (Okonofua, Paunesku, & Walton, 2016).

## **Conclusion**

There is more to learn about which policies and practices are the most effective replacement for suspending students for minor misbehavior. Although there is no definitive, proven best practice or policy that researchers can guarantee will work, there are some discipline policies like suspensions for truancy, automatic suspensions for minor misbehaviors, vague codes of conduct, and suspensions for dress codes violations that schools exhibiting racial disparities in discipline should review and consider eliminating entirely. I would also encourage the numerous state attorney generals who wrote a letter opposing the removal of the guidance<sup>16</sup> to explore ways they might provide avenues for redressing the harmful impact of unsound policies and practices. Although the disparate impact regulations are still good law, and although I am confident that most state and local policymakers will continue to attend to disparities cause by unjustified policies, the data reveal that there are many districts with huge disparities that show no inclination toward change.

## **We Need a Private Right of Action**

In some situations district policymakers may be reluctant to review or change policies if they are not aware of the disparate and harmful impact or if they hold unsubstantiated beliefs that harsh punitive discipline is necessary to maintaining order. It is unlikely that parents of children of color in such districts have a viable avenue to protect their children from harmful policies and practices considering that the current administration has signaled that it is opposed to enforcing the disparate impact regulations. Ultimately, the nation must rely on Congress to restore the private right of action that the Court eliminated in *Alexander v. Sandoval*.

Even if the current administration had not signaled its disdain for enforcing the disparate impact regulations, based on the available research and for the reasons stated in this



testimony, I would recommend that this Congress develop legislation to reverse the *Sandoval* decision by explicitly amending Title VI to establish a private right of action to enforce disparate impact regulations. The Equity and Inclusion Enforcement Act would accomplish this goal.

Thank you for this opportunity to testify. I look forward to answering any questions members of Congress may have, and to providing additional and new information with the upcoming release of two new national reports. One, on disparities in the use of corporal punishment in the schools and districts that still practice it, is co-authored with the Southern Poverty Law Center and was the source of the data presented. The other we are co-authoring with the Learning Policy Institute that covers both in- and out-of-school suspensions and days of lost instruction at the state and national levels. Preliminary findings from that report were also presented in this testimony. I look forward to providing further assistance to Chairman Scott and to any other members of the House Education and Labor Committee if they are interested in my help reviewing research regarding related problems or to explore possible solutions in greater detail.

Sincerely,

Daniel J. Losen  
Director, The Center for Civil Rights Remedies  
The Civil Rights Project at UCLA

### **Appendix:**

#### **Refuting the U.S. Department of Education's reference to research (Wright, 2014) which concluded that there was no evidence of racially discriminatory school discipline:**

It is hard to fathom the reasoning behind the U.S. Department of Education's disturbing reference to the study that concluded that "long-standing behavioral differences" likely explain the observed racial disparities in suspensions (Wright, 2014). Putting aside expressed concerns that the conclusion drawn embraces a harmful racial stereotype and that the author may have been influenced by racial bias, it is important to note that in January, when it was referenced, the specific findings had already been invalidated.<sup>17</sup> Specifically, the Wright findings were refuted by another conservative researcher whose work, ironically, was cited by the Department of Education as part of its justification for rescinding the guidance on racial disproportionality in special education (Morgan, 2017). Although Morgan's research has been criticized on many grounds, it is important to note that Morgan produced a study nearly identical to Wright's, and Morgan's findings (page 8) directly contradict Wright's.<sup>18</sup> Specifically, Morgan corrected just one of the many flaws in Wright's research design. Namely, Wright's study failed to consider the available data on the number of suspensions. Morgan repeated Wright's study in nearly every way, except that Morgan added the responses to the question, "How many times

was your child suspended?” Ultimately Morgan reported that Blacks were 1.6 times (60%) more likely as similarly situated Whites to be suspended after controlling for behavioral ratings, poverty, low test scores and all the other variables that Wright controlled for.<sup>19</sup>

Moreover, it is surprising that the Department of Education would use Wright’s research to criticize the disparate impact guidelines in the 2014 Obama administration discipline guidance, given that Wright’s study did not examine whether a policy or practice was contributing to the racial disparity in the national sample he studied. Wright’s study only looked for evidence of different treatment of otherwise similarly situated Black and White students. As I’ve pointed out in my testimony, the disparate impact regulations, as applied to discipline disparities, calls for the examination of disparities that can be linked to particular policies or practices. Wright admits that he does not consider the effects of different discipline policies and acknowledges that other forms of responding, besides suspensions “may be more effective in controlling the behavior of difficult children.”

The data we have reviewed in this testimony show that there are large racial disparities that vary dramatically from school to school and between districts. This suggests that they are likely caused in part by locally controlled policies and practices. Any examination of a national sample, lacking information on district policies and district disparities, could not possibly rule out the possibility that unjustified policies were at least partially responsible for the disparities observed in aggregate at the national level. Therefore, even if Morgan’s findings had not refuted Wright’s, neither study would be relevant to the guidance on disparate impact, as neither included a test for the racially disparate impact of an identified policy or practice.

Readers should also note that both the Morgan and Wright studies were severely limited in scope, such that both relied on parental recall of suspensions. Neither study had any actual administrative data from the schools on the number or duration of suspensions. Just as Morgan’s addition of the number of suspensions that parents could recall altered the findings dramatically, so could consideration of duration, the actual days of lost instruction, further change the findings. Unfortunately, the database Morgan and Wright relied on had no information about the duration of suspensions. As the latest OCR data collected from every school in the nation demonstrates, duration matters! There are profound Black-White gaps in the days lost due to suspension per 100 enrolled students.

Another flaw shared by Morgan and Wright is that, while looking for evidence of racial bias among teachers and principals who suspended students, both relied on the kindergarten teacher’s behavioral ratings as a control. This means that, while testing for evidence of racially different treatment by educators, both studies assumed, without justification or validation, that the recorded behavioral ratings of their colleagues were bias free.

We need to be able to challenge the disparate impact of discipline policies because we know that locally determined discipline policies and practices can drive differences in educational opportunity. In a given locality there could be evidence of both unlawful

different treatment and evidence that an unjustified policy or practice was contributing to the observed racial differences. What neither Morgan nor Wright seem to understand is that there is more than one kind of discrimination and a test for different treatment cannot possibly rule out the presence of disparate impact.

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### **About the UCLA Civil Rights Project's Center for Civil Rights Remedies**

The UCLA Civil Rights Project's Center for Civil Rights Remedies (CCR) is dedicated to improving educational opportunities and outcomes for children who have been discriminated against historically due to their race or ethnicity and who are frequently subjected to exclusionary practices such as disciplinary removal, over-representation in special education, and reduced access to a college-prep curriculum. CCR has issued numerous reports about the use of disciplinary exclusion in California's schools, including the 2015 report, "Closing the School Discipline Gap in California: Signs of Progress." CCR is an initiative of the UCLA Civil Rights Project /Proyecto Derechos Civiles (CRP), co-directed by Gary Orfield and [Patricia Gándara](#), researcher professors at UCLA. Founded at Harvard in 1996, its mission is to create a new generation of research in social science and law on the critical issues of civil rights and equal opportunity for racial and ethnic groups in the United States. It has monitored the success of American schools in equalizing opportunity and has been the authoritative source of segregation statistics. CRP has commissioned more than [400 studies](#), published more than [15 books](#) and issued numerous reports from authors at universities and research centers across the country.

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<sup>1</sup> See 20 U.S.C. Sec. 1418(d).

<sup>2</sup> For a comprehensive discussion of the value of disparate impact and succinct rebuttal of some of the most common justifications for harsh discipline policies please read, Discipline Policies, Successful Schools and Racial Justice, (2011) <https://nepc.colorado.edu/sites/default/files/NEPC-SchoolDiscipline.pdf>. For an extensive review of the contributing factors, harmful disparate impact and studies of several promising remedies please read the edited book containing studies by leading scholars across the nation, *Closing the School Discipline Gap*, Teachers College Press (2015).

<sup>3</sup> As surprising as it may seem, articles published by the National Review and the Wall Street Journal have contained unsubstantiated claims that the school discipline guidance and the disparate impact section in particular was driven by policymakers who believed that all racial discipline disparities are caused by racist teachers. See e.g., Max Eden, *On School Discipline, Fix the Problem, Not the Statistics: Are America's teachers a bunch of racists? Democrats seem to think so*, National Review (November 13, 2017), Available at <https://www.nationalreview.com/2017/11/school-discipline-federal-rules-not-helping/>

<sup>4</sup> Although beyond the scope of this testimony, one possibility not considered by the federal disparate impact guidance is that, once policymakers become aware of the disparate harm caused by an unjustified policy, their decision against taking protective action to mitigate the anticipated disparate harm indirectly satisfies the intent element, assuming that the policymakers have the power to change the policy in question.

<sup>5</sup> Daniel J. Losen and Amir Whitaker, *11 Million Days of Lost Instruction*, (2018)

<sup>6</sup> This analysis should be regarded as preliminary. A new report, to be jointly released with the Learning Policy Institute will provide this information for every district in the nation broken down by race and race with disability and provide at the elementary and secondary levels.

<sup>7</sup> See Daniel Losen, Amir Whitaker, Jamie Kizzire, Zoe Savitsky and Katherine Dunn.

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*The Striking Outlier*, (forthcoming 2019).

<sup>8</sup> This analysis, the text, and graphs are all excerpts from our report on California.

<sup>9</sup> Our reports have repeatedly warned against misleading statements, such as “data show that even while suspension rates fell across the board, the rate for black students dropped the least. In fact, in 2017, black students were still being suspended at four times the rate as whites—and that gap had widened slightly from 2013.” See <https://www.the74million.org/article/even-as-californias-student-suspension-fell-46-over-the-past-6-years-the-racial-discipline-gap-remains-as-wide-as-ever/>. The underlying suspension rates are not at issue, but in absolute terms the rates dropped more for Black students and the racial gap narrowed. The author made the error of relying solely on a purely relative disparity measure and overlooking how the reductions, in absolute terms, were greater for Black students than others. It is plain to see that the racial differences have narrowed over time. Mathematically, the relative ratios will only decline if the ratio of the reductions exceeds the starting ratio. For example, for the new ratio to become lower than the starting ratio, with a starting ratio of 5 to 1, the amount of reduction to the rate of the higher group must be greater than five times the reduction of the rate to the lower group. Consider, for example, an elementary school where, in a prior year, 5% of Black students are suspended and just 1% of Whites. Fast-forward to today, a few years after discipline reform. If the new rates indicate that 1% of Black students were suspended and 1/10 of 1% of White students were suspended, one could say that, in the more recent year, Blacks were suspended at 10 times the rate of White students, where it had once been five times the rate. The actual difference between the rates in absolute terms would be less than one percentage point, whereas it had once been a full four percentage point difference. Indeed, the Black rate dropped by four points and the White rate dropped by less than one point. Readers should be wary when the media or researchers describe trends using relative ratios, because they can be very high when the absolute racial differences in rates are very low, and where these differences have gotten a great deal smaller.

<sup>10</sup> Over time, as unnecessary suspensions for minor misbehaviors are reduced further or eliminated, we should expect to see higher and higher shares of total suspensions meted out for the most serious behaviors, such as violence with injury, weapons, or illicit drugs because the new pattern would reflect that suspensions were being used as measures of last resort and that suspensions for minor misbehaviors had been replaced by more effective responses. However, we would also expect to see suspension rates for the most serious behaviors remain within a very low range.

<sup>11</sup> Russell Rumberger & Daniel J. Losen, *The High Cost of Harsh Discipline and Its Disparate Impact*, National Report, The Center for Civil Rights Remedies, UCLA Civil Rights Project (2016).

<sup>12</sup> Russell Rumberger and Daniel J. Losen, *The Hidden Cost of California’s Harsh School Discipline* (2017). Available at [www.schooldisciplinedata.org](http://www.schooldisciplinedata.org)

<sup>13</sup> LAUSD students lost 8,841 days of instructions from suspensions in the 2013-14 school year, compared to 5,160 in the 2016-17 school year. Data available online at <http://schoolinfosheet.lausd.net/budgetreports/disciplinereports.jsp>.

<sup>14</sup> National Education Policy Center commentary and author Gary Ritter’s response and an additional rejoinder are all available at <http://nepc.colorado.edu/thinktank/review-discipline>.

<sup>15</sup> If all the teachers watched the Black boys most when not one was misbehaving, one can imagine their conclusion about how the experiment would turn out if all the students had misbehaved in equal degrees. If the teachers accurately reported what they saw if all were misbehaving, they would have seen Black boys exhibit more misbehavior simply because they predominantly watched the Black boys. None would realize that the students were all misbehaving in equal amounts. None would report that White girls misbehaved more, which they might have done if they had watched the White girls most of the time. By directing our attention in this manner, our initial racial biases can wind up reinforced with real data without us even knowing that our data collection was skewed. This example is offered not as proof of intentional different treatment but to suggest that implicit racial bias can influence how differently we observe children’s behavior. In turn, our biased observations can reinforce negative perceptions, making it more likely they will be triggered again.

<sup>16</sup> See Letter from Xavier Becerra, Attorney General for the State of California, August 24, 2018 joined by ten other state AG,s available at: <https://nj.gov/oag/newsreleases18/Federal-School-Discipline-Guidance-Multistate-AG-Letter.pdf>

<sup>17</sup> Most important, instead of the zero evidence of discrimination, Morgan’s nearly identical study concluded that, compared to otherwise similarly situated White students, Black students were significantly more likely to be suspended. Morgan presented his preliminary findings in December 2017, while testifying before the U.S. Commission on Civil Rights. His report findings were available on line as of December 21, 2018. Therefore, this is an additional reason to be deeply concerned that the Department of Education, which has relied on Morgan’s research for other purposes, would still decide to rely on Wright’s directly repudiated research findings.

<sup>18</sup> See, Paul L. Morgana,\*, George Farkasb, Marianne M. Hillemeiera, Yangyang Wanga,

Zoe Mandela, Christopher DeJarnetta, Steve Maczuga, *Are students with disabilities suspended more frequently than otherwise similar students without disabilities?* Journal of School Psychology 72 (2019) 1–13 at p. 8.

<sup>19</sup> See *Id.*, at p 9.